THE ENGLISH REPORTS

ECCLESIASTICAL, ADMIRALTY, AND PROBATE AND DIVORCE

CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LATELY LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE BARON FINLAY OF NAIRN,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE

ENGLISH REPORTS

VOLUME CLXII

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II

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REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By J. ADDAMS, LL.D., an Advocate in Doctors' Commons. Vol. I. Containing Cases from Hilary Term, 1822, to Trinity Term, 1823, inclusive. In Continuation of the ECCLESIASTICAL REPORTS of Dr. PHILLIMORE. London, 1823.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

PERRIN *v.* PERRIN. Arches Court, Hilary Term, 1st Session, 1822.—The wife's incontinence in her single state not pleadable in the first instance by the husband in a suit for a separation à mensâ et thoro, by reason of adultery against the wife.

(On the admission of the libel.)

This was a suit for a separation à mensâ et thoro, by reason of adultery, promoted by William Perrin against his wife Frances Eleanor Perrin.

The three first articles of the libel pleaded in substance the marriage of the parties on the 7th of April, 1818, and their subsequent cohabitation as husband and wife, until the 26th of February, 1820. The fourth article then went on to plead,

"That on Saturday the said 26th day of February, in the year 1820, the said William Perrin was informed, and it then for the first time came to his knowledge, that his wife the said Frances Eleanor [2] Perrin had, previous to their aforesaid marriage, carried on a lewd and criminal intercourse with a person named , by whom she had become pregnant, and that she had been delivered of a male child, begotten on her body by the said , that she had also, previous to their said marriage, carried on a like intercourse with another person named , by whom she had also become pregnant, and that she had been delivered of a female child, begotten on her body by the said ; and that she the said Frances Eleanor Perrin had, since her said marriage, continued to receive from the first of her said paramours an allowance of 40l. per annum, and an allowance of 20l. per annum from the second. That on receiving such information the said William Perrin, in the presence and hearing of her mother Frances Hislop, and others their mutual friends, charged his said wife with the misconduct hereinbefore pleaded; the several circumstances of which she, the said Frances Eleanor Perrin, then and there admitted to be true. That the said William Perrin thereupon determined to, and did accordingly, separate himself from his said wife, and on the following Monday, the 28th day of the said month of February, quitted his house in Pitt's Place, leaving his said wife therein, and did not return to the same; that on the 13th day of the month of March following, a deed of separation was entered into and executed, by and between the said William Perrin on the one part, and the said Frances Eleanor Perrin and Frances Hislop on the other part, whereby it was agreed that the said William Perrin and Frances Eleanor [3] Perrin should live separate and apart from each other, and that the said William Perrin should make his said wife an allowance of 1l. 11s. 6d. per week for her board and maintenance; that the weekly allowance aforesaid was

regularly paid by the said William Perrin from the time of the execution of the said deed of separation up to Saturday the 25th day of August last (1821) inclusive, in the beginning of which month the facts after pleaded first came to the knowledge of the said William Perrin."

The subsequent articles of the libel pleaded various acts of adultery committed by the wife after the separation, which, coming to the husband's knowledge, gave occasion to the present suit.

Judgment—Sir John Nicholl. The objections to the admission of this libel are confined to the fourth article, which pleads the incontinence of the wife with two persons, neither of whom is an alleged adulterer in the cause, prior to the celebration of the marriage. It is objected that the marriage was a waiver of all former misconduct on the part of the wife; that as no sentence of separation can be founded on the wife's incontinence prior to the marriage it is improperly mixed up in a suit which is limited in its object to the obtaining of that sentence; and that the effect of its introduction is injurious to the wife, as disposing the Court to a belief of those charges which, being proved to its satisfaction, it is bound to pronounce as prayed by the husband.

[4] It is said, however, on the other hand, that the matter objected to is pleaded, not to criminate the wife, but in apology for the conduct of the husband—and to apprize the Court of the fact that the parties were living separate and apart at the time when the adultery in question is alleged to have been committed. But to compass this last object, which is all that is requisite, it will be sufficient if the fact of separation be pleaded generally, without a detail of the circumstances under which that separation was had. All which it is necessary, and, therefore, all which it is proper, for the Court to be informed of is that the parties, at the time in question, were living separate by mutual consent. If indeed the wife should set up a case of desertion by the husband, without any provocation on her part, her antenuptial misconduct might be fairly pleaded in his justification. It might, possibly, too, be fairly pleaded by the husband, responsively to the wife's libel, in a suit for restitution of conjugal rights. But, in this stage, at least, of the present cause, I am of opinion that its allegation is improper, and, consequently, I direct the fourth article of this libel to be reformed,(*a*) by the omission of that part of **[5]** it which pleads the wife's incontinence in her single state. The wife, by these means, is precluded from suffering any injury by the production of extraneous matter unfavourable to her defence; and even the husband may be ultimately benefited in being saved the expence of going into proof of facts which, after all, may have little bearing upon the real question at issue in this cause.

CHICHESTER *v.* THE MARQUESS AND MARCHIONESS OF DONEGAL. Arches Court, Hilary Term, 4th Session, 1822.—If a party cited as within the jurisdiction of an Ecclesiastical Court, though actually resident within another jurisdiction, appear and submit to the suit, such original defendant (a fortiori one cited to see proceedings by such original defendant) is bound to the jurisdiction.—Quære, whether a citation of the wife, at the domicile of the husband, is not sufficient to found the jurisdiction of the Court in a suit, even of nullity of marriage against the wife, wheresoever the wife may be actually resident?—Steps taken by the

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(*a*) The article stood as reformed,—

"That in the month of February, in the year 1820, some unhappy differences having arisen between the said William Perrin and Frances Eleanor Perrin his wife, it was mutually agreed between them, that they should thenceforth live separate and apart from each other; and that the said William Perrin should make his said wife an allowance of 1l. 11s. 6d. per week for her board and maintenance; that accordingly on Monday, the 28th day of February, the said William Perrin quitted his said house in Pitt's Place, leaving his said wife therein, and did not return to the same; that the weekly allowance aforesaid was from that time regularly paid to the said Frances Eleanor Perrin by the said William Perrin, up to Saturday, the 25th day of August last, inclusive, in the beginning of which month the facts after pleaded first came to the knowledge of the said William Perrin."

The omission of the "deed of separation" in the article, as reformed, was occasioned by the counsel for Mrs. Perrin insisting on its being annexed to the libel, if it were specifically pleaded.

Judge à quo on the same Court-day, but after appeal entered; and subsequent thereto, but prior to the service of the inhibition and subsequent to, even the service of the inhibition, the defendant not being founded in his first appeal, held to be no attentats.

[Referred to, *Montague* v. *Montague*, 1824, 2 Add. 372; *Dale's case*, 1881, 6 Q. B. D. 466; *Perrin* v. *Perrin*, [1914] P. 136.]

(An appeal from the Consistory Court of London.)

This was a cause of nullity of marriage by reason (as alleged) of minority, promoted and brought originally in the Consistory Court of London by the Most Honorable George Augustus Marquess **[6]** of Donegal, of the parish of St. Mary-le-bone, in the county of Middlesex, and diocese of London, and province of Canterbury, against the Most Honorable Charlotte Anna, Marchioness of Donegal (wife of the said Most Honorable George Augustus Marquess of Donegal), the said Marchioness of Donegal being, in such cause, described as Charlotte Anna May, spinster, falsely calling herself Marchioness of Donegal, of the parish of St. James's, in the county, diocese, and province aforesaid.

The history of this cause, and the proceedings had in it, are so fully detailed in the judgment,(*a*) that any preliminary statement of them would be mere tautology.

Judgment—Sir John Nicholl. This is an appeal from the Consistory Court of London, where the suit was originally depending. It was a cause of nullity of marriage "by reason of minority, and want of legal consent," promoted by the Marquess of Donegal against the Marchioness of Donegal, or, as she is described in the proceedings, against Charlotte Anna May, spinster, falsely calling herself Marchioness of Donegal.

The citation was returned on the 2d Session of Easter Term, 1821, and on the same day an appearance was given for the party cited, and a libel prayed. That libel was brought in on the 3d session, or next following Court day—on which day a decree to see proceedings in the cause, **[7]** with the usual intimation, was taken out against Arthur Chichester and George Chichester, Esqrs., the lawful nephews of the plaintiff, and against Sir Arthur Chichester, Bart., and the Rev. Edward Chichester, clerk, two collateral kinsmen in the next degree—the presumptive heirs in succession, to the plaintiff's honors and estates, in the event of marriage with the defendant, sought to be impugned in the present suit, being pronounced null and void. This "decree to see proceedings" was directed to issue by the Judge, on motion of counsel, and at the instance of the defendant. It was returned, duly served upon three of the parties cited, on the 4th session. A decree, by letters of request, was served upon George Chichester, Esq., the fourth party cited, in another diocese—and was returned on the 1st Session of Trinity Term.

On the 4th Session of Easter Term the Judge admitted the libel, to which the proctor for the marchioness (confessing only the marriage as pleaded) gave a negative issue. At the same time, by way of further answer to the libel, he asserted, and then brought in, an allegation, which stood for admission on the 1st session of the ensuing term. On the same day, the Judge, on motion of counsel, founded upon affidavits of the witness's age and infirmity, permitted Dame Elizabeth May, widow, to be examined upon this allegation de bene esse. Afterwards, sitting the Court, a proctor appeared for Arthur Chichester, Esq., but under protest to the jurisdiction of the Court, which he asserted that he would be ready to extend by the next Court day; and prayed that no examination de bene esse of **[8]** Dame Elizabeth May should be had in the interval—to which prayer however the Judge, after hearing counsel on both sides, refused to accede.

The act entered into, on the part of Mr. Arthur Chichester, on one side, and of the Marquess and Marchioness of Donegal, severally, on the other, was not sped and concluded till the bye-day of the following term. It was argued on the 28th of July; and, further, on the 1st of August, two sittings of the Court after term; when the Judge was pleased, as the minute expresses it, "to overrule the protest so far as respected the jurisdiction of the Court by reason of the alleged residence of the party originally cited." From this order of Court the proctor for Mr. Chichester appealed instanter; and was assigned to prosecute his appeal by the 1st session of the next term. The Judge then proceeded to admit to proof the allegation brought in on the

(*a*) Wherever this occurs, it is the editor's wish to confine himself to the judgment only.

part of the marchioness, which had stood on admission ever since the 4th session of the preceding term, and a decree for answers, compulsories, and commissions, and requisitions for taking the evidence, were directed to issue in the ordinary course. On the same day Dame Elizabeth May was produced as a witness, and subsequently examined. All this in the presence, and without opposition on the part, of the proctor for the marquess. No further step appears to have been taken in the cause till the 15th of August, when other witnesses were produced and admitted before a surrogate, whose examinations were taken in due course.

The inhibition in this Court was extracted on the 17th of September, was served on the 24th; and **[9]** was returned on the 1st Session of Michaelmas Term. The libel of appeal was brought in on the 4th session—and, on the bye-day of that term, its admission was opposed, as not disclosing, upon the face of it, an appealable grievance. But the Court was of opinion that this objection could only be taken by an appearance under protest to the inhibition. The Court therefore admitted the libel of appeal, as declining to pronounce upon the merits of the appeal, with nothing before it but the libel only. The process has been since brought in, in proof of that libel, and the appeal has been solemnly argued—and it now becomes the duty of the Court to pronounce, upon full information, on the whole matter of the alleged grievance.

The pleadings and prayers on either side are, in substance, to this effect. The libel pleads that the party against whom the proceedings are had was illegitimate—was a minor—and was married by license, with no other consent than that of her putative father. It prays therefore a sentence, pronouncing and declaring the said marriage to have been null and void, by reason that a putative father is incompetent to give that consent to the marriage of a minor, by license, which is required by the marriage act (*Horner* v. *Liddiard*, Consistory, 24th May, 1799).

The defence set up is, not the defendant's legitimacy, or that her putative father's consent to her marriage was valid in law; but it is—that she was a major at the time of her marriage, notwithstanding her supposed minority; and, consequently, that she was capable of contracting lawful matrimony **[10]** by license, without any consent at all. Her allegation pleads that she was born in the month of March, 1774, and, therefore, that she was twenty-one years and nearly five months old when married to the plaintiff (then Lord Belfast) in the month of August, 1795. On this ground it is prayed that the marriage so had, and sought to be impugned on the suggestions made in the libel, may be pronounced good and valid.

And here, in the first place, I must observe that this allegation, upon the face of it, discloses the defendant's case as to the single material fact, with the utmost particularity. It specifies the exact time and place of the mother's delivery in 1774; it vouches, by name, the parties immediately privy to that delivery, as the midwife, the nurse, &c.; distinguishing, as it goes, those who are dead from the survivors. It establishes (in plea that is) the identity of the infant so born with the present defendant, by circumstances which, if established in evidence, are conclusive of that fact. It not simply, therefore, apprizes an adverse party of the nature of the case set up in defence, but fully instructs him how, and where, measures may be taken, and inquiries made, by which, if other than genuine, that case may be met and refuted.

Nor can the Court in this place omit also to observe, upon the substance of the decree, to see proceedings which have issued in the cause. For this is not, as has been suggested, a compulsory process, menacing the parties cited with any penalty in case of non-appearance—it merely invites them to become parties to the suit, if they deem it their interest so to do—with intimation—that otherwise the suit **[11]** will proceed in their absence. The decree therefore was hardly more than a legal notice of suit; and to what inconvenience it could subject the parties cited is not very obvious: it left them at liberty to appear or not to appear, to act or not to act in the cause, ad libita.

The grievances on the part of the Judge of the Consistory specially appealed from, as set forth in the several instruments of appeal, are, 1st, "That he, the said Judge, overruled the protest entered on the part of Arthur Chichester, Esq., to the citation issued and returned against him, to see the proceedings in the cause, so far as respected the jurisdiction of the Court by reason of the alleged residence of the party originally cited;" and, secondly, that he "proceeded to do further acts in the cause (to wit, by admitting an allegation, and granting a decree for answers, compulsories, &c.), notwithstanding an appeal from the protest being so, in part, overruled, was

entered, instanter, by the proctor for the said Arthur Chichester, and deferred to, on the part of the Judge, by the assignation of a term for the prosecution of the said appeal." It will be proper, therefore, or convenient at least, to consider these heads of grievance in the order in which they thus present themselves.

When Mr. Arthur Chichester, the present appellant, appeared in the Court below under protest—he was assigned, technically speaking, "to extend his protest;" that is, to state his grounds of exception to the jurisdiction of the Court in a sort of informal plea, which is termed in our Courts, "an act of petition." The very object of that assignation was that such grounds of exception **[12]** should be stated, specifically, and distinctly so, that both the Court and the adverse party might be duly apprized of them; and in order that the latter might furnish, if able so to do, a counterstatement upon any matter either of law or fact. Now, upon adverting to the act of Court, which I must presume to have been entered into with this view, I am rather surprised at the present appeal. For the act, as originally extended, has not one word in respect to Lady Donegal's residence in Ireland, but alleges grounds of protest of quite a distinct and dissimilar nature. The grounds of protest stated in the act are, that no instance occurs of the issue of a similar process in any suit of nullity of marriage, where the alleged ground of nullity was a breach of the marriage act; that as no remainderman can institute this species of suit for his own benefit, so neither is he compellable to become a party to it for that of any body else; that the party cited has no direct, immediate, interest in the point at issue in the cause; and that neither the proceedings had, nor the sentence pronounced in it, will be, legally, binding on him. The act, therefore, prays that the Judge will, for all these several reasons, pronounce "the said Arthur Chichester, Esq., to have been unduly and illegally cited, and will dismiss him from any further observance of justice in the cause, with costs." In support of that prayer it goes on to charge that "the proceedings carrying on in the suit between the Marquess and Marchioness of Donegal are collusive;" and that the object of the suit is "to uphold a pretended marriage by fraud and connivance:" and, in verification of this charge, it travels into a variety of extraneous matter (par-**[13]**-ticularly as with reference to certain affairs of Lord Belfast, the plaintiff's eldest son, in the year 1819), not very regularly introduced, it must be admitted, into a mere question of protest. Now, it is obvious that all this had nothing whatever to do with the jurisdiction of the Court below, so far as it depended on "the residence of Lady Donegal in Ireland." And yet the Courts pronouncing for its jurisdiction, notwithstanding such residence, originally constituted the sole, as it still does the principal, grievance that is drawn by the present appeal into this Court.

The protest, so extended, was replied to, severally, on the parts of both Lord and Lady Donegal; the latter insisting on the propriety of the decree taken out, on grounds to which I shall presently have occasion to advert; and both denying, explicitly, the charge of collusion, either in the institution, or conduct, of the suit. It is in a rejoinder on this reply that the alleged fact of residence first discloses itself; namely, that Lady Donegal "had been continually for the four years last past, and then was, resident in Ireland." Now it is manifest, as well from its place or position in the act, as from the immediate context of this averment,(*a*) that it was **[14]** origin-

(*a*) "And the said Shephard (the proctor for Mr. Chicester) further alleged that whereas it is alleged by the said Gleunie (proctor for the Marquess of Donegal) that his said party, the said Marquess of Donegal, instituted proceedings against his said wife, without her concurrence and against her approbation, and denied that in the said suit the libel or allegation, or other proceedings, have been concerted, agreed upon, or settled by or between, and in behalf of the said Marquess of Donegal and Charlotte Anna May, calling herself Marchioness of Donegal: now the said Shephard denied the same to be true, and alleged that the said Charlotte Anna May, falsely calling herself Marchioness of Donegal, has been continually for upwards of four years last past, and still is, resident in Ireland—that the citation in this cause issued under seal of this Court on the 12th day of May last, and that, on the 14th of the same month, the letters missive of the Judge of this Court were shewn by the officer to the said Blake (the proctor for the Marchioness of Donegal), who undertook to accept the service thereof for the said marchioness, and to appear and defend this suit; and that the citation was returned into Court by the said Glennie on the 18th of May, and an

ally introduced into the cause for a mere incidental purpose; namely, that of fixing on the original parties in the suit, a charge of collusion; and not as a ground of protest, properly so called. The matter therefore of residence, as applying to the jurisdiction of the Court, between Lord and Lady Donegal, was a mere objection, taken by counsel in the argument upon the protest; and how the over-ruling that "objection" (for such the minute should have termed it, and not "a part of the protest," since of the protest, properly speaking, it formed no part) can be a matter of appeal at all is first to be considered. Possibly the alleged fact of residence might be untrue, and might stand uncontradicted, simply from the adverse parties not being aware of the supposed bearing of that fact upon the question of jurisdiction. They might possibly, and not very unreasonably, think that the charge of collusion itself was too immaterial to the question of jurisdiction to call for the particular negation of any fact adduced merely in support of that charge. At any rate the proof of the alleged fact, which rests simply upon the affidavit of a **[15]** Mr. Robinson,(*a*)[1] as to "hearing and belief," is of the slenderest possible description.

Now, to apply these observations to the present question of appeal. The prayer of the act, as I have already stated, was, that the Judge would pronounce Mr. Arthur Chichester to have been "unduly cited," and would "dismiss him with costs;" and this upon grounds not including, but wholly foreign to, the matter of Lady Donegal's residence in Ireland. In the course of the argument upon that act an objection is taken to the jurisdiction of the Court to entertain the suit at all, even as between Lord and Lady Donegal, on the ground of such residence; which the Judge of that Court might, I think, very properly over-rule, as not considering it part of the protest: though whether he so over-ruled it, upon that, or upon any other consideration, is a point on which I am uninformed. But how the over-ruling of that objection, upon any consideration, could be a grievance on the present appellant—a party cited merely to see the proceedings in the cause—is what I am wholly at a loss to discover. The Judge of the Consistory Court, in making the order appealed from, neither assigned this party "to appear absolutely," nor refuse to "dismiss him," as prayed in his protest—that matter—the whole matter of protest, properly speaking—stood undetermined. Possibly the Judge, but for the intervention of the appeal, might have pro-**[16]**-ceeded, on the same Court day, to dismiss this party. I say possibly—for I would be understood as intimating no opinion of the probability of such an event. I rather, perhaps, infer that the contrary was probable. In suffering or ordering this decree to issue the Judge appealed from appears to have considered that it could at least lead to no injustice to give parties so deeply interested, as those in remainder, notice of the proceedings, and to afford them an opportunity of intervening, if they thought it for their interest, leaving it for them to choose whether they would appear or not. He seems to have conceived that as persons in remainder had been allowed to bring suits of nullity, to declare a marriage void, by reason of consanguinity, as in the case of *Maynard* v. *Heselrige*,(*a*)[2] and in other instances; so, by analogy, and upon principle, they might also possibly be entitled, even to institute such an original suit under the marriage act, though no instance had yet occurred—the more especially, as the marriage act itself is of no very remote antiquity, and as suits of nullity, under that act, were, comparatively, unfrequent, till in quite modern times. Perhaps he concluded, at the same time, that it was unnecessary for him to dismiss the party, as the party might attain the effect of that dismissal by the simple process of not appearing. But upon these and similar points the Court below intimated no opinion, and still less does this Court; they were undetermined by the Judge from whom this appeal is brought, and they have scarcely been touched upon, even in **[17]** argument before me. I desire therefore to be understood as expressing no opinion whatever, whether the Judge of the Consistory would have done right, or would have done

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appearance immediately given thereto on the part of the said marchioness by the said Blake."

(*a*)[1] "And this deponent saith that he hath heard and verily believes that the said Charlotte Anna May, calling herself Marchioness of Donegal, hath been continually for four years last past, or thereabouts, and still is, resident in Ireland." Affidavit of Mr. Stratford Robinson, sworn on the 18th July, 1821.

(*a*)[2] Commissary of Surry's Court, Hil. 1789, Mich. 1790. See too the case of *Faremouth and Others* v. *Watson*, 1 Phill. 355.

wrong, in complying with the prayer of the protest; but under that protest, the want of jurisdiction as between the parties principal on account of the residence of the defendant not being regularly before the Court—not being a part of the protest, properly so called, as extended in the act, I am strongly disposed to hold that the over-ruling of a mere objection on that account, taken at the hearing (and which the other parties had not been called upon to answer, eo intuitu, by the act), was no matter of appeal.

But taking it, on the other hand, that the defendant's residence in Ireland was made a part of his protest by the present appellant, in the Court below, still I am of opinion that the Court below was perfectly correct in pronouncing for its jurisdiction. It is certainly true that both the canon (vide Gib. Cod. 1004, 1008) and the statute law (23 Hen. 8, c. 9 (the bill of citations)) forbid the citing of parties out of their dioceses, or peculiar jurisdictions. But it is equally true that the rule, at least in the statute law (vide preamble of 23 Hen. 8, c. 9), was meant for the benefit of the subject; which benefit it hath uniformly, as far as I see, been held to provide for sufficiently, by giving defendants who are so cited a privilege of pleading to the jurisdiction. Consequently, if a party who is so cited once waive that privilege, by appearing and submitting to the suit, he or she is bound to **[18]** the jurisdiction (see Hetley, 19, 1 Vent. 61, Carth. 33, Show. 161, &c.). What then was the condition of the present defendant at the period of this protest? A citation had issued, describing her as "resident within the diocese of London" (*b*)[1]—to that citation she had appeared. A libel was given, pleading the fact of her residence within the same diocese—on that libel she had joined issue. She had not objected to the jurisdiction of the Court below, at the time when the point appealed from was determined by that Court; nor has she yet objected, as far as I am aware, to the jurisdiction of this Court. I have carefully looked through all the authorities to which I have been referred, in the course of the argument (vide n. (*a*), supra), by the counsel on both sides; and I am satisfied that no objection, on the ground of residence, to the jurisdiction of the Consistory Court could, in that stage of the proceeding, have been taken even by the original defendant. Still less then could it be taken by this defendant (if indeed the term defendant is applicable to a party cited merely to see proceedings by the original defendant); and who, to crown the whole, is cited within *his* diocese. What possible injury, or inconvenience, can this party have sustained from the **[19]** suit being prosecuted in the Court appealed from? (*a*) Neither the spirit, nor letter even, of the canon and statute law are applicable to him. That it was competent for this party to object the residence of the original defendant (appearing too, and under protest, to a process taken out by that very defendant) is a conclusion at which I should have some difficulty in arriving, even were I to hold, which I do not, that it was competent to the original defendant, in that stage of the proceeding, to have objected this matter of residence so as to oust the jurisdiction of the Consistory Court for herself.

But, lastly, independent of all this, could even the original defendant have taken this objection with effect, in any stage of the proceeding; or, in other words, was not the Consistory Court of London the legal jurisdiction notwithstanding her actual residence, as alleged, during a certain period in Ireland? A party may have two domiciles, the one actual, the other legal; and, primâ facie at least, the husband's actual, and the wife's legal, domicile are one, wheresoever the wife may be, personally, resident. (*b*)[2] Now it is admitted that the husband's domicile is **[20]** within the diocese

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(*b*)[1] Had the citation described her as resident in Ireland or elsewhere, out of the local jurisdiction of the Court, the error would have been fatal; possibly if objected even after sentence; as the Court's want of jurisdiction would have been apparent on the face of the record. The Judge too in that case would have been clearly liable to the penalties denounced in the bill of citations, namely, the forfeiture of double damages and costs to the party, and of 10l. (for every person so cited), half to the King, and half to the informer, to be recovered in a qui tam action.

(*a*) Upon similar principles his Honor, the Vice-Chancellor, when applied to, on behalf of Mr. Chichester, for a prohibition to restrain the Consistory Court of London from proceeding in this suit, refused the prohibition. Vice-Chancellor's Court, 4th August, 1821.

(*b*)[2] Upon this principle of the domicile of the husband being the legal domicile of the wife, I apprehend that a citation of the wife at the domicile of the husband is

of London. Mr. Chichester, too, has even alleged in his act that the parties are still cohabiting; nor can it be suggested that they were living asunder, under any legal separation, at the commencement of this suit. Lady Donegal has a right, and is bound, whensoever called upon, to return to the marquess's domicile, provided her marriage is, what she contends it to have been, a good and valid marriage: so that upon this, independent of other considerations, London appears to me to have been sufficiently the residence, or domicile, of the defendant, to found the jurisdiction of the Consistory Court of London in a suit of this description. Add to this, that the parties were married in London—it is therefore the "forum contractus"—also, that the validity of the marriage is to be pronounced upon by the law matrimonial of this country, not of Ireland; a country to which our marriage act does not extend; and the law of which, we all know, to be materially different from that of England, as to what is, and what constitutes, a valid marriage—a consideration upon which alone to have instituted this proceeding in Ireland, the only other alternative, would have savoured strongly of that fraud and collusion, imputations of which are so liberally cast in the act of Court. In every view, therefore, which the Court can take of the subject, it is of opinion that the Judge of the Court appealed from was right in over-ruling the objection taken on behalf of the present appellant.

It still, however, remains to be considered whether he was equally correct in proceeding in the suit, as between the principal parties, notwithstanding, and after, an appeal entered from the first head of **[21]** grievance—that just disposed of—by the present appellant. Now I take it that in appeals, at least from grievances, the hands of the Court are in no case tied up till the service of the inhibition; (*a*) and that what, or whether any intermediate steps shall be taken, depends upon the particular circumstances of the case, the Judge of the Court exercising, in that respect, a sound legal discretion. If it be said that the Judge, in this case, had tied up his own hands, by deferring to the appeal, I answer that it rested with this Court, and not with him, to determine whether the matter in fact appealed from was, or was not, in its nature, an appealable grievance; (*b*) and, consequently, that he was bound to defer to the appeal, so far as the mere assigning of a term to prosecute can be construed a deference to it.(*c*)

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clearly sufficient to found the jurisdiction of the Ecclesiastical Court in a suit for a separation à mensâ et thoro, by reason of adultery. It is necessary of course to fix the wife with notice of the suit.

(*a*) Appellatio à diffinitiva, statim cum fuit interposita, ligat manus judicis à quo, ut non possit procedere ad aliquem actum ulterius in illâ causâ. Sed appellatio ab interlocutoriâ, non ligat manus judicis à quo, quin possit procedere ad ulteriora, donec per judicem appellationis fuerit inhibitum. Maranta, lib. vi. act. 2, s. 160, 162; and Lancellott (De Attentatis), 2 pars. ch. 12, lim. 1, No. 1 & 2.

(*b*) Adverte, quod discussio appellationis, an sit justa vel injusta, frivola vel non frivola, non spectat ad judicem à quo appellatur, see ad judicem ad quem. Lyndw. Com. in Const. Mepham. in Concilio, &c. Vide quoque Decretal, 15 in sexto, c. 10.

(*c*) Regulariter, judex à quo, tenetur quamlibet appellationem admittere. Si ipsam judex non admittit, seu non defert illi, mittitur ad superiorem puniendus, abitrio superioris, de jure canonico. Maranta, lib. vi. 2, 388. Vide quoque Covarr. tom. 2, pract. quæst. c. 23, n. 4; and Lancellott, 2 pars. c. 12. Ampl. 5, No. 11, 15. Maranta, for instance, limits this, it is true, to cases in which appeals are not prohibited by law; and in the number of appeals which are prohibited by law, he reckons, by a reference to a former passage [ib. 335, 336], "appellationes frivolæ," that is, "vanæ et inanes, et sine justa causâ interpositæ, quæ nullum poterint sortiri juris effectum," so that in these "non tenetur judex appellationi deferre."* But it is apprehended

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* "Quando autem," says Lancellott [2 pars. c. 12, lim. 6, n. 27, 28], "appellatio quæ de jure tanquam frivola non fuisset admittenda, fuisset de facto admittenda, facit attentata, &c.;" and to the same purport Maranta [ubi sup. n. 171] and others. But it not only seems highly unreasonable in itself, except in extreme cases, and hardly accordant with what is laid down, for instance, by Lancellott [ubi sup. Amp. 5, n. 11, 12], with respect to the admission of appeals [namely, "quod semper in dubio, est appellationi deferendum, ut dicunt omnes;" and that "etiamsi judex admiserit appellationem non admittendam, sit a pœnâ excusandus, &c."], that what-

[22] The several acts, had and done, in supposed prejudice of the original appeal, and which are charged in the libel of appeal as attentats,(*a*)[1] were so had and done, either on the Court day on which the appeal was entered, or subsequent thereto, but prior to the issue of the inhibition, or, again, after the issue and service of the inhibition. Now, as to the first of these, it has been constantly held that all the several acts of one Court day constitute, as **[23]** with reference to this head of attentats, but one act, notwithstanding an appeal intermediate, or between those acts, accompanied with the several formalities of depositing money for the stamp, and so forth. As for the second, no ulterior step appears to have been taken in the cause till the 15th of August, within which period there was surely time sufficient to have extracted, and served the inhibition; (*a*)[2] so that, no inhibition having been served, the surrogates admitting certain witnesses to be produced, &c. (the ulterior step taken) on the 15th of August, still amounts to no attentat, in my judgment. On the 17th of September, and not before, the inhibition is extracted, and is served on the 24th. Whatever steps were taken, subsequent to the service of the inhibition, would be nullities of course, provided the appellant had been founded in his first appeal. But that appeal being frivolous and unfounded, he has no right to demand the revocation even of these, as attentats,(*b*) at the hands of this Court. He **[24]** is to be considered as having withdrawn from the Consistory Court (a Court having cognizance of the suit) at his

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that appeals must be such, very manifestly indeed, to warrant a refusal to defer to them on the part of the Judge à quo, so far as this can be collected from their simple admission. As for assigning the appellant to prosecute them within a given term, this follows upon their admission naturally, not to say necessarily; for, otherwise, it should seem that the suit might remain suspended ad infinitum. To determine whether the appeal be founded or not, except in extreme cases, clearly belongs to the Judge ad quem.

(*a*)[1] An attentat, in the language of the civil and canon laws, is any thing whatsoever wrongfully innovated or attempted in the suit by the Judge à quo pending an appeal.

(*a*)[2] It was intimated in this place by the counsel for Mr. Chichester, that the earlier issue of the inhibition had been prevented by a caveat against the issue being entered in the Arches Registry. But to this it was replied by the counsel for Lady Donegal, that a notice in the nature of a caveat against the issue of the inhibition had, indeed, been served upon the Registrar of the Court of Arches, upon the authority of the precedent in *Lord Herbert's case* [2 Phillimore, 430], but that such notice was not served till the 15th of August, and that it was subducted prior to any application being made, on the part of Mr. Chichester, for the inhibition.

(*b*) Illa quæ post appellationem interpositam, ante diffinitivam sententiam, innovantur, donec appellationis causam veram esse constiterit, revocari non debent; nisi judex appellationis (postquam sibi constiterit ex causâ probabili fore ad se negotium devolutum) inhibeat, canonice,* judici à quo appellatum extitit, ne procedat; tunc enim, quicquid post inhibitionem hujusmodi* fuerit innovatum, est (licet causa eadem non sit vera) per eundem appellationis judicem, ante omnia in statum pristinum reducendum. Decret. lib. ii. tit. 15, c. 7, in sexto.

It may be proper to observe that the Judge à quo had never, at any time, been so inhibited in this cause, nor had the requisitions of the 97th canon been complied with, on the part of the appellant, before the going out of the inhibition, which actually issued in the cause. In other words, the Judge, ad quem, had not that constat of the truth of the grievance appealed from, prior to its issue, which was necessary to the full validity of the inhibition [vide Marant, vi. 2. 196, 197], and

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soever is done by the Judge à quo, after the bare admission of an appeal, must, in all cases, and necessarily, be an attentat; but he himself admits [ubi sup. lim. 6, n. 40, 41] a diversity of opinions as to this matter—and that "appellatio frivola, etiamsi per judicem fuerit admissa de facto, non facit attentata," according to some authorities.

* See also Lancellott, De Attent., 2 pars. c. 12, lim. 6, s. 16, 17, who lays down "quod inhibitio vigore frustratoriæ appellationis non potest operari effectum, ex quo non potest dici canonica," and that "inhibitio tunc tantum operetur effectum attentatorum quando est canonica."

own risk, and is to be remitted there; leaving it to the Judge of that Court to proceed upon the whole question, and between all the parties, as the justice of the case may appear to require.(*a*)

[25] This whole proceeding to be considered as one of a peculiar character. There are circumstances, as between all the parties, which tend to excite the vigilance of the Court, and to claim no inconsiderable share of its strictest attention. As between the original parties, the Court is bound to pronounce, **[26]** according to the existing law applicable to the facts in issue, substantiated by evidence; without suffering its judgment to be biassed by any consideration of the hardship, real or supposed, with which possibly that law may bear upon their particular case. For instance, if this marriage shall ultimately prove to be null and void in law, the Court in which the suit is then depending is bound, however painful to itself, so to pronounce it; nay, more, it is bound to look narrowly into the nature and proof of those facts by which a sentence of nullity may be sought to be averted. Here are great interests at stake. Lord and Lady Donegal may very possibly, and very naturally, feel a strong wish to sustain a marriage which has subsisted nearly thirty years; and which has given birth to no fewer than seven male issue, whom a sentence of nullity must, at once, deprive of every legal and hereditary claim. They may also very possibly and naturally wish, and for obvious reasons, that their legal state and condition shall be ascertained, by the sentence of a Court of competent jurisdiction, be that legal state and condition eventually what it may. The proceedings had in the cause certainly tend to shew that the suit, as between the principal parties, is amicably conducted. But this mere circumstance of amicable conduct in the suit does not warrant an imputation that the parties are fraudulently colluding to procure a sentence contrary to the truth of the facts and to the law applicable to those facts. One strong pre-

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without which the above passage from the decretals plainly implies, that steps taken by the Judge à quo, though in fact inhibited, are not, necessarily, revocable as attentats. See also upon this head Gaill. lib. i. Obs. 144, n. 4, and Ayliffe, par. 297, 298.

(*a*) It was thrown out by the Judge, in the progress of the argument, that the regular course for procuring the revocation of attentats was by a separate proceeding, civil or criminal, as against the Judge à quo, and that it was not by charging the supposed attentats, accumulatively, in a mere ordinary libel of appeal.

The latter of these (the criminal) was the course adopted in the case of *Luke and Fisher*, which was a proceeding by articles in the Consistory Court of Exeter, promoted by Luke against Fisher, surrogate of the archdeacon of Cornwall, for (an attentat in that) having decreed Luke, the promovent, to be certified for a contempt, in a cause of subtraction of tithes, &c. (then depending in the Archidiaconal Court of Cornwall, between Whitaker, rector of Ruanlanihorne, and the said Luke, one of his parishioners), under the statute of 27 Hen. 8, c. 20, he, Fisher, issued, or caused to issue, a certificate of such contempt under seal of the archdeacon of Cornwall, to certain justices of the peace for the county of Cornwall, after an appeal to the Consistory Court of Exeter from the said decree, made on the part of Luke, and admitted by Fisher, in contempt, &c. of the said appeal. The Judge at Exeter dismissed this proceeding, generally, with costs, from which sentence an appeal, on the part of Luke, was prosecuted to the Court of Arches. The dean of the Arches (Dr. Calvert) pronounced (Trinity Term, 1786, 4th Session) for the appeal, and retained the principal cause, and therein revoked the pretended certificate (the attentat, a step not taken by the Judge à quo), but affirmed so much of the decree appealed from as dismissed the respondent from the original citation with costs,† and gave no costs of the appeal. Luke, the appellant, in the Arches Court, again appealed from this sentence to the Delegates.

This appeal came on to be heard at Serjeants' Inn, on the 26th of May, 1789; when the Judges Delegates, Sir Henry Gould, Knt.; Sir William Henry Ashhurst, Knt.; Sir Richard Perryn, Knt.; and William Macham and John Fisher, Doctors of Law, pronounced against the appeal—affirmed the sentence of the Judge appealed from, and condemned Luke, the appellant, in the costs of the appeal.

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† It appeared by the evidence that the issue of the certificate was owing to the imprudence of the registrar (not a party proceeded against) who put the seal to it, unknown to the surrogate, after the suspension of the decree by the admission of the appeal.

sumption against the existence of such collusion, in the present case, is this very step of citing the parties, one of whom is the present appellant, to see the proceedings. For [27] I think it scarcely possible that, considering the known privileges of intervention, a final sentence can be had in a suit of this description by collusion, but in the absence of all parties who are interested to detect and defeat it.

Still, however, the Court appealed from was bound to be on its guard, and to look into proceedings had between the parties principal in the cause with a jealous eye. Nor did it behove it to be less careful in watching over the conduct of this third party, especially in the article of delay—since he too had great interests at stake, and was placed in a situation which, as with reference to those interests, obviously suggested to him the policy of delay. If the birth of Lady Donegal really occurred half a century back, direct evidence of that fact could only be had from the mouths of witnesses far advanced in life—and the loss of their testimony might wholly defeat the real justice of the case. This party, too, had an obvious interest in delaying a declaratory sentence even of nullity: for in that event of the suit the plaintiff may try the experiment "convolandi ad alteras nuptias," in the prospect of legitimate issue to inherit his honors and estates—a prospect which, it need not be observed, becomes fainter in proportion as the period for making that experiment recedes. Under these circumstances the Court below was called upon, in point of justice, not to suffer, on the eve of a long vacation, the cause to be tied up, as between the principal parties, by the appeal of this third party—and, consequently, I am of opinion that neither on the one nor the other head of grievance can the ap-[28]-peal and complaint preferred to this Court be sustained.

I pronounce, therefore, against this appeal, and remit the cause; (*a*) and, although the appellant [29] ought not to be abridged of any fair means of fully investigating the case set up by one of the respondents, yet in prevention of future delays in that quarter whence too many have already proceeded, and by which, as I have already

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(*a*) This cause was remitted accordingly to the Consistory Court of London, the Judge of which Court [Sir Christopher Robinson], proceeding according to the tenor of the former acts, "over-ruled (1st Session, Easter Term, 1822) the protest entered on behalf of Arthur Chichester, Esq.," but did not assign him to appear absolutely. A proctor then, however, did appear absolutely for the said Arthur Chichester, and prayed to be heard on the admission of the allegation thentofore admitted on the part of the Marchioness of Donegal [vide page 8, ante]; which prayer the Judge was pleased (2d Session, Easter Term, 1822) to reject. At the same time, by consent of the counsel for the Marquess and Marchioness of Donegal, he decreed a monition to issue against the witnesses already produced and examined upon the said allegation to attend for the purpose of being examined upon interrogatories, to be administered on behalf of the said Arthur Chichester.

But now by 3 Geo. 4, c. 75, s. 1, so much of 26 Geo. 2, c. 33, as provides "that all marriages solemnized by licence after the 25th of March, 1754, where either of the parties (not being a widower or a widow) shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties so under age (if then living), first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother (if living and unmarried); or if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery, shall be absolutely null and void to all intents and purposes whatever;" is repealed, so far as relates to any marriage to be subsequently solemnized.

And the second section of the same act provides, "That in all cases of marriage had and solemnized before the passing of that act, without any such consent as is required by that part of 26 Geo. 2, c. 33 (the old marriage act), recited in, and repealed, by the first section: and where the parties shall have continued to live together as husband and wife, till the death of one of them, or till the passing of the act; or shall only have discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage shall be deemed good and valid to all intents and purposes whatsoever."

It is to be presumed that, in consequence of these enactments, the above suit has virtually determined.

said, the real justice of this case may be defeated, I think that I am bound to accompany this sentence with a decree for costs.

[30] ROGERS AND BROWNING *v.* PITTIS. Prerogative Court, Hilary Term, 3rd Session, 1822.—A codicil operates as the re-publication of that will to which it applies; and, consequently, as the revocation of any intermediate will.

Judgment—Sir John Nicholl. James Stephens, the testator in this cause, died on the 11th of June, 1820. His first testamentary paper before the Court, in point of time, is a duly executed will, which is dated on the 30th of July, 1814. The substance of it is a bequest of a certain cottage at Brook Green, of his household goods, plate, and other articles, and of a life annuity of 50l. to his housekeeper Elizabeth Vesey. The rest and residue of his property, real and personal, are bequeathed by it to his three nieces, namely, Mrs. Rogers, Mrs. Pittis, and Mrs. Browning—and Mr. How and Mr. New are appointed executors.

On the 4th of June, 1817, the deceased is alleged to have executed another will: the substance of this will is to give the whole of his property, real and personal, to his niece, Mrs. Pittis, subject only to the life annuity of 50l. to Elizabeth Vesey; and this will appoints Mr. Pittis, the husband of the principal legatee, and Mr. New, executors, to the exclusion of Mr. How.

There is also a third instrument before the Court, which is a codicil dated the 5th of June, 1820. By that codicil the deceased gives certain provisions, which were in the house, and a furze-house, described as standing near the yard gate, to his house-**[31]**-keeper Vesey, the same person mentioned in both the former instruments. This codicil is written on the lower part of the third side, or page, of the will of 1814, just below the deceased's signature and the subscriptions of the attesting witnesses.

The will of 1814, together with this codicil, is set up on the part of the two nieces, Mrs. Rogers and Mrs. Browning; the will of 1817 is propounded by the husband of the third niece, Mrs. Pittis; and the questions in the cause for the Court to determine are, 1st, whether the factum of this last instrument, the codicil of June, 1820, is sufficiently proved: 2d, with which of the wills, being proved, is it to be taken in conjunction.

Now, to prove this codicil, two witnesses have been examined, the one, Robert Rayner, the attesting witness, the other, Mr. James How, the writer of the codicil, who has renounced the executorship of the will of 1814 in order to become competent as a witness in the cause.

The account of the transaction given by Rayner, a neighbour of the deceased, and employed by the deceased in his trade, which was that of a shoemaker, is to this effect: He says that he well remembers being sent for one morning to Farmer Stephens, whom he found sitting up in his bed, with Mr. How, also a neighbour and intimate acquaintance of the deceased, seated near the bedside, at a table, on which were pens and ink, and a written paper—Vesey, the deceased's housekeeper, was also present. On being introduced into the bed-room the deceased, after the usual salutations, said to the deponent, "I have been adding to my will, in order to give Betty all the provisions and **[32]** cured meats," of which there was a great abundance at that time in the house. He also said, that he should give her one of the furze-houses, "to be taken over the way," meaning, as the deponent understood, to a cottage on the green, opposite his house. He then observed that this addition to his will had been written by Mr. How, and that he, the deceased, wished the deponent to attest the execution of it. How, at the same time, observed, that he had read over the codicil, which he had just been preparing, to the deceased, and that the deceased approved of it. The deceased then executed the codicil, by putting his mark to it, declining the offered assistance of Mr. How, and said, "It was all quite right—it was all very well," and that "he would never make any other alteration in his will." The codicil was then subscribed by the deponent as a witness to the execution of it; after which he retired, being desired by the deceased to take some refreshment down stairs. He adds that the deceased appeared in pretty good spirits, and much better than he expected to find him, and was of perfectly sound mind, memory, and understanding. I may just observe by the way that the deceased's capacity at, and during, the premises, is admitted in all hands. There is nothing in fact to impeach it; for although he is described as sitting up in bed, supported by bolsters, and extremely feeble in bodily health at the time in question—yet there was nothing in the nature

of his disease, or otherwise, to occasion mental incapacity. Nor was the deceased in extremis, for he survived this transaction of the codicil upwards of six days.

[33] Now, the circumstances deposed to by this witness—the manner in which the deceased received him on his first introduction—his declared knowledge of the contents of the instruments—his expressed desire that the witness should attest its execution—his mode of executing the instrument—his declaring himself perfectly satisfied with the contents of it, and that he would make no other or further additions to his will; all these circumstances bring up this case, completely, within the rules of evidence of intention. This witness's account, if true, proves every thing that is necessary to establish the factum of the codicil; and, as to the truth of the account, the credibility of this witness has suffered no attack, either in plea or argument, nor is it liable, that I am aware of, to the slightest imputation.

If, however, it were necessary that the deposition of this witness should be, it is corroborated very fully by that of Mr. How, the other party present at the transaction—for his account of that part of the transaction which occurred after Rayner came into the room, is precisely similar to Rayner's own account—so that there are two witnesses deposing together, and contesting, to the making of this codicil; and supposing Mr. How to be shaken in credit as a witness, still, upon his deposition in conjunction with that of Rayner, by his evidence as corroborating, or corroborated by, that of Rayner, the codicil must be held sufficiently proved.

Upon the question, however, of the credit due to Mr. How, as a witness, I can by no means persuade myself to think it materially affected. He is described as a yeoman, of considerable property, **[34]** and great respectability—he is an individual, in short, against whose general character, there is no impeachment. He was the deceased's confidential friend, and the principal manager of his affairs after his brother's death, about ten years preceding his own—and he is perfectly disinterested, as taking no benefit to himself, either under the will, or the codicil. It is true, indeed, with all this, that he has deposed, positively, to a fact in the case, as to which the preponderance of evidence satisfies me that his deposition is erroneous. But the question, in its bearing upon that of his general credibility, is whether he has so sworn falsely and corruptly, or whether he has so deposed, though in error, still honestly and sincerely. I have no hesitation whatever in acquitting him of having so sworn corruptly. It is a mere collateral and immaterial fact, upon which the contradiction arises, namely, whether the will, bearing date on the 30th of July, 1814, was executed upon that day, or whether it was executed three or four months after, on a day in the month of October.(*a*) The instrument is equally valid in either case, and the time **[35]** of execution has no bearing whatever upon the question of its re-publication by the codicil. He has certainly deposed, in this particular, with a degree of blameable confidence in the face of the instrument itself, and the attesting witnesses; but that very confidence tends to shew his sincerity—for he must have been aware that the three attesting witnesses, supported by the instrument itself, might, and probably would be, as they have, in fact, been, brought to contradict him.

But it has been contended that, at all events, this witness is so inaccurate and so defective, in point of memory, that the Court ought to place no reliance upon him, even though it should acquit him of intentional falsehood. This, however, is not a sound argument, to that extent at least, in my judgment. It by no means follows, that because a witness is inaccurate as to the date of a transaction which occurred six years before his examination, no reliance can be placed upon his memory as to facts and circumstances that passed only as many months before; and which facts and circumstances must have early become fixed in his mind, by his attention being called to them in consequence of proceedings to which they almost immediately gave rise.

(*a*) On which day the deceased executed the conveyance of an estate which he had previously sold, for 1000l. to Mr. Basset, of Newport. The witness (How) insisted that the will was executed on the same day (the 19th of October), and not in July. He accounted for the "date" by stating that the instructions were given, and the will was prepared in July; and that it was so dated by Mr. Worsley, in expectation that the deceased would have attended at Newport to execute it upon the 30th of that month; that not having done so, the matter stood over till the 19th of October—when the will was actually executed by the deceased; but without the date, inserted as above, having first been altered.

I think, therefore, that I cannot reject the evidence of this witness altogether, on the score of inaccuracy or deficiency of memory.

The other circumstance objected to this witness is, his having written receipts on the back of his own bond for 1000l. lent to him by the deceased, acknowledging the payment of interest, and having signed those receipts himself. But this only proves to me that neither of these parties were in habits **[36]** of business, and that they were acting towards each other with that want of circumspection, proceeding from their mutual confidence in each other, which is by no means unusual in persons of their class and occupation. The deceased is proved to have been a person of very great indolence—and this witness signing the last of these receipts with the deceased's name, which has been much insisted upon, could hardly, by possibility, have been for any purpose of fraud. There appears to me no attempt whatever to imitate the deceased's hand-writing, such as it was. The bond, too, was to remain in the deceased's own possession—so that this witness should have forged his signature at the back of it—that is, should have placed it there for any purpose of fraud—is quite out of the question. The occurrence at first sight may be startling to those who are accustomed to transact business in a more orderly and methodical manner—but it is an occurrence of no uncommon sort between country farmers—something very similar to it would have passed between two persons of this class, no long time back, under my own eye, but for my intervention. I think, therefore, that this objection does not materially detract from the credit due to Mr. How, any more than the preceding objections—and, giving him credit—he not only corroborates, and is corroborated, by the attesting witness—but he speaks to the history of the making and preparing of this codicil in a manner which does not leave a doubt in my mind that it was legally prepared and executed, and is, in itself, a valid instrument.

[37] The codicil then being, in the judgment of the Court, proved, and valid, the next consideration is, with which of the two wills is it to operate in conjunction—the will of 1814, or the will of 1817?

Now this I take solely to depend upon the result of a necessary previous inquiry, which is, to which of these two wills is the instrument in question to be taken as a codicil: for I apprehend the law to be settled, 1st, that making a codicil to a will re-publishes that will; 2d, that the re-publication of a former will supersedes one of a later date, and re-establishes the first. If, therefore, this codicil is to be taken as a codicil to the will of 1814, I shall have no hesitation in pronouncing for it in conjunction with that will, notwithstanding the intermediate will of 1817.

1. First, then, I apprehend it to be clearly settled that making a codicil to a will, republishes that will—that a codicil even of personalty, if executed so as to act on the subject, that is, if attested by three witnesses, republishes a will of lands; so that a will of personalty à fortiori, or a mixed will so far as respects personalty, is republished by a codicil, whether so attested or not. No evidence of intention to republish is requisite in either case; the very act of making the codicil, primâ facie at least, infers the intention. It is true, indeed, that this primâ facie inference may be rebutted by proof, that the act was done by the deceased, in error, or obtained from him by fraud. So the cancellation of a will may be shewn to have taken place in error, or the execution of a new will to have been procured by fraud. Primâ facie at least, however, the making of a codicil to a will, as **[38]** much republishes that will as a will is revoked, primâ facie, by its cancellation, and as a new will, primâ facie, annuls and makes void any will of a prior date.

2. Secondly, the republication of a will is tantamount to the making of that will de novo; it brings down the will to its own date, and makes it speak, as it were, at that time. In short, the will so republished is, to all intents and purposes, a new will.(*a*) Consequently, upon the ordinary and universal principle, that of any number

(*a*) So far as this principle has been carried, that where a testator had made his will in December, 1734, before the statute of Mortmain, 9 Geo. 2, c. 36, and devised all the residue of his personal estate to be laid out in land, and settled to certain charitable uses, and had confirmed that will by a codicil made in July, 1739, after the statute, the codicil, by making the will a new will, was held to bring the devise within the statute; and so much of the will as related to the residue of the testator's personal estate was, consequently, held to be void. Vide *Attorney-General* v. *Heartwell*, Amb. 451.

of wills, the last and newest is that in force, it revokes any will of a date prior to that of the republication.

By the cases quoted of *The Attorney-General* v. *Downing* (see Amb. 571, and the cases there cited), of *Barnes* v. *Crowe* (1 Ves. jun. 486), of *Walpole* v. *Cholmondeley* (7 Durnford & East, 138), and the rest, both these points seem to be clearly established in the judgments of other Courts. It may be satisfactory to shew that, in a case where the same points fell under the consideration of this Court, they were viewed in the same light, and determined upon the same principle.

I allude to the case of *Jansen and Field* v. *Jan*-**[39]**-*sen*, which occurred here in Trinity Term, 1797, in which case I was of counsel. The deceased in that case had executed a will dated on the 21st of July, 1792; he had made another will dated on the 18th of July, 1796; lastly, there was a codicil dated in March, 1797, referring, in terms, to his will (not of the twenty-first, but) of the first of July, 1792. The Court (*a*) said, "If the codicil of 1797 refer to the former will and not to the latter, it revives the former. In the case of *Lords Walpole and Cholmondeley*, it was held that parol evidence was inadmissible to shew that the testator intended by his codicil, in which he referred to his last will of 1752, not to republish that will, but to confirm his real last will of 1756; there being no latent ambiguity (*b*) as to which of the wills it referred to in the codicil itself. In the present case, however, there is some ambiguity in the codicil itself as to this point; for it refers in terms to a will of the 21st of July, 1792, and there is no will of that precise date extant. But here, in the first place, I must observe it is much more probable that the deceased should have written the '1st of July, 1792,' in **[40]** error for the '21st of July, 1792,' than that he should have written the '1st of July, 1792,' in error for the '18th July, 1796.' The codicil is written somewhat inaccurately, and bears date only a short time before the deceased's death. It agrees with either will in its contents, but it was formed in conjunction with neither of the two; it is possible, therefore, and indeed to be presumed, that the deceased had neither of the two wills before him when he drew up this codicil." The Court then went on to state and examine the circumstances of the case, as disclosed in the evidence, for the purpose of determining to which will it was most probable that the codicil should refer; and having arrived at a conclusion that it was to be referred, with much greater probability, to the will of 1792, than to that of 1796, it proceeded finally to pronounce for the will of 1792, in conjunction with this codicil, and against the intermediate will.

Here, then, is a case directly in point, and under the authority of that case I proceed to consider whether this codicil is to be taken as a codicil to the will of 1814, or to that of 1817; and I shall have no hesitation in pronouncing for it in conjunction with that will of which it is to be taken as a codicil, although this should be the prior will in point of date, or the will of 1814, not that of 1817.

Now, upon a full review of the case, what possible doubt can exist of the intentional, as well as actual, annexation of this codicil by the deceased, to the will of 1814, and not to the will of 1817? And, first, as upon the face of the several instruments, and without having recourse to extrinsic evidence.

[41] And here, in the first place, is the circumstance of actual annexation—it is annexed to the will of 1814, in point of fact; it is written on the very instrument itself. Why this circumstance, as observed by the First Commissioner Eyre, in the case of *Barnes* v. *Crow*, is powerful to shew that it was intended as a codicil to the will of 1814, and to no other will. It is headed, "A codicil added to my will;" and begins, "Furthermore it is my will," &c. Could this be meant of any other will than that upon which it was written? A casual inspection, even of the two instruments, will render it evident that any mistaking of the one will for the other

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(*a*) Sir William Wynne.

(*b*) It was contended (in error) and successfully, that any supposed ambiguity could only arise from the fallacy of considering a "last will" to be a "will made last, in point of time;" whereas "wills" and "last wills" are synonimous, and the general meaning of term "last will" is, that will which is to be operative at the testator's death. It was said, "Suppose the devisor had referred to his 'will,' dated in 1752, without adding 'last' to it, there could have been no ambiguity. And the addition of the word 'last' does not create any, because 'will' and 'last will,' are synonimous." See 7 Durnford & East, 138.

by the deceased at the execution of the codicil was hardly possible. The codicil is written towards the bottom of the third side or sheet of the one instrument, the will of 1814. On the upper part of that sheet were, fairly and legibly, written, not only his own signature, but the subscriptions of the three attesting witnesses; at the head of them, that of his confidential solicitor, Mr. Worsley, written in a large character. Why the deceased, when about to execute this codicil, could hardly fail to perceive that he was going to execute a codicil written upon Mr. Worsley's will, namely, the will of 1814, and not written upon the other will, that of 1817, which has no external resemblance to the former—as being written on one side of paper only, and with much darker ink, and which was subscribed by three persons, with whose names the deceased could not be familiar, as it does not appear that he ever saw either of them, but upon the single occasion of their attesting his will. Added to this, I may just observe that it is an admitted fact in the **[42]** cause that the will of 1814 was constantly in the deceased's possession; that the will of 1817 was taken, and kept possession of, by Pittis, and was never in the deceased's custody, or under his controul, for a single day. Lastly, the contents of the codicil agree with those of the first will, and those of the first will only; for the furze-house, bequeathed to Vesey by it, is plainly an adjunct to the cottage, opposite the deceased's house, on Brook Green; the bequest of which cottage to Vesey, by the will of 1814, is revoked by the will of 1817.

Now, I very strongly incline to hold what has been forcibly argued by one of the counsel, that nothing in the shape of what he has termed mere inferential evidence could avail, to counterweigh these strong presumptions, growing out of the instruments themselves, that the deceased meant this as a codicil to the will of 1814, and not as a codicil to the will of 1817. But mere inferential evidence is all that has been attempted to be adduced by way of countervailing those presumptions. For what in substance is the case set up by Mr. Pittis, the party upon whom, I must observe, the burthen of proof is clearly imposed by the circumstances of the case. It is this: the deceased's augmented regard and affection for him and his family; his diminished regards, and alienated affections, to, and from, his other nieces. Upon this shewing, this Court is asked to infer that the deceased could not mean to revoke a will by which he had given the whole of his property to Pittis, and to revive one in which it stood bequeathed equally to Pittis and the other nieces, and upon this inference it is further asked to pronounce for the will of 1817.

[43] I entertain, I repeat, strong doubts whether this inference, if ever so fairly raised, could enable me to arrive at any such conclusion as that which is prayed; and, in this view of the subject, it is perhaps unnecessary to travel further into the circumstances of the case. But I am unwilling to pass them over altogether, as being of opinion that, upon the result of the whole evidence, no such inference as that contended for on the part of Mr. Pittis is fairly raised.

Stephens, the deceased, was an opulent farmer, living at Brook Green in the Isle of Wight; he was about sixty years of age and of reserved habits, and suffered much from illness, being severely afflicted with rheumatism. During his brother's life he principally managed the deceased's concerns; but on the death of his brother, which preceded his own about ten or eleven years, the management of the deceased's business and property fell considerably into the hands of Mr. How, a neighbouring yeoman, and much in his confidence, who appears to have served parochial offices for him, and, in brief, to have done him a variety of kindnesses. The deceased himself was so indolent as, during his brother's lifetime, hardly ever to have gone to Newport, the nearest market town; and it seems that he had not been there for the last four or five years of his own life.

The deceased had made a will in the month of November, 1813, disposing of the bulk of his property in a manner precisely similar to that in which it was disposed of by the subsequent will of 1814, before the Court, namely, to, and equally between, his three nieces. He bequeathed, by that will, an **[44]** annuity of 50l., as well as his household goods and plate, to his old servant Vesey, and appointed a Mr. New and Pittis his executors.

In July, 1814, the deceased made a new will, being the one of that date propounded in this cause. His sole object in making it, as spoken to by Mr. Worsley, his solicitor, was to leave, in addition to his former bequests, the cottage on Brook Green, already mentioned, to Vesey, and to substitute Mr. How for an executor in the room of Pittis.

Now from these alterations two inferences necessarily arise; the one, that the deceased's regard for Vesey was increasing at this time; the other, that his confidence in Pittis was diminishing, for Pittis is displaced from the executorship, and How, as I have already said, is substituted in his room. In these testamentary intentions, however, the deceased appears to have persisted for nearly three years, till the 4th of June, 1817; when he is alleged to have signed the will propounded by Pittis; a transaction to the brief consideration of which I now proceed to apply myself.

On the 4th, then, of June, in the year 1817, Mr. Pittis applies (not to the gentleman whom the deceased had constantly employed in that capacity, but) to his own solicitor, and instructs him to prepare a will as for the deceased to execute; the purport of that will being to appoint himself an executor, and his wife the sole legatee of the deceased's property, real and personal, with the single exception of a life annuity of 50l. to Vesey; a bequest, which it is open to conjecture, was inserted purely for colour and by way of saving appearances. No time is lost in complying with Pittis's **[45]** instructions, which are reduced into a will on that very morning; and Pittis himself is the person who conveys it to the deceased for execution. The attesting witnesses are neither friends or neighbours of the deceased, nor any persons casually at hand; but Pittis sends into the country, a distance of ten miles, for two of his own labourers and his brother's shopman for the express purpose of attesting the execution. Vesey, the deceased's old confidential servant, his faithful housekeeper, is left wholly in the dark as to the nature of this transaction—whether it is a will, or a bond, or what it is that her master is to execute in the presence of these witnesses, she is kept in utter ignorance of. The will itself is not read over to the deceased in the presence of any one of these witnesses. Pittis is the person all along closeted with the deceased—and how he represented the matter to him—what he said or did not say, what he did or omitted to do—is matter of mere conjecture. He might have read over the will to the deceased, but there is no proof that he did. The witnesses are then introduced: one of them speaks to hearing the deceased desire them to come in and "witness the execution of his will:" one other says that he "appeared to be reading over the instrument (not specifying its nature) which he subsequently executed," and that "he put it down and said he was satisfied with it." Other than this there is no proof that the deceased knew that the instrument which he was about to execute was a will; still less is there any proof that he knew what were its contents. The formal execution then takes place.

Observations undoubtedly might be made upon **[46]** the face of that execution; it might be fairly questioned whether it was, or was not, such an execution as would amount to a revocation of the will of 1814, under the statute of Frauds. But I conceive that they are wholly uncalled for, and consequently that they would be out of their place upon the present occasion. It is quite sufficient for any purpose with which I am considering the transaction in question to state that it is one, in my judgment, of a very unsatisfactory and of a very unexplained character. True it is that agents of unimpeached capacity are presumed to be aware of the contents of instruments which they execute de facto; and the agent's capacity, in the present instance, is unimpeached; so that the proof of the factum of this instrument might probably be deemed sufficient. Still the circumstances which I have already stated (aided by others to which I shall presently advert) must, I think, be admitted to throw much of suspicion and doubt upon the transaction, although, perhaps, they do not operate to the extent of invalidating it.(*a*)

It is first, however, the duty of the Court to notice a part of the history of this transaction, which it does not see without regret. I allude to the conduct, as deposed to, of the solicitor who prepared this will, which the Court must not pass over in **[47]** silence, painful as it always is to express itself dissatisfied with the conduct of any professional gentleman, in whose office a will has been prepared, to which its attention is judicially called. The solicitor who drew up this will took the instructions for it

(*a*) It remains, however, to be stated that a jury, on the trial of an ejectment, at the Summer Assizes (for Hampshire), 1822, found against this will. It was necessary, on the part of Mrs. Rogers and Mrs. Browning, to submit the validity of that will to a jury, as the codicil of 1820, being executed in the presence of only two witnesses, neither revived the will of 1814, nor consequently revoked that of 1817, so far as respected the deceased's real estate.

from the party whom it purported principally, if not solely, to benefit—of the deceased's testamentary intentions he had no constat but from these instructions, and of his state and condition, either of mind or body, he could know nothing but from the representation of the same interested party. He himself had never seen the deceased but once, and that five years before. Surely all this was enough to excite a feeling of caution on his part. So far, however, from having been actuated, apparently at least, by any such feeling, his conduct was precisely that which, if this transaction was fraudulent, afforded it every imaginable facility. He not only prepares the will without any communication with the testator, through Pittis's sole agency, but, when prepared, he delivers it to Pittis for execution, without proposing to satisfy himself as to the testator's capacity and volition, either in person, or by an agent even, in whom he reposed trust and confidence. So ignorant, however, are the parties likely to be present, considered of the proper mode of conducting a business of this description, that I can still trace, written in pencil on the instrument, so written, I must presume, in the solicitor's office, a direction to this effect—"Write name against the seal." Now the Court is willing to, and does hope and believe, that all this has proceeded from a mere want of due caution and consideration on the part of the solicitor—from a too blind confidence in the **[48]** integrity of his client Mr. Pittis. That confidence may have been perfectly well-founded—the whole transaction may have been fair throughout, in all its parts—still this does not exonerate from blame the solicitor with whose conduct in the business I must express myself dissatisfied, not, most undoubtedly, for the sake of giving pain to this individual, but for that of admonishing professional gentlemen generally, that where instructions for a will are given by a party not being the proposed testator—à fortiori where by an interested party—it is their bounden duty to satisfy themselves thoroughly, either in person or by the instrumentality of some confidential agent, as to the proposed testator's volition and capacity—or, in other words, that the instrument expresses the real testamentary intentions of a capable testator—prior to its being executed, de facto, as a will at all.

Assuming, then, that, for some or other inscrutable reasons, the will of 1817 was approved of by the deceased—that it was executed by him as a will, with a full knowledge of its contents, and with a perfect intention to give it effect—still it is a most remarkable circumstance that the sole trace of any abandonment of the will of 1814 is to be found in the insulated act of the will of 1817. I call it an insulated act; for, abstract the transactions of a single day, the 4th of June, 1817, out of the history of this case, and there is not a vestige of any dissatisfaction conceived by the deceased with the bequests of the former will, of any intention expressed by him to adopt the provisions of the latter one. The transaction rests wholly upon itself for support; it derives none from any thing that preceded; it de-**[49]**-rives none from any thing that ensued upon it. There is no previous declaration as of intention to make the will of 1817—there is no subsequent reference to, or recognition of, that will, when it is made—there is not a vestige in the evidence of any diminished affection for the other nieces—of any increased regard for Mrs. Pittis—of any disgust at the conduct of Vesey, towards whom I have always said his esteem was increasing in the interval between 1813 and 1814—of any restored confidence in Pittis himself—his confidence in whom, as I have also said, was decreasing during the same interval. The change of disposition is wholly unaccounted for; consisting, not only in displacing the other nieces, and giving all to Mrs. Pittis, but in the re-substitution of Pittis for How as an executor; and in the withdrawing of a part of his testamentary bounty from Vesey, to benefit whom, in a greater degree, was the deceased's principal object in substituting the will of 1814 for that of 1813; whereas, this will of 1817 purports to place her in a worse situation than that in which she stood under the will of 1813 itself. Subsequent to the execution of the instrument, and its delivery to Pittis, not only no allusion to its existence, for aught that appears, is ever made by the deceased; but there is nothing in the conduct, either of the deceased, or (which, perhaps, under the circumstances, is full as remarkable) of Pittis, from which its existence can be fairly inferred. Pittis's condition was that of a man going down, as it is called, in the world; his circumstances were declining, not possibly from any fault of his own, but from the burthen of a large family, and the pressure of various untoward incidents, which finally, **[50]** in the year 1819, produced his emigration to America. It is in evidence that the deceased neither advised nor approved of this measure. Is it in evidence

that he endeavoured to prevail with Pittis to abandon it, by reminding him of this will? Was Pittis's voyage to America retarded (prevented it certainly was not) by any anticipation of the great benefit which he was likely to derive under this will at the death of the deceased? There is not a tittle in the evidence from which any thing of the sort can be conjectured. Subsequent, therefore, I repeat, to its delivery to Pittis on the day of its execution, there is nothing to shew that either the one or the other party, either in word or in deed, ever alluded to, or acted as upon, this will of 1817 in any shape.

Now, under all these circumstances, where is the improbability (for to determine this alone has been my object in considering the transaction)? What is there to render it incredible? That the deceased should revert to his old testamentary dispositions expressed in the will of 1814, and abandon those expressed in the will of 1817, giving these last credit, that is, for having once been his testamentary intentions. As for the deceased's silence with respect to this will of 1817, and every thing connected with it, when about to execute the codicil of 1820, this, I think, may be accounted for in various ways. Possibly, as conjectured, he had forgot the transaction of this intermediate will altogether; possibly, as also conjectured, he supposed that will revoked by Pittis's emigration to America; possibly, a third conjecture is nearer the mark; namely, that he was unwilling to disclose to How that he had ever made a will, displacing him (How) from his executorship—**[51]** disinheriting two of his three nieces—and revoking a part of the benefit conferred by two prior wills on his housekeeper Vesey. The whole of this however is mere conjecture, in which it is useless for the Court to indulge itself. But the intire history of this case, as disclosed in the evidence, is so far from evincing to my mind the improbability of the deceased doing what, probable or not, the law determines him to have actually done, that I conceive it the most natural and the most likely step for the deceased to have taken, when his attention was definitively called to the subject of his final testamentary arrangements.

Lastly, the parol evidence connected with the immediate factum of the codicil removes any doubts upon this head, could any be entertained upon other grounds. Rayner alone (without How) proves that the will of 1814 alone, not that of 1817, was in the deceased's mind at the time of his executing the codicil. He expressly mentions the deceased's saying that "it was to give Vesey the fuel-house, to be taken over to the cottage." The deceased must in this, as I have already said, have referred to the will of 1814. But Mr. How speaks to having actually read over the will of 1814 to the deceased before he wrote the codicil; so that this gentleman's deposition (if he is not utterly unworthy of credit) renders it as manifest upon the parol evidence as upon the acts done, that the testator meant this codicil to apply to the will of 1814.

I pronounce therefore for that will in conjunction with the codicil as prayed by Mrs. Rogers and Mrs. Browning; but I am not of opinion that this is a case which calls for the condemnation of Mr. Pittis in costs.

[52] LORD JOHN THYNNE *v.* STANHOPE. IN THE GOODS OF THE RIGHT HONORABLE LADY ELIZABETH STANHOPE. Prerogative Court, Hilary Term, 4th Session, 1822.—If a testamentary paper be cancelled, law infers the revocation of it, unless it can be clearly shewn, 1st, that it once existed as a finished will; 2d, that the testator adhered to it throughout in mind and intention, notwithstanding its cancellation.

(On the admission of the allegation.)

Judgment—Sir John Nicholl. This is an allegation on the part of Lord John Thynne, the executor, propounding the will of Lady Elizabeth Stanhope, the party deceased in the cause. I am of opinion that the facts alleged, if proved to the utmost feasible extent, would not justify the Court in pronouncing for the instrument set up.

The paper propounded, on the face of it, is clearly invalid. It concludes, "And all that remains of my fortune, after the payment of the above legacies, I leave to Georgiana Stanhope, my beloved sister, making it however my particular request, that a jewel, having belonged to me, be presented to these following persons, as a remembrance or token of my affection for them, viz." Here the paper ends—so that either it never existed in a finished state, or, if it did, the finishing part, contained in

a second sheet (for the concluding words, it is to be observed, occupy the bottom line of the fourth side of a sheet of paper), has been withdrawn, and is presumed to have been destroyed. Now,

As an unfinished paper, and one in its progress to completion, it is quite evident that this paper can never be pronounced for; for the paper bears **[53]** date on the 22d day of November, 1818, and the testatrix only departed this life on the 30th of October, 1821, nearly three years after it was written: and no ground whatever is laid in the plea for its completion having been so long postponed by the testatrix, had she been disposed to put it into the shape, and to invest it with the character, of a finished instrument at all. Added to this, it is stated to have been found in an open drawer, thrown aside among loose papers; a situation in which, when a testamentary paper is found, it carries with it, primâ facie at least, a presumption of abandonment.

It is not attempted however to set up this as an unfinished paper, and one in its progress to completion; but as a finished paper, which has been cancelled, sine animo revocandi, by the testatrix under an erroneous impression that the law did not permit her, as a minor, to dispose of her property by will.

Now it is perfectly true that, in legal consideration, a will may be cancelled without being revoked. The cancelling, itself, is an equivocal act, and, in order to operate as a revocation, must be done animo revocandi. A will, therefore, cancelled through accident, or by mistake (as in the instances put by Lord Mansfield, in the case of *Burtenshaw* v. *Gilbert*,(*a*) and similar ones), is not revoked. On the same principle it was held, by Lord Chancellor Cowper, in the case of *Onions* v. *Tyrer*,(*b*) that **[54]** cancelling a former will, on a presumption that a latter, devising the same lands to the same uses, was effective, which latter will however proved to be void, was no revocation of the former, so as to let in the heir.

I assent therefore to the general legal position that the cancellation of a will does not, necessarily, infer any intentional abandonment of the dispositions contained in, or, consequently, any revocation of it. At the same time it is obvious that this is the ordinary inference, deducible from every act of cancelling. And I may venture to lay down that, in order to bar its application to any particular case of cancelling, two things at least are requisite: first, it must be proved by indisputable evidence that the cancelled paper once existed as a finished will; secondly, it must be shewn, by evidence equally indisputable, that the testator adhered to it, throughout, in mind and intention, notwithstanding its cancellation. In the absence of either of these indispensable requisites, the ordinary presumption is that upon which a Court of Probate is bound to act.

It remains therefore only to consider whether the matter of this allegation is such as to afford any reasonable ground of belief that evidence of the kind described, upon these two points, could be furnished in the present case, should the Court suffer it to proceed by admitting the allegation.

Now, what are the facts stated in the allegation, as applicable to the case in this view of it? The four first articles of the allegation plead, in substance, only the finding of the instrument, in the hand-writing of the deceased, after her death, at the **[55]** house of her grandmother, Lady Bath, with whom the deceased had been principally resident, in Lower Grosvenor Street. There is no averment even of formal execution; and the actual execution of the instrument is so pleaded as negatives the supposition that any attempt will, or can, be made to produce other evidence in support of it, than what results from a declaration of the deceased, pleaded in the fifth article of the allegation, upon which I proceed to advert.

The fifth article pleads (in substance) that in the month of January, 1821, the deceased, whilst on a visit in Derbyshire, declared to her ex-governess, Madam de Montmollin, "that she had made her will; and that the same would be found in her writing-box, which box the said testatrix then had with her." And upon proof of this declaration the Court is to be asked to infer the factum of the will.

Now, supposing this declaration to be proved, in the very words of the plea, it furnishes no proof whatever, to my mind, that this paper ever existed as a finished

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(*a*) Cowp. 52. "Incaute factum, pro non facto habetur," is also the express doctrine of the civil law upon this very subject. Vide D. 28, 4, 1.

(*b*) 1 P. Wms. 345. Reported also 2 Vern. 743, and Prec. Chanc. 459.

will. In the first place, the expression put into the mouth of the deceased, that "she had made her will," is extremely vague and equivocal; and is just as likely to have been applied by the deceased, a young lady of rank in her minority, to an unfinished, as to a finished, instrument. But what I should be glad to know is, how the declaration, be its import what it may, could be pinned down to this particular paper. I mean, what proof could be furnished that the deceased, in referring to her will upon the occasion in question, referred to this identical will. The deceased, between the years 1818 and 1821, might have made another **[56]** will; nay, the probability is, that she had actually done so; for Lord John Thynne states, in his affidavit of scripts, that "he (the appearer) has been informed, since the death of the deceased, and which information he believes to be true, that she, the said deceased, subsequent to the making and writing her said will" (i.e. the paper propounded in the cause), "made some further or other will, or wrote some paper of a testamentary nature; but of the contents, or of the date, of such paper the appearer has no knowledge or information." But to proceed,

The article goes on to plead, that in a subsequent conversation with the same Madam de Montmollin, on the subject of her will, in the month of September in the same year, when the testatrix was again upon a visit in Derbyshire, she the testatrix declared that, being nearly of age, and "having a doubt whether her will, if made previous to her attaining her age of twenty-one years, would be valid, she had destroyed it;" and added that, "upon attaining her age of twenty-one years, she would make another will." And it is upon the evidence of this further declaration, that the Court is to be required to infer that adherence of the testatrix to the cancelled paper, in mind and intention, which will authorize the Court to give it the sanction of its probate.

I could certainly comply with no such requisition. In the first place, I could have no proof that this, any more than the former, declaration referred to this identical paper. But, secondly, and principally, admitting that it referred to it, I could by no means collect from the declaration that perfect adherence of the testatrix to the paper, throughout, **[57]** to every part of it, which alone could justify me in departing from the ordinary presumption of abandonment furnished by the act of cancellation. The reason which the deceased is made to assign for having destroyed the paper—namely, her doubt as to its validity—is rather a singular reason—admitting it however to have been her reason, non constat, that it was her only one. She had given away, in legacies, more than the amount of her property; and that might have operated with her as a reason for destroying it. Allowing it, ex hypothesi, to be fully proved that the deceased intended "to make a new will"—non constat, that it was to be a will of precisely the same tenor and effect as this, presuming this to have been that will referred to by the deceased, as the one which she had destroyed. Any person, much more a young lady, at the deceased's time of life, may be supposed to have varied, or departed altogether from testamentary intentions once held, in the course of three years, without any stretch of probability.

With this impression of the case I consult the interests of all parties, in staying these proceedings in limine, by rejecting the allegation; holding the facts pleaded insufficient to sustain this paper, as they will neither shew that this very instrument ever was a finished will, nor that it was cancelled by the deceased, sine animo revocandi.

Allegation rejected.

[58] STEADMAN *v.* POWELL. Prerogative Court, Hilary Term, 4th Session, 1822.—Probate of a will refused to the executor as being the will of a married woman, and consequently invalid in law. Administration of her effects committed to her husband, whose interest as such had been denied by the executor. A marriage in Ireland, between the parties, held to be proved by circumstantial evidence. Its alleged nullity, on account of its celebration by a Popish priest, held to be not proved.

Margaret Steadman, otherwise Powell, died on the 22d of March, 1820, having been for nearly forty years preceding, with the exception of the last fifteen months, in the service of her Grace the Duchess Dowager of Rutland. At the time of her death she was in possession of personal property to the value of about 1500l., accumulated by savings from monies of her own acquirement, in the Duchess of Rutland's service; which monies, as she acquired them, the deceased had been in the habit of investing in the purchase of stock in the public funds, in the name of her brother, Mr. George Steadman (party in this cause).

The deceased left behind her a regularly executed will, bearing date the 2d of October, 1819, in which will she described herself as "Margaret Steadman (otherwise Powell), spinster;" and the will is so signed. She had passed, however, for the last five-and-thirty years of her life, by the name and title of Mrs. Powell; and appears to have considered herself, and was universally reputed, the lawful wife of James Powell (the other party in the cause), until within about two years of her death. From that time it is to be inferred that the deceased considered herself as a feme sole, in consequence of having obtained something in the shape of a legal opinion, against the validity in law of a marriage, had under the circumstances then stated by her to have accompanied her marriage, in fact, with her reputed [59] husband. Under this impression, believing herself at liberty to dispose of her property by will, she made and executed two wills successively; the first bearing date the 4th of May, 1818; the second on the 2d of February, 1819, being the will already mentioned.

Some months after the death of the deceased, on probate of that will being applied for by Steadman, as one of her executors, a caveat against the same passing was found to have been entered on behalf of Powell, alleging him to be the lawful husband of the deceased. His interest, as such, being denied by the executor, was propounded in an allegation, which pleaded (in substance) that the parties had been duly and lawfully married in Dublin, some time in the latter end of the year 1786, according to the rites and ceremonies of the Church of Ireland, as by law established; together with cohabitation, the birth of issue, and the general reputation of their being husband and wife from that time. A responsive allegation on the part of the executor pleaded merely, first, the statute 19 Geo. 2, c. 13, Irish, enacting, "That every marriage celebrated after the 1st of May, 1746, between a Papist and any person who hath been, or hath professed himself to be, a Protestant, at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever;" 2dly, that Powell and the deceased respectively professed themselves to be, and were respectively, at the time in question, Protestants; [60] 3dly, that their pretended marriage in question was celebrated by a Popish priest.

This cause was argued, and stood for sentence, upon the evidence taken in support of the facts stated in these several allegations.

Judgment—Sir John Nicholl. This, in substance, is an issue purely matrimonial, although it occurs in a testamentary suit. The point in issue is simply whether the party deceased, who is described, and who describes herself as Margaret Steadman, otherwise Powell, died a feme sole, or the lawful wife of James Wakeford Powell. In the former event, the deceased has died testate, and probate of her will is to be granted to George Steadman, the brother of the deceased, and an executor named in her will, the one party in this cause. As a married woman, it is not suggested that the deceased had any authority to make a will—consequently, in the latter event, her will, so styled, is a mere nullity, and the administration of her effects is to be committed and granted to Powell, her husband, the other party in the cause.

The interest of Powell, the alleged husband, has been denied generally by the executor, and is propounded in an allegation which has been given on his behalf pleading him to have been "duly and lawfully married to the deceased in Dublin, sometime in the latter end of the year 1786, according to the rites and ceremonies of the Church of Ireland"—together with cohabitation, birth of issue, and general reputation from that time downward. An allegation has also been given on the part of the executor, which pleads, first, that marriages in Ire-[61]-land between Papists and Protestants, or between two Protestants, are absolutely null and void, if celebrated by a Popish priest, under an Irish act of parliament—secondly, that Powell and the deceased were Protestants respectively when married, as pretended, and were married by a Popish priest; and, consequently, that such their pretended marriage was and is null and void to all intents and purposes.

Upon the face of the pleas and proceedings, two questions present themselves, first, whether these parties were married at all; secondly, whether being so, they were lawfully married—a point, indeed, to which the executors' general negation of the interest of the alleged husband, as contained in the proceedings, is somewhat narrowed by the shape of his plea. An attentive investigation, however, of both questions is due to the justice of the cause, and may be convenient for a reason which will presently appear, that the Court should address itself to these questions separately; and first, as to the former.

The facts and circumstances of the case as pleaded and proved, which are applicable to the first of these questions, are briefly as follows:—Margaret Steadman, the deceased, was an attendant upon the present Duchess Dowager of Rutland, and accompanied her Grace to Ireland, whither she proceeded, in the summer of 1784, to join her husband the late Duke of Rutland, then in Ireland, of which kingdom he had been recently appointed Lord Lieutenant. Powell, the party in this cause, was at that time in the service of General Finch, one of his Grace's aide-de-camps, and living as such at Dublin Castle, or the Phœnix Lodge, near **[62]** Dublin, the official residences of the Irish Vice-Roy; so that Powell and the deceased, on the arrival of the latter in Ireland, were members, in a manner, of one family. In the summer of 1786 the deceased became pregnant, as she said, and as it was "rumoured" by Powell—on becoming acquainted with which pregnancy, her mistress, the duchess, refused to continue her in her service, unless as the wife of Powell. It further appears that Dr. Preston (then or soon after bishop of Ferns), at that time private secretary to the duke, interested himself to procure a marriage between the deceased and Powell, at the request of the duchess—and caused it to be intimated to the latter through Emerson, a fellow servant, that his marriage with Steadman was necessary to either of the two keeping their places. A fact of marriage between the parties, to say the least, was asserted by themselves, and was generally understood by others, to have taken place accordingly. Nor was this permitted by the duchess to rest upon the report of the parties, or upon general rumour merely—an instrument purporting to be a certificate of the marriage was produced to the Duchess of Rutland, and was shewn by her to the duke, her husband; who, being satisfied (as it should seem, by inspection of this certificate) that the parties were really married, suffered the deceased to retain her situation in his wife's service. This certificate is pleaded to have been lost or mislaid—it is said by the Duchess of Rutland to have been torn or destroyed, as she understood, on the occasion of some quarrel between the parties. It is further proved that, from and after that time, the deceased was constantly addressed by the name, and treated **[63]** as the wife of Powell—that she was permitted by the duke and duchess to lie in at the Phœnix Lodge, where she gave birth to a son, who was baptized as her lawful issue by Powell—that, on the return of the duchess from Ireland, the deceased accompanied her, still as her attendant—and continued in her service, uninterruptedly, until compelled to relinquish it by bodily infirmity, in the month of January, 1819—that during this whole interval, Powell and the deceased acknowledged each other as husband and wife, and were so reputed, and taken by all who knew them—that Powell was under the necessity of living much apart from the deceased, both whilst he continued in the service of General Finch, and when, upon quitting it, he became a king's messenger, in which capacity he was occasionally absent in foreign parts; but that he frequently did, and was permitted at all times to, cohabit with the deceased, as well at the several residences of the Duchess of Rutland specified in the plea as elsewhere—lastly, that the deceased had two other children, the issue of her connection with Powell, born in this country—one (a daughter) in the house of the Duchess of Rutland, in Arlington Street—both of whom were constantly owned and acknowledged by the parties themselves, to be their lawful issue; were maintained and educated as such at their joint expence; and were constantly reputed, and taken for such, by their friends, relations, and acquaintances.

Now it appears to me that this evidence does sufficiently establish a fact of marriage between the parties. Its foundation is not the mere assertion of the parties, together with the contemporary rumour or **[64]** report, although these alone possibly, under the circumstances, might justify the Court in inferring a fact of marriage; but a certificate of marriage is at the time produced, plainly satisfactory to the parties who suggested the marriage—one, at least, of whom is to be presumed no incompetent judge of its authenticity—to omit any mention of the bishop of Ferns, who is to be deemed, in some sort, privy to the transaction, and to have lent it throughout the sanction of his countenance. That the certificate in question was satisfactory to the duke and duchess is plainly to be collected, as well from the positive testimony of the latter, as from their suffering the deceased to continue in their service, and even to give birth to her issue under their roof—circumstances which can only be ascribed to their perfect confidence in the genuineness, at least, of the certificate, not to say in the validity of the marriage purported to be certified.

The absence of stricter proof of a fact of marriage in the suit is, in my judgment,

fairly accounted for, by the time and place, taken conjunctively, when and where the marriage was had. The locus contractus shews that such stricter proof may be dispensed with—the lapse of time suggests to the Court the peculiar propriety of dispensing with it in the present instance.

And, first, as in Ireland marriages may be had without any celebration in facie ecclesiæ, or in the presence of witnesses, it would be unreasonable to deny that a marriage had, in Ireland, may be proved by slenderer evidence than is requisite to the proof of a marriage celebrated in this country. With us, too, in England, subsequent to the mar-[65]-riage act, the proper, not to say the sole, evidence in this matter is the register-book—a medium of proof which, of course, is excluded where the question respects the factum of an Irish marriage, at least of this description. The general matrimonial law of Ireland is what that of this country was prior to the marriage act; and as marriages in England were proveable by circumstantial evidence prior to the marriage act, marriages in Ireland, I apprehend, are proveable by the same species of evidence at this day. If this be so, a marriage of some sort is proved in the present case to all intents and purposes—for I can scarcely figure to myself stronger proof of a fact of marriage (at this distant period from the time of its celebration), by circumstantial evidence, than is to be collected from the depositions taken on the husband's plea.

Upon the whole, then, I incline to think that sufficient proof is furnished of a fact of marriage—in furnishing which, the party whose interest is denied has discharged himself of the obligation which the law imposes upon him. The next question is whether sufficient proof is also adduced of the alleged nullity, the burthen of proving which, I am of opinion, rests with the adverse party—the party setting it up in plea.

I must observe, however, in the first place, that all presumption is in favor of the validity of the marriage, the marriage itself being once held to be proved. And, first, the presumption of law is clearly in its favour—"semper præsumitur pro matrimonio," being the constant legal maxim upon these occasions. It has been said, indeed, that this being, at best, a secret or clandestine marriage, is not [66] entitled to that presumption in its favour; and that the maxim upon which it is claimed for it, only operates upon marriages regularly celebrated. To this position I cannot exactly accede. The circumstances under which the marriage was had suggested privacy as to the time of celebration—and the marriage, so far as respected the mere time of celebration, certainly was a secret marriage. But though a secret marriage, it was tainted by no character of fraud—it was not a marriage which the policy of the law discountenanced, or one which it either would or could have interfered to prohibit—it was the very contrary of all this. I am of opinion, therefore, that the general legal presumption in favor of this marriage is not at all rebutted by the mere circumstance of its being kept intentionally secret, to answer a special purpose, as to the precise time at which it was solemnized.

Nor is the general presumption of law the only presumption in favor of the validity of this marriage. A strong presumption in its favor arises from the circumstances under which it was had. All parties must have been anxious that it should be validly solemnized: nor can any ground be suggested why, when a marriage between Powell and the deceased was once determined upon, a mode of effecting it should have been resorted to, in which its own nullity was internally involved.

Such, however, it is asserted to have actually been upon the ground of its celebration by a Popish priest; so that it becomes necessary to state and examine the evidence upon which that assertion rests.

The party who has pleaded, and who, as I have [67] just said, is bound to prove that the marriage was celebrated by a Popish priest, has produced not a single witness in support of that part of his plea. The proof is attempted to be drawn from the mouths of the witnesses examined on the adverse allegation, who are argued to have disproved their own case—with what success it remains to enquire.

The only witnesses from whose depositions this inference can be attempted to be drawn are Mr. Hamilton, the deceased's solicitor, and her Grace the Duchess of Rutland.

Mr. Hamilton deposes to having been sent for in the month of April, 1819, to prepare a will for the deceased, who had then recently quitted the service of the Duchess of Rutland, and was in lodgings in Baker Street. In the course of giving instructions for this will the deceased consulted Mr. Hamilton how she was to be

named, or described, and then stated "that she considered her name Steadman, and that she ought to be described as Margaret Steadman—that she had been married to Mr. Powell in a way that she conceived illegal—and consequently that she deemed such her marriage a mere nullity." On this gentleman, with a view to the guidance of his conduct in the premises, inquiring how she was married, the deceased replied "that she was married in a private room, by an old man, whom she was told was a Catholic priest, and whom she supposed to be dead—and that he had given her a certificate, but which Mr. Powell had taken from her, and destroyed." This witness deposes precisely to the same effect, in answer to an interrogatory administered by the executor—adding only, that the deceased, on the said occasion, further in-[68]-formed him that "no one was present at the ceremony of marriage," and that "the duchess, with whom she resided (meaning the Duchess of Rutland, but whose name the witness had forgot), wished them (that is, the deceased and Powell) to be married again in a Protestant church."

The parts of the Duchess of Rutland's evidence relied on by the counsel for the executor are, briefly, the following:—

To the 2d interrogatory the respondent answers (nearly in the language of every other witness interrogated) that she "cannot take upon herelf to depose, from her own knowledge, that any marriage was ever actually solemnized between Steadman and Powell, but that she believes such to have taken place." This respondent states her own particular grounds of belief to be, "The deceased having produced a certificate that such marriage had been solemnized, which she, the respondent, had in her possession, and shewed to the duke her husband; at the same time she cannot undertake to depose when or where the said marriage was had, nor who was or were present, nor what was the name of the person by whom such marriage was solemnized; nor can she say whether he were a minister, in holy orders, of the Church of Ireland, or a Roman Catholic priest;" but she adds that, "From everything told her by Steadman, at and about the time of the said marriage, she believes that it was celebrated by a Roman Catholic priest."

To the 3d and 4th interrogatories the respondent's answers are precisely similar.

To the 5th she deposes, "That she thinks Dr. Preston (who was private secretary to the duke, [69] and who appears from her Grace's deposition in chief, and that of several of the other witnesses, to have interested himself in procuring a marriage between these parties) did advise the said parties to be re-married in England." It is only from her so thinking that the respondent can account for a belief, which she admits herself to have entertained, "That the said parties were subsequently re-married in this country, on their return from Ireland."

To the 6th interrogatory she says, that "the certificate of marriage was, as she believes, given by a Roman Catholic priest, being, as she apprehends, the same person who married the parties."

Now this being, as it is, the only evidence against the validity of the marriage, it does not appear to me sufficient, either in kind or degree, either in nature or amount, to establish the nullity contended for.

And first as to its nature, and the source from which it is derived. And here, in the first place, it is evident that the whole, be it what it may, is founded upon the mere averment of the deceased herself; whose doubts (entertained or expressed) of the validity of her marriage, after an acquiescence of five and thirty years, are so intimately connected with her wishes to dispose of her property by will, that it is next to impossible not to suspect that the latter may alone have suggested the former. It should even seem that these scruples were scarcely indulged, in earnest, until certain schemes of the deceased for procuring, from Powell, a release of his claims upon her acquisitions in the Rutland family, had failed. In a letter which is exhibited in the cause from Smith, a sister of the deceased, evidently [70] written with the concurrence of the deceased, to Powell, she writes, "She (the deceased) further requested me to ask you if you would execute a deed of settlement on herself of the property she possesses, so that she may be enabled to dispose of it in any way which will be most advantageous to her present interest, as a married woman is very unpleasantly fettered in that respect." This letter is dated on the 9th of January, 1819. The same is to be collected from the following expressions in a letter, also exhibited in the cause, from the Duchess of Rutland to the deceased, in answer, it should seem, to one from her, requesting her Grace's interference with Powell on the subject of his leaving her the

uninterrupted enjoyment and disposal of her property. She says, "I don't know what to say about writing to Mr. Powell, and indeed I don't clearly understand what you wish me to say to him. I certainly think he has no right to take your money; but fear that if he was to refer it to the law he would have a right; and I do not know how he could be told that your marriage would not hold good here." Again, "I think your brother has mentioned to me that Powell had torn the certificate; if so, we might venture to tell him that he could not claim your property; but then your daughter would be illegitimate; therefore, I think that you had better consult your brother before I write to Powell. Powell's answer probably would be, that as you have refused his offer to live with him, he thinks he has a right to your money. I hope and trust it is not so; but fear much, that whatever a wife has is her husband's." Again, "I really quite dislike writing to him (Powell), as I could use no argument **[71]** of any weight, unless it is by urging that, as all your little property was acquired by your own exertions in my service, he ought to permit you to enjoy it in peace; the more especially, as you had never been any expence to him. Perhaps that may be what you wish me to say; let me know; but consult your brother about it, &c." All this is perfectly just and reasonable; but how is it compatible with the writer's firm conviction, or even sincere belief, at that time, that the marriage was a nullity? Must not she, in that case, almost necessarily, have taken higher ground? This letter, I should observe, appears to have been written in the October of 1819. It is certainly true that expressions occur in this very letter from which an inference may be drawn of her Grace having entertained a belief, all along, that the ceremony of marriage was performed, and the certificate granted, by a Popish priest. It is also true that she has deposed, in her answers to the 2d interrogatory, already recited, to her having entertained that belief in consequence of what was told her by the deceased, recenti facto, or at the time of the marriage. But is it quite impossible that this witness, deposing, most unquestionably, according to her then present impression and belief, but after a considerable interval, may have confounded what was communicated to her by the deceased, at and about the time of the marriage, with other suggestions from the same quarter, at a much later period? when it should seem that the enjoyment of her property, with all its incidents, and the jus disponendi, as one of them, was so paramount an object with the deceased, that provided she attained the end, she was not very scrupulous about the means. This, at **[72]** least, is the only way in which I can account for some apparent discrepancies in the evidence of this witness. The hypothesis to which I have ventured to resort solves the whole difficulty.

So much as to the kind of evidence adduced, and the source from which it is derived; next, as to its scantiness in point of amount. For what, in truth, does it amount to? Why, to little more than evidence of the deceased having assured Mr. Hamilton (not that she had been married by a Popish priest—for she did not venture to go that length—but merely) that she, the deceased, had been told that she was married by a Popish priest—without any specification of when, where, and by whom told; without one, in brief, of the numerous requisites to stamp upon the communication a character of authenticity. She might be so told, and yet, very possibly, the fact be otherwise; at all events, it is not to be contended that her being told so is proof that it was the fact. In limiting the evidence in favour of the executor to the deposition of Mr. Hamilton, I must not be supposed to have forgotten that of the Duchess of Rutland. I do so, as being of opinion that her Grace's deposition, taken as a whole, furnishes no inference whatever against the force and effect of this marriage.

Lastly, the improbability that a Popish priest would have married these parties in the face of a sentence of capital felony (*a*) is a circumstance not wholly to be left out of the account. Is it likely, at any rate, that a priest of that communion would have risked incurring that sentence for any requital **[73]** which these parties can be supposed to have had either the inclination or the means to offer? Something was said in the argument, indeed, as to the statute imposing this penalty being obsolete, or a dead letter, and never acted upon. But I really do not know how the Court can presume all this; certainly not, how it can venture to found its judgment on any such presumption. Obsolete the statute (stat. 12 Geo. 1, Ir. c. 3, s. 1) could hardly

(*a*) Vide 12 Geo. 1, Ir. c. 3, s. 1. See, however, 17 & 18 Geo. 3, Ir. c. 9, s. 1.

be; for little more than sixty years had then elapsed from the time of its enactment. It was urged again, however, that ministers of the Church of Ireland are punishable for celebrating irregular marriages; so that a penalty was incurred by a priest of whichever communion this marriage was celebrated, it being at best an irregular marriage, though a valid one, if celebrated by any other than a Popish priest. This is a specious answer to the objection of improbability; but the vast disparity of penalty in the two cases—in the one a sentence of capital felony, in the other a mere subjection to ecclesiastical censures—deprives it of any great weight in my judgment. Ministers in this country were liable both to ecclesiastical censures (canon 62) and to pecuniary forfeitures (6 & 7 W. c. 6. 7 & 8 W. c. 35. 10 Ann. c. 19) for celebrating clandestine marriages prior to, and independent of, the marriage act; yet it is well known that parties here, who were desirous of being married clandestinely anterior to that act, were seldom put to any difficulty for lack of a minister, in spite of these penalties and forfeitures. It is probable that equal facilities **[74]** in this kind are afforded to parties in Ireland at the present day.

Upon all these several considerations I pronounce for Mr. Powell's interest; and, consequently, that he is entitled to the administration of the deceased's effects as a husband, whose wife, the deceased, is dead intestate in law.

SCRUBY AND FINCH *v.* FORDHAM AND OTHERS. Prerogative Court, Hilary Term, By-day, 1822.—1. A will partially defaced by a testator, whilst of unsound mind, is to be pronounced for, as it existed in its integral state, that being ascertainable. 2. If a testator of impeached sanity do some act with relation to his will, whose state of mind, at the time of doing which, there is nothing to evidence, aliunde; his rationality at such time, or the contrary, is to be inferred from that of his act.

Judgment—Sir John Nicholl. The party deceased in this cause is John Trigg, late of Melburn Bury, in the county of Cambridge, who died on the 6th May, 1821. He died a bachelor, without father, leaving behind him a mother, a sister by the whole blood, and two sisters and a brother by the half blood; and was possessed of property, amounting, at the time of his death, to between sixteen and twenty thousand pounds.

The testamentary papers before the Court are paper B, the original draft of a will; and paper A, a will or testament itself. This latter instrument is pleaded, and proved to have been drawn up from the former, and was executed by the deceased, in the presence of three witnesses, with the usual formalities, on the 6th day of June, 1818. He appoints in it seven executors, amongst whom are Thomas Scruby and Charles Finch, the parties now propounding the instrument, as it existed in its original state, and at the time of its execution. **[75]** For its present plight and condition (in which it was left by the deceased) are as follows:—A part of the last line of the fourth sheet, and a part of the first line of the fifth sheet, is obliterated with ink; and the upper part of this same fifth sheet, down to the tenth line, is also torn, or gnawn, or otherwise defaced. It is pleaded, and proved, that the passage obliterated with ink ran as follows:—"Unto Mr. Thomas Scruby, of Melbourn, the sum of 500l.;" and that the several bequests in the upper part of the fifth sheet, down to the tenth line, were—"Unto William Mortlock, Esq. of Meldreth, the sum of 500l.; unto Mr. William Scruby, of Malton, the sum of 500l.; unto Mr. William Wedd, of Foulmire, the sum of 500l.; unto Mr. William Nash, of Royston, the sum of 500l.; unto Mr. Charles Finch, sen. of Cambridge, the sum of 500l.; unto Mr. Thomas Newbury, of Melbourn, the sum of 200l.; unto Mr. Richard Beaumont, of Whaddon, the sum of 100l.; and unto Mr. Joseph Dickson, of Littington, the sum of 100l."

The execution of the will itself, and the capacity of the deceased at the time of execution, are admitted on all hands. It is proved to have been prepared with great deliberation: the bequests contained in it were canvassed, in repeated interviews, between the deceased and his solicitor, Mr. Wedd, of Royston, who drew it up; and the draft was settled by counsel prior to its engrossment for execution. In substance it provides for the sister by the whole blood, and her family, the more liberally, it should seem, through Mr. Wedd's good offices; it bequeaths legacies to several friends and relations, eleven in number; and it disposes of the rest, and **[76]** residue, comprising a large proportion of the whole property, to charitable uses.

To this disposition of his affairs the deceased adhered for nearly three years, and

up to the time of his death; unless any thing to the contrary is to be collected from the present plight and condition of his will. It is contended, however, that nothing to the contrary is to be so collected. For the case set up is that the instrument was so, in part, at least, apparently, cancelled by the testator, whilst he was of unsound mind, memory, and understanding. And the Court is prayed to decree probate of the instrument, as it originally stood; supplying the blanks caused by these apparent cancellations from paper B, the admitted draft of the instrument.

It appears that the deceased and his family were not upon the most amicable terms. His father died when he was an infant; his mother married again, and had a second family. The mother, as administratrix of the father, took possession of a leasehold estate, of considerable value, for herself and her children, which was occupied and farmed, for a series of years, by her second husband. On the deceased becoming of age, in the month of March, 1812, differences arose as respecting that estate; which, being referred to arbitration, produced an award, giving the deceased possession of the estate upon certain conditions. A bill in Chancery was filed by the one party to set aside this award; and steps were taken in the Court of King's Bench, by the other, to enforce submission to it. It is true that, in this stage of the business, a compromise was effected, through the interference of mutual friends **[77]** to the parties, but it is in evidence that the deceased, from this period, never cordially forgave "the Fordhams;" and that his father and brother-in-law (the husband of his sister by the whole blood), both named Fordham, were the objects of his particular disaffection. I have already said that this sister was indebted to Mr. Wedd's interposition for partaking so largely of the deceased's testamentary bounty. She it is, and her husband, who oppose the will, as propounded, it being their interest, under the will, that it shall be pronounced for in its present plight, rather than in its original state. An appearance has also been given, indeed, for the next of kin, praying an intestacy; but their opposition may be taken as virtually abandoned.

At the time when this will was made and executed there is no reason to suspect the testator of any intention to marry. But it seems that, for some months prior to his decease, he had paid his addresses to the daughter of a friend and neighbour, who had consented to be married to him, with the perfect sanction and approbation of her family. Now this circumstance has been taken hold of by the counsel against the will, as propounded, as laying a foundation for those mutilations apparent on the face of it, for the validity of which they would contend. But in order to determine the force of this argument it is requisite to consider what these mutilations in themselves import; or, in other words, what would be their effect, supposing the Court should incline to pronounce for them, as being of opinion that the testator was perfectly sane and rational at the time of their being made. For, if it should appear that these cancellations, at most, could **[78]** operate merely as revocations of particular legacies, and not as a revocation of the whole will, it disposes at once of the argument for the probability, à priori, of the deceased's being induced to make them, from this circumstance of his contemplated marriage. By the result of this enquiry will also be determined the propriety, on the contrary, of the parties in distribution ceasing to contend for an intestacy.

Now, as with respect to this part of the case, I am of opinion that, on the face of the instrument itself, this obliteration and tearing could, at most, effect a partial only, and not a total, revocation of the instrument. Questions of revocation are mere questions of intention—all which rests with the Court, in respect of them, is to put a rational construction upon the act of revocation. If a testator tear off or efface his seal and signature, at the end of a will, the Court will infer an intention to revoke the whole will; this being the ordinary mode of performing that operation. If a testator, on the other hand, obliterates a particular clause, this, on the same principle, operates only as a revocation pro tanto or of that particular clause.(*a*) So, again, if part of one sheet of a will, consisting of several sheets, be torn off or cut through, the other sheets, together with the signature, attestation, and so forth, remaining in their

(*a*) This also was the doctrine of the civil law. Vide D. 28, 4, 3. Mantica says, "Ita demum præsumitur testamentum cancellatum, favore venientium ab intestato, quando testator cancellavit vel induxit totum testamentum. Quod si testator solum cancellaverit testamentum in aliqua parte, in aliis partibus non cancellatis, firmum manet." De Conj. Ult. vol. l. xii. tit. 1, No. 31.

original state, this would [79] only revoke the part actually so cut or torn; and would not enure to a revocation of the whole will. Whether, indeed, any person in his senses, under ordinary circumstances, would resort to this mode of partial revocation is another question: but if he did, or must be presumed so to have done, I am of opinion that the effect could be only that last described. Now these considerations, I apprehend, dispose of the whole argument against the will, as propounded, built upon the deceased's intention to have been married. His intention to marry might be ground for revoking his whole will, as preparatory to a new disposition of his property altogether; but it could be no reason for cancelling particular legacies; the whole effect of this last operation being to swell the residue, which, as well as specific sums to a large amount, stands bequeathed, as I have already said, to charitable uses. The same considerations, by the way, also evince that the parties in distribution could not have contended effectually for an intestacy.

The history of the deceased, as spoken to by the witnesses, is peculiar and affecting. He is described as "a very clever, sensible, young man, quick and keen in business, of a lively and cheerful disposition, but rather irritable." This is said to have been his "general character," and it continued to be, for any thing that appears in evidence to the contrary, till within a few days of his decease. On the Monday (30th April) preceding that event he is described by Mr. Wedd, upon whom he had called at Royston, as "transacting business correctly;" but as evidently labouring under "a great dejection of spirits;" and, in par-[80]-ticular, as impressed with a notion, for which there does not seem to have been the slightest foundation, that his intended match with Miss H. was "off," as he expressed it; or would never take place. On Wednesday, the 2d of May, the deceased was visited by Mr. Mortlock; and on Thursday, the 3d of May, at his own express desire, by Mr. Wedd; and the depositions of these gentlemen render it obvious that his disorder in this interval was still gaining ground. They represent him, on those days, as buried in gloom and despondency, and visited with a number of fancies, the mere offspring of that malady, with the seeds of which he was obviously impregnated on the preceding Monday. He still insisted that his match with Miss H. was "off," assigning as the reason for it, when urged, one which could not be true; he complained that "all his friends turned their backs upon him, and could have nothing to say to him;" he said that a mere common place letter which he had received in answer to one enquiring the character of a bailiff was "ironical," and meant to "banter him;" and that he had been betrayed by the parishioners of Melbourn, at a parish meeting, into "signing a paper, by which he was ruined." These and similar notions, which haunted the deceased's imagination, had no foundation whatever but in his own distempered fancy.

It is not my intention to pursue this melancholy history in detail. It is sufficient to state that the deceased became rapidly worse—and that during the last three days, at least, of his existence, he was decidedly lunatic. In the course of Sunday, the 6th of May, towards midnight, he escaped from [81] the persons about him, by leaping from a window of some height into the garden of his house; and was suffocated in a pool or pond of shallow water, contiguous to the garden, into which he either threw himself, or accidentally fell; possibly, in making his way towards some deeper water a little further off, for the purpose of self-destruction. Mr. Haines, his medical attendant, speaks to his belief that he was "meditating suicide" on the Saturday, the day preceding.

I shall now briefly advert to those parts of the evidence which respect the deceased's operations upon his will, on the particular subject of which it will be seen that the deceased, although constantly harping upon it, was not a bit more rational than in his general conduct.

Mr. Mortlock, an intimate friend and neighbour of the deceased, deposes that just as he was about to leave the deceased's house on the morning of Wednesday, the 2d of May, after the visit to which I have just alluded, the deceased followed him, and stopt him, saying, "I want you to take care of a paper which Joseph Wedd has given me for you." The deponent having asked "what paper Mr. Wedd could have given him for the deponent," the deceased told him "it was his (the deceased's) will; and that he wished the deponent to take care of it for him." The deceased looked for it in the parlour where they were, but could not find it. The deponent told him that "he could not stop then, but that he would be with him again in the afternoon, and would then take it." In the afternoon, however, of that day the deceased rode

over to Mr. Mortlock's, and remained alone with him **[82]** nearly three hours. Mr. Mortlock represents him as buried in gloom and despondency, which he now ascribes to mental derangement, though he did not so consider it at that time. In the course of conversation he repeated his wish that "Mr. Mortlock should take charge of his will," which, however, he had not brought with him, for the purpose of depositing in his custody, as might have been expected.

In the morning of Friday, the 4th of May, the deceased had a good deal of irrational conversation with his housekeeper, Taylor, on the subject of his will. He repeatedly expressed his fears that "the Fordhams would get at it," in which case, as he expressed it, "Melbourn" would be ruined.(*a*) He wished her to convey it to Mr. Thomas Jarmain's, a neighbour, which she refused. He then persuaded her to take charge of it herself, to which at length she consented, and folded it up in one of her gowns, by the express desire of the deceased, where it remained till the evening of that day. She deposes that "about eight o'clock in the evening the deceased, who had gone out on horseback, and who, it appears, had dined with Mr. William Scruby, of Malton, his uncle by marriage, returned home, and after being alone some little time in the parlour, rang for the deponent and desired her to fetch him that parcel which he had given her in the morning, and added, 'I want to put some writing into it,' or 'I have got more writing to put into it,' or to that effect: she went and fetched **[83]** it to him, and left it with him; he said nothing that she recollects when she gave it to him: he remained in the parlour alone after that for some time, she cannot say how long; from half an hour to an hour it might be: he then rang for, or called her, and again wished her to take the will, but she did not like to have it again: he kept worrying her about it as he had done in the morning, either to take it herself, or to send for her husband and let him take it, to Mr. Jarmain's." This continued till the deceased was diverted from his importunity by the arrival of Mr. Scruby.

Mr. Scruby, who had followed the deceased home, in some alarm, deposes that "on hearing his voice, as he believes, the deceased came out from the parlour, and said, 'He was glad the deponent was come, that he was just setting off to the deponent's house;' he then took the deponent into the parlour, a parcel was lying on the table, the deceased said, 'Here is what I was telling you about, what I was going to send to Jarmain's.' He then broke open an envelope, and gave the enclosure to the deponent, saying, 'There, do you take this home with you;' the outer cover which he so took off was addressed, in the hand-writing of the deceased, to Mr. Jarmain; the inner cover which the deceased did not break, but in which he gave the parcel to the deponent, was addressed, also in the hand-writing of the deceased, to the deponent, or Mr. Mortlock; and the deponent put it in his pocket." After some further incoherent conversation the "deceased ordered his horse, and accompanied the witness home, where he agreed to take a bed. The witness, after supper, attended the deceased to his bed-room, **[84]** where he left him; and, shortly afterwards, retired to his own bed-room, immediately over that in which the deceased was to sleep; appointing a female servant to sit up in a room adjoining the deceased's, and to call him up if she heard the deceased moving. Accordingly, he had scarcely retired to bed when he was summoned to the deceased's apartment, whom he found extremely agitated, and insisting on the re-delivery of the 'paper which he had given the witness.'" The witness deposes that "on giving it him, he broke open the seal, and kept turning the sheets over and over; he said, 'I scratched my pen over Tom Scruby when I was a little angry with him about the small tithes, but I wish that to be as it was—he has been a very kind friend to me'—nothing would satisfy the deceased but he would have the will from the deponent, and he had it, as he has deposed; and then, when he had done with it, the deponent had to get him wax to seal it up again, and he was very particular in sealing it up again." The deponent says that "while the deceased was turning over the sheets of his will, he stood by the side of the bed, and noticed him—his manner was quite insane—he turned over a sheet, looked at the next, and did not attempt to read it, or any part of it." After the deceased had sealed up his will again he gave it to the witness, who locked it up in a drawer in the room, and took out the key, and determined on continuing with the deceased during the rest of the night, in the course of which he fell asleep, and

(*a*) The testator had bequeathed by his will 2000*l.* towards the education of poor children living in Melbourn and Meldreth, or within six miles of Melbourn.

slept till awakened by the deceased. He goes on to depose that "he left the deceased about six o'clock, and returned about eight, when he found him still in bed." On the [85] deponent asking him how he did, the deceased answered, "How am I? I am a wretch not fit to live, I am a devil—what have I been doing? I have been tearing my will." The deponent, not believing this, having locked it up, and not seeing it about, said, "Oh, no!—you have not"—he said, "I have"—the deponent said "No, no"—upon which the deceased took it from under the bed cloathes, and casting it before the deponent on the bed, said, "There it is"—the deponent turned over the pages, and not, at first, seeing the torn part, said, "Oh, no!—I don't think you have torn it." The deceased rose up in the bed, and reaching a coat that lay by the side of the bed, put his hand in the pocket, and pulled out some torn pieces of paper, which he gave to the deponent, saying, "There it is; I have been gnawing it like a dog—Oh! what a wretch am I, I have been trying to injure my best friends—can it be repaired?" The deponent, to pacify him, told him he had no doubt but it could; the deceased added, "Only think that I should go to the drawer, and that one of my keys (of which he had several with him) should undo it." The deponent then gathered the pieces of paper which the deceased had given him, and folded them into the will, which he again put into the drawer.

On the Saturday morning the deceased, still continuing at Mr. William Scruby's, consented to be bled; after which he was apparently quiet, and possibly enjoyed something of a lucid interval for several hours. He soon, however, relapsed, and reverted to the subject of his will, insisting on having "that paper again." The deponent, not thinking it right that the deceased should have it, [86] told him that he had given it to Mr. Mortlock, who had been at the deponent's house in the course of the morning—the deceased at first suspected the truth of this assertion, but, on being satisfied by the deponent's assurances, he said "he would go to Mr. Mortlock for it, for have it he would;" the deponent, who "saw the storm rising," as he expresses it, took an opportunity of fetching the will, and dispatching it by Mr. Haines to Mr. Mortlock; and then, seeing that nothing would satisfy the deceased, agreed to ride with him to Mr. Mortlock. The deceased was very impatient—"They set out together, but the deceased very quickly broke away from the deponent, and rode off at speed."

Mr. Mortlock deposes that, In the afternoon of Saturday, between three and four o'clock, as he best recollects, Mr. Haines came to the deponent's house in great haste, and brought with him the deceased's will—but there was hardly time for him to tell the deponent the occasion of his visit, or for the deponent to put the will in his secretary, when the deponent, looking round on hearing an exclamation from his wife, saw the deceased himself, riding, at speed, to the house; the deceased leaped a chain, came through a narrow way between two posts, where there was scarcely room for a horse to pass, into the garden—jumped from the horse, rushed into the hall, and, knocking down two of the children of the deponent, and pushing aside his wife, came up to the deponent, in a state of the greatest agitation, insisting on having his will. The witness endeavoured to persuade the deceased to leave it in his (the witness's) custody, but the deceased betrayed [87] such increasing agitation about it, that the witness, by the advice of Mr. Haines, and in order to calm the deceased, at length suffered him to have it. He still, however, pressed the deceased to leave it in his keeping, which the deceased at last said that he would, provided the deponent would let him have some paper and wax to seal it up. The deponent accordingly lighted a candle, and having supplied him with some writing paper, and a stick of sealing-wax, the deceased proceeded to enclose the will in an envelope, and seal it up; this he did with considerable industry, for he sealed it in many places, but in a very few minutes afterwards the deponent heard him tearing something behind him; the deponent getting round him, and seeing what he was about, suddenly withdrew the will itself from the cover, which the deceased had torn open, trying, as it seemed to the deponent to tear the will itself, but without having actually done so. The deceased then tore the cover (which it seems not unlikely that he mistook for the will itself) in pieces, and held them over the candle, burning them as if he was at play with them; the whole action being one of decided derangement. The deponent (who appears to have used considerable dexterity in recovering possession of the will) then withdrew with it up stairs. The deceased remained at Mr. Mortlock's house till about nine o'clock that evening; between eight and nine Mr. Mortlock proposed that the deceased

should go home, to which he assented, but when the gig came, he could not be prevailed upon to get into it—he put his foot on the step five or six times, and then withdrew it, and returned into the parlour, each time beckoning or calling to the de-[88]-ponent, who had taken his seat in the gig, to follow him, telling him that he wanted to speak with him alone. On each occasion when the deponent was alone with him, he told him what he wished principally to say was about his will—he asked where it was—the deponent, considering him to be in an unfit state to have it in his possession, told him that he had burnt it—"Well then," said the deceased, "can't I make another?" the deponent told him that he might—that a man might make a will at any time, &c.—"Could not he then make another?" he said—"Might not he make another?" and in this way he continued, calling the deponent back, and asking what had become of his will, and when told that he had burnt it, asking, over and over again, "whether he could not make another?" At length, however, the deceased was persuaded to get into the gig, and was driven home by Mr. Mortlock to his house at Melbourn. As for the will itself, that remained in Mr. Mortlock's custody, till he delivered up the possession of it to Mr. Wedd, after the melancholy catastrophe of the following evening already alluded to.

Now, in the face of this evidence, it would be idle to contend that the deceased was sane at the time of reducing this fifth sheet of his will (whether by tearing or gnawing it, non constat) to the plight in which it now appears; and I have no hesitation whatever in pronouncing for those legacies, as part of that will, which are proved to have stood at the top of this fifth sheet, when in its integral state.

To the obliteration with ink, of the legacy of 500l. to Mr. Thomas Scruby, in the bottom line of the fourth, and top line of the fifth, sheet of the [89] will, different considerations apply; and this, indeed, is the only part of the case upon which the Court has felt, all along, any sort of difficulty. The ground of distinction between this and the other part of the case is, that it is impossible to ascertain the precise time at which the obliteration was made. It might have been made at any time within ten or eleven months before the deceased's death—for the deceased, as I shall presently observe, is proved to have had the will so long in his possession or custody, though for nearly the two years next after its execution it had remained in the hands of Mr. Wedd. But, on the other hand, the high probability is that it was effected on the Friday evening preceding his decease, at which time he was, decidedly, insane. On that evening it is proved, by Taylor's evidence, to which I have already adverted, that the deceased was alone, with the instrument before him, for from half an hour to an hour, for the express purpose, as he assured the witness, of "putting some writing, or putting some more writing into it." It should seem from the deposition of the same witness, that the deceased had an equally apposite occasion of performing the operation on the same Friday morning, for he, probably, had been busy with his will, prior to his dispatching Taylor for a candle and sealing wax for the purpose of securing it in an envelope, as she speaks to his having done, on the morning of that day. Be this, however, as it may, to the morning, or the evening, of that Friday, I am clearly of opinion that this obliteration is, with far the greater probability, to be referred.

Still, however, it must be admitted, that the [90] Court has no direct evidence of the time, or, consequently, of the deceased's state of mind at the time, of the act done. It must have recourse, therefore, to the usual mode of ascertaining it in such cases—which is, by looking at the act itself—for this I take to be the general rule, where a will is traced into the hands of a testator, whose sanity is once fairly impeached, but of whose sanity or insanity at the time of doing or performing some act with relation to that will there is no direct constat. In other words, the agent is to be inferred rational, or the contrary, in such cases, from the character, broadly taken, of his act.

Applying, therefore, this test to the present question, I am led to consider whether the obliteration of this legacy of 500l. to Mr. Thomas Scruby, under all the circumstances, were a rational act in itself—and whether it were rationally done, and performed, as to the mode of obliteration resorted to by the deceased. Now I own that I can bring myself, exactly, to neither of these conclusions.

And, first, how was the act done or performed? If a person of sound mind was about to revoke a legacy, he would probably erase it, or strike his pen through, or draw lines across it; and, if a person of only ordinary caution, he would note the revocation in the margin, accompanied with its date, and authenticated by his signature, or the initials of his name. Has any thing of the sort occurred in this instance? The

mode of obliteration appears to have been this: The testator appears to have let drops of ink fall on the passage from the quill part of a pen, and then to have smeared it over with the feather end; and that so incautiously, as in part to [91] efface, at the same time, his own signature at the bottom of the fourth sheet. Now this is hardly a sane mode of obliteration. It is observable, too, that the testator has suffered the phrase, "my eleven last mentioned legatees," to stand at the very foot of this obliteration, though, if valid, it reduces the number to ten; and that the name of Mr. Thomas Scruby is left as an executor, though it is purported to be struck out as a legatee.

Nor, secondly, can I quite be of opinion that the act itself, independent of the mode of action, is perfectly rational: it is so far, at least, irrational as to be capable of no assignable reason, which, perhaps, under the circumstances, is all that is required. It has, however, been attempted to be shewn that something of a reason did exist for the testator altering his mind as to Mr. Thomas Scruby's legacy; and to this end interrogatories have been addressed to, I believe, all the witnesses, as to a misunderstanding which is supposed to have occurred between the deceased and Mr. Thomas Scruby, subsequent to the making of the will. Now, in the first place, it is not quite clear whether this misunderstanding did not occur prior to the execution of the will; but, be that as it may, this at least is certain, that any coolness which it might have occasioned between the parties had subsided long before the deceased ever had this will in his possession. For it appears by the evidence of nearly all the witnesses that the difference in question (as to the origin of which, too, the deceased had the candour to admit himself in the wrong) occurred in the spring of the year 1818, and that it lasted, as one of the witnesses expresses it, "a very little while." And it is mani-[92]-fest by the deposition of Mr. Wedd, that the will was in his custody from the time of its execution till the month of May or June, 1820, when it was delivered to the deceased by Mr. Wedd (of his own mere motion, and not at the request of the deceased, as for any purpose of alteration or cancellation) only ten or eleven months prior to the death of the deceased.

And this last piece of evidence, by the way, nearly disposes of the argument, derived from what has been termed the deceased's "recognition" of the obliteration, contained in his declaration, already stated, to Mr. William Scruby, that he had "scratched his pen over Tom Scruby when he was a little angry with him about the small tithes." Supposing, however, that the deceased's averment on this head had not been erroneous on the face of it, as it plainly was, still the Court could scarcely have ventured to build any superstructure on the foundation of what fell from a man, in the state of derangement which the deceased is proved to have been in at the time of making this supposed "recognition."

Upon the whole, then, the Court has reason to be satisfied that the testator was of unsound mind, memory, and understanding at the time, as well of cancelling this legacy to Mr. Thomas Scruby, as of defacing the bequests at the top of the fifth sheet of his will; and I have no hesitation in pronouncing for the will, as it originally stood, in both respects.

[93] STANHOPE *v.* BALDWIN, OTHERWISE GOSSTER, FALSELY CALLED STANHOPE. Consistory Court of London, Hilary Term, 4th Session, 1822.—A marriage annulled by reason of an undue publication of banns, under 26 Geo. 2, c. 33.

Augustus Henry Edward Stanhope, the natural and lawful son of the Earl and Countess of Harrington, was born on the 25th of March, 1794, and was baptized, on the 14th of May following, by the aforesaid names of Augustus Henry Edward. On the 8th of May, 1813, at the age of little more than nineteen, he was married to Jane Baldwin, otherwise Gosster, in the parish church of St. John, Hampstead, by virtue of banns, in which he was described as "Edward Stanhope" only. This was a suit instituted by Mr. Stanhope, to annul his marriage with his said wife, by reason of such (undue) publication of banns.

On the part of Mr. Stanhope it was pleaded and proved that at all times, from his baptism, he was called and known by the name of Augustus, to the entire exclusion of the names of Henry and Edward. These last, indeed, were so completely dormant that even his nearest relatives, and most intimate friends, were ignorant that he had any other Christian name than that of Augustus. It was further pleaded and proved that the said marriage was had without the consent or knowledge of Lord Harrington; and that, in order to conceal it the more effectually from Mr. Stanhope's friends, the

parties [94] had been married in disguise—Mr. Stanhope having assumed, on that occasion, the dress of a groom, or labouring man, and the lady that of a maid servant. It was also in evidence that Lord Harrington did not become acquainted with his son's marriage for more than two years afterwards; at which time his said son had attained his majority—that Mr. Stanhope had been resident abroad nearly ever since his marriage—and that he had only recently ascertained that proceedings could be instituted, with a prospect of having the marriage declared null and void.

The Judge (*Sir Christopher Robinson*) was of opinion that the ground of nullity charged was fully sustained; and that, even if the variation did not go intirely to disguise the identity, which he was inclined to hold, still that he was bound, under the circumstances, to pronounce a sentence dissolving the marriage.(*a*)

[96] THE OFFICE OF THE JUDGE, PROMOTED BY CLINTON *v.* HATCHARD. In the Commissary Court of the Dean and Chapter of Westminster, Hilary Term, 1822. —"Chiding and brawling in a church," penalty of, under 5 & 6 Edw. 6, c. 4.—No person can be a lecturer, although elected by the parishioners, without the rector's consent—unless there be an immemorial custom to elect without his consent.

This was a proceeding by articles against Henry Hatchard, of the parish of St. Margaret, Westminster, at the promotion of the Rev. Dr. Charles Fynes Clinton, prebendary of the collegiate church of St. Peter, Westminster, and incumbent curate of the said parish. The articles, after pleading, first, the general law touching the orderly demeanour of persons who repair to their parish churches; and, secondly, that part of 5 & 6 Edw. 6, c. 4, which respects quarrelling, chiding, or brawling, in any church, went on to charge that the said Henry Hatchard did, in the afternoon of Sunday the 10th of December, 1820, whilst at the church of St. Margaret, Westminster, and during the celebration of divine service therein, behave in an irreverent and disorderly manner, and annoy and interrupt the Rev. William Johnson Rodber, assistant curate of the said parish, whilst he was passing from the vestry-room to the pulpit, and endeavour to prevent him from preaching a sermon therein—that he, the said Henry Hatchard, in order to effect his said purpose, had caused, or induced a number of persons to collect about the vestry door, by shouting, in a loud tone, "We want some friends about the [97] vestry-room door;" so that the said Rev. William Johnson Rodber could, with difficulty, effect a passage from the said vestry-room to the pulpit—that, during the said Rev. William Johnson Rodber's passage from the said vestry-room towards the pulpit, the said Henry Hatchard took hold of his gown, and, addressing himself to him, said, "Here is Mr. Saunders, ready to do his duty; why won't you let him preach?" that upon the said Rev. William Johnson Rodber's disengaging his gown, and still proceeding towards the pulpit, he, the said Henry Hatchard, followed him, repeating the word "Shame;" and adding, in an angry, chiding, and reproachful manner, "For shame, Mr. Rodber; Mr. Saunders was regularly elected—why not let him preach? For shame"—and that, by such

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(*a*) See the principles which governed the decision of this case laid down in the case of *Pouget* v. *Tomkins*, 1 Phill. 499.

It is to be observed that the statute 3 Geo. 4, c. 75, commonly called the New Marriage Act, does not render good and valid, marriages had by banns, prior to the passing of the act, such marriages being, in themselves, null and void by reason of undue publication of banns—but only such as, being had by licence prior to that period, were, in themselves, null and void by reason of minority and want of legal consent. A marriage therefore prior to the 1st of September, 1822 [vide s. 21 of the act], had in virtue of banns unduly published, is still a nullity; and must be so pronounced, upon proof made in a suit instituted for that purpose. But it is provided by the act [s. 19 & 21] that no marriage had by banns, from and after the 1st of September, 1822, "shall be avoided, on account of the true name, or names, of either party not being used in the publica-[95]-tion of such banns; but it shall be lawful, in support of such marriage, to give evidence that the persons, who were actually married by the names specified in such publication of banns, were so married; and such marriage shall be deemed good and valid, to all intents and purposes, notwithstanding false names, or a false name, assumed by both, or either of the said parties, in the publication of such banns, or at the time of the solemnization of such marriage."

irreverent and improper conduct, he, the said Henry Hatchard, greatly annoyed and disturbed, as well the said Rev. William Johnson Rodber in the performance of his duty, as the congregation then assembled in the said church, for the purpose of divine worship.

A responsive allegation was given, and admitted on the part of the said Henry Hatchard, which pleaded, in substance, that in the autumn of the year 1820 the afternoon parochial and unendowed lectureship of the parish of St. Margaret, Westminster, having become vacant, the Rev. Isaac Saunders, rector of St. Ann's, Blackfriars, was chosen lecturer against several competitors, by a majority of parishioners at a poll taken by the churchwardens on the 6th, 7th, and 8th of December in that year—that it being doubted during the said election whether Dr. Clinton, the incumbent, would grant Mr. Saunders the use of the pulpit, if elected, much [98] curiosity was excited among the parishioners to know the result, which led to the assemblage of an unusual number of persons at the afternoon service at St. Margaret's on the ensuing Sunday, being the 10th of December—that, among others, the said Henry Hatchard went, and arrived there towards the conclusion of prayers; and having learnt upon his arrival that the said Mr. Saunders was in the vestry, he went thither to inquire whether he was, or was not, allowed to preach—that being answered by that gentleman in the negative, he withdrew from the vestry into one of the aisles of the church, where, having learnt soon afterwards from one of the beadles that the said Mr. Saunders had retired into the church-yard, upon the vestry being cleared, he also went there and found him in conversation with a friend, who suggested that it would be proper to give formal notice to Mr. Rodber, the officiating curate, that Mr. Saunders was in attendance as a matter of curtesy; and that the said Henry Hatchard, as a supporter of the said Mr. Saunders, was a proper person to communicate such notice to Mr. Rodber—that the said Henry Hatchard thereupon proceeded towards the vestry for the purpose so suggested; but that, encountering Mr. Rodber in his way from the said vestry, which he had just left, to the pulpit steps, he said to him in a very low tone of voice, and in a mild and respectful manner, "Mr. Rodber, sir, the Rev. Isaac Saunders is here to perform the duty to which he has been elected"—that the said Rev. William Johnson Rodber taking no notice thereof, the said Henry Hatchard immediately turned away and left the said church, which he did not re-enter during [99] that afternoon—that, on the said Henry Hatchard so turning away, several persons cried out "Shame, shame," and "For shame, Mr. Rodber," or to that effect; and there was a noise, and a hissing, and a considerable tumult, in the said church; but that the said Henry Hatchard took no part in the same—that he had not previously shouted or said in a loud tone of voice, or otherwise, "We want some friends at the vestry-room door;" and that he did not subsequently accompany the said William Johnson Rodber towards the pulpit steps, exclaiming, "For shame, Mr. Rodber," or to that effect; or address him in any other words than those before pleaded.

No evidence was adduced in support of this allegation; but three witnesses were produced and examined upon the articles.

Frederick Price, one of the bearers of the parish, deposed (in substance)—that he was at the parish church of St. Margaret, Westminster, on the afternoon in question, and that, just after the evening prayers were finished, he observed Mr. Hatchard (whom he had never seen at the said church before, but at a funeral, he being an undertaker) standing very near the vestry door, by the deponent whose office it was to attend the officiating clergyman from the vestry to the pulpit—that he distinctly heard him say to a person who stood close to him, "We want a few friends near the vestry-room door"—that, as Mr. Rodber was passing from the vestry towards the pulpit, he was closely followed by Mr. Hatchard, who said to him in the deponent's hearing, plainly and distinctly, "Shame, Mr. Rodber, Mr. Saunders is regularly elected—why not let him preach?—for shame of you"—that immediately [100] upon Mr. Rodber's ascending the pulpit, a number of persons began to hiss and shout, and call out "shame"—whereby so great a tumult was excited that a very few of the congregation could possibly distinguish Mr. Rodber's sermon, although preached in his loudest tone, and that after the service was over the crowd, which was greater than ever the deponent had seen there either before or since, would not quit the church till a magistrate was sent for and arrived, from the Queen Square Police Office, accompanied by several constables—and that it was between five and six o'clock before the church was cleared. This witness further deposed that, "Although there

was some talking and a kind of murmuring noise before Mr. Hatchard addressed Mr. Rodber as above—yet there was nothing violent or outrageous until after he had so addressed him."

The Rev. William Johnson Rodber (in substance) deposed, that on Sunday the 10th of December, 1820, he attended the afternoon prayers at the parish church of St. Margaret, Westminster, as assistant curate of the parish—that as soon as the clergyman who read the prayers had finished he left his pew and retired to the vestry —that, on leaving the vestry for the pulpit where the deponent was about to preach, his progress was impeded by a great number of people about the vestry-door, among whom was Henry Hatchard, the party proceeded against, so that the deponent had great difficulty in effecting a passage towards the pulpit—that he had proceeded but a short way from the vestry, when he felt the left sleeve of his gown pulled and heard his own name called out; where-**[101]**-upon he turned round, and saw the said Henry Hatchard, who immediately said, "Mr. Rodber, here is Mr. Saunders ready to do his duty, will you choose to let him preach?" [The deponent says that he had observed the said Rev. Mr. Saunders in the said church during the afternoon prayers, and knew him to have been elected afternoon preacher by the parishioners, although he had been denied the use of the pulpit even for a probationary sermon, and had been told that it would still be denied to him in the event of his being elected]—that the deponent did not make any reply to the said Henry Hatchard, but passed on—that the said Henry Hatchard kept close to the deponent, and as he was passing near the rail of the altar, again addressed him, saying angrily, "Mr. Rodber, why won't you let Mr. Saunders preach?—he has been regularly elected—for shame"—that deponent still not answering, but forcing his way through the crowd, a most violent outcry and noise immediately took place—that in his passage through the crowd to the pulpit steps, which the deponent with difficulty effected, by aid of two of the church beadles, he was kicked till both his legs were black and blue, and hissed at, and spit upon—whilst there were many persons crying out, "Mr. Rodber, come back, don't disgrace yourself" —that the deponent delivered his sermon in the midst of an uproar, which continued during the whole service, and was loud enough at times to drown the sound of the organ and the voices of the congregation and the charity children—that this uproar was such as the deponent had never upon any occasion before witnessed, and that after the service the crowd **[102]** was obliged to be dispersed by constables—that it was evidently the intention of the persons who hustled the deponent in his way to the pulpit to prevent him from reaching it—and that the said Henry Hatchard was principally instrumental in this attempt, and in exciting the tumult and disorder which otherwise existed in the said church.

The evidence of John Woodward, also one of the bearers of the parish, was precisely corroborative of that of Price, the first witness, and that of Mr. Rodber.

Judgment—Dr. Swabey [after stating the charge, and recapitulating the evidence]. Upon this view of the case I conceive it impossible to deny that the offence imputed to this defendant, and which, as appears, may be one of great consequence, is brought home to him by the clearest and most indisputable evidence. In particular, no language can be a "chiding and brawling" within the statute of Edw. 6, in a truer sense of the words than the defendant's expostulations or remonstrances with Mr. Rodber, as spoken to by the several witnesses, upon the occasion in question. The attempted justification set up (in plea) can be regarded in no other light than that of a mere pretext. Not only was a "formal notice" to Mr. Rodber that Mr. Saunders was in attendance purely superfluous, but its delivery can scarcely, I think, under the circumstances, be ascribed by any stretch of charity to a laudable motive. But be that as it may, it is certain that the scene of tumult and disorder which ensued was the actual, if it was not the designed, consequence of the delivery of this **[103]** "notice" by the defendant; who therefore has been selected, in my judgment, with great propriety, as the person against whom these proceedings have been instituted. A very little inquiry, which it was his duty to have made, if inclined to meddle in this matter at all, would have instructed him, that in the case of every, at least unendowed, lectureship no choice, by the parish, of a lecturer is effective without the consent or approval of the rector; (*a*) whose undoubted right it is, in every such case, to grant to, or

(*a*) No person can be a lecturer, endowed or unendowed, without the rector's consent, unless there be an immemorial custom to elect without his consent—where

withhold from, the lecturer so chosen the use of his pulpit. At all events, however, he could not be ignorant that if Mr. Saunders had a legal right to the pulpit in the instance in question, there must be a legal mode of enforcing it—that any other mode of attempting to enforce it was as unjustifiable as it must eventually prove unavailing; and that an appeal to private judgment, or rather to popular feeling, upon such a subject (which this defendant's conduct amounted to, in my apprehen-**[104]**-sion of it), was illegal, as well as, in the highest degree, indecorous.

It remains only to pronounce the sentence of the law, which assigns to this species of offence, the offender being a layman, the penalty of suspension ab ingressu ecclesiæ, for a discretionary period. I am induced to limit that period to one month only (to be computed from Wednesday next) in the present instance, from the circumstance of this defendant being an undertaker. I trust that he will be sensible of the lenity of the Court in this respect—and that, in future, he will be led to his parish church by better motives, and conduct himself in it with greater caution and propriety.

I accompany this sentence of suspension with a decree for costs against Mr. Hatchard, as a matter of course.

[105] SCHULTES *v.* HODGSON. Arches Court, Easter Term, 1st Session, 1822.—1. The admissibility of articles is not debateable, in an appeal Court, upon an appeal entered more than fifteen days after their admission by the Court à quo. 2. In criminal suits the defendant's answers, upon oath, are not to be required, even to those heads or positions which are not, in themselves, criminatory.

[See further, p. 318, post.]

(An appeal from the Consistory Court of Sarum.)

This was an appeal from the Episcopal Consistorial Court of Sarum, promoted and brought by the Rev. John Schultes, vicar of the vicarage and parish church of Hagbourn, in the county of Berks, diocese of Sarum, and province of Canterbury, against Christopher Hodgson of Parliament Street, Westminster, in the county of Middlesex, and province aforesaid, from two certain orders or decrees, made, and interposed, in a certain cause, or business, of the office of the Judge, promoted by the said Christopher Hodgson, against the said Rev. John Schultes, "touching and concerning his soul's health, and the reformation of his manners, and correction of his excesses, and more especially touching and concerning the crimes of fornication, adultery and incontinency, committed by him, and the fame thereof." By the first of such orders or decrees, bearing date the 22d of November, 1821, the Judge appealed from "admitted the articles tendered by the promovent" only upon that same Court day, notwithstanding the defendant dissented to their admission, and prayed to be assigned a term, to the next Court, **[106]** in order to consult upon their admissibility; by the second, bearing date the 19th of December, he, the said Judge, further decreed that "the defendant should take the usual oath for his personal answers to the said articles." The other proceedings had in the Court below are stated in the judgment.

On the part of the appellant various objections were taken by counsel to the articles admitted as above, in point both of form and of substance—in particular, it was submitted that the time had gone by when Ecclesiastical Courts would, or ought to, proceed upon common fame. They also contended that it was not competent to the Court appealed from to require the defendant's answers, on oath, to articles exhibited against him, under the stat. 13 Car. 2, c. 12, s. 4,(*a*)—and that this was a

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there is such a custom, it is binding on the rector, as it supposes a consideration to him. The endowment only seems material, in this respect, as it does (or may) furnish an argument in support of the custom, and to shew that it had a legal commencement. See 2 Str. 1192. 1 Wils. 11. *Rex* v. *Bishop of London*, 1 T. R. 331; and *Rex* v. *Field and Others*, 4 T. R. 125.

Even after the rector's consent is obtained the bishop's license is also necessary—if not as forming part of the title of the lecturer, still, at least, to exempt him from the penalties of 13 & 14 Car. 2, vide s. 19, and Canons of 1603. Canon xxxvi. c. 4. Vide 1 T. R. 331.

(*a*) Which enacts that "it shall not be lawful for any person exercising ecclesiastical jurisdiction to tender or administer to any person whatever, the oath usually called the oath ex officio, or any other oath, whereby such person, to whom the same is tendered or administered, may be charged or compelled to confess, or accuse, or to

grievance which the Court must, at once, pronounce for, whatever became of the other alleged matter of grievance, the admission of the articles.

On the other hand, it was contended, by counsel for the respondent, 1st, that no exceptions could now be taken to the articles—their admission having been acquiesced in for a longer term than that prescribed by law for an appeal; and, 2dly, on the authority of Oughton (vide tit. 66, 141, 142), that the defendant, **[107]** being himself present in Court, was bound to take the oath, and to answer to such positions or articles as were not criminatory (as to the first, for instance, pleading that the defendant was a clerk in holy orders, and vicar of Hagbourn; to the 11th, pleading the jurisdiction of the bishop of his diocese, &c.) though not to answer to such parts of the articles as conveyed any criminal imputation. They admitted, indeed, that the practice was otherwise in the superior Ecclesiastical Courts—but they protested against the judges of the diocesan and inferior Courts, which were slower in their changes, being liable to be appealed against for grievances, in adhering to the more ancient, and as they insisted, the correcter (or, at least, in many respects the more convenient) practice.

Judgment—Sir John Nicholl. This is an appeal from two orders or decrees made by the Consistory Court of Sarum, in a cause of office, originally promoted there against a clerk of that diocese, for adultery, fornication, or incontinency.

The proceedings had in the Court appealed from seem to have occupied, in all, but three Court days. On the first of these, the 31st of October, being the day of the return of the citation, the party cited, not appearing, was pronounced contumacious. No writ,(*a*)[1] however, appears to have issued: and on the 2d Court day, the 22d of November, the defendant having appeared voluntarily, and taken the usual oath, &c. was absolved from his contumacy. The articles were then brought in, **[108]** and were admitted, instanter, notwithstanding the dissent of the defendant's proctor; and the defendant was monished to answer immediately: whereupon, the articles being first read over, the defendant gave, in person, a negative issue, and the proctor for the promovent was assigned a term probatory, till the next Court. On the 3d, and next following, Court day, the 19th of December, the Judge, at the the petition of the proctor for the promovent, decreed that the defendant should "take the usual oath for his personal answers"—when his proctor, for the first time, protested of a grievance, with intent to appeal. That appeal was entered accordingly, and has since been prosecuted, and the Court has now to determine on the matter, or matters, of alleged grievance.

The grievances (for they are to be spoken of in the plural number) purported to be appealed from, in special, seem to be, 1st, the admission to proof instanter of the articles, nothwitstanding the dissent of the proctor for the defendant, on the 22d of November; and, 2dly, the order or decree of Court, for the defendant's personal answers upon oath, of the 19th December.

Now, as with respect to the first alleged grievance—that of the 22d of November—it is observable that this appeal is only entered on the 24th of December, clearly after the fifteen days allowed by the statute.(*a*)[2] No appeal is protested of, even, till the 19th of December—and the protest is then only of appeal from steps taken by the Court on **[109]** that day, and not of appeal from the admission of the articles on the Court day preceding. The defendant too had acquiesced (*a*)[3] in the admission of the articles, by complying with the assignation of the Court in giving a negative issue, of course subsequent to their admission.

Upon these grounds I am of opinion that, however harsh and precipitate the proceedings in the Court below may have been, and however at variance, not merely with formal, but, in some respects, with substantial justice (for instance, as well in pronouncing the party contumacious on the very day of the return of the citation, which is still not complained of as a grievance; as in admitting the articles without affording

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purge him or herself, of any criminal matter or thing, whereby he or she may be liable to censure or punishment."

(*a*)[1] Viz. "De contumace capiendo." Vide 53 Geo. 3, c. 127.

(*a*)[2] 24 Hen. 8, c. 12, s. 7. Ten days for appeal are assigned by the canon law, and the same rule was adopted into the reformatio legum.

(*a*)[3] Non potest appellare qui terminum recipit ad procedendum, vel ad solvendum, vel alias, processui causæ acquievit. Alciat. Præs. 253.

the defendant time, or opportunity, to consult upon their admissibility, which now is, still), I am opinion that the admission of the articles had been too long, and too far, acquiesced in, to be duly appealed from; and, consequently, that the articles must stand admitted in their present form, however objectionable that form may be; the question of their admissibility being one of which the Court has no authority to dispose. Whether, if substantial justice require it, the Court, in the progress of the suit, may not devise some means of putting these articles into a more regular shape, if irregular in their subsisting form, is a point as to which it would be useless to enter into any present speculation. Mean time I may suggest to the counsel for the promovent, the propriety of considering **[110]** whether, and how far, it would be advisable to proceed to examine upon articles which were substantially faulty in their original frame and construction; without at all committing myself to any opinion that the articles in question are such.

The other matter of grievance, the order or decree for the personal answers of the defendant, is duly appealed from: so that the only question in respect of this is, was it, or was it not, in its own nature, an appealable grievance? Nor is it a question which imposes on the Court any sort of difficulty. This is a criminal suit; and I am clear that, in a criminal suit, under the statute of Car. 2, the answers on oath of the defendant are not to be required.(*a*)[1] An issue negative, or affirmative, is the only answer, and the calling for any other certainly is an appealable grievance.

The Court was aware indeed, prior to the argument, that the contrary was asserted by Oughton, whose authority upon points of this nature, generally, is not lightly to be questioned. But the practice (if such were the practice) of Oughton's time has been varied in all modern instances, and I conceive correctly, according to the very wording of the statute. For the statute provides that no ecclesiastical Judge shall tender any person whatsoever, any oath, whereby such person shall be charged to purge him or herself of any criminal matter or thing: it not simply justifies the party to whom the oath in question is tendered, in refusing to take it; **[111]** but it prohibits the very tender of it, by any person exercising ecclesiastical jurisdiction.

It is argued, however, that this statute only goes to protect parties from being forced to answer criminal charges; and that it contains nothing which prevents the usual oath for answers from being administered to defendants in criminal suits, so as to oblige them to answer those articles objected to them, which are not criminal charges. To this interpretation of the statute I can by no means assent; it being neither consonant to practice, nor to those general principles, which govern, in this country, the administration of criminal justice.

And first, as to practice, the contrary has been laid down by this Court in such repeated instances, that it would be mere idle pedantry to refer to particular cases. It may, indeed, be the modified practice in civil suits, founded on criminal imputations; it is clearly not the practice at all, in suits directly criminal. For instance, if adultery be proceeded against by libel, quoad petendum divortium; the defendant's answers may be (though seldom are (*a*))[2] taken to such parts of the libel as involve no direct or implied charge of adultery. But if adultery be prosecuted by articles, quoad pœnam legalem; the defendant's answers may not be taken, not even (that is to such parts of the articles as involve no charge of adultery, either direct or implied. The same **[112]** holds, mutatis mutandis, in proceedings for incest, and in other cases. It is the not attending to this settled distinction which may have given rise to the erroneous notion that answers may be called for in criminal suits.

Nor, secondly, do I conceive that calling for answers in suits of this description, is more at variance with the correct practice, than it is objectionable upon sound principle. On principle parties are neither compellable to render themselves, nor to furnish their accusers means of rendering them, obnoxious to censure or punishment: they are neither to be forced to implicate, nor to do anything which has a tendency to implicate, themselves. The guilt of parties under prosecution is to be sifted out

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(*a*)[1] It should seem that if the Ecclesiastical Court proceeded to enforce answers in a criminal suit, prohibition would lie. See *Goulson* v. *Wainwright*, 1 Sid. 374.

(*a*)[2] An issue, if confessing the marriage, though otherwise contesting suit negatively, is all that is required. Answers are seldom, if ever, called for in cases of this description; unless as to the fact of marriage, where the defendant's proctor has given a negative issue to the libel, generally, a step which is rarely taken.

by the depositions of witnesses and other "due proofs and evictions," from the number of which the parties own answers are excluded, as well by natural justice as, I conceive, under the statute of Car. 2, by positive law. In criminal suits the maxim is, "Actore non probante, reus absolvitur." And it is obvious how much of the burthen of proof may be shifted from the "actor"—the promovent—by the defendant's answers, even to such heads or positions objected to him as are not in themselves, and directly, criminatory. Admissions from the defendant of those parts of the articles which are not of this kind may be the means (perhaps the only means) of helping the promovent to the proof of those parts of them which are. Add to this that the popular, at least, though not the just and legal, inference deducible from the defendant's answering articles in part, and declining to answer the criminal charges, is an admission of his guilt. And it is contrary to **[113]** natural justice that a defendant, even if guilty, should be put to the alternative of perjury, or any thing in the nature of confession; the more especially as the same defendant, swearing himself innocent (as the fact might be) of the offence imputed to him, could hope to obtain but little credence, and expect to derive but little benefit.

As to the single other point insisted upon in the argument, the hardship of sustaining appeals from inferior Courts for pursuing the ancient, in preference to the modern and, it is to be presumed, the correcter practice; the general answer to arguments from topics of this nature is simple and obvious. Where those Courts have deviated into mere formal irregularities, the visiting of these with any thing of strictness by this Court may justly be deprecated as harsh. But where their course of procedure violates either the rules of positive law or the dictates of natural justice, or both these together, this Court is bound to administer a correction to them which it can only apply, by sustaining appeals from those orders, or decrees, to which that course of procedure may have led.

Upon these considerations I reverse the order for the defendant's personal answers, and retain the cause. The observations which I have made, hypothetically, upon the articles, are in the recollection of the respondent's counsel, and will, I have no doubt, be attended with due effect.

[114] DURANT *v.* DURANT. Arches Court, Easter Term, 2nd Session, 1822.—Whatever is to be done personally by the party principal in the cause requires, in strictness, a personal service of the notice, or decree, for doing it, upon the party principal. Hence, the service of a decree for answers upon the proctor will not justify the Court in putting the principal in contempt, if those answers are not brought in.

[See further, 2 Add. 267.]

(An appeal from the Consistorial Episcopal Court of Lichfield and Coventry.)

This, in the first instance, was a cause of divorce, or separation à mensâ et thoro, by reason of adultery, promoted and brought by Mary Ann Durant, wife of George Durant, Esq., of the parish of Tong Castle, county of Salop, in the diocese of Lichfield and Coventry, and province of Canterbury, against the said George Durant, Esq., in the Consistorial Episcopal Court of Lichfield and Coventry. The present appeal was entered, on the part of the original defendant, from a sentence or order of that Consistory Court, pronouncing him in contempt, and decreeing him to be signified, pursuant to the statute (stat. 53 Geo. 3, c. 127).

The proceedings had in the Court below are stated in the judgment.

Judgment—Sir John Nicholl. The course which the present appeal has taken relieves me from the obligation of determining on the merits of it; for it appears, if I may so say, to have determined itself. But it involves a question of some nicety in practice; upon which it may be convenient that I should embrace the opportunity, thus afforded me, of delivering my opinion.

[115] This in an appeal from the Consistory Court of Coventry and Lichfield, where the suit originally depended, being a suit of separation à mensâ et thoro, promoted by the wife against the husband for adultery. The citation was returned, personally served on the 18th of January, 1820; but no appearance was given for the party cited till the 8th of May, 1821; and then only, it should seem, in consequence of a notice served upon the party on the 17th of April preceding, that he would be put in contempt and signified, failing to appear upon that day. A libel and allegation of faculties were brought in on the 22d of May, and were admitted on the 3d of July,

when a general negative issue to the libel was given for the defendant, and a decree for answers, both to the libel and allegation of faculties was prayed for the plaintiff. The decree was subsequently extracted, and was returned on the 9th of October, personally served upon the defendant's proctor, who appeared to the decree, and was assigned to bring in his client's answers by the next Court. This assignation was continued from Court day to Court day, till the 15th of January, 1822, when the Judge (having already previously directed a notice to be served on the party, and which was actually so served on the 8th of November, that he would be put in contempt if his answers were not filed as on the 20th of November preceding, his proctor then appearing, and still appearing from Court day to Court day, and praying further time) pronounced the defendant in contempt, from which supposed grievance this appeal has been duly prosecuted to its present stage.

[116] Now, on the face of these proceedings, there are strong grounds to suspect that the defendant has been, vexatiously, endeavouring to obstruct the course of justice to the plaintiff. No appearance even was given till more than a year and a quarter after the return of the citation; and though something has been said of compromise, and of proposed arrangement, which partly relieves from the impression produced by that fact, still, it is to be remembered that this appearance, at last, is only obtained by threats from the Court of resorting to its compulsory process. A general negative issue is then given to the libel (quite out of the usual course), not even confessing the marriage; so that the Court, with no constat before it of a fact of marriage, could allot the wife nothing on the account, or in the nature, of alimony. Lastly, an interval of nearly six months occurs between the decree for answers and the step appealed from—the answers to the libel, though said to be ready, being then unfiled, and the answers to the allegation of faculties not even being asserted to be in a state of forwardness.(*a*)[1]

It is not to be denied that the proceedings here stated compose a case of great, I may even say of extreme, hardship upon the wife. Still, however, the Court would have been put to some difficulty to pronounce against the present appeal, in the absence of "a personal service, upon the party, of the decree for answers;" in which absence I should **[117]** hardly have been led to decide that the present appellant was duly and lawfully put in contempt. And this is a question which the Court might have had to determine judicially, with reference to the merits of the present appeal, had it been made a point of, and insisted upon, by the counsel for the appellant, and had not the appeal been pronounced for, less upon the merits than under a sort of arrangement between the parties.(*a*)[2] As with any **[118]** immediate reference therefore to the

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(*a*)[1] The appellant's proctor merely prayed "further time," upon a statement that his client's "answers to the libel, settled by counsel, had been just left with him," but that his answers to the allegation of faculties "had not yet come to his hands."

(*a*)[2] The following is the minute of the judgment entered by consent. "Bedford (proctor for the appellant) prayed the Judge to pronounce for the appeal, and complaint made and interposed in this behalf, and for his jurisdiction, and that the Judge, from whom this cause is appealed, hath proceeded wrongfully, nully, and unjustly—to reverse the order or decree appealed from—to retain the principal cause—and therein to allow time for him the said Bedford to give in his client's answers. Box (proctor for the respondent) prayed the Judge to pronounce against the appeal, and complaint made, and interposed in this behalf, and that the Judge, from whom the same is appealed, hath proceeded rightly, justly, and lawfully—to affirm the order or decree appealed from, and to retain the principal cause—and therein to decree the said Bedford's party in contempt, and his contempt to be signified according to the act of parliament, in that case made and provided, for not having obeyed the order or decree of the Judge from whom this cause is appealed, and to condemn the appellant in costs. The Judge having heard the proofs read, and advocates and proctors on both sides thereon, by interlocutory decree, having the force and effect of a definitive sentence in writing, pronounced for the appeal and complaint made and interposed in the said cause, and for his jurisdiction, and that the Judge, from whom this cause is appealed, hath proceeded wrongfully, nully, and unjustly, reversed the order or decree appealed from—retained the principal cause—and therein assigned Bedford to give in his client's answers the next Court day."

A new decree for answers was also further directed to issue at petition of Box.

present appeal, the question, in a manner, merges, still however it may be convenient, I repeat, as a guide to practitioners, in these and similar cases, that I should state and examine, somewhat indeed extra judicially, and without the point having been argued, what the correct practice in this matter of personal answers is.

And here, in the first place, it may save time to inquire what was the old practice in the matter inquired of; for if that be consonant to reason and analogy, and has undergone no authoritative alteration, it is, or ought to be, the practice of the Court at the present day.

From the old practice then as laid down by Oughton, Clerk, and Consett, it is to be collected that personal answers were twofold—being to be had, in certain causes, on special application, from the proctor in the cause, as well as from the principal. This is distinctly laid down by Oughton; for instance, in the 16th sec. of his 61st title,(*a*)[1] "De litis contestatione," and in the subsequent section **[119]** [s. 17 of the same title (*a*)[2]], the suits, in special, where the proctor's answers may be had, are pointed out, and the uses to which they are capable of being made subservient in these suits are ascertained. Now this being so, I apprehend that notices or decrees for personal answers were always served accordingly; that is, notices for such answers from the proctor, upon the proctor; and decrees for such answers from the party, upon the party.

It is true indeed that Oughton, in his 62d title, refers to a note on title xxi. [obs. 9] by which it seems that a decree for the answers of the party principal in the cause may be served on his proctor. But this can only be, he observes,(*b*) under the special authority of the Court, in virtue of a special clause inserted in the decree itself; and consequently it forms no exception to the rule that in **[120]** ordinary cases the decree for the personal answers of the party principal must be personally served upon the party principal. Oughton's whole 62d title represents, under ordinary circumstances, the decree for the personal answers of the party principal, as a formal process, under seal of the Court, against the party principal, and required to be served personally upon the party, as contradistinguished from any mere assignation or notice to be served upon the proctor. And this, I conceive, to have been, invariably, the old practice, except as excepted in the 9th obs. on Oughton's 21st title—an exception not at all applicable to the case of present appeal, or in ordinary instances.

So stood the old practice, a practice, I must also remark, both perfectly reasonable in itself, and perfectly consonant with the practice of the Court in analogous cases. For the reasonableness of the practice, it is too obvious to be insisted upon; and for its consonance with analogy we all know that whatever is to be done personally by the party

(*a*)[1] Nota etiam, quod procurator actoris, postquam lis sit contestata, si crediderit se in aliquo [videlicet in aliquâ positione materiali libelli, præsertim positione aliquâ libelli matrimonialis] posse relevari ex responsis procuratoris partis adversæ, potest primò [scilicet ante decretum pro parte principali] jurare, pro parte suâ, quod credat se fideliter posuisse* contenta in libello, et petere juramentum a procuratore partis adversæ præstari, de fideliter respondendo positionibus ejusdem libelli in proximo die juridico: quod est concedendum. Oughton, tit. l. xi. s. 16.

(*a*)[2] Et est admodum necessarium ut hoc fiat, in causa restitutionis obsequiorum conjugalium, vel divortii aut seperationis à thoro et mensâ: nam de verisimili procurator rei est ita instructus à domino suo, quòd vult fateri solemnizationem matrimonii allegati; ex quo, procurator mulieris agentis potest adstatim petere sumptus litis et alimoniæ, dominæ suæ decerni, quod alias petere non possit, nisi postquam ipsa pars criminalis fuerit examinata; quod plerumque (præsertim in his casibus) differtur, per rei contumaciam, ad evitandum condemnationem in eisdem expensis litis et alimoniæ. Oughton, ubi sup. s. 17.

(*b*) Citatio verò, seu decretum citatorium pro responsis (post litis contestationem) personalibus partis principalis exequi solet vel in partem ipsam principalem, per ostensionem ejusdem sub sigillo judicis officii, et relictionem notulæ (ad effectum ejusdem) anglicanæ; vel, ut supra, viis et modis; aut aliter, vi clausulæ cujusdam in ipso decreto (cum ita petatur a judice) specialiter inserendæ solummodo, nonumquam exequi solet in procuratorem originalem in causâ, pro dictâ parte exercentem; ostendendo scilicit decretum hujusmodi pro responsis, sub sigillo; et veram penes cum relinquendo copiam ejus. Oughton, tit. xxi. obs. 9.

* This, in Oughton, is misprinted potuisse.

absolutely requires in strictness a personal service of the notice or decree for doing it upon the party. Where steps are to be taken by the proctor merely, a mere assignation upon the proctor suffices—he, quoad hæc, being "dominus litis." But where the personal intervention of the principal is requisite to the act to be done, as it is, for instance, where costs are taxed against him, or where sums are decreed to be paid by him on account of alimony, the practice is to take out a monition against the party, not merely to serve a notice on the proctor, which monition must be personally served upon the party; in all cases, that is, where it is requisite that the **[121]** proceedings should be conducted with any semblance of regularity.

It must be conceded, however, in this matter of personal answers, that the modern practice has been to serve the decree on the proctor only and not on the principal. This may have arisen partly, perhaps, from the two species of personal answers already alluded to (the latter, for obvious reasons, now obsolete) being confounded in modern practice; and partly because persons seldom hang back in this matter of answers, which are to be obtained, in most cases, without any sort of difficulty. Being the practice, however, I should be disposed to admit that a service of the decree for answers, though merely upon the proctor, might be a sufficient service of the decree for very many purposes. For instance, if, after such service, the party's answer to an allegation of faculties were not brought in within a fit and reasonable time, it might justify the Court in allotting sums on account of alimony (the marriage, that is, being proved or confessed) in proportion to the full extent of the faculties alleged; and so on. But it is a very different question whether such a service would justify the Court in putting the party in contempt, and proceeding to signify him, in order to his imprisonment, under the statute; a measure which I conceive Ecclesiastical Courts to be only warranted in adopting where the prior proceedings have been conducted with the strictest regularity.

Nor would it vary the case, in this view of it, to my apprehension, that notice of the decree should have been served on the principal, or that the proctor should have appeared to the decree, and prayed **[122]** further time, and so forth; both which circumstances occurred in this very suit. As for the notice, that was a mere notice from the adverse proctor; the only notice which the party was bound (under this penalty at least) to obey, being the decree of the Court, under seal of the Court, duly, i.e. personally, served upon him, the party. As for the proctor's appearing to, and acting upon the decree, I can by no means think the act of the proctor so binding on the principal—unless, indeed, in virtue of some special clause to the effect of enabling him to accept services of decrees, &c. upon the principal, inserted in the proxy—for I cannot concede that a party may be put in contempt and signified so as to become liable to all the penalties of contumacy, merely from his proctor doing that for doing which he has no strict legal authority.

Such, then, being the old practice, and being so, as it is, consonant both to reason and analogy, it remains only to inquire whether it has undergone any authoritative alteration in later times. Nor do I conceive that the inquiry can be attended with any sort of difficulty. Is there any adjudged case producible where this Court has proceeded to enforce decrees of this nature by its compulsory process, in the absence of a personal service? I am confident there are none. Can it even be shewn that such decrees have been so enforced, unless after a personal service, the whole matter passing sub silentio? I am nearly as confident that this has not occurred; for the Court is always (or means to be) satisfied that there has been a personal service before issuing its compulsory process in this description of cases. The result, therefore, of the whole inquiry, which is **[123]** almost too obvious to be stated in terms, is that the old practice in this matter of personal answers, being both perfectly reasonable and perfectly analogous to the correct practice in similar cases, should and must, in all cases, stricti juris, be the practice of Ecclesiastical Courts at this very day.

For the present appeal I have only to pronounce for it, upon the understanding and under the terms arranged between the parties; and I direct that the Judge of the Court below shall be apprized at once of this decree and of the grounds upon which it has proceeded.

[124] CLIFFORD *v.* MABEY. In the Peculiars Court of Canterbury, Easter Term, 3rd Session, 1822.—Quære, whether a party can be entitled to sue or defend as a pauper in a defamation cause? A party's swearing himself not worth 5l. gives him no indefeasible right to be admitted a pauper; that fact, if denied, must be

specifically proved. Nor will even proof of that fact be sufficient, if the party can be fixed with the receipt of a competent income.

The present question arose upon the right of a party to be admitted a pauper in a suit for defamation.

Judgment—Sir John Nicholl. This is a cause of defamation promoted by Martha Mizzlebrook Clifford against Henry Mabey. The citation was returned on the 1st Session of Michaelmas Term, 1821, when the party cited appeared personally and prayed a libel, which was brought in and admitted. A negative issue being given to the libel, witnesses were examined and publication was prayed—when the defendant, still appearing personally, asserted an allegation.

On the 1st Session of Hilary Term, 1822, the defendant, still only giving a personal appearance, prayed to be admitted a pauper. This was objected to on the part of the plaintiff, who has stated his grounds of objection in an act of Court, to which the defendant has also written in support of his prayer. Affidavits are brought in on both sides; and the question for the Court to determine is whether the petitioner is, or is not, entitled to be admitted to defend this suit in formâ pauperis. It is denied that he is so entitled, on the part of the original plaintiff, as well, 1st, from the nature of the suit, as, 2dly, from the state of the petitioner's circumstances. In determining this question, I **[125]** shall endeavour to keep these two heads of objection distinct and separate; only premising that, as the privilege claimed, that of appearing in formâ pauperis, is a great privilege in law, on several accounts, the claim must be clearly made out before the privilege itself can be conceded.

1. First, then I entertain considerable doubts whether a party can be admitted, either to sue or defend, as a pauper, especially the latter, in a cause of defamation. A defamation cause is in the nature, at least, of a criminal suit—it is styled by Oughton causa mixta [hoc est—partim criminalis, partim civilis]—and again, with greater precision, causa criminalis, civiliter intentata—and I strongly question whether in reason and upon principle it is competent to a party, under any circumstances, to appear as a pauper in a suit of this description.(*a*)[1] Of any precedent for the present application I am wholly unaware—nor would the Court be induced, by acceding to the prayer of this petitioner, to furnish a precedent which might be nearly tantamount to licensing persons of a low condition to defame their neighbours with impunity, unless it felt itself deprived of any discretion on this head, by some **[126]** paramount authority. On the contrary, however, the single authority in point with which I am acquainted, or to which I have been referred, is express that parties are not admissible to sue or defend as paupers in defamation suits.(*a*)[2] It occurs in Oughton's 8th tit. "De admissione in formâ pauperis," or rather in a note on that title; but it is to be observed that Oughton's notes, generally speaking, are of at least equal authority with his text—the notes being explanatory of the practice in Oughton's time; the text of the older and commonly less correct practice in the time of Clerk.

2. But, secondly, I am of opinion that the facts disclosed in this act of Court, and upon the affidavits, would not justify the Court in conceding to the petitioner this great legal privilege—if the law were otherwise, or if the petitioner were defendant in a mere civil suit. From the petitioner's own affidavit it results that at the time when the defamatory words are charged to have been uttered, and at the commencement, and long subsequent to the commencement, of this suit, he was a master shoemaker, employing two journeymen, and occupying a house at Walworth, at the annual rent of 18l., including the taxes, indeed. It appears, too, that he only finally withdrew from this house on the 21st of January in the present year—the very day upon which he prayed to be admitted a pauper—a circumstance which justifies a suspicion

(*a*)[1] The statute 11 Hen. 7, c. 12, clearly relates only to civil suits. It should seem, however, a defendant in some kinds of misdemeanor may be admitted to defend in formâ pauperis—but the reason there is said to be that the prosecutor, who can have no costs, is not prejudiced—a reason observed by the Court not to apply in this case. Vide *Rex* v. *Wright*, 2 Stra. 1041. The provision in 2 Geo. 2, c. 28, only applies to defendants in actions brought relating to the customs.

It was held in *Rex* v. *Pierson*, 2 Burr. 1039, that a defendant could not be admitted pauper upon an attachment for a contempt. But the decision there proceeded upon a quite distinct principle.

(*a*)[2] In causa diffamationis non est omninò admittenda pars in formâ pauperis. Oughton, tit. 8, n. (*b*).

that he only withdrew from it for the express purpose of that prayer. The petitioner has deposed, indeed, to the diminished state of his business and income, [127] for the last twelvemonth, which he ascribes to circumstances into which it is not necessary for me to enter—yet I observe that even during this period, he admits the average amount of his weekly income at 20s. Add to this, that he has still a shop in which he carries on his business, and "furniture, goods, and effects"—which, though he swears them not to be worth 5l., he has not specified, as he ought to have done; so that neither the adverse party, nor the Court, has any means of forming an estimate of their probable value. So, again, the petitioner has sworn himself unable to pay up the arrears of rent due for his late dwelling-house, as also to discharge his debts—but neither the amount of these arrears, nor that of his debts, nor how these last were incurred, is stated in any manner. As for the petitioner swearing himself not to be worth 5l., after payment of all just demands upon him—this gives him no indefeasible right to be admitted a pauper, where that step is objected to—the fact of his not being worth 5l., if denied by the other litigant, must be specifically proved. Nor will even proof of that fact be sufficient, if the petitioner, notwithstanding such actual insolvency upon the balance, can be fixed with the enjoyment of a competent income. Were this otherwise, many persons of large expenditure, and living in splendour and luxury, might entitle themselves to the gratuitous labors of others, as well as place their legal adversaries under very undue disadvantages, without any risk of a prosecution for perjury. This was explicitly stated by the Court in the case of *Lovekin* v. *Edwards* (1 Phillimore, 179), a case [128] in which this question was much canvassed, and fully entered into—from the general principles laid down in which case I see no reason whatever to swerve or depart.

Upon these considerations I am satisfied that I cannot, in justice to the other party, admit this defendant (if a defendant in any such suit) a pauper; and I pronounce accordingly.

[129] ROOSE *v.* MOULSDALE. Prerogative Court, Easter Term, 1st Session, 1822.—A testamentary paper, which is neither a finished will in itself, nor proved to have been such in the deceased's apprehension of it, is of no effect; where the deceased had full time and opportunity, if he had thought proper, to have rendered it a finished will.

(On the admission of an allegation.)

Stephen Roose, late of Bryntirion Amlwch, in the Island of Anglesea, died on the 6th of October, 1821, a widower, leaving behind him three sons and four daughters.

Within a few days after the deceased's death the following testamentary paper, all of his own hand-writing, was found between the leaves of a ledger-book, locked up in the deceased's bureau.

"(*a*) ~~Of~~ what I purpose to be my Will:—That my Son Stephen Rose his to be my sole Executor of all my Estat's Lease Hold Property of all discriptions of Cash Mortgages Bonds Notes of Hand Promisory Notes Shares in Shipping Amlwch Oxn Stock of Horses Cows Hay & Corn &c. &c. &c. Brewery Houses Household Furniture of evry discription where ever they may be found in this or any other Country &c. &c. and to pay in Twelve Months after my demise as folows:—

"Viz. to my Son George Bradley Roose	£500
to my Daughter Sarah Hughes Madyn	250
to my Daughter Easter or Hester Owen	800
to my Daughter Margaret Roose Steed with the Beed & Beeding she now lyeth upon	1,100 for her life & after return to that to my son Stephen and his Isue &c.
with a House in Amlwch called Synllan Bishops Lease with the Sheeds &c. ~~belonging thereto~~ (*b*)	

(*a*) The word "Of" was struck out with a pen.

(*b*) The words "belonging thereto" were struck out with a pen.

Brought forward . .	£2,650
[130] Also I give to my Grand daughter Jane Hughes Madyn	100
to my Grand daughter Jane Ann Moulsdale	100
to my Grand Son Stephen Roose, Liverpool	100
to my Grand Son John Stephen Owen	100
in all	£3,050

"Bryntirion,
"May 24th, 1821."

The present question arose upon the admissibility of an allegation, propounding the above testamentary paper, as the last will of the deceased, on behalf of Stephen Roose, the sole executor purported to be named in the same. Of the seven children of the deceased, five were before the Court, consenting that probate should pass as prayed. This was opposed, however, by a married daughter, Mrs. Moulsdale, party in the cause; and the proceedings were had in pain of another married daughter, who gave no appearance. The deceased, at the time of his death, was seised of real estates, of the value of about 60l. per annum, and of personalty to the amount in value of about 10,000l.

Judgment—Sir John Nicholl. The several considerations which appear to me to apply to the paper propounded in this allegation, and consequently to the allegation propounding it, are briefly the following:—

1st. Is the paper in itself, and upon the face of it, to be deemed a finished and complete will? or, if not to be so deemed,

2dly. Would it, nevertheless, be established by the circumstances propounded in the allegation that **[131]** it was a finished and complete will, in the deceased's view and apprehension of it—in other words, would it result from the facts pleaded, that the deceased regarded it as a will, and meant it to operate as such in its present shape, and without doing any further act in order to give it testamentary effect?

In the latter of these events this instrument may be, as in the former it clearly is, entitled to probate. But if both these questions are to be answered negatively, there is an end of the case. If the paper were "a finished will" in neither of the above respects it is wholly invalid—it not being pretended that the deceased had not full time and opportunity, to have rendered it a "finished will." He survived the writing of this paper upwards of four months—and is pleaded to have been "gradually declining in health for the last two years of his life, so as to have required the visits of a medical attendant during the greater part of that period"—and yet, not to have been "confined to his bed until within about three days of his death." Under these circumstances—in this total absence of any "act of God," technically so termed, to prevent or obstruct its completion—this instrument can, I repeat, only be entitled to probate, either as being in itself, or as proved to have been, in the deceased's apprehension of it, a finished and complete instrument—in point of effect, that is—in its present shape.

1. Now, as to the first of these questions—the paper, upon the face of it, and taken by itself, is not in my judgment, to be considered as finished and complete. It begins, "What I purpose to be my will"—that is, as I understand it, "what I **[132]** intend to make my will in futuro;" or "the manner in which I mean to dispose of my property, when I make my will"—not "what I constitute to be my will in presenti, and by this very instrument." It signifies the same thing, to my apprehension, with "outlines of, or memoranda for, a will." With this interpretation of the heading of the paper the wording of it throughout corresponds. It is not dispositive—it is not in the ordinary terms, "I give or bequeath"—it suggests to my mind, in every part, the notion of heads of a will to be drawn up at some future period, not the notion of a will itself. The interlineations and erasures, apparent in the body of the paper, and the want of subscription at the end, all confirm this notion of it.

2d. But, secondly, are the circumstances pleaded sufficient to shew that this was a complete and operative instrument, in the deceased's view of it? for in this case I have already said that it will be equally entitled to probate, as in the former one. In answer to this question, it becomes necessary to state and examine the several circumstances from which this inference is sought to be drawn.

The second article of this allegation enters into a long and particular history of various advances made by the deceased to his several children; and the next following

article pleads the exhibit annexed to the allegation, being a paper book in the deceased's hand-writing, in which those several advances are set out to the account separately of each child. It should seem that the deceased contemplated making a provision for each of his children, to the amount of from a thousand to twelve or thirteen hundred pounds—and the advances ac-**[133]**-tually made to four of the seven during his life, together with the sums purported to be bequeathed them in this testamentary paper, make up something near that amount. For instance, the advances to the deceased's son, George Bradley Roose, are stated in the account-book at 750l. and 500l. is supposed to be bequeathed in the will—making up, together, 1250l. The advance to the deceased's daughter Hester Owen, namely, upon her marriage, is stated at 200l., and the will purports to bequeath her 800l. in the whole 1000l. The advance to Mrs. Moulsdale on her marriage is stated at 1000l. accompanied with the following notice :—"N.B.—This is all I purpose (*a*) giving to Ellen"—and accordingly this daughter is not benefited by, or even mentioned in, the supposed will, though it bequeaths a legacy of 100l. to her daughter, the granddaughter of the deceased. The deceased's son John Roose again is in no sort benefited by the will—but the advances set out to his account in the paper book amount together to 1230l. The deceased's daughter Margaret (who, together with Stephen Roose, the party in the cause, are pleaded to be the only children of the deceased not settled in the world) is bequeathed 1100l., she having received no advance in her father's life-time. The several sums, indeed, carried to the account of Stephen Roose, amount to nearly 700l., and the operation of the present paper is to give him almost as many thousands, to say nothing of the real es-**[134]**-tate—all the several supposed bequests, amounting to only 3050l., and the deceased's personalty being pleaded to have amounted in value to nearly 10,000l. But the deceased's superior love and affection for this son is expressly pleaded, and must be taken as proved—and there are plain indications of his floating intentions not to benefit his other children beyond the amount of, from 1000l. to 12 or 1300l. as already stated.

Now the obvious inference from the facts alleged in these articles of the plea, and from the annexed exhibit, upon which so much stress has been laid by the counsel for its admission, unquestionably is, that the dispositions contained in the paper propounded, under the circumstances, are not improbable—that they are conformable with the deceased's expressed intentions, and being so are not unlikely ones for the deceased to have actually made. But to what does all this amount, as bearing upon the real question before the Court? that question, it is to be remembered all along, being not the probability of what the deceased would do, but the fact of what he has actually done. In my judgment it amounts to but very little. It is good in proof of the deceased's intention to make a will, so disposing of his property—of the fact of his having finally made such a will it is no proof. It is good in bar to any argument of improbability that might be urged against the paper, from the apparently unequal distribution of the deceased's property between his several children—but upon the real point in issue, namely, whether the deceased intended this paper to operate in its present form, and meant to do nothing more to give it effect—it bears very remotely.

[135] 2. The next circumstance relied on by the counsel for the paper is pleaded in the seventh article of the allegation, in the following terms :—

"That the deceased had been gradually declining in health for the last two years of his life, and was attended by Mr. Robert Williams, a surgeon in the neighbourhood, during the greater part of that period, but he was not confined to his bed until about three days before his death : that on the day after the said deceased had been confined to his bed by his said illness, and when he was in perfect possession of his mental faculties, the said Robert Williams, at the request of some of the family of the said deceased, asked him, the said deceased, 'if he had made his will,' and the said deceased said 'that he had done it,' or words to that or the like effect. And the party proponent doth allege and propound that the said deceased then alluded and referred to the paper propounded in this cause as his last will and testament."

Now admitting, for argument's sake, what I conceive to be incapable of proof, that the deceased, on the occasion pleaded, referred to this identical paper ; still, I am of

(*a*) The Court observed that there was no constat as to the time at which this purpose was expressed—it might have been many years before ; in short, at any time subsequent to Mrs. Moulsdale's marriage in February, 1811.

opinion that the reference itself will by no means produce the effect ascribed to it—that of converting this (apparently) unfinished, into a finished paper this imperfect into a perfect instrument—and that, on general principles, it would be extremely unsafe to ascribe this effect to it. Parties enfeebled by long illness, and on the verge of dissolution, often answer at random, and merely to avoid disturbance and importunity. By what I collect from the plea, the whole of what fell from the deceased on the occasion (in answer, too, to a **[136]** query put by his medical attendant) was a mere general declaration in the affirmative. I presume, of course, that all which passed on the occasion, in substance at least, has been embodied in the plea.

The sole remaining circumstance insisted upon is, the place of finding, to which, however, I can attach no greater importance than to those preceding it. It is pleaded to have been found "within a ledger-book, in which the deceased kept his accounts, and had written entries very shortly before his death," such ledger-book being, together with other books and papers, locked up in a bureau, of which the deceased always kept the key.

Now this place of finding, to my mind, furnishes rather a contrary inference to that which has been contended for. It is found between the leaves of a ledger-book, which the deceased must be presumed, and is pleaded, to have been in the constant habit of turning over for making entries, and similar purposes. Surely it can't be contended that this is the natural repository of a will, even though the ledger-book itself were locked in the deceased's bureau. It is just, indeed, the place where a man of business would dispose of a paper of the deliberative kind, such as I conceive this to have been. It is one of the last places which any man would have deposited a will for safe custody, which had received its final shape, and was an operative and effective instrument, in his view and apprehension of it, without any further act done, in its subsisting form.

That this instrument was such, is rendered, to my judgment, further improbable by the circumstance of the deceased having died seised of real **[137]** estate. I consider it to have been the deceased's intention that his son Stephen should have this, as well as the residue of his personalty; for I cannot accede to the supposition of one of the learned counsel, that the deceased, by the term "estates," might mean his personal estates only, leaving his real estate to go, by regular descent, to his heir at law. I entertain no doubt whatever, looking at the whole context of the paper, and all the circumstances, that it was the deceased's intention (his floating and deliberative intention) at the time of writing this paper, that Stephen Roose, subject to the conditions named, should take his realty as well as personalty. Now if this be so, it is nearly conclusive against the supposition that the deceased meant and intended that this should operate as a final will; for though the deceased, as it has been observed, and as indeed it is to be collected from this very paper, was not a man of letters or of much education, yet, as a man of business and the world, one probably raised, ex humili, to a respectable rank in life by his own efforts and exertions, I can hardly suppose him to have been ignorant that the law renders the attestation of three witnesses necessary to every devise of real estate.

Upon the whole, I feel warranted in concluding, both that the paper propounded is, in itself, an unfinished paper, and that proof of the facts pleaded would be insufficient to justify me in deciding that it was any other than an unfinished paper in the deceased's own apprehension of it. Taking the paper to be unfinished in both respects, I have already said that it could not be pronounced for; the deceased having survived the writing of it up-**[138]**-wards of four months, without any steps taken on his part to finish or complete it. I at once, therefore, adhere to the practice of the Court, and spare the parties useless expence and anxiety, by rejecting this allegation. As for the consent of five of the seven next of kin to probate of the paper passing as prayed, of which something has been said in the argument, I need scarcely observe that this is wholly immaterial to the case, in a legal point of view. Had the next of kin been much more numerous, any one of the number would still have had a perfect right to submit the validity of this paper to the consideration of the Court; and having been so submitted, it instantly became subject to those rules which Courts of Probate are bound to follow in determining cases of this description; and it was by the operation of those rules alone that its fate could be ultimately decided.

Allegation rejected.

EVANS *v.* KNIGHT AND MOORE. Prerogative Court, Easter Term, 2nd Session, 1822.—The admission of an exceptive allegation may be suspended till the hearing of the principal cause; when the Court will permit evidence to be taken upon, or will finally reject it, according as it then appears that the credit due to the witness attacked is, or is not, essential to a right decision upon the merits of the principal cause.

[See further, p. 229, post.]

(On the admission of an exceptive allegation.)

This question arose upon the admissibility of an allegation exceptive to the testimony of Edward Manwaring, a witness examined upon an allegation propounding certain "instructions," as containing the last will and testament of John Moore, the party deceased in the cause.

[139] *Judgment—Sir John Nicholl.* As the admission of this allegation must unavoidably, tend to increased delay and expence, I shall be ill disposed to admit it if I can see reason to believe that it may be dispensed with, in all probability, without detriment to either party. For the allegation, if admitted, provokes a counter allegation; and leads, consequently, to the introduction of several new issues, quite foreign to the real issue, and equally so to the real merits of the cause, which is before the Court.

The deceased in this cause died on the 24th of April, 1812, and probate of his will—that is, of certain instructions as containing his will—was granted to the executors on the 23d of the following month. That probate is called in, eight years after, in the month of April, 1820, and the executors are put on proof of the will in solemn form of law.

The plea propounding the will was admitted to proof in July, 1820. In the November following an allegation was admitted on behalf of the next of kin—as a further allegation has since been, on the same behalf, exceptive to the character of Edward Manwaring, a witness examined upon the executor's plea. The allegation now tendered to the Court is exceptive to the testimony of the same witness, who is charged to have deposed falsely in his answers to the 23d interrogatory. (*a*)

[140] The instructions of which probate was granted, as containing the deceased's last will, bear date on the 21st of April, 1812. The drift of the adverse allegation is, that the deceased, at this period, was of unsound mind. It pleads in the 6th article,

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(*a*) That interrogatory was as follows:—

Let Edward Manwaring be asked, Did not you, some years ago, and when, live in the capacity of waiter at the Jamaica Coffee-house, kept by Mr. Grubb? Were you not discharged by the said Mr. Grubb, in consequence of his having detected you in the fact of stealing the wine from his cellar, or in consequence of his having accused you of so doing? Did you not afterwards obtain a situation as waiter at the Virginia Coffee-house, in Cornhill, kept by Mr. Strout? Were you not living in such situation at the period of the death of the deceased in this cause? For what reason were you discharged from such situation? Did you not, at or about the time when you were so discharged therefrom, offer for sale, or to pledge to ——— Underhill, who resided in , some table cloths? Did not the said Underhill retain them, and carry them to Mr. Strout? Did you not, after you had been discharged from the Virginia Coffee-house, make proposals in the way of marriage to ——— Royle, who is a pastry-cook, and who resides near the Town Hall in the borough of Southwark? Was not such intended marriage broken off in consequence of impropriety of conduct on your part towards the said Royle? Did not the said Royle, in consequence of such your conduct, cause you to be arrested and imprisoned in the Fleet Prison How long did you remain in such prison, and by what means were you liberated therefrom? By what means did you procure a livelihood after you had procured your release from such prison? Were you not soon, and how long afterwards, again imprisoned at the instance of the parish officers of some and what parish, for the expences occasioned by two natural children of yours, whom you were unable to maintain, or for some other reason, and what? When and by what means did you obtain your release from such imprisonment? Let the witness be reminded of the pains and penalties of perjury, and be further asked—Upon your oath have you not frequently, since your last liberation from prison, solicited and received alms? Have you not even received halfpence given to you in the way of charity?

that "the deceased having, in the beginning of the month of April, 1812, been taken ill of the sickness whereof he died, continued daily to get worse, and was, **[141]** during the latter part thereof, very frequently in a state of delirium—that, on the 19th of April, he was removed from the room which he had till that time occupied, and which was on the first floor of the house in which he resided, to a room on the second floor, in which room he continued to remain till his death—that from the period of such the removal of the deceased into the room on the second floor until his death, he was, from the violence of his disorder, in a state of almost constant delirium, which rendered it, very frequently, necessary for two persons to hold him—that, during the said period, the violence of his delirium occasionally abated for a short period, but his mind was so much weakened and affected that he remained, in such intervals, totally incapable of knowing or understanding what he said or did, or what was said or done in his presence, and was rendered incapable of recognizing those about him; and, during such intervals, he was constantly subject to delusion and mental derangement, and was of unsound mind, memory, and understanding." And the next, the 7th, article recites, that part of the executor's plea, which alleges the factum, &c. of the instructions on the 21st of April, 1812, which it contradicts, and pleads that "the deceased was not, at the time the instructions bear date, nor at the time the same may have been drawn up and reduced into writing, of sound or disposing mind, memory, and understanding; nor did he, at any time, give verbal, or other, instructions, or directions for the drawing up of the same—that if the pretended instructions were, in fact, ever read over to the deceased, he did not know or understand the contents thereof—and that he did not set and subscribe his name thereto in testimony of any good **[142]** liking or approbation of the same; nor did he, at the time the instructions were drawn up, or at the time the same bear date, know or understand what he said or did, or what was said or done in his presence, neither was he capable of giving instructions or directions for, or of making or executing, a will, or of doing any other serious or rational act, of that or the like nature, requiring thought, judgment, and reflection—that the deceased was, during the whole of the 21st of April, either labouring under violent attacks of delirium, or, in the intervals thereof, in a state of entire mental debility and derangement—so that he was not, during any part of the same, capable of entering into, or holding any rational conversation whatever." The main issue, therefore, between the parties in the cause obviously is the deceased's testamentary capacity on Tuesday, the 21st of April, the day on which the instructions were taken.

The article of the allegation, propounding the will, to which the witness Manwaring was designed, pleads, in effect, that on the day following that on which the instructions were taken, being Wednesday, the 22d of April, he, Manwaring, called upon the deceased, with whom he continued for about half an hour: that the deceased was then of sound mind; and that, in answer to a question put to him by Manwaring, he distinctly recognized the instructions given for his will on the twenty-first.

Now, whether the evidence taken upon this article of the plea, as to what passed on the 22d of April, is material, or the contrary, depends on the sufficiency, or insufficiency, of the evidence as to the deceased's capacity on the preceding day. I think it not improbable that it is quite immaterial. No **[143]** fewer than nine other witnesses have been examined upon the plea—one of whom is vouched as having been actually present when the instructions were taken; and several are vouched as having seen, and conversed with, the deceased in the course of that, and upon subsequent days. It may possibly be that their evidence renders the case, in favour of these instructions, too clear to require the subsidiary aid of recognitions in support of it: on the contrary, evidence of subsequent recognitions may be most material to the decision of the cause—should the evidence, that is, of the deceased's capacity, at the time when the instructions were taken, leave it questionable how far, resting upon such proof alone, they were entitled to probate. Under these circumstances I am disposed neither to reject, nor to admit, the allegation, but to suspend it till the hearing of the cause. If it should appear to be essential that the question of this witness Manwaring's credibility should be gone into, the Court will then rescind the conclusion of the cause, and suffer evidence to be taken on the allegation now offered. But if the Court can satisfy itself, either one way or the other, without going into further evidence as to the credit due to this witness, from the other proofs in the cause, it will be best for all parties that it should be finally dispensed with. I am the less disposed to the present admission of this allegation, as the general character of the witness has already been

excepted to—and although I by no means lay down that the particular testimony of a witness may not be excepted to after an exception taken to his general character, yet I certainly recollect no instance of this double exception to one and the same witness. I may also **[144]** observe that the interrogatory, in answer to which the witness is charged to have deposed falsely, has been merely put in order to furnish a test of the credit due to him generally; and that it has no relevancy whatever to the question at issue between the parties in this cause.

RITCHIE *v.* REES AND REES. Prerogative Court, Easter Term, 3rd Session, 1822.—An inventory and account may be dispensed with, if not applied for till after so long a period that, in conjunction with circumstances, it affords a reasonable presumption of the estate's having been fully administered.

Richard Wall died some time in the year 1777. In the month of November in that year administration of the goods of the deceased (with the will annexed) was granted to Richard Rees, a creditor, upon the renunciation of Martha Wall, widow of the deceased, his sole executrix and universal legatee. Martha Wall survived her husband Richard Wall only a few weeks, and died intestate, leaving two children, a son John, and a daughter Martha. John Wall died in the year 1815, having first made his will, and appointed his wife, Mabell Wall, his universal legatee, but no executor. Mabell Wall died in the year 1819, without having taken probate of her husband's will, and appointed Archibald Ritchie her sole executor. Ritchie took probate of the will of Mabell Wall; and, subsequently, obtained letters of administration (with the will annexed) of the goods of John Wall; as also of the goods of Martha Wall, mother of John Wall, and universal legatee of the original testator. Martha Kell (formerly Wall), daughter of Richard and Martha Wall, and sister of John, was still living.

[145] In the month of January in the present year (1822) a decree issued, under seal of the Court, at the suit of Archibald Ritchie, calling upon Richard and Robert Rees, the sons and executors of Richard Rees, who died in the year 1807, to exhibit on oath an inventory and account of the effects of Richard Wall, deceased.

To this decree an appearance was given for the parties cited under protest. It was objected on their parts "that upwards of forty-four years had elapsed since the original grant of administration, with the will annexed, of the effects of Richard Wall, deceased, to their father, Richard Rees:" that "fifteen years had elapsed since the death of the said Richard Rees;" that "John Wall, as a representative of whom the said Archibald Ritchie called for an inventory and account, had lived till within the last seven years without proceeding in that behalf;" and that "Martha Kell was then living, and neither had taken, nor was about to take, any measures to compel such inventory and account to be exhibited." And it was submitted, for the parties cited, that "by reason of the premises, Archibald Ritchie, at whose promotion the citation was taken out, was not entitled to call upon them to the effect of the said decree." On the other side it was alleged that "Ritchie, the party proceeding, was also the legal personal representative of the universal legatee of the original testator;" and that the parties cited, "as the executors named in the will of Richard Rees, whilst living, the administrator (with the will annexed) of the goods of the said Richard Wall, deceased, were bound to exhibit an inventory of the personal estate and effects of the **[146]** deceased, and to render an account of the administration thereof, to the best of their knowledge and belief, when lawfully called upon so to do;" and that, "by reason of no inventory or account thereof having been thentofore rendered, they were lawfully called upon in this respect by the party proceeding."

Judgment—Sir John Nicholl. The persons from whom this inventory and account are prayed are the representatives of a creditor administrator (with the will annexed) of the original testator: the person who calls for it is the representative of his widow and universal legatee. He also, as executor of the widow, and universal legatee (there being no executor named in his will) of John Wall, one of the two natural and lawful children of the widow and universal legatee of the original testator, she having died intestate, is interested in a moiety of the surplus, if any, of the original testator's estate; the other moiety belonging to the other of these two natural and lawful children, namely, a daughter, Martha Kell (formerly Wall), who is still living.

The letters of administration in this case were granted to a creditor forty-five years ago; and the creditor to whom they were granted survived the grant thirty years,

and has been dead fifteen, without, as it should seem, any demand of this nature having been made, either upon him, whilst living, or upon his representatives, since his decease. Now, although no statute or rule of positive law, with which I am acquainted, has fixed any time certain, within which an inventory and account must be sued; still reason and justice prescribe some limitation to **[147]** calls of this sort, almost necessarily. If, therefore, this lapse of nearly half a century is not pleadable in bar to the present demand, still it may operate as a bar; provided, that is, it can be taken, in conjunction with circumstances, to afford a reasonably strong presumption that the estate has been fully administered and disposed of; in which case I shall feel no hesitation in dismissing the parties from the effect of this citation.

What, then, are the opposite probabilities as to a plene administravit disclosed upon the face of the present petition? In the first place, the renunciation of the widow and universal legatee raises a presumption that the estate was insolvent; in which case it must be fully administered, quoad this party at least, for he can have no interest, but in the event of a surplus. And this presumption is fortified by the time that has elapsed without any account prayed; and by the circumstance of Mrs. Kell, who is entitled to one moiety of the surplus, if any, of the first testator's estate, still being no party even to this proceeding.

On the other hand, as against the first inference, it may fairly be urged that the widow might be cajoled into suffering the creditor to take administration, by promises of a larger surplus, after payment of the debts, in the event of the estate being left at his disposal—a circumstance not improbable from her sex and condition. She, it appears, survived the deceased only a few weeks; so that she, at least, had no opportunity of taking any further steps in the case. The parties entitled to the surplus, if any, after her death were at that time minors; the one under fourteen and the other under seven years **[148]** of age. As minors, and in indigent circumstances, it was little to be expected that they should compel the administrator to account for the deceased's effects: and when they attained respectively their majorities the whole was a bye-gone transaction, and one which probably in their opinion it was too late attempting to investigate. For the condition of these parties, and their limited means of obtaining advice upon a subject of this nature, are circumstances not to be lost sight of, in estimating the presumptions and probabilities in this case, on the one side and on the other. It is sworn, too, by Ritchie that "Mabell Wall did several times call upon Richard and Robert Rees, the parties cited, relative to the affairs of the said Richard Wall, and that Robert Rees appointed a time for this appearer (Ritchie) to call upon him, with her; and upon the appearer afterwards calling upon him, he said he had re-considered the matter, and should not give him any information relative thereto." All this very considerably repels the presumption of a full administration, arising from the non-claim of the several parties successively entitled to any surplus.

But, as with respect to the acquiescence of Kell, a circumstance is alleged, which not only furnishes a directly contrary inference, but is absolutely conclusive to the merits of the petition. For it is sworn by Ritchie that "he hath been informed, and verily believes, the said Martha Kell or her husband in her right is now in possession of two houses, situate in Leather Lane, Holborn, in the county of Middlesex, which were a part of the estate of the said Richard Wall, deceased, or were purchased with monies arising therefrom."

[149] Now if this be so, it is conclusive, I repeat, on the merits of the case. For it not only accounts for Kell's non-appearance, but is proof of a surplus in the hands of the administrator or his representatives. For if there were no surplus, she could be entitled to nothing: if there were a surplus, she was entitled to only a moiety; and the other moiety should have been paid to her brother, or his representatives; which as it is not pretended to have been by the representatives of the administrator, I must presume it to be assets of the original testator in their hands. At the same time this statement of Kell's possession of "houses in Leather Lane, which were part of or purchased with monies arising from the deceased's estate," appearing, for the first time in Ritchie's affidavit, without any allusion to it in the act of Court, I shall certainly afford the parties cited an opportunity of explaining or denying that statement in a further affidavit; and I direct this matter to stand over, in order to afford them that opportunity. And as some doubts have been suggested—1. Whether the party proceeding is entitled to call for an inventory and account, not having first taken

a de bonis grant of the effects of the original testator; 2. Whether the parties proceeded against are liable so to be called upon; as the mere executors of a deceased administrator, and, therefore, not the personal representatives of the original testator; I shall reserve my opinion upon these points till the whole question comes to be re-considered.

In the mean time the parties cited will do well to consider the propriety, on their parts, of complying with this citation, in the best mode in which they are able, even if they are not bound to comply with [150] it in strictness of law. The Court, in that case, would make every allowance, as to the sort of inventory exhibited—a matter, I apprehend, quite in its discretion. That these parties are not without the means of rendering an account of some kind, I infer from their own affidavit, which states, that "their father, Richard Rees, duly administered the personal estate of the deceased, and fully completed the administration thereof, within two years and a half after the death of the said deceased." The production of the documents (for such there must be) upon which their affidavit is founded would probably be satisfactory, to the Court at least, if not to the party at whose promotion this citation is taken out, and, consequently, might set this question at rest.

The affidavit of the parties cited is not quite satisfactory to my mind in several respects. It is extremely vague, relying much on time and general presumptions, with little or nothing in the shape of specific averment. It does not even aver, specifically, that the estate was insolvent; but merely that "it was fully administered," within a certain time. But if the estate were solvent, which as I have just said is not, specifically, denied, it is clear that it is not "fully administered" at the present day. For there is no suggestion even of the distribution of any surplus to the representatives of the widow and universal legatee, which was essential to the complete administration of the estate, in any other event than that of its insolvency.

[151] On a subsequent day two further affidavits were tendered from the parties cited—one, of the parties themselves—the other, of Martha Kell. The first of these stated, among other things, that "from certain books and papers of Richard Rees, their father, in their possession, they the appearers (Richard and Robert Rees) were enabled to swear that the said Richard Rees fully completed the administration of the effects of Richard Wall, deceased, within two years and a half of his death; and also, that the said Richard Rees satisfied debts due from the estate of the said deceased to a greater amount than the value of his, the said deceased's, estate. And they further made oath that the said Richard Wall, deceased, was not, at his death, so far as they know or believe, possessed of, or entitled to, any house or houses in Leather Lane, Holborn, in the county of Middlesex; and they disbelieve that any such were ever afterwards purchased with monies arising from his estate." The appearers further made oath, in substance, that "they had always manifested a willingness to give every information in their power relative to the affairs of the deceased, to the parties interested; that "they had never made, and subsequently broken, any appointment with Mabell Wall, or Archibald Ritchie, as for the purpose of giving such information;" and that "since the death of Mabell Wall, the said Archibald Ritchie had made no application to them for information relative to the said deceased's estate, otherwise than by the citation issued in this cause."

The affidavit of Martha Kell stated that "she was intimately acquainted with Richard Rees' administrator, with the will annexed, of the goods of [152] her late father, Richard Wall, the party deceased in this cause, and was then, and always had been, perfectly convinced that, as such administrator, he fully and duly administered the said estate and effects, which she verily believes were inadequate to the discharge of the said deceased's debts; and she further made oath that neither she, the appearer, nor her husband, then or ever were in possession of any house whatever, which formed a part of the estate of the said Richard Wall, deceased, or was purchased with monies arising therefrom; and that the only houses which she, the appearer, or her husband, possess in Leather Lane, Holborn, in the county of Middlesex, are two houses which were devised to the appearer, under the will of her uncle, Edward Pryce, late of Red Lion Street, aforesaid, which houses were purchased by the said Edward Pryce, at a public auction, in the year 1780."

Judgment—The further affidavits now exhibited, coupled with the other circumstances of the case, satisfy my mind that this estate has been fully administered.

Consequently, I am disposed to dismiss the parties cited, but without costs; as no inventory or account in any sort, of the administration of the deceased's effects, had been exhibited or rendered at the time of the issuing of this citation. The administrator was bound to exhibit an inventory, even though uncalled for: at least, he should have preserved an account of his administration, with sufficient vouchers; or have obtained releases from the parties entitled to any surplus of the effects, on their attaining, respectively, their majorities. The probability is, that by taking either of these precautions, he would **[153]** have saved his representatives the trouble and expence of this proceeding.

On the reserved points of the case, I am of opinion, 1, that the party proceeding, having an interest in the effects, was entitled to call for an inventory and account without first taking a de bonis grant of the effects of the original testator. The very object of the proceeding was to discover whether there were any effects to which a de bonis grant could apply. I am also of opinion, 2dly, that the parties cited, as the representatives of the deceased administrator, although not, at the same time, those of the first testator, were liable to be called upon for such inventory and account; upon a reasonable presumption being raised that any part of the effects of the first testator had travelled into their hands.

[154] BEATY *v.* BEATY. Prerogative Court, Trinity Term, 1822.—The presumption of law is against a testamentary paper, with an attestation clause, not subscribed by witnesses. It is a slight presumption; but must be rebutted by some extrinsic circumstances, in order to the paper being pronounced for.

Francis Beaty died on the 21st of March, 1822, leaving the following testamentary paper:—

"I, Francis Beaty, purser of the Royal Navy, being of sound mind, and in perfect health, do make this my last will and testament, hereby revoking all former wills by me made.

"I give and bequeath unto my beloved wife, Catherine Beaty, all my furniture, plate, books, linen, and all other property whatever in my house, No. 19, Dorset Street, together with the lease and fixtures thereof. I give also unto my dearly beloved daughter Catherine Beaty, one thousand pounds in the 3 per cent. consols; my wife Catherine Beaty to have the interest of it for her life, unless she wishes to give it up to her sooner; and I give to my wife Catherine as aforesaid, all other monies I may have in the stocks, and all and every sum or sums of money that may be in the hands of Mr. William M'Inerheny, my agent, or that may be due or owing to me by government, and every other property I may be possessed of at my decease, I give unto my wife as aforesaid; and I do hereby appoint my wife, Catherine Beaty, sole executrix of this my last will and testament. In witness whereof **[155]** I have hereunto set my hand and seal this sixth day of June, in the year of our Lord 1820, and in the first year of the reign of his Majesty King George the Fourth, over Great Britain, &c.

"FRA^{s}. BEATY.

"Signed, sealed and delivered in the presence of"

"It is my particular wish and request, that I may be buried as privately as possible, at seven o'clock in the morning, and without any more expence than is absolutely necessary. "FRA^{s}. BEATY,

"June 6th, 1820."

"(*a*) Having given my dear boys a liberal education, and done what I could for them during my life, I now leave them with my blessing, to the care of their mother, and have not a doubt but she will (with the kind assistance of her friends) get them provided for and taken care of. May God bless you all. "FRA^{s}. BEATY,

"6th June, 1820."

The above testamentary paper was propounded in an allegation tendered on the part of his widow and relict, upon the admissibility of which the present question arose.

The allegation pleaded in substance,

1. That the deceased died on the 21st of March, 1822, at the age of sixty-eight

(*a*) This second memorandum was written upon a separate paper, but was found folded up with the other, in the deceased's writing-desk, after his decease.

years, leaving be-[156]-hind him a widow and four children—three sons and one daughter.

2. The second article pleaded the factum of the will, on the 6th day of June, 1820.

3. The third pleaded that, subsequent to the making of the said will, to wit, in the months of January, February, March, and July, 1821, the deceased sold out the whole of the 1000l. 3 per cent. stock of which he stood possessed when he made the said will, and which he had given, by the said will, to his daughter, Catherine Beaty, after his wife's decease; and that the sole property of which he died possessed, consisted of the lease of a house in Dorset Street, his household furniture, and sundry articles of plate, not amounting in value, altogether, to more than 500l. or 600l.

4. The fourth article pleaded that "the said Francis Beaty, the deceased, sometime in or about the year 1819, having made a new will, requested Matilda James, a young lady who was on a visit at his house at Rochester, in the county of Kent, where he then resided, to witness his said will, to which the said Matilda James assented: that thereupon the said deceased produced a paper which he said was his will, and, at the same time, observed to her that it had been made a long while, and that he only waited for some one to witness it, or words to that effect: that the said will having been previously signed by the said deceased, he then, in the presence of the said Matilda James, retraced his signature thereto with a dry pen; and the said Matilda James then subscribed her name as a witness thereto: that about eight months before the said deceased's death she, the said Matilda James, being [157] again on a visit at the house of the said deceased in Dorset Street, in the parish of St. Mary-le-bone, to which place he had then removed, he, the said deceased, in the course of conversation with her, and alluding to the will which she had witnessed for him at Rochester, in manner as before pleaded, then observed to her that he had 'destroyed that will and made another will;' and at the same time remarked that 'he usually made a fresh will whenever an alteration took place in his property,' or to that effect: that, on another occasion, happening about the middle of January, 1822, and being only a week before the deceased was confined to his bed by the illness of which he afterwards died, the said Matilda James, having called at the said deceased's house, she found him, the said deceased, writing at his desk, in the parlour, where his wife and family were also sitting, and while the said Matilda James was engaged in conversing with the wife of the said deceased, he, the said deceased, occasionally joined in the conversation; and, alluding to the aforesaid will, which the said Matilda James had witnessed for him at Rochester, again remarked that he had destroyed that will, that the said Matilda James thereupon replied that he had better make another will, to which the deceased replied that 'he had made another will;' or then expressed himself in words to that, or the like, effect."

5 and 6. The fifth and sixth articles of the allegation pleaded the finding of the instrument in the deceased's writing-desk, on the Sunday following his decease, in the same plight and condition that still belonged to it; and that the whole body, series, and contents of the said will, &c. and also the [158] several subscriptions thereto, were of the deceased's own proper hand-writing.

Judgment—Sir John Nicholl. The paper propounded in this allegation would be clearly entitled to probate, but for the attestation clause. It is all in the deceased's hand-writing; it is signed and dated; it appoints an executrix; it is a complete disposition of personal property; and the deceased had no real estate to suggest to him the necessity of executing his will in the presence of witnesses. But if a testamentary paper be imperfect, either in itself, or in the writer's apprehension of it, it can only be entitled to probate, on proof being furnished of his having been prevented by what is technically called the "act of God," from completing it. As, therefore, the natural inference to be drawn from an attestation clause at the foot of a testamentary paper is, that the writer meant to execute it in the presence of witnesses, and that it was incomplete, in his apprehension of it, till that operation was performed—the presumption of law is against a testamentary paper, with an attestation clause not subscribed by witnesses; where the testator is not proved, as he is not suggested even in the present case, to have been prevented by any "act of God" from going on to complete it, had he so intended. The presumption against an instrument, so circumstanced, I admit to be a slight one, where the instrument, like that before the Court, is perfect in all other respects. Slight as it is, however, it must be rebutted by some extrinsic evidence of the testator intending the instrument to operate in its

subsisting state; before it can be entitled to **[159]** probate,(*a*) consistently with those established principles to which it is the duty of the Court to adhere.

[160] Now the circumstances which are pleaded in this allegation are so far from repelling the legal presumption against the paper propounded, that they go far, in my mind, to fortify and confirm it. For, in the first place, it is pleaded that the deceased, on the occasion of a former will which he had made and signed "a long while before," retraced his signature, with a dry pen, in the presence of a person who subscribed, by his desire, her name as a witness; apparently as if considering the instrument incomplete till that precaution was taken. This, to say the least, does not lessen the probability of his intending to perform a similar operation upon this **[161]** instrument; and that it was incomplete, in his view of the subject, till that operation was performed.

But it is pleaded, further, to have been the deceased's habit, according to his own

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(*a*) This was the doctrine of Courts of Probate respecting testamentary papers which, though furnished with clauses of attestation, were, in fact, unattested, from an early period, till the decision of the Court of Delegates in the case of *Cobbold and Baas* (29th Nov., 1781).

The deceased, in that case, James Savage, had given instructions to an attorney to prepare a will. The attorney prepared it with several quæres and abbreviations, and the deceased made several alterations and interlineations in the draft. He afterwards, with his own hand, wrote the said will over fair from the draft, adding a bequest of the residue; and concluded as follows:—

"In witness whereof I have to this my last will and testament, contained in three sheets of paper, to the first two whereof I have set my hand, and the last my hand and seal, this in the 16th year of the reign of our Sovereign George 3rd, &c. A.D. 1777.—Jam[s] Savage.—Signed, sealed, published, declared, and delivered by the testator James Savage, as and for his last will and testament, in the presence of us, who have, at his request, and in presence of each other, set our names as witnesses hereto."

The deceased had subscribed his name to each sheet, and affixed his seal to the last sheet. But the clause of attestation not being subscribed by witnesses, it was considered imperfect for that reason by Dr. Calvert, the then Judge of the Prerogative; and he admitted parol evidence, upon which he set aside the paper. On appeal, however, the Delegates, Sir W. Henry Ashhurst, Sir Beaumont Hotham, and Dr. Macham, were of opinion that, it being a will both of real and personal property, it was, reddendo singula singulis, a perfect disposition of personal estate, and therefore a good will. Accordingly they rejected parol evidence against it, and reversed the sentence of the Court of Prerogative. [See 4 Ves. 200, in notis.]

This judgment of the Court of Delegates in the case of *Cobbold and Baas* may be considered to have governed, for some time, Courts of Probate with respect to testamentary papers so circumstanced, averse as they were to consider it settled law. But the authority of that case was held to be so shaken, not to say overturned, by inference and deduction from the decision of the Court of Review * (20th Nov., 1799), in the case of *Matthews and Warner*,† that Courts of Probate reverted, without scruple, to the old doctrine upon this matter, which has been uniformly adhered to in subsequent instances: so that (and the editor considers it important, from the publicity which has been given to that case, to be rightly understood) the judgment of the Court of Delegates in the case of *Cobbold and Baas* is now held not to be law—the principle which governs this class of cases being that stated in the text.

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* Consisting of Beilby, Lord Bishop of London; Lloyd, Lord Kenyon, Lord Chief Justice of his Majesty's Court of King's Bench; Sir Archibald Macdonald, Lord Chief Baron of his Majesty's Court of Exchequer; Sir William Scott, Knight, Judge of the High Court of Admiralty; Sir Giles Rooke, Knight, one of the justices of his Majesty's Court of Common Pleas; Sir Soulden Lawrence, Knight, one of the justices of his Majesty's Court of King's Bench; and James Henry Arnold and Christopher Robinson, Doctors of Law.

† See the argument upon the application for a "Commission of Review," in the case of *Matthews and Warner*, 4 Ves. 186, 211. It may be proper to add that the Court of Review, in that case, reversed the two concurrent sentences of the Prerogative Court and the Court of Delegates.

profession, "to make a new will after every change in his property." Why, this being so, there is a circumstance in the case which lays the strongest ground for concluding this paper designedly abandoned. For it is pleaded that the deceased sold out, at different times in the year 1821, the thousand pounds consols which he possessed at the date of it, and had bequeathed by it, after the death of his wife, to his daughter. The probability therefore is, that he meditated a new will, and had abandoned this instrument; as well from his habit on similar occasions, as from the circumstance of its object being wholly defeated, and its plan wholly deranged, by the sale of his stock. By this paper the deceased's whole property stands bequeathed to the wife; the daughter will take nothing. It is perfectly true that the whole is but little; and that his sons, very contrary possibly to the deceased's intentions, will become entitled to share in that little in the event of his intestacy. But these are circumstances which, in no degree, alter or detract from the principle that governs the case—a principle which it is the first duty of the Court to adhere to, uninfluenced by any such considerations.

The only circumstance which, in my judgment, can have a tendency to repel the legal presumption against the paper is the deceased's declaration to Miss James, pleaded in the 4th article, that "he had destroyed his former will, and had made a new one." But the mere vague declarations of testa-**[162]**-tors, that "they have made" their wills, are not always to be implicitly relied on; and can never, standing singly, supply proof of due execution, or, consequently, of what is to be taken in lieu of it. In common parlance, a man may well say, and possibly often does, that "he has made" a will, when he has written a testamentary paper, however incomplete or unfinished that paper may be. In the present case, at all events, I cannot accept the declaration pleaded as sufficient to shew that the deceased intended this instrument to operate; when both the presumption in law, and the probability from the facts pleaded are, that he abandoned it.

Allegation rejected.

SAPH *v.* ATKINSON AND WESTCOTT. Prerogative Court, Trinity Term, 2nd Session, 1822.—If a will is before the Court, the validity of which is admitted, the Court will pronounce for it in preference to an alleged subsequent will, of the genuineness of which it entertains serious doubts.—The principles what upon which Courts of Probate proceed, where the inquiry is whether an asserted will was, or was not, the act of an alleged testator.

[Referred to, *Robson* v. *Rocke*, 1824, 2 Add. 90.]

Judgment—Sir John Nicholl. The present question respects the validity of an instrument, set up as the will of William Harcourt, late of the city of New Sarum, the party deceased in the cause, who died on the 22d of March, 1820. This instrument, which purports to bear date on the 4th of June, 1819, is propounded on the part of Sarah Susannah Saph, whom it constitutes the deceased's sole executrix. It is opposed by Mr. Atkinson and Mr. Westcott, the deceased's executors, **[163]** under a will dated the 24th of October, 1818, the genuineness of which is admitted on all hands.

The validity of the contested will in the present cause (in which, by the way, no fewer than seventy witnesses have been examined to the several allegations admitted upon either side) is not dependent upon the state of the deceased's capacity at the time of its suggested execution, but upon the fact of execution itself; the question being, whether the deceased ever executed it at all. For the case set up by the executors of the former will is that the alleged latter will was not subscribed by, and is not the act of, the alleged testator. The contrary to this is, of course, advanced by the party propounding the instrument, upon whom therefore, as asserting an affirmative, the burthen of proof must be taken to rest. She it is who is bound to satisfy the conscience of the Court that the contested instrument was the supposed testator's own act; the law does not impose upon Mr. Atkinson and Mr. Westcott the burthen of furnishing proof that it was not.

Now, where the inquiry is, whether an asserted will was, or was not, executed by an alleged testator, all such collateral circumstances may be pleaded and proved on either side, as have a tendency to shew, on the one hand, the probability, and on the other, the improbability, that it should have been so executed. I allude to such circumstances as the place in which the alleged will was found—the parties through

whose agency it was prepared—its conformity, or the contrary, with the deceased's avowed or presumed testamentary intentions; and so on. A variety of such circumstances are actually pleaded to this intent, on either side, in the present cause; and to the evi-**[164]**-dence furnished upon the principal of these the Court will direct its attention, in the first instance, before it proceeds to consider the evidence more immediately applicable to the fact of execution, the main point in issue.

And, first, what is the evidence as to the circumstances connected with the finding of this instrument? Now, the circumstances under which a will is found may, as we all know, tend very materially to its authentication. If, for instance, it is found locked up in repositories, to which the deceased only had access, and is produced from such by indifferent and disinterested parties, these are circumstances which, as tending to connect the will with the testator, are strongly confirmatory of its genuineness and authenticity. The disputed will, in this cause, has no advantage of that description: its first production, after the deceased's death, is by Mrs. Saph, the sole executrix, and party principally benefited under it—from where remains to be answered. But the testator's former will (from which this latter was avowedly drawn up by her son, Mr. John Saph) is admitted not to have been in the deceased's possession at the time of his death; but at Mrs. Saph's house, and in Mr. John Saph's custody. Something might be observed as to what passed when inquiry was first made for that former will. Mr. John Saph's answer, to say the least, was by no means explicit. That answer impressed the inquirer with a notion that he asserted the instrument to be destroyed. He explains himself as having meant to assert, not that the instrument itself was destroyed, but that it was revoked, or that its effect was annulled. After admitting, however, the exist-**[165]**-ence of the instrument, he was somewhat reluctant to produce it; and, at last, only did so in compliance with the recommendation of his solicitor, Mr. Dew. Something might also be said as to the mala fides of the Saphs, in endeavouring to snap a probate, as it is termed, in breach of their engagement to take no step of that nature till after the funeral of the deceased. Both these last, however, are mere out-lying circumstances, and will go little to impeach the credit of this transaction, unless it shall turn out that they are connected with others of the same colour and complexion. At the same time I cannot fail to observe that here, in the very outset of this inquiry, I encounter somewhat of deviation, on the part of those who set up this instrument, from that straight-forward path in which truth and fairness are accustomed to proceed. But,

Secondly, to consider the parties agent in this transaction, namely, Mrs. Saph and her family. For the Court is under no difficulty, in the present case, as to who are the fabricators of this instrument, if it be fabricated; they can be no other than the identical parties, who are vouched to the factum of the instrument as a genuine one. Now, had these parties any inducement to attempt, and did they possess any means to effect, the fabrication of an instrument of this description? As to inducement, there was every inducement of which the nature of the thing is capable; for the will purports to bequeath the intire bulk of the deceased's property to the Saph family. And although the three members of that family, who attest the execution (one of the three being also the writer) of this instrument, take no direct benefit under it, still that circumstance, **[166]** as I shall have occasion presently to observe, leaves the question pretty much where it stood before, as to this matter of inducement. As to the means again, it must be admitted that these parties were in possession of fully sufficient information to get up an instrument of this description; for, to say nothing of their long personal connection with the deceased, his former will, from which this latter is manifestly drawn up, was avowedly in the possession and custody of the Saphs at the time of his death.

That Mrs. Saph was not altogether indifferent about obtaining a will in her favor is obvious from the evidence of Pleyer, who lived in the deceased's service from Michaelmas, 1817, to the summer of 1818. She deposes to having heard Mrs. Saph speak to the deceased about his will one evening before he had the paralytic stroke. "She wished," she said, "he would do something more for her; and he replied that he should not; for he had done enough for her already." She says that "after the said deceased had had the paralytic stroke, Mrs. Saph used often to rub his hands with mustard, and other things, to recover the use of them again; and that, on such occasions, she used to say to him that she wished she could get him the use of his hands again, so that he could write; for she did believe that then he would do

something more for her by his will." Now, the evidence of this witness proves two things; first, that Mrs. Saph was sufficiently alive to her own interests; secondly, she was withheld by no scruples, of delicacy at least, from trying to promote them. Nothing of all this, however, appears to have made any impression upon the de-[167]-ceased; for it is in evidence that he made and executed two subsequent wills, in neither of which he acceded to Mrs. Saph's claims, nor paid the slightest attention to her applications.

Now, if Mrs. Saph was still dissatisfied with the trifling provision, to which only, as I shall presently shew, she stood entitled under the deceased's last (genuine) will, is there any thing, let me inquire, in special, that is, in her station or character, which in any sense negatives the probability of her having been tempted to have recourse to a fabricated one? Mrs. Saph was a married woman living (possibly not through her own fault) separate and apart from her husband, with a large family, and, I presume, in necessitous circumstances; for it seems that, after the discharge of Pleyer, the deceased's last servant, in 1818, she was the deceased's sole attendant, and performed even the menial offices of his house. She is obviously therefore not so elevated as to be above all suspicion of fraud, on the score of wealth or condition. Her character will best disclose itself in the future stages of this inquiry. Is there any thing, again, in the stations or characters of the agents, through whose instrumentality the fraud, if any, was effected, to render this violently improbable? The writer of this will was Mr. John Saph, the son of this Mrs. Saph; and it is attested by him and his brother and sister, strictly a family party. Of these, all that I shall at present say is, that Mr. John Saph's induction into life was through the medium of an attorney's office, which he quitted in consequence of a most disgraceful transaction; and I find no trace in the evidence of his having redeemed his character, at this time, by any part of [168] his subsequent conduct. There is nothing, at least, in his station or character which precludes the probability of fraud. Looking then at the inducement which these parties had to fabricate a will, and at the means which they possessed of fabricating one, especially in connexion with Mrs. Saph's, even avowed, claims upon the deceased's testamentary bounty; I do not mean to say that either her station and character, or those of the writer and attesting witnesses, amount to affirmative proof of this being a fabricated will; but I do say, and I would be understood to mean no more, that there is nothing in these, in special, that is to negative the probability of its being such—nothing to render it either highly incredible or even very unlikely à priori. The instrument propounded, therefore, has indeed the ordinary presumption against fraud in its favor; but that is, strictly, all.

But, thirdly, as to the dispositive part of this will; for, in determining the probability of any will being the act of an alleged testator, the Court is, in all cases, naturally led to consider the disposition made by it. The disposition purported to be made by the will propounded is so important a feature of the present case that the Court will consider it, both generally, and in detail. And the Court, in this case, is not left merely to presume, or conjecture, what the deceased's testamentary intentions might have been—it has the benefit of two prior wills, declaratory of his testamentary intentions, or at least of what these were at a period not much anterior to the date of this instrument, with which to compare the present disposition.

[169] Now, upon a comparison of the deceased's two former testamentary acts with the present instrument in this respect, it will plainly appear that his mind and intention, as to the disposal of his property, had undergone, within a short period, a complete revolution, supposing the present instrument to be, in truth, his will. The two former wills, the one dated in June, the other in October, 1818, are, in substance, as to their dispositive parts, precisely the same. By both, the bulk of the property is bequeathed to Mr. Westcott and his family; some bequests, rather honorary than beneficial, are made to Mr. Atkinson and his family; a considerable sum is devoted to charitable uses. Mr. Atkinson and Mr. Westcott are the trustees and executors in both wills; as the latter of these gentlemen, Mr. Westcott, is the residuary legatee. Mrs. Saph and her family are legatees to more than a trifling amount in neither of the two. By the instrument propounded, these dispositions are nearly reversed—Mrs. Saph and her family are bequeathed the great bulk of the deceased's property; Mr. Westcott and his family are nearly excluded; Mr. Atkinson and his family are wholly so; even the honorary legacies to these last are omitted; so are the charitable bequests; Mr. Atkinson and Mr. Westcott are no longer executors or even trustees; Mrs. Saph, who

is also the residuary legatee, is the sole executrix. All this implies a complete revolution of testamentary mind and intention, in order to estimate the probability of which it is necessary to see whether it can be fairly accounted for by extrinsic circumstances.

[170] And here, in the first place, it is not to be accounted for by any caprice or fickleness of the deceased in this respect that can be collected, at least, from the variations between the two instruments of June and October, 1818. They, on the contrary, go to shew the very reverse; for they are trifling in themselves, and satisfactorily explained. By the will of June, a house in Green Croft Street, after a life interest to one Webb and his wife, is given in remainder, together with a legacy of 10l., to a Mrs. Heyley; and a Mrs. Jeboult is bequeathed 100l. In the course of that summer, however, this Mrs. Heyley appears to have set up a demand against the deceased, as entitled to some property under the will of his late wife; which it appears that the deceased borrowed money (in part of Mr. Atkinson) to discharge. In return the deceased, by the will of October, withdraws his testamentary bounty from Mrs. Heyley altogether, and bequeaths the freehold interest, before devised to her, to Mrs. Jeboult, in lieu of her pecuniary legacy. It seems too that there was an erroneous description in the former will of a joint note of hand, given by the deceased and Mr. Westcott to Mr. Atkinson, it being described in that will as due to Mr. Gray—in the latter will that error is corrected, and it is described to be due (as the fact was) to Mr. Atkinson. These are the sole and the trifling variations between the two instruments; by the latter of which, the bulk of the disposition contained in the former is ratified and confirmed: and the two, together, furnish evidence of fixed testamentary intention infinitely beyond that which could be supplied by any single testamentary act. Any single testamentary act might be the result of sudden whim, **[171]** or temporary impression; but this confirmed act—the will of June, thus ratified by that of October—establishes, on a solid foundation, the deceased's then fixed testamentary intentions, and renders a sudden change in these, as to the bulk and general tenor of the disposition, highly improbable, unless most satisfactorily accounted for.

Nor to pass, for an instant, from the matter to the form, is any inference, in favour of the last will propounded, derived from comparing it in this respect, any more than in the former, with the two prior wills. A particular investigation of the mode and manner in which the contested will is said to have been drawn up and executed, belongs to another place. It will be sufficient, in this place, to observe that these were highly informal, as contrasted with those adopted in the framing and execution of both the other two. In respect of both these, the deceased availed himself of the agency of his confidential solicitor, Mr. Wilmot, who had acted for him, as such, for twenty years before; who had been employed to draw up and attest the will of October, as well as that of June, 1818, though the former varied from the latter only in those trifling particulars to which I have just adverted; who had also prepared and attested the will of his deceased wife in 1808; and who was actually resorted to by the testator himself, upon other business, in August, 1819, subsequent, that is, to the date of the will propounded on the part of Mrs. Saph.

But to proceed to consider the probability of this change in the deceased's testamentary intentions, the first, indeed I may say the only, previous intimation of which is contained in the deposition of **[172]** Mr. John Saph. For to no other human being can the deceased be shewn to have expressed himself, as dissatisfied with his former testamentary arrangements, made and confirmed so recently, or as intending any alteration in these, than to Mr. John Saph. True it is, indeed, that Mrs. Saph has pleaded that the deceased, intending to revoke his will of October, 1818, and being dissatisfied with his solicitor, Mr. Thomas Wilmot, who had drawn it up, conversed with John Petty, clerk to the said Thomas Wilmot, thereon, and asked him, 'what he would charge for making a new will?'" But when Mr. John Petty, the person so vouched, comes to be examined upon this allegation, he positively and explicitly denies the whole transaction; or that the deceased ever made any such application to, or enquiries of, him. He says that he was a subscribed witness to the deceased's will of June, 1818, by mere accident, being at that time, not a regular clerk, but a sort of extra writer, in the office of Mr. Wilmot during the bustle of a general election only; and that, to the best of his knowledge and belief, he never was in the deceased's company or society upon any other occasion. This total negation of the fact, so alleged by the witness Petty, to say the least, has no tendency to dispel the clouds of suspicion that hang upon Mrs. Saph's case.

Before I proceed to any ulterior consideration of the probability of those alterations it may be advisable to state them somewhat more in detail.

The deceased, however, I should premise, at the period of these transactions, was far advanced in life, nearly, I believe, eighty years of age, but in **[173]** possession of his full mental faculties, as also of tolerable bodily health; for he was walking about, and at market, within a day or two of his death, nine months posterior to the date of this contested will. He was afflicted, indeed, with erysipelas, and with something of paralysis, especially in the hands; which required to be rubbed, as stated in Pleyer's evidence, with mustard, &c. to give him the free use of them. Hence, he was averse to writing, though not totally disabled from it; and Mr. John Saph, who was sometimes employed to receive his rents, occasionally, also, signed receipts for them, in his (the deceased's) name. The deceased was a widower, and without children. His wife died in 1812; having first by her will, which was made in 1808, left the bulk of her property, after the death of her husband, to Messrs. Westcott and Atkinson; so that these gentlemen were her executors and trustees, as well as those of the deceased, under the two prior wills. Mrs. Saph's maiden name was Mundy. The Mundys and Harcourts were somehow related; and the deceased and his wife appear to have been upon friendly terms with the father and mother of Mrs. Saph, though resident at some distance from Salisbury. The deceased's wife had stood godmother to Mrs. Saph; and she and her husband took notice of, and were kind to her, both when a school girl, at Salisbury, and when, after her marriage and separation from her husband, she was left with a large family, in narrow circumstances, in more mature life. With all this, however, Mrs. Saph was no object of Mrs. Harcourt's testamentary bounty. Whatever was her connexion with, and whatever were her claims upon her, she, by her **[174]** will, left her nothing. The deceased, after his wife's death, keeping only one female servant, Mrs. Saph, who lived near, used from that time frequently to be at his house; attended him in particular, in his sicknesses; and no doubt contributed very much to his comfort. On Pleyer's discharge, in 1818, she became his sole attendant. In the previous year, 1817, as well as in 1818, she and her daughter, Ann Saph, had accompanied the deceased to Lymington. The deceased, in return, paid great attention to Mrs. Saph, and was kind to her children, especially to this daughter Ann; occasionally also employing her son Mr. John Saph. The deceased, it is to be observed, however, had returned from Lymington, before the will of October, 1818; and although, in the intervening time between October, 1818, and the date of the new will he had gone to Weymouth, accompanied by Mrs. Saph and her daughter; yet it does not appear that, either on their journey, or during the rest of the interval, there was any marked difference in the sort of intercourse between the deceased and the Saphs, from that which had been going on for, and during, several years prior to the wills of June and October, 1818. And now to state these purported alterations in the deceased's testamentary intentions, as a test of their probability, somewhat more minutely.

The first alteration respects the house in Green Croft Street. This, I have already said, was given by the will of June to Mary Heyley; and, for the reasons stated, to Mrs. Jeboult, by the will of October, in lieu of her pecuniary legacy of 100l. It is now, however, taken from Mrs. Jeboult (no legacy being substituted for it), and is given to a **[175]** Mrs. Crocker, who turns out to be a married daughter of Mrs. Saph, and in no particular favour or habits of intercourse with the deceased, that I can discover. For the probability of this alteration not an argument even has been advanced; except that general one, of the deceased's increased regard for the Saph family, which I shall consider, once for all, presently.

The next alteration is an interchange between the houses given to Mrs. Saph and Mr. Westcott. By the wills of June and October, 1818, the deceased had given a house in Church Street, adjoining that in which he resided, to Mrs. Saph for her life, with remainder to her son and daughter, James and Sarah Saph; and the house in which he resided to Mr. Westcott, with remainder to his son William Westcott, charged with the payment of 100l. due from the testator and Mr. Westcott to Mr. Atkinson on a joint note of hand. These devises are now interchanged; the last mentioned house is devised to Mrs. Saph in lieu of the first; the first mentioned, and with a similar charge, to Mr. Westcott, in lieu of the last. Now it happens that the testator's own house is worth about five times as much as the adjoining one, described merely as a cottage; the life interest of Mr. Westcott in which is actually not worth

the sum charged upon it. Mr. Westcott, at the same time, is excluded from any other benefit or trust under the will; and Mrs. Saph is substituted as the sole executrix and residuary legatee.

In order to account for these alterations, an attempt has been made to set up (still in conjunction with the deceased's great increasing regard for the **[176]** Saphs) something of disaffection towards Mr. Westcott. But to what does the evidence furnished on this head amount? why, merely to this: that the deceased did sometimes observe that Westcott was imprudent, and might have been richer and provided better for his family. Expressions, however, of this sort are not only of little weight in themselves, but being proved to have occurred as well before the wills of June and October, under which he is the principal legatee, as subsequent thereto; they do not confer a shadow of probability on his virtual exclusion under this third will. It is an alteration, I conceive, highly improbable in itself; and in no degree rendered less so by this attempt to account for it by diminished esteem, on the deceased's part, towards the Westcotts.

Nearly the same observations apply to the case of Mr. Atkinson and his family as under the three wills. Under both the former wills this gentleman was an executor and trustee. His daughter and himself had pecuniary legacies, rather complimentary, however, than any objects to them, as matters of property. His sons and himself had pieces of plate, carefully ticketed by the deceased in his lifetime to distinguish them. In this third will all these bequests are omitted, even those of the pieces of plate, so ticketed, as I have described; nay, more, many of the articles themselves, I observe, are not included in Mrs. Saph's declaration, instead of an inventory, upon her oath, furnished in the February of the preceding year; and what has become of them, non constat. The attempt which has been made to shew that Mr. Atkinson was losing ground in the **[177]** deceased's esteem wholly fails. He was a very old friend, both of the deceased himself and his wife; he was executor and trustee of both; he had advanced money to the deceased only recently, to enable him to satisfy the demand of Mrs. Heyley; he held a power of attorney to receive his dividends; and the deceased is proved to have made kind enquiries about him, during his absence in Scotland, after the date of the will propounded, and down to the time of his own death. For the probability of this alteration, therefore, we have still nothing to refer to but the deceased's great regard for the Saphs.

The next alteration is that respecting the disposition of the bank stock. The deceased, by both his former wills, had given and bequeathed "so much of his bank stock as should produce 60l. per annum" to the minister and churchwardens of the parish of St. Edmund, Sarum, to be divided between six poor persons—three poor men and three poor women, with direction that if Mrs. Saph chose to apply as one of these latter she was to have a preference. Any bonus payable on the said bank stock after his decease he bequeathed to Mr. Gray, and the residue (being about 3l. 16s. a year each) to Mr. Gray and the three junior Mr. Atkinsons. Under the will propounded on the Saphs' part all these bequests are swept away: "the produce of 800l. bank stock" is bequeathed to Ann Saph, the daughter, and "the remainder" is given specifically to Mrs. Saph, the mother.

An observation upon the wording of this purported legacy of the bank stock will be more in place in a subsequent stage of this enquiry. Meantime, how **[178]** stands the probability as to the substitution of Mrs. Saph and her daughter, in lieu of the charities? Now it appears that charitable bequests of some sort had been long projected by the deceased. He had long purposed building alms-houses, a purpose, it should seem, not wholly relinquished at the very latest period of his life. Under these circumstances, his abandoning altogether any bequest of the kind is in itself highly improbable.

But, superadded to the improbability that the deceased should have sanctioned any such total abandonment, we have his own positive averments, subsequent to the date of this will, that he had not done so. The witness Nash states that "in conversation with the deceased about the house adjoining his own, then under repair, the deceased said, 'He had had some thoughts of pulling it down and building alms-houses there; but that he had given that up, as building was too fatiguing for him.' The deponent observing, 'He was sorry for it,' the deceased said, 'I have left,' or 'I will leave,' the deponent did not understand which, 'in lieu of it, a weekly allowance to so many poor people.' The deponent said, 'I hope you will not forget it, sir,' to which the deceased replied, speaking very quick and with great earnestness, 'Why, I have

done it.'" This conversation the witness fixes in the latter end of September, 1819. Again, the witness Randall, who had been long intimate with him, deposes "to having taken an opportunity of saying to the deceased, upon whom he had called for the poor rates of the parish, 'You used to talk, sir, about the money you meant to lay out in the parish for charitable purposes;' the deceased said, 'My mind is quite **[179]** easy and satisfied upon that head; I have made my will and have given the sum you and I used to talk about, for the benefit of the poor; you'll hear more about it hereafter.' The deceased further said, 'You are a young man; if you live you will know more about it on some future day. I have left it to the vestry, or to the minister and churchwardens to distribute, and you will have something to do with the distribution of it one day, if you live'—alluding, as the witness understood, to the probability of his being churchwarden at some future period." This was in August, 1819, the month preceding that of the deceased's declarations to Nash.

Why, if the testator really made these averments, and was sincere in making them, independant of their bearing upon the question of probability, there is nearly an end of the case set up by Mrs. Saph upon another score—for they amount to distinct recognitions of the former will, to distinct disavowals of the alleged latter one. Of the sincerity of these, however, on the testator's part, I see no reason whatever to doubt; and the witnesses who have deposed to them, Nash and Randall, are perfectly unbiassed and perfectly unimpeached.

The whole, then, of these alterations, which I have thus gone through in detail, are highly improbable in themselves, and that last considered is, also, at variance with the deceased's express subsequent declarations. We have seen that the attempts, in special, to account for them in two instances, have wholly failed; it remains only to consider that sole remaining and general salvo for all difficulties, set up in the deceased's alleged great (and in process **[180]** of time it should seem nearly exclusive) regard for the family of Mrs. Saph.

And here it may freely be admitted that, from Mrs. Saph's long connexion with the deceased's family and long attendance upon his person—from her constant and unremitted exertions to contribute to his comfort, especially during his latter years—no surprise could have been excited in the mind of the Court by any provision that the deceased might have made for her in a will that stood per se. The Court would most unquestionably have declined putting its own estimate upon the value of her services—services which only the deceased was qualified duly to appreciate. But the Court has before it an undoubted constat of the value of those services, in the deceased's estimation, at a period only shortly anterior to the date of the will propounded, in the wills of June and October, 1818. And what, upon inquiry, does this turn out to be? Why, it is to be collected from the will of June, ratified and confirmed by that of October, that the deceased, notwithstanding the urgent instances of Mrs. Saph with him to consider her claims and services, had deliberately fixed the value of those services, in his estimate, at a devise of the cottage and garden adjoining his own residence to her for life, with remainder to her two youngest children, and a recommendation that she, on application, should be preferably entitled as one of the six poor persons to whom, as already noticed, he had appropriated 10l. a year each, in the way of charitable bequest. What he had given her in his lifetime, in remuneration of her services, does not exactly appear. According to some of the **[181]** witnesses, as, for instance, Mrs. Gilbert, he had been very liberal to her and her family. According to his own declaration, as deposed to by Pleyer, "he had done enough for her." Be that however as it may, this is the whole given to her by the will of June, confirmed by that of October, 1818. As a ground, then, of probability for the high rate at which these are estimated in the will now propounded, all merits and services on her part, all declarations and kindnesses in return, on his, either at Lymington or elsewhere, prior to this will of October, 1818, are done away—they go, but they go no farther than, to that will. The vastly higher rate at which they are estimated in this last will than in that of October can only be satisfactorily accounted for, in my mind, by some great accession, either of desert on her part, or of regard on his, or of both these together, between the dates of the two wills, of which I don't see a vestige in the evidence—I should rather, indeed, say, between the date of the first of these wills, or the end of October, and the beginning of March: for it should seem from Mr. John Saph's evidence (of which presently) that the deceased expressed to him his intention of altering his will three months before that intention was actually carried into effect;

so that the deceased's mind must be considered as having undergone the change or revolution so to be accounted for, between the end of October and the very beginning of March. But I can discover nothing, in this interval, in the nature of cause, to which any such effect can be reasonably ascribed; there occurred in it nothing more, that I can perceive, than the same attentions on the one part, and returns of kindness and good **[182]** will on the other, that had been interchanged between the same parties for years before. Yet this last will (to state more explicitly, what that change or revolution is) purports to bestow on Mrs. Saph and her family, in lieu of the trifling provision made for them under the former wills, the whole of the deceased's property, real and personal, to the utter exclusion of the former objects of his testamentary bounty, whose places they alone occupy. I say the "whole of his property," and to "the utter exclusion;" for I can scarcely consider that the few legacies given away from the Saphs furnish any virtual exception to this mode of speech; being of trifling amount, and precisely such as the generality of fabricated wills are found, by way of colour, to contain.

Upon the whole result, then, of this examination into the evidence furnished upon each of the principal circumstances disclosed on either side, in proof of the probability, or improbability, of this contested will being the deceased's own act, the presumption, I must say, is very strongly against the instrument. I now come to the more direct evidence applicable to the question of whether it be such or not—a question upon which nothing that has been hitherto advanced is, in any sense, decisive. For a case how unlikely and suspicious soever in itself may be irresistibly proved by the force of testimony. Evidence may be such as to substantiate a transaction, however improbable; for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish.

The present case is one of a somewhat painful **[183]** nature to determine. Upon questions of capacity, which, perhaps, most frequently occur in this Court, the evidence in great part, is commonly reconcilable. For evidence upon capacity being, chiefly, evidence upon a mere matter of opinion, witnesses who differ most may depose, upon a question of capacity, with equal sincerity. Here, however, the Court will be under the absolute necessity of withholding its credence from the principal witnesses, that is from those to the factum of the instrument, in the event of pronouncing against it. At the same time, it by no means feels itself driven to the alternative which has been pressed upon it in argument, of either pronouncing in its favour; or of determining, affirmatively, that the instrument is a forgery, and that those are perjured who have attempted to sustain it. The presumption of law, and burthen of proof, are different in the case of a civil inquiry (which is the character of the present proceeding) and in that of a criminal prosecution, under which alone charges of forgery and perjury can be duly investigated. On charges of forgery and perjury the presumption is in favour of innocence; and the weight of any doubt that may arise in the investigation of those charges belongs, most unquestionably, to the parties accused. Here the presumption is in favour of the former will, the validity of which is admitted—so that the Court, instead of giving the latter the benefit of any doubt (which, as I have just said, those who support it would be entitled to, if arraigned upon a criminal charge) is bound to give it the other way, namely, upon the admitted will. I apprehend that this distinction is sufficiently real to enable me to pronounce in favour of the admitted **[184]** will, without going the length of deciding affirmatively the asserted one to be a forgery. I proceed then to consider the direct evidence applicable to the alleged execution of this instrument.

Now the sufficiency of that evidence to sustain this transaction necessarily depends on the credit, both general and particular, due to the witnesses who speak to it; and upon the character, as to its intrinsic probability, or the contrary, of their narrative.

Who, then, are the witnesses by whose immediate testimony this instrument is to be sustained? and how do they stand affected? and, first, as in point of general credit.

The witnesses upon the condidit are two of the sons, and a daughter, of Mrs. Saph, the party principally benefited under the will propounded. They are competent witnesses, as not having, themselves, a direct pecuniary interest in the event of the suit. At the same time they can, by no means, be considered unbiassed ones. A direct interest of the smallest amount in value would preclude them from being witnesses at all; so jealous is the law of the purity of evidence. At the same time it is obvious that these parties are under much stronger inducements to support this transaction

(and were, originally, to embark in it) than a trifling legacy would have furnished; though this last, as I have just said, would have destroyed their competency as witnesses, whereas the "stronger inducement" only goes to their credit. But though the law (which can only draw its line between interest and no interest) permits witnesses who are so circumstanced as the present are to be heard; yet it even requires them to [185] be heard (as indeed common sense does) with a very considerable deduction from the credit to which they might be otherwise entitled.

And here, by the way, it strikes me as a little singular, that these three Saphs should be competent witnesses; or, in other words, that they should be the only members of the family unnoticed in the deceased's will. Their very competency is an argument, to my mind, against the genuineness of this transaction. Why should the deceased exclude these alone of all Mrs. Saph's children from any participation of his bounty? James and Sarah have the reversion of the deceased's house; Elizabeth (Crocker) has the reversion of the house in Green Croft Street; Ann has the bank stock; but John, Robert, and Sarah have nothing, which is the more extraordinary as to the first, since it appears that he was something in the confidence of, and much employed by, the deceased. That the deceased should have omitted them expressly, as for the purpose of making them witnesses (which is the only solution of the difficulty) is, in itself, most improbable; as he could be at no loss for neighbours and friends to attest his will, even though he had not thought proper to confide in Mr. Wilmot to prepare it. Their exclusion, therefore, is a circumstance which it is extremely difficult to account for, on the supposition of this being the deceased's act. But is it equally unaccountable in the other alternative, namely, that it was not the deceased's act, but a fabrication of Mr. John Saph? By no means—that he, either should not venture, or could not contrive, to embark three indifferent persons in a transaction of this nature is extremely likely: as it also is, that he [186] should have picked up something about legatees not being competent witnesses in his attorney's office. The making these three Saphs, therefore, attesting witnesses, and the omission of any benefit to them, in order to their being such, is perfectly reconcilable with the notion of this instrument being a fabrication—irreconcilable as it is with the notion of its being a genuine and authentic instrument.

The above observations go to the general credit of the attesting witnesses, collectively. I now proceed to consider the credit, both general and particular, which is due to each of them, taken separately. And, first, for Mr. John Saph, who must be admitted to have been the principal actor in this transaction, whether it be false or genuine.

And here, in the first place, how does Mr. John Saph's credit stand affected by his general character? Now it is difficult to conceive a person whose credit is more shaken by what appears of his general character (which has been formally excepted to) than Mr. John Saph. His absconding from Mr. Winch the attorney's office, with some of his employer's money, is a particular fact, which is spoken to by witnesses on both sides, and, indeed, is not attempted to be denied. After so absconding from the service of Mr. Winch, he set up in business as a maltster, at Calne; where his sisters Elizabeth and Jane appear to have lived with him. His particular transactions at Calne, being differently represented by the witnesses, I endeavour to shut out of my mind; but there are several witnesses from Calne who must be presumed to have had means of knowing him, and who swear that, from their knowledge of him, generally, they would not believe him [187] upon his oath. And other persons, from other places, who are acquainted with, and have grounds for forming an estimate of his character, depose to the same effect. Of the witnesses, on the other hand, produced in support of his character, some say "they do not know what character he bears," and consequently prove nothing. Others admit that they have heard "reports to his disadvantage;" and, therefore, prove worse than nothing. Others, indeed, express a more favourable opinion of him, but the Court, for reasons that will presently appear, can place no implicit reliance upon their testimony. The result, in short, of the whole evidence, as to this person's general character is, that it affects his credit very materially: so that whatever proceeds from the mouth of such a witness, even upon this consideration only, requires strong corroboration before it is entitled to belief. The Court is bound, however, to resort to his evidence, he not being an incompetent witness in law. It is in substance as follows:—

He says that, "Living in Salisbury, at but a short distance from the deceased (with

whom his mother had resided for the last three years of his life as his housekeeper), he was in the habit of calling upon the deceased daily, or nearly so. That on one of such occasions, the deceased told him, he intended to alter his will; but that he should not employ his attorney to alter it, for that he had ill treated him. This might be about three months before the execution of the new will. After that, he repeatedly mentioned to he deponent, whom he knew to have been writing clerk to an attorney for about three years, that he should alter his will for him. In [188] April, 1819, he drove the deceased, who was accompanied by the deponent's mother and sister Ann, as far as Blandford, on their way to Weymouth; on that journey the deceased told him, before his mother and sister, that he should alter his (the deceased's) will for him when he returned from Weymouth. In the latter end of May the deponent met the deceased, accompanied as before, at Blandford, on his way home, and drove him back to Salisbury. In this journey the deceased said that the deponent should now alter his will for him. The deponent thinks they returned the 26th or 27th of May. On the following morning the deponent called upon the deceased, and mentioned to him the subject of his will, when the deceased said 'he might as well give the instructions for it at once.' This was about nine o'clock in the morning; no other person was present. Pens and ink were on the table, standing in the middle of the room, from a drawer of which the deceased took and gave the deponent some paper. The deceased began by saying that 'he had, by a former will, left a certain sum to charity, but he said that he should give part of that sum, namely, eight hundred pounds bank stock to deponent's sister, Ann Saph, and the remainder of such sum to deponent's mother, Sarah Susannah Saph, independent of her husband Robert Saph, and to be at her sole disposal.' He said that 'he should bequeath the house given by the former will to a Mrs. Jeboult, to Mrs. Crocker, and her heirs.' He further directed that the deponent's mother should be his sole executrix and residuary legatee still, independent of her husband, as before. He directed the deponent to omit a legacy of 200l. to a [189] Mr. Atkinson, and to leave out every thing given to the said Mr. Atkinson and his family. He further said that 'he would give the house in which he lived to the deponent's mother for her life; with remainder to her two youngest children, James and Sarah, instead of to Mr. Westcott, to whom it was given by the former will; and that he, Mr. Westcott, should have the adjoining house, which was given by the said former will to the deponent's mother, Mrs. Saph.' The deceased then got up, and took out his former will from a cupboard in the room, in which they were sitting, and gave it to the deponent, telling him 'to write it over again with the aforesaid alterations.' The deponent, after he had written the aforesaid instructions, read them over loud enough to be heard by the deceased (who was rather deaf) distinctly; and when he had finished the deceased said, 'That will do—that will do; that's all right.' The deponent, having prepared a new will from such instructions and former will, went with the same to the deceased, about three days after; he found him alone, and read it all over to him; the deceased then took, and read, or appeared to read it, all over, to himself. The deponent said that he would procure a light, which he accordingly did, when the deceased, having taken some wax from the ink-stand drawer, melted the same, and made a seal at the end of the will, impressing the same with the initials of his name, from a seal hanging to the watch which he wore in his fob. He then told the deponent that 'his brother and sister, Robert and Jane Saph, should be two of the witnesses to his said will, and that when they were both at home together, and at leisure, he would [190] execute his said will,' which the deponent left with him. The deponent had made one or two drafts before completing the said will; but which he destroyed, as well as the instructions so taken from the deceased as aforesaid, when he had completed it. He goes on to depose that, being with the deceased on the evening of the 3d of June, the deceased told him, if his brother and sister Robert and Jane were at home at breakfast time, the following morning, to bring them with him, and he would then execute his will. On the following morning the deponent went to the deceased accordingly, and was followed by his said brother and sister, who came in about nine o'clock; the deceased's will was then lying on the table, he having previously taken it from the cupboard and placed it there; his mother was the only other person present. The deceased then 'perused the first sheet of the will, mentally, and having so done, he took the pen and ink, and signed his name thereto; the deponent then took the pen and ink, and wrote J. S., being the initials of his name, in the margin of the said sheet, and

desired the said Robert and Jane Saph to write their respective initials, which they did.' This was repeated, as to each of the four sheets; the deponent, and his said brother and sister, also subscribing their respective names at the foot of the attestation, written on the fourth sheet. The deponent's said brother and sister then withdrew, and the deceased, without saying any thing, took the will, and went up stairs, whence he shortly returned to the deponent and his mother, but did not mention the will again; having, as the deponent believes, left it up stairs. As the deceased never enquired for his former will, the deponent kept **[191]** the same in his possession until after deceased's death."

Such is the history of this transaction from its outset to its final completion, as stated by Mr. John Saph. I shall first briefly advert to some improbabilities in his narrative, taken alone; and shall then compare two passages of it, which afford the Court that opportunity; the former, with the evidence of another witness in the cause; the latter, with the face and appearance of the instrument itself.

In the first place, then, the mode in which these instructions are first communicated, as stated by this deponent, strikes me as a little improbable. According to this witness's account, the deceased had the whole matter of the new will so completely arranged in his own mind that he communicates full instructions for it without hesitation, from memory only, and without any reference whatever to any written document. For it is not till after the instructions are so delivered by the testator, and taken down by the witness, that the former will is fetched from the cupboard. So accurately are these instructions, however, given on the one hand, and taken on the other, that when read over to the testator, on being reduced into writing, not an alteration, not a correction, suggests itself—the testator says, "That will do—that will do—that's all right."

The witness goes on to say that, having prepared a new will from these instructions, he took it to the deceased about three days after. The will, so prepared, is then read over, first to, and after this by, the deceased, to whom again, although no intermediate draft had been submitted, not a syllable that requires any alteration presents itself. The witness **[192]** then, apparently at his own suggestion, procures a candle; and so alert is this aged testator, so active to give effect to this instrument, that, although his hands were paralized in a manner that nearly prevented him from signing, he goes through the much nicer and more operose process of melting the wax, &c., in order to sealing it; with as little of apparent difficulty as there could be of actual occasion. This surely, again, is a little improbable.

This witness, Mr. John Saph, deposes to "having made one or two drafts before he finished the will as for execution;" but he says that "when he had completed it, he destroyed, as well the said drafts, as the instructions so taken from the deceased as aforesaid." Hence it appears that neither these drafts, nor the original instructions, are forthcoming, either to support the truth of his account, or, as the case may be, to detect its falsehood. This asserted destruction of these documents, to say the least of it, supposing the narrative to be true, was a most incautious act—their non-production, under the suspicious circumstances of this case, adds very much to that suspicion. Upon the whole I dismiss the foregoing account with this brief general remark—it does not set out in a manner which creates an impression in favour of the narrator; or that bespeaks a favorable construction for any passages of doubtful import that may subsequently be found contained in it.

I now proceed to consider a passage in this witness's deposition, which the Court has the opportunity of comparing with that of another witness in the cause—I mean that somewhat remarkable one as to the original suggestion of this deponent and **[193]** the two other Saphs for attesting witnesses to the will. Mr. John Saph's account is to this effect:

Having stated his production of this will to the deceased about three days after taking instructions for it, and that the deceased approved of and affixed his seal to it, in the manner upon which I have already observed, he goes on to depose that "the deceased then told the deponent that his brother and sister, Robert Saph and Jane Saph, should be two of the witnesses to his will; and that when they were both at home together, and at leisure, he would execute his will." He further says that, "Being with the deceased on the evening of the 3d of June, the deceased told him, if his aforesaid brother and sister would be at home, at breakfast time, the following morning, to bring them with him, and he would then execute his will." Now, how

does this narrative tally with the evidence of another witness, a Mr. James Gilbert? Previous to considering which, it may be as well, however, to state who Mr. James Gilbert is; and the general tenor and effect of his evidence in the present cause.

Mr. James Gilbert is the cousin and intimate associate of Mr. John Saph, to whose failings he does not seem (as might, indeed, be expected) very clear sighted. In answer to the 10th interrogatory, he positively swears that "John Saph is, to the best of his knowledge and belief, a person of good character, credit, and reputation." This is deposing somewhat boldly, considering his necessarily intimate acquaintance with the character, and past conduct, of the person as to whom the interrogatory was put. In answer to the 11th interrogatory, he speaks to some "ill treatment" of Mr. John Saph, **[194]** at Calne, where he went to see him; but he does not say a syllable as to any actual or imputed misbehaviour during his residence there. Again, in answer to the 12th interrogatory, he had said that "in 1818 Mr. John Saph kept a school in Salt Lane [Salisbury], and continued to keep it till the deceased's death; he thinks he has left off keeping it about a twelvemonth; during the greater part of that time he has been living with the respondent at his house." Now the deposition of this witness was not finished at one sitting—it broke off at the end of the 13th interrogatory. On the following day, after answering the 22d interrogatory, he desires to amend his answer to the 12th interrogatory (as to his cousin John Saph's occupation, &c. during the last three years), by adding thereto that "he, Mr. John Saph, had, within the last three years, and particularly within the last twelvemonth, repeatedly been visiting at the respondent's mother at Stapleford; and that he had also, within that period, been paying his addresses, in the way of courtship, to a young lady at Ringwood, &c." Being asked by the examiner whether, subsequent to leaving him on the preceding evening, he, the witness, had seen Mr. John Saph, he replied that, "having a dangerous road to pass, John Saph accompanied him home, he, the respondent, being on horseback, and John Saph on foot; and that they had returned, in the same manner, nearly half-way to Salisbury from Stapleford, a distance of seven miles, that morning; but the respondent declares that, in obedience to the strict injunction of the examiner not to say one word respecting this cause to any person whomsoever, he had not said one word to John Saph, nor **[195]** John Saph to the respondent, in any way or manner. What he now adds to his deposition is the consequence of his own reflections." All this may, possibly, be very true and sincere; but the general complexion of this witness's deposition (which I have considered with much attention) by no means disposes me to think that it actually is so.

It is said, and very truly, that in vivâ voce examinations, the Court and jury have the benefit of seeing the witness, and of collecting, from his manner and deportment, whether the substance of his evidence be true or false. This advantage is denied to our mode of examining witnesses; but then it has others, with which examinations of witnesses in open Court, vivâ voce, are not attended. It affords us an opportunity of considering, maturely, the story which the witness has told, deliberately—of balancing the parts of that story one with another, so as to form an adequate opinion of its probability or improbability—finally, of inspecting its general tone and character—which last to those, the habit of whose life it is to consider written testimony, may ordinarily furnish as accurate a test of the forwardness or shyness of a witness, of his proneness to add or suppress, and the like, as his manner and deportment could do if the witness himself were examined in open Court—where, it may be added, very erroneous impressions of these are, sometimes at least, liable to be formed, from the mere embarrassment of witnesses, of a certain character, under that course of examination. All this, independent of the benefit of deliberately **[196]** weighing and comparing the stories told by different witnesses. But to proceed.

Mr. James Gilbert deposes, on the 8th article of the allegation, that, "Being one day in Salisbury after he had gone to reside at Clarendon, and in the latter end of 1814, or the beginning of 1815, John Saph came to the deponent, and asked him if he would be a witness to Mr. Harcourt's will? that Mr. Harcourt had sent him to ask—the deponent replied that he would—a day was fixed, and the deponent attended; and, together with the said John Saph, saw the said William Harcourt execute his will in the parlour of his, the said deceased's, house in Church Street—he does not recollect that any other person was present; the deponent understood that Mr. Wilmot, of Salisbury, the solicitor, had made such will."

Now is the above statement, relative to this witness attesting a former will of the

deceased, one upon which the Court can depend? There is no trace of any such former will in any part of this cause; neither John Saph nor Mr. Wilmot, whom the witness understood to be the drawer of such will, make any mention of it; nothing about it even is suggested in the interrogatories. The transaction itself is most improbable. If this "former will" had been prepared by Mr. Wilmot, how came he not to attest it himself, as he had the deceased's other wills, and the will of his wife, which he had also prepared? Again, the deceased had real estate; so that it is most improbable that he should have executed a will in the presence of any two only, much more of these two, witnesses. Lastly, John Saph had absconded from Mr. Winch's in April 1814, and was **[197]** at Calne at the specified period of this transaction, namely, the latter end of 1814, or beginning of 1815. All these circumstances taken together render this statement, I confess, somewhat incredible in my opinion. It has strongly the semblance at least of a pure fabrication; as by way of laying a ground, and to account, for other particulars in his evidence, which he might think in want of something of the kind to introduce, or usher them in.

This witness goes on to state that, "Subsequent to the execution of that will [that is, of the will which he so states himself to have attested, as above], and prior to the time when Mr. John Saph applied to the deponent to witness another will, the time more particularly he cannot recollect, the deceased complained of Mr. Wilmot to the deponent." He said that "he had made him pay a large bill for making his will; that he should never make another for him, or do any other business. The deceased told the deponent that he could get a will made for a guinea. The deponent said that he could get a will made for nothing; any body could make a will for him."

Now, here again, with respect to these declarations against Mr. Wilmot, are they genuine, or are they mere inventions to lay a ground for the deceased's alleged employment in this behalf of Mr. John Saph? They have much more the appearance of the latter than of the former, in my apprehension of them. In the first place, this witness takes a wide range as to time; only fixing them as having been made sometime between 1814 or 1815, and 1819. The probability should seem that, if made at all, they were made soon after the transaction of the former will, i.e. in 1814 or 1815; that being **[198]** the will, of course, I presume, with Mr. Wilmot's charge for preparing which, it is meant to be inferred that the deceased expressed himself so highly dissatisfied. In the course of three or four years that dissatisfaction would, probably, have worn off; and the circumstance itself would, probably, have been forgotten. But unless these declarations are fixed as having been made subsequent to October, 1818, they prove nothing; if made, the deceased departed from them in his employment of Mr. Wilmot to draw up the two successive wills of June and October, 1818. He departed from them, indeed, at any rate; for it is in evidence that Mr. Wilmot was professionally employed by the deceased in August, 1819; subsequent, that is, by three months to the date of this will propounded by Mrs. Saph.

This witness, Mr. John Gilbert, further says, that "one day, just before the deceased executed the will in question in this cause, John Saph came to the deponent at Clarendon, and informed him that Mr. Harcourt wished him to come and be a witness to his will, which the said John Saph told the deponent he, the said John Saph, was making for him. The deponent told him that if it was a market day he should have no objection; and added, that there was no occasion for him to come down, that his, the said John Saph's, brother and sister would do as well; any body would do for witnesses; or to that effect. The deponent asked the said John Saph what was in the will; but he said that he had promised Mr. Harcourt not to tell; and he did not."

Here, at length, then, we arrive at a part of this witness's evidence, directly at variance with, and contradictory of, and that in no more unimportant **[199]** particular, the evidence of his cousin and fellow-witness Mr. John Saph. In the first place we have seen that, according to the evidence of the latter witness, this notion of procuring Robert and Jane Saph to attest his will originated with, and proceeded solely from, the deceased; without being proposed to him by the witness, or any other, and without the deceased himself, as in the first instance, designing Mr. Gilbert or any other person to that office. The witness Gilbert, on the contrary, represents this as having been recommended by him, and as having proceeded from his suggestion. But whatever may be said of this inconsistency, secondly, the evidence of the witness Gilbert as to the message, &c. from the deceased, upon this head, is utterly irreconcileable

with Mr. John Saph's parallel evidence by any process that I can apply to it. Is it possible that, if this person had really gone over to Clarendon with any such message as that spoken to by Gilbert, at the express desire of the deceased, the circumstance itself, and every thing connected with it, could wholly have escaped his memory? But not a syllable respecting it occurs in his deposition, though taken eight months before that of Gilbert. Not a word is said about "witnesses," according to his statement, till the will is drawn up and sealed; and then the deceased himself proposes his brother Robert and his sister Jane, and never adverts to any other.

Now which of these two witnesses the Court is to believe, or whether either are credible, is not very material. It is quite sufficient that Mr. John Saph's evidence not only is not confirmed, but is invalidated by Gilbert's contrary evidence. Nor **[200]** does this last witness's deposition, as contended, necessarily connect the deceased with the execution of this instrument. The passage relied on as having that effect being that which immediately follows the one just recited, is in these words, "The deceased, when the deponent next saw him, a week or two after, or perhaps longer, observed to the deponent, 'You did not come,' alluding, as the deponent believes, to the deponent's not having attended to witness his will." Now, as to this passage confirming the truth of the transaction, or amounting to a recognition of this instrument by the deceased, it does nothing of the sort, even admitting it to be genuine. All that it makes the deceased say to Gilbert is, "You did not come;" that might as well have been said if Saph, or any other, had told the deceased that Gilbert was coming over to Salisbury, and would dine, or drink tea, with him, or would see him for any other purpose, or upon any other business. But, in the next place, I have strong doubts whether the deceased said any thing of the sort, or whether the whole matter of this last passage is not a mere after-thought between these two witnesses. I suppose it an after-thought, because the circumstance deposed to is wholly extra articulate; there being no such circumstance pleaded. And although, where little or no intercourse subsists between a witness and a party, a circumstance sometimes comes out in evidence with greater effect, from its not having been stated in plea; still, in the present case, considering the intimate connection between this witness and the Saphs, and considering that he is vouched in the article to the having been applied to as a witness —his not having been vouched to, at **[201]** the same time, nor the plea averring, this supposed recognition of that application, strongly inclines me to suspect the whole of it to be, what I have already termed it, a mere matter of after-thought between these two persons.

I have only one other observation to make upon the evidence of Mr. John Saph: it results from a comparison of his narrative, not with that of any other witness, but with the instrument itself. He says (in substance) that, "In three days after the instructions were taken [namely, on the 27th or 28th of May] the will was finished, and submitted to the deceased, who read, &c. and affixed his seal to it, as already stated, when the instrument was left in his possession ready to be executed; but no time of execution was proposed." He further says that, "Being with the deceased on the evening of the 3d of June, the deceased told him, he would execute it next morning." Until the evening then of the 3d of June it should seem from this statement that the execution was neither fixed nor even proposed for the fourth; but this statement the instrument itself contradicts, and is at variance with; for upon the closest inspection of the instrument, I can perceive no trace of a blank having been left for the date, and of the date having been subsequently supplied: the whole instrument appears to have been written uno contextu; and the date to have been inserted at the time when the body of the instrument was written.

This circumstance, coupled with the others already noticed, is decisive, in my judgment, and prevents me from placing any sort of reliance upon the truth of the narrative contained in the deposition of this **[202]** witness, Mr. John Saph, or upon the reality, so far as it depends solely upon that narrative, of the transaction itself.

It is argued, however, that if Mr. John Saph is discredited, there are still two other unimpeached witnesses to the fact of execution, upon whose testimony the Court is bound to rely, even if it is under the necessity of rejecting his. But here, in the first place, it is observable, that it is not merely the general credit of this witness that is impeached, but the truth of his particular narrative. The very foundation, consequently, of the whole transaction is shaken; a circumstance, this, which affects the credit of all the witnesses. In respect to these other two Saphs, again, although

it is true that their general characters are not liable to the same objections that apply to that of Mr. John Saph, yet they are equally biassed witnesses in this particular transaction, as having the same expectant, if not direct, benefit. They are also equally, or nearly to the same extent, implicated in this fraud, if it be one; and to the penal consequences of failing to sustain it, they are all three liable in common. And not only are they biassed and implicated witnesses, but there is a "suppressio veri" in the deposition of one at least of the two (on a point not immediately connected with the factum of this instrument), which, independent of other considerations, by no means tends to create a favorable impression, on my mind, of the credit due to them.

It is in evidence that this young woman Jane Saph actually resided with her brother at Calne. Now, whether he behaved ill, or whether he was used ill there, as Gilbert represents, she must have known that he went to Calne upon quitting Mr. **[203]** Winch's, where he set up as a maltster; and that he got into disputes, and was under difficulties at Calne. She must also have perfectly known the circumstances under which he left Mr. Winch's. Yet in answer to the fourth and fifth interrogatories she deposes that "she does not know whether her fellow-witness and brother John Saph left Mr. Winch's service voluntarily, or whether he was discharged therefrom; neither does she know upon what account it was if he was so discharged. She does not recollect into what trade or business he went after leaving Mr. Winch's employ, nor where he immediately afterwards lived; that he has been, occasionally, absent from home, but not for long together; that she has never known her said brother to be involved in debt, nor insolvent, &c. &c." This, I repeat, is a suppressio veri, upon a collateral point, by no means creditable to the witness. Nor am I at all satisfied that the brother Robert is wholly clear of the same imputation. He was examined in August, 1820, and then stated himself to have been seventeen years old in the December preceding; he was, therefore, between eleven and twelve when his brother was discharged from Mr. Winch's service in April, 1814. He, however, professes the same utter ignorance of all the circumstances attending that discharge as the last witness; an ignorance which I can hardly suppose to be real, considering his age at the time; and that the whole family have been residing together, at Salisbury, nearly ever since. So much for the general credit due to these witnesses; and now for the particular credit due to their account of the transaction in dispute.

[204] In proportion as these two witnesses have been less connected with that transaction than the witness whose narrative of it has been already examined, the means of the Court to ascertain the truth, or to detect the falsehood of their narratives, are obviously abridged. One or two observations, however, occur, as upon the face of the account given by these two witnesses of the act of the execution.

The counsel for Mrs. Saph have argued much for the genuineness of the transaction, and consequently of the instrument under review, from the three witnesses concurring strictly in their account of the manner in which this instrument was executed by the deceased. The truth of the premises I am ready to assent to; in the propriety of their inference I am not disposed, unreservedly, to acquiesce. Concurrence up to a certain extent most unquestionably evinces truth and sincerity; but the instant that it savours of preconcert, it operates the other way. Now these witnesses concur in stating one circumstance at least, to an extent that savours strongly of preconcert in my judgment. They all depose that the deceased read over the will apparently to himself, or, as one of the witnesses expresses it, mentally, and then executed it, sheet by sheet; that is, that he so perused and then signed the first sheet, which the witnesses attested by their initials; and so of the remainder; repeating this cumbrous and operose process (no very likely circumstance in itself) four times; the instrument consisting of as many sheets. Now that all the three witnesses should not only remember this circumstance, but should remember to specify it with the particularity which they all do, in their respective **[205]** depositions, does savour strongly of preconcert, considering who these witnesses are, and how they are connected together. The mode of executing the instrument (sheet by sheet) is, I have already said, no very usual or likely one for the deceased to have adopted. It is, too, I may further observe, not very probable that the deceased, an old man of eighty, should have perused the will at all, mentally or otherwise, at the instant of execution. The deceased himself had given instructions for it, which, when taken, were read over to and approved by him. The will itself, when drawn up, was also read over first to

and then by the deceased, at the time of his affixing his seal to it. The deceased had the intermediate possession of it from that time to the time of execution; an interval of at least three days. All this according to the evidence of Mr. John Saph. That the deceased, under these circumstances, should have perused this instrument as they describe him to have done, in the presence of these three witnesses, whom he must have kept waiting, accordingly, during the operation—one of the three, a young apprentice, pressed into this service of attesting the will during an interval in which he had merely stept home for his breakfast—is a little unlikely.

I am not aware that the depositions of these two witnesses suggest any further material observation, nor am I willing to press against them, to any thing of a harsh extent, the one or two remarks which they have actually suggested. It will be quite sufficient to observe that the testimony of these two witnesses—so biassed—so implicated—so not devoid of suspicion upon the face of their testimony—by **[206]** no means furnishes the evidence of their fellow-witness, Mr. John Saph, with that sort of corroboration of which it stands in absolute need in my judgment: and, in conclusion, I may safely dismiss the evidence upon the condidit with this general remark: It is very far from satisfying the moral conviction of the Court against all the probabilities which have been already stated, that this, really and truly, was the deceased's own act.

Before actually dismissing it, however, it may be requisite that the Court should redeem its promise of saying a word as to the purported legacy of the "bank stock" to Ann Saph, apparent on the face of this instrument.

The deceased Mr. Harcourt, jointly with his wife during her life, was a holder of bank stock, which, as long back as 1790, had amounted to 594l. stock, and which had increased by bonuses to 742l. 10s. stock, producing, as at 10 per cent., an annual income of 74l. 5s. The dividends were received by Messrs. Hoares, of London, and carried to the credit of Mr. Atkinson; who accounted for the amount from time to time to the deceased. Out of this same bank stock he had given, by the wills of 1818, "so much as would produce 60l. per ann." to a purpose, and "the remainder" in a manner already stated. This third will, however, purports to bequeath "800l. bank stock" (worth nearly 2000l. and more by 57l. 10s. of that stock than the testator had to bequeath) to Miss Ann Saph, and "the remainder," specifically, to the mother Mrs. Saph. Why, here again is a circumstance utterly inconsistent with any notion of this instrument being the deceased's act; but easily reconcileable with the **[207]** supposition of its being a fabrication of these Saphs, which it is admitted that it must be, if it be not the act of the deceased. The deceased, who, of course, was fully acquainted with the nature and properties of bank stock, could not but have discovered this obvious blunder whilst repeatedly perusing, first the written instructions, and then the will itself, as already observed; granting even that he might have committed it, by saying, as deposed to by Mr. John Saph, that he should give his sister Ann "800l. bank stock," and "the remainder" to his mother, in the first instance. But there is no improbability in the commission of this blunder by the Saphs; they may well be supposed ignorant of the rate of interest payable on bank stock; and as it appeared by the former will that the deceased had more than sufficient bank stock to produce 60l. per ann. (which itself at 5 per cent., the standard rate of interest, would require 1200l.), they might very naturally conceive that the deceased's interest in that fund was quite sufficient to cover these several bequests of "800l. bank stock," and "a remainder."

An attempt, however, a last attempt, has been made to support the credit and character of this instrument, by what are technically called "recognitions;" that is, by declarations or acts of the alleged testator referring to this instrument. Previous acts or declarations, as of dissatisfaction with his former will or the like, there are none, excepting the declarations spoken to singly by Mr. John Saph; which, for reasons that need not be repeated, are entitled to no sort of consideration from the Court. But still clear and distinct subsequent recognitions of this will, proved as clearly and distinctly by **[208]** witnesses above exception and suspicion, might alter the whole complexion of this case, and carry irresistible conviction to the mind of the Court that the paper set up in it is, what it asserts itself to be, the deceased's will. It is material therefore to consider, both who the witnesses are that speak to them, and what the asserted recognitions themselves amount to.

Two witnesses only (besides Mr. James Gilbert, the supposed recognition, contained

in whose deposition, I have already said, giving it credit, amounts to nothing) have been relied on in this respect—a Mrs. Betsy Bursey and a Mrs. Elizabeth Gilbert.

Bursey, by business a dress-maker, at Lymington, is the intimate friend of Mrs. Saph, whom she confesses to have "assisted her memory" in some things relative to which she has been subsequently examined; she has been active too in collecting testimony in the cause. Now I do not mean to say that these are circumstances which would at all induce the Court not to take this person's oath to a mere matter of fact; but they are circumstances which do induce the Court to listen to her with some degree of suspicion when she is brought to speak to expressions said to have been used by the deceased several years before—expressions liable to misapprehension, possibly insincere, and certainly not unlikely to be distorted and exaggerated in the deposition of a witness, whose scanty memory, in respect of them, is admitted to have been eked out by that (or the invention) of Mrs. Saph. The declarations too, themselves, when accurately considered, amount to little or nothing; they are either equivocal or immaterial; and by no means directly **[209]** come up to what I am bound in law to consider distinct recognitions of this will.

Mrs. Gilbert's evidence is of still less weight. She is the sister of Mrs. Saph, and the mother of the witness James Gilbert, whose evidence has already undergone the investigation of the Court. Her deposition is open in its outset to the same remark which was applied to that of her son; that of bearing a strong internal character. For instance, speaking of her nephew, John Saph, she says that "he misapplied some of his master's money, which she considers a mere frolic of youth; she believes him to be a good young man." Such is her moral estimate of the transaction at Winch's and of her nephew's general conduct and character. Again—her examination broke off at five o'clock upon a Monday, and she was appointed to attend the examiner at seven o'clock on the same evening. Instead of this, however, she does not in fact so attend again until the Wednesday evening following, at the same hour, by reason, as pretended at least, of indisposition; and then, after forty-eight hours, "recollection," as she terms it, she desires to amend her deposition, as taken by the examiner, upon the second article of her sister's allegation. Now that deposition, as already taken, was pretty minute as to favors conferred by the deceased upon her sister Mrs. Saph; but, after an interval of two days (admitted by her to have been spent at the Saphs, in the company of both mother and son, though she, too, protests to the examiner that not a syllable was exchanged between them on the subject of the suit, after that interval I say) for "recollection," she comes out with a long story, wholly extra articulate, **[210]** of Mrs. Saph having shewn her about Christmas, 1818, three notes of hand (as she calls them), given to her by the deceased; the one for 100l.; the other for 30l. odd; and the third for 25l. She says that after this (consequently in 1819) she heard the deceased Mr. Harcourt say that a very unpleasant thing had happened to him, relative to a Mrs. Alie (to whom he had left 10l. by his will) appearing to be entitled to some houses and land under the will of his late wife, which he (Mr. Harcourt), conceiving them to belong to him, had sold; but the value of which he was now obliged to refund to this Mrs. Alie. And she adds that, sometime after this again, her sister Mrs. Saph told her that Mr. Harcourt had taken back the three notes, amounting together to 150l. odd; and had given her one note for 450l., which note she then produced, and shewed to the witness.

The account furnished by the witness John Saph, relative as it should appear to this same note of hand for 450l. is as follows:—In answer to an interrogatory suggesting him to have said that, "Even if the will would not stand, still that his mother had the deceased's note of hand for a considerable sum," this witness, after, in the first place, denying the use of that or any similar expression, goes on to state that "the only note of hand he ever knew of, as given by the deceased to his mother, the producent, is one for 450l., which was given, as the deceased told the respondent, for what he owed to the producent, and for a sum of money lent to him by the respondent's sister, Ann Saph, who was just come of age, to enable him to pay the relations of his deceased wife some money, which the deceased **[211]** had, inadvertently, and conceiving it to be his own, applied to his own use." He says that "he, at the desire of the deceased, drew such note, which was to secure both his mother and his sister, as he now best recollects, in the latter part of 1818; that he has seen it once since in his mother's possession; but whether before or since the deceased's death he cannot recollect."

He further answers that "if the same is now in existence, he does not know in whose care, custody, power, or control, it is."

Now it appears from the above, and by the names "Alie" and "Heyley" (which are nearly idem sonantia, especially vulgarly pronounced), that the transaction to which these witnesses would, some how or other, refer this matter of the "notes of hand," is the identical transaction deposed to by Mr. Fletcher Wilmot, in speaking of the deceased having altered his will of June, 1818, by that of October in the same year, as already stated, in consequence of his displeasure at the conduct of a Mrs. "Heyley," a legatee in the former will, in making some claims upon him as under the will of his deceased wife. But he deposes to the deceased's having borrowed money of Mr. Atkinson, and not of these Saphs, to pay Mrs. Heyley's demand; and the transaction itself plainly belongs to the former year 1818, and not to the year 1819, where Mrs. Gilbert's evidence would place it. Not to dwell, however, upon these inconsistencies, this circumstance of the notes, altogether, is one of a very suspicious character. If the transaction itself were fair and genuine, how is it possible that it should not have been brought forward in some shape (for instance, in proof of the intimate connexion between the Saphs **[212]** and the deceased, and of the obligations which they mutually conferred upon each other) during the long pending of this cause? Mrs. Gilbert's account of it, after an interval of forty-eight hours for "recollection," confessedly spent with the Saphs, by no means either clears up the character of the alleged transaction itself, in my judgment, or impresses me with a favorable opinion (and it is with this view alone that my attention has been directed to it) of the credit due to her testimony in other particulars.

But, lastly, supposing even this witness, Gilbert, entitled to full credit, still the declarations to which she has deposed would leave the case pretty much where they found it. They are of the same character as those spoken to by Bursey, and are open to the same remarks. At all events, they are by no means so forcible as those of a contrary tendency stated by Nash and Randall, witnesses wholly unimpeached; which are directly referential to the will of October, 1818, and are plainly inconsistent with the alleged subsequent will of June, 1819, propounded on Mrs. Saph's part.

Supposing, then, the case to have rested here, the Court would have felt itself bound to pronounce against the instrument propounded; looking, in the first place, to the improbability that it should be, and, secondly, to the insufficiency of the evidence tendered in proof of its being, the deceased's will. Before actually arriving, however, at this conclusion, it is proper that I should notice the evidence which has been introduced into this case, on the direct question of whether the signature is, or is not, in the hand-writing of the deceased.

Evidence as to hand-writing, in questions touching **[213]** the factum of any instrument, is (or may be) common to both parties. Affirmative, may be produced by the parties setting up the instrument; and negative, by those whose object it is to impeach it. The advantage to be derived from either is, in a great measure, dependant on circumstances. Where neither the character of the transaction, nor the credit of the witnesses, is materially affected; affirmative evidence upon this head is unnecessary; and negative is unavailing: the converse of both these almost necessarily follows where the transaction is suspicious, and where the witnesses are discredited. Such evidence, indeed, either affirmative or negative, is commonly inconclusive for obvious reasons; the former from the exactness with which hand-writing may be imitated; the latter from the dissimilarity which is often discoverable in the hand-writing of the same person, under different circumstances. Still, however, it is admissible evidence in these, as in other Courts; although the assertion that greater weight is attached to it here than in other Courts is by no means correct. On the contrary, the rule here rather inclines to hold that a will cannot be proved by mere evidence to the hand-writing of (without some concomitant circumstance, as the place of finding, or the like to connect it with) the party whose suggested will it is.

In the present case, however, evidence as to the deceased's hand-writing was not merely admissible; but affirmative was actually called for from the parties, that is, who have propounded this instrument, from the circumstance of negative being tendered, by its opponents, in every capable shape. Nor were they unaware of this, as it should seem, **[214]** from their having pleaded the affirmative; although they have not ventured to produce a single witness to an opinion that the signatures to the asserted will are of the deceased's hand-writing. The first circumstance, therefore,

that strikes one on turning to this part of the case is, that the evidence is all upon one side; on that side, too, in favour of which, in the view just taken by the Court, the scale, independent of it, decidedly preponderates.

I have said, and repeat, that negative evidence of this kind was vouched by the parties opposing this instrument in every capable shape. For it was, in substance, pleaded by them, not only 1st, that the subscriptions to this instrument were not those of the deceased in the cause, and were known not to be such by persons who had seen him write, and were acquainted with his manner and character of hand-writing; but it was further pleaded, 2dly, that the said signatures would appear not to be those of the deceased, on a comparison of them with other, his admitted, signatures; 3dly, that they would appear to be of the proper hand-writing of Mr. John Saph; 4thly, that they would appear to be, let who would write them, written in a feigned, and not in a natural, hand.

Now, as to the first of these four special allegations, no witness has been produced who will undertake to swear, from a previous knowledge of the deceased's hand-writing, derived from having seen him write, that the subscriptions to the instrument in question are not those of Mr. Harcourt, the party deceased in the cause. Mr. Wilmot ventures nearest, but does not go the whole length, possibly, as much, from his disinclination—a disinclination which is common to most of us—to depose positively to such **[215]** a fact, as from any great doubt which he entertains upon the subject. But I am yet to learn that this absence of evidence upon the first of the four is a bar, as asserted, to the reception of any, upon the other three. The assertion has proceeded from an utter misconception, as I take it, of the true meaning of the maxim, that "the best evidence must be given of which the nature of the thing is capable." But the application, at all, of that rule (into the true meaning of which this is not the right place to inquire) to the present case, assumes this position, namely, that the evidence of witnesses acquainted with the supposed writer, and who have acquired a previous knowledge of his hand-writing from seeing him write, is the best proof of hand-writing—a position to which, if laid down universally, and without limitation, I am not disposed to accede. It may, or may not, be the best, according to the means and extent of the witness's information, who deposes, one way or the other, from such previous knowledge; may be the best, that is, where these are ample; and may be very far from it, where these are scanty, or abridged. Suppose the case of two persons who have written for years at the same desk; the evidence of one of these to the other's hand-writing, from his previous knowledge of it so derived, may, for aught that I know, be the best evidence which the nature of the thing admits. But suppose the case of two persons, one of whom has seen the other write only a few words, or only once, or many years ago—will it be said that the evidence of that one to the hand-writing of the other, from his previous knowledge of it, so derived (which still, be it observed, is that of a witness deposing to **[216]** the party's hand-writing from a previous knowledge of it, acquired by having seen him write), is the best evidence? is better (for instance) than persons of competent skill and experience could furnish, after comparing the signature (for instance) in dispute, with ten or twenty admitted signatures of the same party, made about the same time, and under not dissimilar circumstances? The proposition can hardly, I think, be seriously maintained. All evidence as to the hand-writing of any party is the mere statement of an opinion formed by the witness, on comparing a writing said to be his, with some standard; and to say that the mere having seen that party write, furnishes, under all circumstances, and universally, the best standard would, in my judgment, be absurd. I not only conceive, therefore, that the maxim of law which has been invoked into this part of the case has been misunderstood in the attempted application of it; but I deny the universality, at least, of the position which has been assumed, in the first instance, in order to its being invoked into the case at all.

Evidence, therefore, upon these last three heads being clearly admissible, notwithstanding the absence, or failure, of evidence upon the first, is any other valid reason assignable for its exclusion? I am aware of none. Evidence of this description has always been received in these Courts (see *Beaumont* v. *Perkins*, 1 Phillimore, 78). In the cases of *Revett* v. *Braham* (4 T. R. 497), and *The King* v. *Cator and Others* (4 Espinasse, N. P. C. 117), it has also been admitted in other Courts; and although under the special cir-**[217]**-cumstances of a late case, that of *Gurney* v. *Longlands* (5 Barnewall & Alderson, 130), the Court of King's Bench did refuse a new trial when

applied for on the ground that the Judge at Nisi Prius in that case had rejected such evidence, I cannot deem that refusal decisive against its general admissibility, at least in these Courts.

Such evidence being, then, upon the whole, admissible in this case, it remains only to see to what it actually amounts.

It is impossible that evidence of this sort can be stronger, or amount to more. The witnesses who have been examined, in proof of these special averments, have given it as their opinion, quasi uno ore, 1st, that the subscriptions to the will propounded are not of the hand-writing of the deceased; a number of whose genuine signatures were submitted to them, at the time of their examination, for the purpose of being compared with those in dispute; 2dly, that they are written in a feigned and not in a natural hand; 3dly, that they are of the proper hand-writing of Mr. John Saph.

The persons who speak to these several particulars (*b*) are persons of skill, persons whose profession, I may almost say that, it is to examine hand-writing critically in order to the detection of forgery. In cases where witnesses of this description entertain different opinions they may so neutralize each other that their evidence, as taken alto-[218]-gether, is good for nothing. But that is not the case here. These witnesses all give their opinion as to each of these several particulars; some indeed with greater and some with less confidence, but they all give it one way. As to one particular, namely, as to these signatures being in a feigned and not in a natural hand, they all speak, without the slightest hesitation, and with the fullest confidence. They say that, acting with all caution, where they entertain any doubts, they either state those doubts, or decline giving an opinion altogether. Here, as to this particular, they neither state any doubts, nor are backward in drawing their conclusions—conclusions in which, in substance, they all agree.

There certainly is a very considerable likeness, to a common observer, between the deceased's alleged signatures to the will propounded and his admitted signature to the prior will of October, 1818; from which last, by the way, the first of the two, if not those of the deceased himself, most probably were copied. At the same time there is one feature of dissimilarity which, as it is noticed by all the witnesses, the Court will briefly advert to—I mean the dissimilitude between the final "t's" in the deceased's name of "Harcourt," in the genuine and disputed subscriptions. In every admitted signature the "t" is made without carrying the pen back behind the perpendicular line, and then crossing it. In every disputed one it is made by carrying back the pen behind the down stroke, and then crossing it, with a loop. This, in itself, is a strong circumstance of the kind, and will appear more so when I add, that in every admitted signature, of which there are several, of the deceased's name by Mr. John [219] Saph, the final "t" in Harcourt is made in the same way in which it is in the disputed signatures to the alleged will.

Upon the whole, I am bound to pronounce that the party setting up this will has failed to establish its authenticity; and I think that I am also bound, as well in justice to the other party, as by way of general example, under all the circumstances of this case, to condemn her in the costs of the present suit.

TROWER AND SMEDLEY *v.* COX. Prerogative Court, Trinity Term, 2nd Session, 1822.—The attornies of an executrix having withdrawn from the suit, after propounding an alleged will, and suffered a next of kin to take administration, held, under the circumstances, not to bar that executrix from calling upon the next of kin to bring in the administration, and re-propounding the alleged will.

This was a cause or business of citing Frances Charlotte Cox, wife of Robert Albion Cox, to bring into, and leave in, the registry of this Court, letters of administration (with the last will and testament annexed, bearing date the 5th day of February, 1794) of the goods of Francis Newman, deceased, thentofore committed and granted to her, as the natural and lawful daughter of the said deceased; and to shew cause why the same should not be revoked, and declared null and void, as unduly obtained;

(*b*) The witnesses examined upon these allegations were Joseph Hume, Esq., Inspector of Franks at the General Post Office; Mr. John Richard Taylor, Inspector of Franks at the General Post Office; and Mr. William Henry Nelson, a clerk in the Power of Attorney Office at the Bank of England.

and why letters of administration (with the last will and testament annexed, bearing date the 26th day of September, 1817, with two codicils annexed) of the goods of the said deceased should not be committed and granted to Robert Trower and Francis Smedley, as the lawful attornies of Elizabeth Hannah Friers, otherwise Elizabeth Newman, the sole executrix, and **[220]** residuary legatee during her single life, named in the said will.

An appearance was given for the party cited, under protest; and an act on petition was entered into.

In this act it was (in substance) alleged for the party cited that "Francis Newman died in the month of March, 1818, having first made and executed his last will, bearing date 5th February, 1794; and thereof appointed certain executors, all of whom, with the exception of James Meddowcroft, died in the testator's life-time; and having, in and by his said will, given and bequeathed the residue of his estate and effects to his reputed son, Elizabeth Francis George Newman, who also died in the testator's life-time; whereby such bequest of the residue became lapsed: that in the month of February, 1820, a citation issued under seal of this Court, at the instance of Frances Charlotte Cox, the natural and lawful daughter of the deceased, against James Meddowcroft, the surviving executor, to bring in, and take probate of, the said will; otherwise, to shew cause why administration, with the said will annexed, should not be committed and granted to the party proceeding: that the executor appeared to that decree, and brought in the will, but declined taking probate; whereupon the usual steps were had, and letters of administration, with the said will annexed, were about to be decreed to the said Frances Charlotte Cox, to wit, on the 3rd of May, 1820, when a proctor intervened for Robert Trower and Francis Smedley, as attornies of Elizabeth Hannah Friers, otherwise Newman, alleging her to be sole executrix of the last will and testament of **[221]** the said Francis Newman, bearing date the 26th of September, 1817, with two codicils: that, upon this intervention, the cause assumed a regular shape, and was proceeded in by the said attornies on behalf of their principal, up to giving in an allegation propounding the said last will and codicils; when, on the caveat day after Trinity Term, to wit, on the 5th of September, 1820, the proctor for the said attornies declared that he proceeded no further in the said cause—upon which letters of administration with the will of February, 1794, annexed were decreed to the said Frances Charlotte Cox, and passed the seal, accordingly, on the 12th day of the said month." And it was submitted for the party cited "that the said Robert Trower, and Francis Smedley, under the circumstances above set forth, were not entitled again to set up the said pretended will of the said Francis Newman, bearing date the 26th day of September, 1817, as his true last will and testament; and, consequently, that she was not bound to appear, absolutely, to the citation taken out in the cause."

To this it was replied, on the behalf of the parties proceeding, that "Robert Trower and Francis Smedley (the said parties) who had been previously concerned as solicitors for Francis Newman, the party deceased in the cause, having received from America an official copy of the last will of the deceased, bearing date the 26th of September, 1817, and the said codicils bearing date on the 30th of September, in the said year, on or about the 28th day of December, 1818, they gave intimation thereof to Robert Albion Cox, the husband of the said Frances Charlotte Cox, the **[222]** daughter of the said deceased, and furnished him with a copy thereof: that, on the 3rd day of February following, they forwarded to America a special power of attorney, to be executed by the executrix named in the said will, authorizing them to prove the same, and also to proceed in a chancery suit, wherein the deceased had been plaintiff, they having been previously concerned for the said deceased in such suit: that, in the month of March following, they received a power of attorney, duly executed by the said executrix, fully authorizing them to act in her behalf in respect of the said will, but, otherwise, varying from the power of attorney sent out as aforesaid, and containing clauses objectionable to the said Robert Trower and Francis Smedley, as with respect to the conduct of the said chancery suit: that the said Trower and Smedley thereupon wrote to the said executors, stating to her that they should decline acting under the said power of attorney, and urging her to send over a new power of attorney, in the form previously forwarded to her; and further intimating that, in the mean time, should it be necessary, they would produce the said will and codicils, and leave it to be dealt with at the discretion of this Court, until such power of attorney, without

the said objectionable clauses, was received by them: that, shortly after, the proceedings hereinbefore mentioned, to obtain a representation to the said deceased, having come to the knowledge of the said Trower and Smedley, they did intervene and act in the said proceedings, as stated on behalf of the party cited; fully expecting the receipt of a satisfactory power of attorney in the course, and during **[223]** the pending, thereof; but that having repeatedly addressed letters to the said executrix, requesting the transmission of the said power of attorney, which produced no reply; and having been repeatedly and solemnly assured, by the said Robert Albion Cox, that he could prove the said will and codicils to be a forgery, and that he should oppose the same in every way; and having no funds in hand to defray the expenses of the suit; they did authorize a proctor to declare that they proceeded no further, as aforesaid: that the said Trower and Smedley, however, have since received a satisfactory power of attorney, as well as divers letters from the said executrix, expressive of her anxious wishes that they should proceed in proof of the will of September, 1817, in her behalf; in consequence whereof they instructed a proctor to procure the decree or citation in this cause to issue: that, subsequent to the return of the said decree, they have received a further letter from their said principal, stating that Elizabeth Francis George Newman, to whom the residue of the deceased's estate was bequeathed by the will of February, 1794, and who was alleged, and sworn, by the said Frances Charlotte Cox, to have died in the said deceased's life-time, is now living, and is one of the legatees named in the will of 1817, by the names of Francis Newman only: lastly, that the amount of property of the deceased expected to be realized under a grant of administration is 8000l., although the goods of the deceased, in order to the former grant, were stated and sworn not to amount to 100l." Under these circumstances, it was submitted that the Court would over-rule the protest, and direct an absolute appearance.

[224] *Judgment—Sir John Nicholl.* Frances Charlotte Cox (heretofore Newman), the party cited in this cause, is the natural and lawful daughter of Francis Newman, deceased; and, as such, is administratrix of the deceased, with a will annexed, dated in February, 1794, and executed in this country. The deceased afterwards went to America, where he died in March, 1818, leaving there a wife, or rather a female with whom he had cohabited as a wife; and a numerous family, consisting of four sons and three daughters.

In the month of February, 1820, a citation issued under seal of this Court, against Mr. Meadowcroft, the sole surviving executor of the will of February, 1794, at the instance of Frances Charlotte Cox, asserting herself to be interested in the lapsed residue of the deceased's estate given by that will to his reputed son, whom she alleged to have died in the testator's life-time. The sole object of that proceeding was, that the party instituting it might obtain letters of administration of the deceased's effects, with the will of 1794 annexed, in the event of the executor declining to take probate; and it had no reference whatever, ostensibly at least, in its origin, to any subsequent will of the deceased. In the course of that proceeding, however, Messrs. Trower and Smedley (parties in the present suit) intervened, as attornies for Elizabeth Hannah Friers, otherwise Newman, asserting her to be the sole executrix of a subsequent will of the deceased, dated in September, 1817, and prayed letters of administration with this subsequent will annexed, to be granted to them in her behalf. After pro-**[225]**-pounding this latter will, however, and giving an allegation, they withdrew from the suit in which they had so intervened, declaring they "proceeded no further;" upon which letters of administration, with the will of 1794 annexed, were decreed to Mrs. Cox without opposition, in common form. The question is whether the executrix is so barred, by her attornies having withdrawn from the former proceeding in the manner which I have described, as not to be entitled to call upon Mrs. Cox, to the effect of the present decree.

Now, under the circumstances stated in this act on petition, on the one side, and on the other, I am not disposed to hold that the party proceeding is so barred, or that the party cited is exonerated from the obligation of an absolute appearance. The suit here, in 1820, was commenced against the executor of the prior will, and not against the executrix of the alleged subsequent one; nor involved any call upon her to set up the validity of that instrument. It is true, indeed, that she intervened in the suit, and propounded that instrument for herself, by her attornies; and that letters of administration, with the one will annexed, were decreed to Mrs. Cox, only upon their

declining to proceed to proof, in solemn form of law, of the other. But it must be remembered, at the same time, that there has still been no sentence, either for, or against, the validity of either will; and, although, in ordinary cases, where the parties being present, declare they proceed no further, or duly authorize a practitioner to take that step for them, the Court, as far as it legally can, will hold them bound; yet, it would be unjust, and inequitable, not to make great allowance in this [226] respect for a case, circumstanced as the present is, for a variety of reasons. For here, in the first place, the party principal is abroad—is resident in a foreign and distant country—a circumstance which, alone, would induce the Court to distinguish this from an ordinary case. But, secondly, and principally, on what grounds did Messrs. Trower and Smedley proceed in withdrawing from the former suit? Was it under any special authority to that effect, communicated to them (under any misapprehension even) by their principal? No such thing. It proceeded, as they allege and depose, upon quite different grounds. Upon the insufficiency of their funds—upon their unwillingness to act under their power of attorney (now rectified in that respect), but which, it seems, then contained some obnoxious clauses—and, lastly, upon the "repeated and solemn" assurances of Mr. Cox, the husband of the party proceeding (somewhat too hastily, perhaps, confided in, on their parts), that "he could prove the will and codicils" of which their principal asserted herself the executrix, "to be a forgery." Now the attornies declining to act, or being deterred from proceeding, under these circumstances, is not so binding, in my judgment, upon their principal as at all to exclude, even her, from re-propounding the alleged last will under the process now taken out.

But the question, in substance and effect, which the Court has to determine, goes a great deal further, being, not whether the act of the attornies shall be binding, to this extent, upon their principal merely, but also whether it shall be binding, and to a similar extent, upon all the parties interested in the bequests of this will. For, unless the Court should [227] determine to have this effect, as well as the former, it would be of little avail to relieve Mrs. Cox from the obligation of appearing to this decree. But that it has, or can have, the effect of barring the other parties entitled under it from putting in suit the validity of the will—several of the parties so entitled, and among them, the substituted universal legatee, being minors; all of them being resident abroad; and none of them having been cited in the course of the prior proceeding, either in form or in fact—is, I apprehend, a proposition that can hardly be seriously contended for. The asserted will of 1817 has every appearance of authenticity, as far as I can judge by inspection of the mere copy; it is certified by the register of Maryland; it was proved, recently after the death of the deceased, not merely on the oath of the executrix, but on the oaths (which it is the custom to require there, for the purpose of the probate) of the subscribed witnesses; there are two codicils of a subsequent date to that of the will; and the instrument has every internal evidence of genuineness, which can be furnished by the character of the dispositions contained in it. Still, however, it may be a forgery, as Mr. Cox suggests. I would be understood only to mean that it looks authentic, primâ facie. Now that the Court should set aside all this; and should decree this whole property (taken, originally, as under 100*l.*; but which, it seems, may eventually be 8000*l.*(*a*)) to Mrs. Cox, [228] away from the legatees, merely because the attornies of the executrix, under special circumstances, withdrew from the former suit, would be a departure from all those principles upon which this Court is in the habit of proceeding, in determining these and similar cases.

But, superadded to this, there is a circumstance disclosed in the act, which gives double weight and effect to the considerations on which I have previously insisted, and which does not leave, in my mind, a shadow of doubt, as to the propriety of directing an absolute appearance. The residuary legatee in the deceased's will of February, 1794, was a reputed son, described in the will as "Elizabeth Francis George Newman;" and it was solely upon her allegation of his death in the testator's life-time that letters of administration were granted to Mrs. Cox at all; she taking no benefit whatever

(*a*) It was said, in explanation, that the amount of the effects was dependant upon the issue of a suit in Chancery; and that if it turned out to be greater than the sum administered to, it was the intention of the administratrix to amend the administration in that respect, as directed by the stamp act.

under the will, but in that event. It is now alleged, however, that this reputed son not only survived the deceased, but is still living; and is a legatee under the will about to be propounded, under the description of "Francis Newman" only. Why, if this be so, Mrs. Cox's administration is clearly voidable: and she, while in possession of it, is a mere trustee for the benefit of the residuary legatee under the former will; independant of any consideration of the validity of the alleged latter testament. It is true that the fact of this reputed son having survived the father rests in allegation only; but it is to be remembered that so also does that other fact of his death in the father's life-time. For I take Mrs. Cox's affidavit, which states that event only in general terms, and without any specification of time **[229]** or place, as proof only of her information, and of course, of her belief, of that event, and not as proof, strictly speaking, of that event itself.

Upon the whole, though Mrs. Cox is entitled to be reimbursed for any expence to which she may have been put in taking out these letters of administration; yet I am clearly of opinion that the executrix, and the parties benefited under the alleged latter will, are not barred by any thing that has hitherto occurred from putting it in suit; and, consequently, I over-rule this protest, and direct an absolute appearance.

EVANS *v.* KNIGHT AND MOORE. Prerogative Court, Trinity Term, 3rd Session, 1822.—Probate in common form of certain "instructions" as containing the last will of the deceased, granted on a special affidavit. That probate called in, eight years after, and the executors put on proof of the will in solemn form of law. This step held to have been taken by the next of kin upon insufficient grounds—the instructions pronounced for—and the next of kin condemned in costs from the time of giving in their allegation.

[For former proceedings see 3 Phill. 413; and see p. 138, ante. Followed, *Beale* v. *Beale*, 1874, L. R. 3 P. & D. 179. Distinguished, *Leigh* v. *Green*, [1892] P. 17.]

Judgment—Sir John Nicholl. The party deceased in this cause is John Moore, who died on the 24th April, 1812. He had formerly been in service as a gentleman's coachman; but afterwards took a wine and liquor shop at the corner of Goodge Street, in Tottenham Court Road, where he died.

The deceased, while in service, had two natural children, by different mothers; the one, a daughter, Betty White, of whom I shall have occasion to speak presently; the other, a son, John Moore, who was in the naval service, and whose death has occurred subsequent to that of the deceased in this cause. He does not appear to have cohabited with either of these women.

[230] In 1803 the deceased paid his addresses to a young woman named Mary Hewitt, then living with her parents in Oxfordshire; and shortly after he came to London, wrote to Hewitt to come up, as for the purpose of being married to him. With this request she complied; and they were supposed to have been married accordingly. Whether a marriage in fact, however, and still more, whether a legal marriage, was had between the parties is extremely doubtful; at all events, no legal marriage can be proved; and the presumption is strongly that none such was had. But from that period to the death of the deceased they cohabited as man and wife; acknowledged each other as such; and were universally so reputed. The issue of this connexion were three children, of whom two, a son and a daughter, survived the deceased, and, indeed, are still living. The deceased invariably treated them with the greatest love and affection; and constantly acknowledged them as his lawful issue.

The deceased, who, by the assistance of his reputed wife, appears to have been successful in business, purchased, in the year 1807, a house in Tottenham Court Road, held on lease for a term of which more than ninety years were then unexpired; and which is stated in the answers to be let for 165l. per annum. In 1809 he purchased a piece of ground in Alfred Place, on a similar lease, and built a house, No. 30, stated also, in the answers, to be let for 63l. per annum. In 1811 he purchased ground in Upper Gower Street, upon which he was building two houses at the time of his death: they have since been completed, and are proved to let, as above, at 195l. 12s. per annum. It is in evidence **[231]** from the witnesses on both sides that the deceased made frequent declarations of the manner in which he meant to dispose of these houses. He frequently declared his intention to give the house in Tottenham Court Road to his widow; the house in Alfred Place to his daughter Jane; and the houses in Upper Gower Street to his son Richard, an infant of two years old at the time of his father's decease.

About a fortnight before the deceased's death he caught a violent cold, while standing about in the wet to purchase timber for his new buildings. This produced an inflammatory affection of the chest and lungs, technically called "peripneumony," under which the deceased was evidently labouring for several days before his death; and which terminated his life on Friday, the 24th of April. No apprehension whatever of the result appears to have been entertained until the Monday preceding, when a physician, Dr. Outram, was called in for the first time; rather, it should seem, to satisfy some doubts entertained by Mrs. Moore (or Hewitt) as to whether the deceased were getting better than from any thing in the nature of actual alarm that he was getting rapidly worse. It is alleged that the deceased on that day sent for a professional gentleman to make his will, who attended accordingly, but not till the afternoon of the following day, being Tuesday, the 21st of April; when it is also alleged that he took from the deceased instructions for his will. The purport of these instructions is to dispose of the leasehold houses in the manner which I have already stated in stating the deceased's declared intentions with respect to the disposal of them. They further provide that the expence of finishing the **[232]** houses in Gower Street shall be defrayed from the deceased's personalty; the residue of which shall "be for the use and benefit of his children;" and they appoint the deceased's "wife, Mary Moore" (so termed in the instructions), his brother, Richard Moore, and a friend, Mr. Joseph Knight, his executors. From these instructions, which are alleged to have been signed by the deceased (who also inserted the date), and attested by the solicitor, a will was actually drawn up, which the deceased, however, was prevented by death from executing.

Probate of the instructions so taken, as containing the last will of the deceased, was granted in common form upon a special affidavit of the solicitor, and of Mr. Hewitt who was present at the giving of the instructions, to the subscription and date being in the hand-writing of the deceased; and to the several circumstances in support of them, of which the above may be considered a general outline. It was granted to all three executors; and the deceased's property, sworn not to amount in value to 10,000l., was administered under that probate for eight years. But in the year 1820 that probate is called in, upon a suggestion that the deceased was incapable, from delirium, at the time when the instructions, as pretended, were taken, of which it was had; and the executors are then, for the first time, put on proof of the will in solemn form of law.

This is the history of the case; and, under the circumstances stated, the presumption is strongly in favour of the will. The burthen of proving incapacity rests with the parties setting it up; especially at this distance of time. It is said, indeed, that these parties had no interest in the question of the **[233]** deceased's testacy or intestacy, until their discovery (stated to have been made for the first time, it does not appear by what means, in the year 1820) of the nature of his connexion with Hewitt; being ignorant, till then, of the relation in which they stood to the deceased of his legal next of kin. This will justify them, I admit, for not proceeding sooner; if it shall appear, in the end, that they have sufficient grounds for proceeding at all. It is a circumstance, however, which disposes of one only of the numerous difficulties attending the case set up, as in opposition to the will. On the other hand, I observe that one of the next of kin, now impugning the instructions, is the very brother who took probate of them; and swore, consequently, to his belief of their containing the deceased's will. I must presume, therefore, that this brother had no intimation, at that time, that the deceased was incapable when the instructions were taken. Yet he says, in his answers, that "he saw the deceased two or three times every day, from the time of his being taken ill till his death." It is also in evidence that he had a daughter resident with the deceased through the whole period of his illness; a daughter, too, now deposing to the deceased's incapacity pretty unreservedly. Under these circumstances, had the fact been such, how is this brother's ignorance of it at that time, which I must presume, to be, even probably, accounted for?

It should seem, indeed, as if the next of kin were fully apprized of these difficulties; for the suit has been conducted, on their part, with extraordinary activity. No pains have been spared to procure evidence against the will; every legal means, at least, **[234]** has been resorted to, to exclude such as might tend to support it. The medical gentlemen who attended the deceased are twice had to the solicitor's chambers, and interrogated as to their opinion of his capacity; and this eight years after his death.

Dr. Outram is apprized by one of the relatives, whom he was professionally attending, a twelvemonth before his examination, what was contemplated, in consequence of their discovering that the deceased was not married to Hewitt—namely, "the setting aside the deceased's will, which, they said, had been made while the deceased was delirious." This sort of, all but, tampering with witnesses frequently communicates a bias; and renders the Court a little jealous as to mere matters of opinion deposed to from recollection, especially after a long interval, by witnesses, however respectable, upon whom it has been practised. Again, if the witness Smith is to be believed, applications were made in another quarter, of a still less warrantable description. He deposes to having been present with Edward Manwaring when a Mr. Barker, the solicitor for the next of kin, "was extremely urgent with him, the said Edward Manwaring, to call upon him, and told him, in deponent's presence and hearing, that he was sorry the other party had got him first—that Mr. Roberts could not find out his direction—that if they could have got him first they would have managed to keep him out of the way at all events, and so to have weakened their opponent's case. Mr. Barker then asked Manwaring if the signature to the will was of the deceased's hand-writing; to which Manwaring replied that it was; and that no power on earth should induce him to say otherwise. And he **[235]** said further, that Roberts knew it as well as he, Manwaring, did. Subsequent to this, several letters came from Mr. Barker to induce Manwaring to go to him; and Manwaring begged that he might be refused, if Mr. Barker should call; and he requested of the deponent to go to Mr. Barker and tell him that he, Manwaring, would not come to him." In justice to the professional gentleman employed for the next of kin the Court abstains from giving full credence to this account; as the matter of the charge coming out upon interrogatories to Smith, a witness, upon the allegation given in support of the character of Manwaring, no opportunity has been afforded him of explaining or denying it. Lastly, four of the seven witnesses produced to the testator's incapacity are on the very verge of incompetency, as being the children of parties entitled in distribution; and, consequently, as having a derivative interest in setting aside the will. As to the exclusion of evidence tendered by the other party, witness the double attack on Manwaring (vide page 138, ante) on his general character and his particular evidence; arising, too, out of transactions very remote in point of date and quite unconnected with the subject of the suit. Witness, too, the objection to the competency of Hannah Roberts,(*b*) on the score of an interest in **[236]** the event of the suit, acquired long subsequent to the death of the testator; so that her evidence in favour of the will,

(*b*) Hannah Roberts, wife of John Roberts, was produced and examined on the part of the executors. Subsequent to her evidence being taken, an allegation was given for the next of kin, pleading that the paper-writing propounded, purported to contain amongst other things a bequest in the following words:—"I give unto my dear wife, Mary Moore, my house, No. 19 Tottenham Court Road, in the county of Middlesex, for the remainder of the term therein: that after the death of the deceased (to wit) in August, 1818, Mary Moore (or Hewitt, so calling herself), by virtue of a certain indenture or deed of gift, assigned or set over the said house and premises, No. 219 Tottenham Court Road, for the remainder of the term then to come and unexpired therein, and all her right, title, and interest therein, under and by virtue of the said bequest, to certain persons, in trust for her use and benefit, during the term of her natural life; and from and after her decease for the use and benefit of her children, as therein mentioned: and from and after the respective deaths of her children, then to and for the absolute use and benefit of Hannah Roberts (formerly Hewitt, she being Mrs. Moore's (or Hewitt's) sister) or her assigns." Consequently that she, the said Hannah Roberts, had, at the time of her examination, a contingent interest in the said house and premises; by reason of which she was an incompetent witness, as having an interest in the event of the cause.

This allegation was admitted without opposition on the part of the executors. Upon the evidence, however, there was no proof whatever that the witness had any knowledge of the deed pleaded against her at the time of her examination; on the contrary, there was every reason to believe that she was then wholly ignorant of it. But the proofs of this last not being quite satisfactory, and the counsel for the executors not pressing for its reception, the evidence of Hannah Roberts, under the circumstances, was taken as rejected

now (in a manner) rejected by the Court, would have been unexceptionable, had the question of its validity been gone into, recenti facto. Witness, again, the objections urged to the affidavit of Mr. Moore, the solicitor who prepared the will, being introduced into the cause (vide note (*a*), page 251, post). All which I would be understood to signify by these observations is that if parties choose to contest **[237]** wills under such circumstances, and by such means, they must be content to do it at their own peril.

Such, then, is the general character of this proceeding; and the question for the Court's determination is whether these pretended instructions were fraudulently obtained from the deceased while in a state of delirium and incapacity. I apprehend there is no medium: it is not resolvable into a case of erroneous impressions as to the state of the deceased, on the part of those privy to and connected with the transaction. The adverse case, indeed, set up is that the transaction, throughout, was bottomed in fraud and has been sustained by perjury. It even appears that suggestions have been thrown out of forgery, as if the date and signature to the will were not, as alleged, of the hand-writing of the deceased. This was suggested to Manwaring, as appears by the answers of Smith to the 3d interrogatory in part recited above; and is also suggested in the answers of the parties to the allegation propounding the will. And the witness, Hewitt, deposes to having been shewn a letter from a nephew of the deceased to Mrs. Browne (formerly Moore or Hewitt), in which he asserted "that the deceased's pretended will was a forgery; that she, Browne, and Hewitt had perjured themselves; and that if they knew no better, he would teach them."

The circumstances of this case hardly require, perhaps, a preliminary statement—that where mental aberration is proved to have shewn itself in the alleged testator, the degree of evidence necessary to substantiate any testamentary act depends greatly on the character of the act itself. If it purports to give effect only to probable intentions, its validity **[238]** may be established by comparatively slight evidence. But evidence, very different in kind and much weightier in degree, is requisite to the support of an act which purports to contain dispositions contrary to the testator's probable intentions, or savouring, in any degree, of folly or phrensy.

What, then, are the features, and what is the character, of the testamentary act set up in the present case? It is precisely such a disposition as natural affection would dictate. The testator bequeaths by it his whole property, in equitable proportions, to his wife and children. If, in truth, the mother of these children were not his lawful wife, this rather increases than repels the presumption in favour of the act. In addition to natural affection, it rendered some measure of the sort absolutely incumbent on the deceased in point of moral duty; as his intestacy in that case would have left this mother and her children wholly destitute and unprovided for. But the conformity of these bequests with the deceased's probable intentions does not rest upon their accordancy with natural affection and moral duty merely; they are conformable with the deceased's constant and repeated declarations, spoken to by both sets of witnesses, as to the disposition of the major part of his property, that consisting of the leasehold houses. There is no evidence, indeed, of any precise declarations of the deceased as to his intentions with respect to the residue; but to whom was it probable that this should be bequeathed but to his children?

Now the presumptions in favour of a will of this description are strong, and it is capable of being supported, according to what I have already observed, on comparatively slight evidence. What the **[239]** evidence tendered in support of this instrument actually is shall be considered presently. I shall first, however, proceed to state and examine the proofs adduced of the testator's alleged general incapacity at and about the time when the instructions were taken.

Experience in this Court teaches us that evidence upon questions of capacity is almost always contradictory. The obvious grounds of conflicting evidence upon these questions are that evidence of capacity is, commonly, evidence of opinion merely; that of the witnesses, no two, possibly, have seen the party whose state is deposed to at precisely the same time and under precisely the same circumstances; and that each again of the several witnesses, however numerous, measures, possibly, testamentary capacity by his own particular standard. These sources of discrepancy, and many more might be enumerated, are common to all cases of this description. In the present case, however, there is an additional source, namely, the remoteness of the transaction to which the witnesses are called to depose—a circumstance sufficient, in

itself, to account for a no inconsiderable degree of contrariety of evidence, even where the witnesses have to speak to facts merely, and not to opinions formed and inferences built upon facts, of which most of the evidence commonly furnished on questions of capacity, as already observed, is made up. If the Court, therefore, on questions of capacity generally is accustomed to rely but little on such evidence, so far as it is that of mere opinion; but to form its own judgment from the facts and the conduct of the parties at the time; it becomes it to do so, more peculiarly, in the present instance, where much of the evidence **[240]** not merely consists of opinions, but of opinions delivered long subsequently to the transactions which they profess to have suggested them—upon loose recollections, too, and in some instances after repeated discussions of the subject-matter with interested parties.

The witnesses examined in support of the deceased's incapacity on the day when the instructions were taken are three nieces and a nephew of the deceased, Betty White, his natural daughter, and Doctors Outram and Pearson. Of these, the deposition of White, the fifth witness, must be taken with some abatement of the credit which might otherwise be due to it; she having died before she had been repeated or examined upon the interrogatories of the adverse parties.(*a*)

[241] Now of these nieces and the nephew, and White, the natural daughter, it is extremely difficult to reconcile the evidence, even taking into the account all the grounds of discrepancy which I have just stated. Some of them say that the deceased was so violent as to be obliged to be held; others represent him as tranquil and quiescent, which last is the character ascribed to his disorder by Dr. Pearson. Some fix the commencement of his delirium on the Monday or earlier; one, indeed, as early as a fortnight before his death; others observed no symptoms of wandering till the Tuesday, and then only slight ones. All agree, however, that the deceased's delirium was not continuous but intermittent; that he was not at once plunged into a state of derangement from which he never recovered, but that this was slight at first, and grew worse latterly, pari passu with the disorder that produced it. And this, I apprehend, is the natural course of the thing where delirium is not the primary disorder—where the seat of that is the chest or stomach, and the head is only affected collaterally.

In estimating, however, the general result of this evidence, the utmost length which the Court could go would be to hold that some degree of wandering had began occasionally to shew itself in the deceased as early as the night of the 20th or the morning of the 21st. But this evidence, even as fortified by that of Dr. Outram and Dr. Pearson, by no means excludes proof of capacity; or renders it in the slightest degree improbable that the deceased should have been in the perfect possession of his intellects for a sufficient interval to perform the testamentary act now under discussion. Dr. Outram only **[242]** speaks to "restlessness and excitement" on the 21st, and an "evident aberration of mind:" he expressly deposes "that the deceased was not in a state of total derangement;" and that, in spite of "a marked confusion of intellect," he could answer questions put him sensibly and rationally. Is there any thing in all this, I may ask, which negatives the probability that the deceased might not merely answer questions sensibly and rationally, but possess full testamentary capacity

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(*a*) Betty White, the deceased's natural daughter, was produced and examined in chief on the allegation given in behalf of the next of kin. The examiner reduced her deposition into writing, and afterwards read the same over to her, and she declared the same to be true; but did not sign it. The examiner, being unable to proceed at that time, desired her to attend on a subsequent day. Previous to this, however, the witness was seized with a sudden and violent illness which occasioned her death in two or three days, before her deposition was signed, and before she had been repeated or examined on the interrogatories of the adverse party. These facts were pleaded in an allegation offered for the purpose of inducing the Court to receive her deposition so in part taken; and being proved by the depositions of five witnesses (one of whom was the examiner) it was received accordingly, with some deductions, however, from the credit due to it, as stated in the text, proceeding on the supposition that the cross-examination might have discredited the witness. See *Hill* v. *Bulkeley*, 1 Phillimore, 280. The deposition of the witness in that case was one step nearer completion, as being actually signed; the single material point in which it differed from the deposition of White in the present case.

for the period which this transaction would occupy? The length of time during which a patient in this state continues rational, when roused from torpor or delirium, commonly depends on the degree of excitement and the degree of interest by which he is roused: and the same patient who instantly relapses after answering, rationally, the common-place queries of a servant or medical attendant, into wandering or delusion, may be stimulated, by any matter of great interest, into the active exertion of a much greater portion of intellect for a much greater length of time.

Upon the evidence of these witnesses I shall only further observe that there are certain admitted facts in the case which are hardly consistent with what must have been the opinion of those about him at the time, if the deceased's state and condition on the 20th and 21st had really been such as they now describe it. Dr. Outram is not called in till the 20th; and then, as it should seem, from no great alarm entertained on their parts. The witness, John Roberts, deposes "that the deceased was ill about a fortnight before his death, as he the deponent best recollects: he was for some time attended by Mr. Thomas, a surgeon, who said he was getting better; but the said Mary Hewitt, **[243]** who lived with the deceased as his wife, thinking Mr. Thomas not altogether right about it, sent the deponent to make some inquiries, &c.;" which, in short, terminated in the introduction of Dr. Outram. The deponent "was not present when Dr. Outram saw the deceased: he was then in a small parlour behind the bar." Hewitt deposes to having gone, on the morning of that day, to Camden Town, "to take a lodging for the deceased to be removed to; but when he returned, after engaging a room, Dr. Outram, whose first visit had been paid in this interval, said that he could not be removed before Friday, when he would determine about it." It is not till Thursday night, I observe, that Dr. Pearson is called in to consultation; and this, and the merely postponing the deceased's removal, satisfies my mind that Dr. Outram did not, at the time, think him in that imminent danger on the 20th which he now conceives himself to have thought him in at his first visit. Dr. Outram expressly deposes that "the persons about the deceased had very erroneous notions upon the subject, having no adequate idea, if any apprehension at all, of the danger he was in." This could hardly have been had the deceased's state at that time been such as the witnesses upon the part of the next of kin would now represent it. Dr. Pearson did not see the deceased till the evening of the 23d, when he was in extremis, having actually died on the 24th. His evidence proves no fact; and his state and condition on the evening of the 23d, the day preceding his decease, furnishes, to my apprehension, very imperfect grounds for an opinion even of what it was, especially in point of mental capacity, in the afternoon of the 21st.

[244] To the evidence of these witnesses, with the exception of Doctors Pearson and Outram, as to the deceased's capacity, so far as it goes to mere opinion, the Court is disposed, for reasons already stated, to pay but little respect. But the mere opinions of professional men of eminence can, by no means, be passed over with similar inattention.

Now Dr. Outram certainly deposes that "when he saw the deceased on the 21st day of April, the deceased was not in his, the deponent's, opinion in a state of sound mind, memory, and understanding, or capable of doing any act requiring the exercise of thought, judgment, and reflection." The length of Dr. Outram's visit on that day, I should observe, did not exceed "a quarter of an hour or twenty minutes;" and whether his incapacity during, and through, the whole day, is a matter of fair inference from his incapacity, admitting him, for argument's sake, to have been incapable during that small portion of it, may, under the circumstances, be justly doubted. Dr. Outram's opinion, however, is, to some extent, that of Dr. Pearson, who says, "That he cannot depose to the state of the deceased on the 21st day of April aforesaid; for the deponent did not see him at all on that day. But the deponent saith that the deceased's complaint did not appear to be of that acute peripneumonic nature which sometimes attacks persons in good health suddenly; but it appeared to be of that kind which had been preceded by inflammation: and it would be out of the ordinary course of that complaint, and so much so as to make it extremely improbable, that the deceased should have been free from wandering and mental affection on a day so shortly before the de-**[245]**-ponent saw him, as the 21st day of that month, the deponent having seen him on the 23d. The deponent considers it to be highly improbable that the deceased should have been of sound mind on the 21st day of April aforesaid." To the opinions of these gentlemen, had they been

examined recenti facto, the Court must have deferred very considerably, though opinions merely; but it is by no means disposed to place the same confidence in them, delivered eight years subsequent to the facts upon which they are founded. Dr. Outram, indeed, speaks from "memoranda" opposite the deceased's name in his "book;" but he does not tell us how these memoranda were made, whether the symptoms of each day were noted upon that day, or whether the whole was put down together, as it might have been, after the deceased's death, in support, possibly, of his hypothesis (with which the Court does not presume to interfere) relative to the nature of his patient's disorder, which the result confirmed.

I am of opinion, therefore, that the whole of this evidence, I mean the evidence of these nieces and the nephew taken in conjunction with that of Doctors Pearson and Outram, not only does not exclude proof of testamentary capacity when these instructions were taken; but that it does not even oppose any thing in the shape of antecedent incredibility to the evidence of such capacity at that time, which may be furnished by the other party.

What then, on the other hand, are the direct proofs of capacity in the deceased when these instructions were taken; and what are the inferences in support of those proofs, fairly deducible from the facts of the cause and the conduct of the parties at the time?

[246] In the first place, then, it is admitted that the person sent for to make the deceased's will (whether at the suggestion of Dr. Outram or not is not very material) was Mr. Moore, a solicitor well acquainted with the deceased, and long employed by him in that capacity. It is admitted, too, that his services were invoked as for that express purpose; and without, as it appears, any shadow of clandestinity. How utterly inconsistent is this with the case now set up against these parties. Was this the probable conduct of parties meditating fraudulently to obtain a pretended will from an incapable testator? Hewitt or some other of those privy to the fraud would, in that case, have been the drawer of the will; and this gentleman, of whose character I shall presently speak, was the last person to be sent for upon such an occasion.

Lloyd, an old and very intimate friend of the deceased, deposes that, "Having called to see the deceased in the afternoon of the Tuesday next immediately preceding the day of his decease, he was desired to walk up stairs, which he did, into a small bed-chamber, where he believes the said deceased usually slept—that to the best of his present recollection there were two women in the room, one of whom was Mrs. Cutmore." He says that "he inquired of the said deceased how he was, who, he thinks, replied 'Not worse.' That soon after Mrs. Moore came up; and the deponent, whispering, asked her if Mr. Moore had made his will? To which she replied, No; and then added, 'But he is going to make it to day.' Shortly after which she requested the deponent to assist the deceased into the next room, whereupon the deceased and the de-**[247]**-ponent proceeded up a few stairs, the deponent putting his hand under one of the deceased's arms in going up stairs. Not long after, Mrs. Moore joined them, and Mr. Richard Hewitt came in. In a short time afterwards a gentleman, at that time unknown to the deponent, but whom he understood before he left the house to be a Mr. James Moore (the solicitor), came into the room. After inquiring of the deceased how his health was, he said, 'You want to make your will;' to which the deceased replied, 'I do.' That pen, ink, and paper were then procured, and a table placed for Mr. James Moore, when the deponent, considering that it was proper for him to withdraw, took his leave."

Why this evidence (especially coupled with the res gesta) outweighs all the loose evidence of delirium given by the adverse witnesses, and proves capacity equal to the act done, up to the very instant of its being entered upon. He speaks to the perfect capacity of the deceased, in his opinion; and adds that the deceased was very weak and unwell, but, he believes, had no thought of dying. He also saw the deceased on the following day, the Wednesday, and speaks to his perfect capacity, in his opinion, at that time.

But the evidence of Hewitt is much more decisive, and, indeed, proves the whole case. Unless the Court imputes to this witness the grossest perjury, all doubt on the subject is removed. It is not from his opinion, but from the facts to which he speaks, that the Court is warranted in drawing this conclusion. It is true that he is the brother of Mrs. Moore (or Hewitt), and, as such, a biassed witness; but he has no interest whatever in the issue of the **[248]** suit, either present or expectant; and I

see nothing in the character of his evidence that has the slightest tendency to discredit him. He, too, as well as the rest of the world, believed that his sister was lawfully married to the deceased; and, so believing, could have no inducement to join in obtaining this will as for the advancement of her interest; since, if the lawful wife of the deceased, she would have been more benefited under an intestacy.

Hewitt was present when the greater part of the instructions were given. He proves that they originated entirely with the deceased himself; not that Mr. Moore, the solicitor, put leading questions to the deceased, to which he merely assented; but that the deceased dictated the several bequests which the solicitor committed to writing, and read over successively, in the order in which they were delivered, for the deceased's approval, without any suggestion even on his part.

Hewitt was not present at the conclusion of the instructions. The deceased had long been his friend and benefactor; and he deposes that he left the room towards the conclusion of the instructions, overpowered by his feelings at the thought of being then, probably, about to part with that friend and benefactor for ever. He returned, however, soon afterwards, and saw the written instructions lying on the table. He then remarked, he says, "That the deceased had signed the same, and noticed that the name of John was clear, and that there was a blot over the name of Moore, the ink of which was still wet." This witness corroborates Lloyd as to his being present up to the commencement of the transaction, and his quitting the room, from motives **[249]** of delicacy, upon the arrival of the solicitor, as soon as he understood the nature of the business about to be transacted.

It is quite unnecessary to state the deposition of Hewitt in detail. It will be sufficient to observe that, if he is credible, he proves every thing. He not simply states his own decided opinion of the deceased's capacity, but he deposes to facts, about which he could not be mistaken, from which the Court can go the whole length of drawing that conclusion for itself.

The other evidence which bears directly upon the factum of these instructions is the proof of the death, character, and hand-writing of the solicitor, Mr. Moore. Now it is proved that this gentleman died in the year 1817, at the advanced age of seventy-eight; and the proofs that are furnished to the Court of his highly respectable character are even stronger evidence in favour of the will, in some respects, than his own deposition could have been had he been living and examined in the cause. In that case the Court would only have had the ordinary presumption that he was a person of fair, because of unimpeached, character. But as it is, his character is proved to have been of the first respectability. He was thirty years vestry clerk of the parish of St. Pancras; and was employed as a collector of rents, and in various offices of trust and confidence. He was also, and had for many years been, the deceased's conveyancer, who was a purchaser of leases, and engaged in several building concerns; consequently, he was well acquainted with the deceased; and not liable, therefore, to form an erroneous impression as to the state of his capacity—and that a person of **[250]** this description should have engaged in the fraud of obtaining these instructions from a testator whom he knew to be in a state of incapacity and delirium is quite incredible. In some respects, however, the legatees under the will may suffer from the loss of his direct evidence: but it is the duty of the Court to protect them from suffering by that loss unduly. He, if living and examined, could doubtless have explained those little variations between the instructions and the instrument drawn up from them (as I shall presently observe)—he could, probably, have also explained how the mistake arose, which has been so much relied upon, about the residence of Knight the executor.(*a*)

But the Court has further, as bearing upon the validity of these instructions, evidence of the conduct of Mr. Moore, the solicitor, as with relation to them at the time. The instructions being taken as above, and signed by the deceased, and attested by the solicitor, he is in the less hurry to prepare a will for execution—

(*a*) He was described in the instructions as residing in Southampton Row, Bloomsbury, whereas it was pleaded and proved by the next of kin that he never resided there; but that, "at the time of the date of the instructions, and for several years prior thereto, he had resided in High Holborn, near Gray's Inn, which circumstance was well known to the deceased whilst" (as they pleaded it) "he retained the enjoyment of his mental faculties." How this mistake originated was left unexplained in the cause.

which is confirmatory of the fact of the deceased not having been then considered in imminent danger by those about him. A will, however, is actually prepared; and on the Thursday evening Mr. Moore desires his assistant, Mr. Ker-[251]-sey, to call at the deceased's house on the next morning, and fix a time for its execution. This is deposed to by Mr. Kersey, as also that, in passing the deceased's house on the following morning, he found the shutters closed, from which he conjectured, as the fact was, that the deceased had died in the course of that night. This conduct, therefore, of the solicitor at the time, in drawing up a will, and preparing to wait upon the deceased, in order to attest its execution, is plainly inconsistent with any suspicion on his part that the deceased was incapable at the time of giving the instructions, and is strongly confirmatory of the other and more direct evidence of their validity. I may also observe that Mr. Moore has confirmed this account of the general course of the transaction by the sanction of an oath. This I do without adverting particularly to the contents of his affidavit; (*a*) but [252] thus much at least being in evidence,

(*a*) The 12th article of the allegation propounding the instructions on the part of the executors pleaded "that in order to probate of the instructions, as containing the will of the deceased, being granted to the executors, Mr. James Moore was, on the 21st of May, 1812, in conjunction with Mr. Richard Hewitt, duly sworn to an affidavit before a surrogate of the Judge of this (the Prerogative) Court, in the presence of a notary public; and in such affidavit Mr. James Moore made oath that he knew, and was well acquainted with, Mr. John Moore, the deceased, for several years before, and to the time of, his death; and that on the 21st of April, then last past, he attended at the house of the deceased, for the purpose of taking instructions for preparing the will of the deceased, and found him ill and sitting in his bed-chamber; and that from the verbal instructions of the deceased he then drew or wrote the paper writing propounded in this cause, as the will of the deceased; and that when he had finished writing the same, he read the said paper over in an audible manner to the deceased, who approved thereof, and subscribed his name thereto; and that he set and subscribed his name to the said instructions as a witness thereof; and then took the instructions home with him to prepare the deceased's will therefrom; and that the deceased was, at and during the transactions set forth in his affidavit, of sound and disposing mind, and well knew and understood what he said and did." And the next subsequent article of the allegation referred to the affidavit, so made, remaining in the registry, of which a copy was annexed; and pleaded the identity of the parties, and also the hand-writing of the surrogate and notary.

The admission of these articles, and the exhibit was opposed, on the part of the next of kin as a novel attempt to substitute a voluntary, and extrajudicial, affidavit for direct evidence.

Trinity Term, 3d Session, 1820.—*Judgment—Sir John Nicholl.* If the professional gentleman, who took the instructions propounded, were still living, his affidavit, though made before this Court, and for the purpose of probate, would be clearly inadmissible as evidence in the cause. It would not in that case be the best evidence; and the adverse parties would be unduly deprived, by its being admitted as evidence at all, of the right to cross-examine, which must result to them in the event of his being produced and examined as a witness. But in this case the professional gentleman being dead, it is the best evidence; and if the adverse parties having lost their opportunity of cross-examining, the loss is to be ascribed to their own laches, in not calling for proof of the instructions earlier.* Mr. James Moore is pleaded to have survived the deceased four years. It would be strange if parties interested to defeat a testamentary paper could lay by till the death of the solicitor who prepared it; could then object a defect of proof; and at the same time could object to the solicitor's affidavit (an affidavit made in this Court, and for this very purpose of probate) being received in evidence.

I am not at all therefore disposed to shut out of the cause these articles and this exhibit, in limine—their value will depend much on the general circumstances of the case, as disclosed in the evidence—valeant quantum. At present I admit the articles,

* It is to be observed that the Court was not at this time in possession of the fact alleged by the next of kin, in excuse for their not having earlier proceeded to contest the validity of these instructions. Vide page 233, ante.

namely, that probate of these instructions was obtained upon his [253] affidavit, I must presume that its contents, in general, verified and confirmed the account given by Hewitt and Kersey.

Without, therefore, any more particular reference to this affidavit—without any reference whatever to the evidence of Manwaring, which, to guard itself from prejudice, the Court has not even read—and without invoking the testimony of Betty Roberts, which is also to be taken as rejected—the depositions of Lloyd and Hewitt, and the evidence to the character and conduct of Mr. James Moore, satisfy me that the deceased gave and signed these instructions, and was fully competent to the act—for, upon loose evidence of incapacity, given eight or nine years after the death of the testator (evidence for the most part of mere opinion), to discredit the witnesses, Lloyd and Hewitt, and to some extent, Mr. Moore, [254] and to pronounce the whole matter of these instructions false and fraudulent, would be quite extravagant; the more especially when the dispositive part of them is viewed in connexion with the admitted state of the deceased's affections; with the nature of his relation to this female, with whom he cohabited, as his wife, and her children; and with his often declared intentions relative to the disposition of his property. And as every just presumption, as well as every reasonable probability, was in favour of this will; as it had been acted upon for so many years; and as the parties opposing it had every opportunity of satisfying themselves upon the justice of the case, before commencing the suit; I think that there were no sufficient grounds for calling in the probate; and that their conduct in so doing was unjustifiable. And as these parties have chosen to stand upon their extreme legal rights in calling, at so late a period, for the proof of this will—a will made in exact conformity as well with the deceased's declared intentions, as with his natural affections, and his moral duties, I think that they are liable, at least, to all the costs incurred from the time of giving in their allegation. My only doubt has been, whether in justice they were not liable to the whole costs from the time of calling in the probate.

[255] IN THE GOODS OF HIS LATE MAJESTY KING GEORGE THE THIRD, Deceased. Prerogative Court, Trinity Term, 4th Session, 1822.—Application to the Court for its process, calling upon his Majesty's proctor to see a testamentary paper of his late Majesty propounded and proved—that application rejected; and upon what principles.

(On motion.)

The case out of which the present question arose was described, in the heading of the act to lead the proposed decree, as "a business of citing Iltid Nicholl, Esq., his Majesty's Procurator-General, for, and on behalf of, our Sovereign Lord the King, as heir and successor of his late Majesty King George the Third, deceased, to see the last will and testament, or testamentary schedule, of his said late Majesty, bearing date the 2d day of June, in the year of our Lord 1774, propounded and proved, in solemn form of law; promoted and brought by her Highness Olive, the natural and lawful daughter of his Royal Highness Henry Frederick, the late Duke of Cumberland, deceased, whilst living, the natural and lawful brother of his said late Majesty, the only legatee named in the said will, and there being no executor, or residuary legatee, named in the same—against the said Iltid Nicholl, Esq., his Majesty's Procurator-General."

On the 1st session of the present (Trinity) term a proctor exhibited, as such, for the party styling herself her Highness Olive, Princess of Cumberland, as above, and alleged—first, that "his late most gracious Majesty, George the Third, of the United Kingdom of Great Britain and Ireland, King, &c. departed this life on, or about, the

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leaving it open to the counsel for the next of kin to renew their objections to the affidavit's being relied on, as evidence, at the hearing of the cause; when the Court, being in possession of all the circumstances, will be better able to finally dispose of that question agreeably to the equity of the case.

Articles admitted.

The question thus mooted merged, however, to some extent, at the hearing, by the counsel for the executors not insisting on the affidavit being read. The fact of an affidavit having been made by Mr. James Moore for the purpose of probate was admitted in the cause.

29th of January, 1820, a widower, leaving behind him his eldest son, his then Royal Highness George Augustus Frede-[256]-rick, Prince of Wales, Prince Regent of the United Kingdom, who thereupon succeeded to the throne of this United Kingdom, and became entitled, in right of his Crown, to all and singular the personal estate and effects of his said late Majesty remaining undisposed of"—secondly, that "his said late Majesty, whilst living, made and executed his last will and testament or testamentary schedule in writing, under his royal sign manual, in manner as required by law, bearing date the 2d day of June, 1774; and therein bequeathed the sum of 15,000l. to his niece, Olive, daughter of his said Majesty's brother, his Royal Highness Henry Frederick Duke of Cumberland; but did not of his said will appoint any executor, or dispose of the residue of his personal estate, and effects." In verification of the premises he exhibited the said last will and testament or testamentary schedule, together with certain affidavits. Lastly, he prayed that the Court would, on motion of counsel, "Decree the said Iltid Nicholl, Esq., his Majesty's Procurator-General, to be cited, by the service of a decree in that behalf, to appear on the sixth day after service, if a Court-day, otherwise on the Court-day next and immediately following, to see and hear the said true and original last will and testament, or testamentary schedule, of his said late most gracious Majesty, King George the Third, deceased, bearing date as aforesaid, propounded and proved, in solemn form of law, if he thought it for the interest of our Sovereign Lord the King so to do; and, further, to do and receive, as unto law and justice should appertain, under pain of the law, and contempt thereof, at the promotion of her said [257] Highness Olive, Princess of Cumberland, &c. with the usual intimation," namely, that "the Court would proceed in the said cause or business, the absence, or rather contumacy, of him, the said procurator-general, in anywise notwithstanding."

The alleged testamentary paper itself was in the following terms:—

"George R. "St. James's.

"In case of our royal demise, we give and bequeath to Olive, our brother of Cumberland's daughter, the sum of 15,000l.; commanding our heir and successor to pay the same, privately, to our said niece, for her use; as a recompense for the misfortunes she may have known through her father.

"June 2, 1774. "CHATHAM.

"Witness, J. Dunning. "WARWICK."

The affidavit of third parties in support of the paper went, merely, to the subscriptions, "J. Dunning" and "Warwick," being of the handwriting respectively of the late Lord Ashburton (formerly Mr. Dunning) and of the late Earl of Warwick; as also to the name and letter "George R." at the top of the paper, being the true and proper sign manual of his late Majesty King George the Third. There was no affidavit as to the signature of the late Lord Chatham, but it was sworn that the whole, body, series, and contents of the instrument (save and except the name and letter "George R." and the other subscriptions), as well as the title "Warwick" subscribed, were of the true and proper handwriting of the late Earl of Warwick.

There was also an affidavit from the party her-[258]-self promoting the suit, accounting for the plight and condition of the instrument; and for the manner in which it came into her hands. She deposed that, "In the beginning of the year 1815 his Royal Highness the late Duke of Kent informed the deponent, that George, Earl Brooke, and Earl of Warwick, with whom the deponent had been well acquainted from her infancy, had told him, the said Duke of Kent, that he the said Earl of Warwick wished to communicate to the deponent, some important particulars regarding this deponent's birth, the purport of which he, the said Duke of Kent, at the same time intimated to the deponent, that one evening happening in, or about the month of May in the said year, the Duke of Kent, being at this deponent's house, No. 74 Seymour Place, Bryanstone Square, the said Earl of Warwick also came there; and, in the presence of the said Duke of Kent, after requiring and receiving a most solemn pledge, on the part of the deponent and the said Duke of Kent, not to divulge the purport of the communication he was about to make, until after the death of his then Majesty King George the Third, informed the deponent of her illustrious birth, to wit, that she, the deponent, was and is the natural and lawful daughter of his Royal Highness the late Duke of Cumberland, deceased; and that the proofs thereof had been deposited with the said Earl of Warwick, for the benefit of the deponent, in case she survived his Majesty, by the late Earl of Chatham and the late Dr. Wilmot, under

a solemn pledge to preserve them safely, and to keep them secret, until the demise of his said Majesty—and he, the said Earl of Warwick, further informed the depo-[259]-nent, that the several papers and documents were then at Warwick Castle; and that, apprehending his own health to be precarious, he had considered it incumbent on him to place the same in safe custody, that, shortly after the premises, the said Earl of Warwick having, as he informed the deponent, gone to Warwick for the documents, delivered the papers into the deponent's hands; and part of them were so delivered in the Duke of Kent's presence; and, amongst other things, the paper writing annexed, beginning thus: 'George R. St. James's. In case of our royal demise;' and ending thus: 'she may have known through her father,' bearing date 'June 2d, 1774,' and having the name and titles, 'J. Dunning,' 'Chatham,' and 'Warwick,' respectively set and subscribed, as witnesses thereto." The deponent further made oath that the instrument was in the same plight and condition as when so delivered to her. Lastly, she deposed to her belief that the instrument itself so delivered was true and genuine; that the name and letter "George R." was the proper sign manual of his late Majesty King George the Third; that the name and title "J. Dunning" and "Chatham," subscribed, were so subscribed by the late Lord Ashburton (then Mr. Dunning) and the late Earl of Chatham; and that the body of the instrument, together with the date, and the signature "Warwick," were of the proper hand-writing of the late Earl of Warwick.

On the 1st session of this (Trinity) term the Court, upon being moved, as above, ex parte, directed the matter to stand over, on account of the special nature of the application; and that his Ma-[260]-jesty's advocate should, in the mean time, be instructed to shew cause against the issue of the proposed citation. In consequence of this intimation, counsel were heard, on the two succeeding Court days, both in support of, and in opposition to, the issue of the process as prayed; and, on this 4th Session, the Court proceeded to dispose of the application in nearly the following words:—

Judgment—Sir John Nicholl. This is an application to the Court for its process, calling upon his Majesty's proctor to see, and hear, an alleged testamentary paper of his late Majesty, propounded and proved. It need hardly be observed that it is not a matter of choice and discretion, but of justice and duty, to grant or refuse that process according as the law shall direct. The Court has received all the assistance that the learning and ability of counsel could furnish in support of the application, as well as in opposition to it; and, after that assistance, the Court has, itself, given the subject all that due consideration which its importance and delicacy appear to require.

The attention of the Court was called, in the course of the argument, to several points—to the right of the Sovereign to make a will—to the form of this particular instrument—to the affidavits exhibited in proof of the hand-writing and history of the paper; and, lastly, to the jurisdiction of the Court to issue the process prayed.

Courts of justice cautiously abstain from deciding more than what the immediate point submitted to their consideration requires. In the present case, several of the points, though properly urged by [261] counsel, would come more regularly for decision in some future stage of the proceeding; if such a proceeding as is prayed can take place.

The right of the Sovereign to dispose of property by will, if doubted, might be ground for the King's proctor's appearance under protest, if this Court should think it could cite him at all. The nature of the instrument, whether testamentary or not, might be formally argued upon the admission of an allegation propounding it in that stage of the proceeding; and its genuineness would be the last, and ultimate, object of the whole proceeding.

Upon these points, therefore, the Court at present expresses no opinion whatever; because, assuming them in the affirmative, and, for the present, taking the several allegations in the act of Court to be true, still the first and immediate question is, whether the Court has jurisdiction to institute this inquiry; to entertain such a proceeding; and, consequently, whether it has a right to form any judicial opinion whatever upon these other points.

His late Majesty (and it is so alleged by the party making the application) "did not appoint any executor, or dispose of the residue of his personal property;" but (and it is also so alleged) "his present Majesty became entitled, in right of his Crown,

to all the personal estate and effects of his said late Majesty remaining undisposed of." The paper itself (assuming it to be genuine and testamentary) directs the bequest to be paid "by the heir and successor." This is, therefore, not a question between the asserted legatee and any subject; either as executor, or residuary legatee, or next of kin. No subject **[262]** is interested in opposing the paper; but it is directly a claim and demand upon the reigning Sovereign.

The process prayed is, consequently, in substance, against the Sovereign; though in form it is described as "a business of citing the King's proctor:" of citing him, however, it is added, "for and on behalf of our Sovereign Lord the King, as heir and successor of his late Majesty."

When the application was first mentioned, the Court asked the learned counsel if any precedents could be furnished; and it did so at that early stage, in order to set all possible enquiry in motion; not, however, expecting or requiring a precedent precisely similar in all its circumstances; but endeavouring to ascertain whether, by diligent research, any proceedings could be found in this Court, or elsewhere, out of which some principle could be extracted, either directly or by way of analogy, furnishing something of legal authority to govern this case.

Now the history of the wills of Sovereigns from Saxon times—from Alfred the Great down to the present day, has been diligently searched and examined; but no instance has been produced of probate having been taken of the will of any deceased Sovereign in these Courts; much less of its having been contested here against the reigning Sovereign. One single instance occurs in the Rolls of Parliament of something of a reference to this jurisdiction in respect of a royal will, which is the instance referred to by Lord Coke (in his 4th Institute (p. 335)) **[263]** and by other writers. It is, in substance, to this effect: In the 1st of Henry 5, it is stated in the Parliament Rolls, that Henry 4 having made a will, and appointed executors thereof, those executors, fearing the assets would be insufficient, declined to act. It is then recited that, under these circumstances, the effects would be at the disposal of the Archbishop of Canterbury, as ordinary, who should direct them to be sold; but Henry 5, instead of allowing the effects to be sold, took to them, and agreed to pay their appraised value. This is the whole that appears on the Rolls of Parliament: and thence it clearly appears that subjects were the executors—subjects alone were interested in the effects bequeathed: and, lastly, that the successor to the Crown voluntarily took to them, and paid their appraised value. But except this recital in the Parliament Rolls, 400 years ago, when the matter was, probably, neither controverted nor even much considered, not the slightest trace is to be found of any allusion to, much less of any exercise of, this Court's jurisdiction over the wills of departed Sovereigns.

The only will of a Sovereign deposited in the registry of this Court (for wills of Queens Consort are wills of subjects) is the will of King Henry 8; and that, as I understand, is not the original, but merely a copy; and from the appearance of this copy there is no trace of any probate of the will having ever been taken. Whether this document was deposited here for safe custody, and as a place of notoriety for such a purpose, or for what else, does not appear.

[264] The statute of the 24th of Henry 8 (c. 12), however, has been cited, as conferring upon the Court a jurisdiction in this respect. The object of that statute was to prohibit appeals to Rome; and the statute itself serves to shew that the reigning Sovereign, at the period of the Reformation at least, became the supreme head of the Church—the supreme ordinary of the country. But how it tends to establish that he became at that time personally subject to the ordinary jurisdiction of the archbishop, whatever might have been attempted in times of Papal usurpation, is certainly not very obvious.

For the last 300 years, and, indeed, from all antecedent time, there is no instance of any Sovereign taking probate in the Archbishop's Court, or of any Sovereign's will having been proved there. Yet if it be true that by the constitution Sovereigns have always had a right to make wills (and it appears, by the Rolls of Parliament, that in the 16th year of King Richard the Second "the bishops, lords, and commons assented in full Parliament that the King, his heirs and successors, might lawfully make their testaments") (vide 4 Inst. 335); and if it is thence to be presumed that Sovereigns, in many instances, have exercised that right (in which or to what extent, in fact, need not, at present, be inquired, but some instances have been referred to, and one so late

as George 1 (vide Annual Register, 1772, page 188)); and if, yet, no instance is to be found of a probate issuing from this Court, nor of any will since the copy of that of Henry 8, [265] being even deposited here; it does furnish pretty decisive evidence, to my judgment, that this Court, in such a case, has no jurisdiction whatever. What might be the case if the will of a deceased Sovereign raised a question merely, and exclusively, between subject and subject, the Court is not, at present, required to decide.

But suppose no royal wills to have been made from Henry the Eighth's time to the present, but that all the intermediate Sovereigns have died intestate, still the inference, in respect to this jurisdiction, is the same. Of the effects of all other persons dying intestate, the ordinary grants administration. Before the statutes of administration, the ordinary granted it to whom he pleased: under the statute of 21 Henry 8 (c. 5) it was to the widow or next of kin: and by the statute of distribution (22 & 23 Charles 2 (c. 10)) that administrator became a trustee to dispose of, and distribute the property in the manner therein prescribed. Of a Sovereign who dies intestate, the successor is exclusively entitled to the personal property; but in order to have legal authority to collect and recover that property, there is no instance of any such successor coming into this Court (as all other persons must do) for letters of administration—for the authority of the ordinary to invest him with the legal character of administrator. Nothing of the sort has ever taken place: and, indeed, it would be against all principle, and contrary to all analogy, that it should. Now the total absence of any exercise of such a jurisdiction by this Court on the death of a Sovereign in cases either of testacy or intestacy is [266] pretty strong evidence, to my mind, that no such a jurisdiction exists.

The testamentary Courts of the two archbishops, in their respective provinces, are styled Prerogative Courts, from the prerogative of each archbishop to grant probates and administrations, where there are bona notabilia; but still these are only inferior and subordinate jurisdictions; and the style of these Courts has no connexion with the royal prerogative. Derivatively, indeed, these Courts are the King's Ecclesiastical Courts; the Sovereign being the fountain of all justice, as well as the supreme head of the Church; yet, immediately, they are only the Courts of the ecclesiastical ordinary. The ordinary, and not the Crown, appoints the Judges of these Courts; they are subject to the restraint and control of the King's Courts of Chancery and Common Law, in case they exceed their jurisdiction; and they are subject, in some instances, to the commands of those Courts, if they decline to exercise their jurisdiction, when by law they ought to exercise it.

That this Court should, therefore, now for the first time presume to entertain a suit for so delicate and high a purpose as that of deciding on the validity of the will of the late Sovereign, under any circumstances, and in any form, would require much consideration in point of law. But this is by no means the only, or the greatest, difficulty which the present application has to surmount.

It is (as has been already stated), in substance, not merely a proceeding to try the validity of the will of his late Majesty, but a proceeding against the reigning Sovereign —a demand upon his Majesty, [267] which is to be enforced, adversely, against him. That a process of the nature prayed could not issue directly against the Sovereign himself seems to be admitted, by praying it, in form, against the King's proctor. It would be quite a novelty in constitutional law to implead the Sovereign personally. These Courts are not presumed to be the best acquainted with the rights and prerogatives of the Crown: in regard to such matters we must look diffidently and respectfully to other authorities; but there seems no principle in the constitution more distinctly laid down by common law writers than that the Sovereign cannot be personally impleaded. Mr. Justice Blackstone, in the first volume of his Commentaries, speaks of the "great and transcendant attributes" which the law ascribes to the King; and first he notices the attribute of sovereignty. "He is said," says the learned commentator (1 Bl. Com. 242, &c.) "to have imperial dignity; and in charters before the Conquest is frequently styled basileus and imperator." "His realm is declared to be an empire, and his Crown imperial, by many acts of parliament, which at the same time declare the King to be the supreme head of the realm in matters both civil and ecclesiastical." "Hence it is," he adds, "that no suit or action can be brought against the King even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would

be vain and idle without authority to redress; and the sentence of a Court would be contemptible, unless that Court had power to command [268] the execution of it; but who, says Finch (Finch, L. 83), shall command the King?"

"Are then, it may be asked, the subjects of England totally destitute of remedy, in case the Crown should invade their rights, either by private injuries, or public oppressions?" To this we may answer that "the law has provided a remedy in both cases."

"And, first, as to private injuries; if any person has in point of property a just demand upon the King, he must petition him in his Court of Chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion."

"Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong."

"The King, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness; and, therefore, if the Crown should be inclined to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the commonwealth or a private person, the law will not suppose the King to have meant either an unwise or injurious action, but declares that the King was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents whom the Crown has thought proper to employ; for the law will not cast an imputation on that magistrate whom it trusts with the executive power, as if he was capable of intentionally dis-[269]-regarding his trust, but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies which, if charged on the will of the prince, might lessen him in the eyes of his subjects."

Again, speaking of the King as the foundation of justice, this author says, "A consequence of his prerogative is the legal ubiquity of the King. His Majesty, in the eye of the law, is always present in all his Courts, though he cannot personally distribute justice." "And from this ubiquity it follows that the King can never be nonsuit; for a nonsuit is a desertion of the suit or action by the non-appearance of the plaintiff in Court. For the same reason also, in the forms of legal proceedings, the King is not said to appear by his attorney as other men do; for, in contemplation of law, he is always present in Court."

Again, in the third volume, speaking more in detail of the modes of proceeding to obtain property from the Sovereign, Mr. Justice Blackstone says (3 Bl. Com. 256, &c.), "The common law methods of obtaining possession or restitution from the Crown of either real or personal property are—1. By petition de droit, or petition of right, which is said to owe its original to Edward the First; 2. By monstrans de droit, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer."

This Court is not sufficiently acquainted with the proceedings of other Courts to say whether this mode of proceeding is the proper remedy, if the [270] right here set up exists. All that this Court presumes to decide is whether the remedy can be obtained here in the mode prayed; it is not necessary for me to decide whether any and what remedy can be obtained elsewhere.

Now to proceed by this sort of process against the King himself; to cite him personally; to put him in contempt; to do certain acts in pain of his contumacy—was too extravagant even to be attempted; and therefore the citation is prayed against the King's proctor.

But here, again, exactly the same difficulty occurs, both in principle and practice. Either the King's proctor does or does not represent the Sovereign. If, virtute officii, he represents his Majesty, he has the same privileges; nor can he be put in contempt and proceeded against in pœnam. If he does not officially, quoad hoc, and so as to be binding upon, represent the Sovereign, this process is nugatory. It may be sufficient to add that the King, as has been said, does not appear by his attorney; and that no instance or precedent exists of making the King's proctor a defendant, so as to bind the Sovereign in a matter touching his personal rights. The present King's proctor has, by his warrant of appointment, the same, but no greater, powers given him than those exercised by his predecessors. He is a mere law agent of his Majesty to watch the interests of the Crown, and to assert them, when so directed, either by originating proceedings, or by intervening when suits have been brought

by others; but it does not follow that the Court can compel him to be a defendant; can put him in contempt, and proceed in pain of his contumacy. So the King [271] may be a voluntary plaintiff in other Courts; he is the public prosecutor; criminal suits are conducted in his name; and his attorney-general may originate other proceedings. But it clearly does not result, as we have just seen, that because he may be voluntary plaintiff, he can be made a defendant by compulsion in other Courts.

The case of the King's proctor appearing for the Crown, to assert its right to the property of illegitimate persons dying unmarried and intestate, which has been referred to in the argument, is the very opposite of the present. There he asserts a right on the part of the Crown; here he is to be made a defendant to resist a claim set up against it. And even, in that case, the King's proctor cannot proceed, officially, without a warrant under the sign manual, countersigned by three Lords of the Treasury; and then only on behalf of a nominee appointed in that warrant. And this, by the way, is conformable and analogous to what Lord Coke states in his 4th Institute (p. 335), that "when the King is made an executor of the will of another, the King doth appoint certain persons to take execution of the will upon them (against whom such as have cause of suit may bring their action), and appointeth others to take the accounts." But in no case is the King's proctor ex officio competent, much less compellable, to have suits brought against him, and to be impleaded, so as to bind the Sovereign.

The notice served on the King's proctor in cases of proceedings by creditors to obtain an administration where a person is dead, intestate, without [272] known relations, has also been mentioned in the argument. But that is a mere notice, and not at all for the purpose of proceeding in pœnam, so as to bind or affect the right of the Crown. It is quite modern practice, too, very lately directed by the Court ex cautela to guard against surprise and oversight; for, although in law the King's proctor is at all times present in Court, still a notice, in fact, is preferable, lest a creditor, perhaps to a trifling amount, should, under an assertion of there being no relations, obtain possession of, possibly, a large property: and the notice which the Court expects to be given to the King's proctor, in these cases, is to preserve the rights of the Crown in the event of no relations appearing; and for the benefit of those relations, if afterwards any should appear. So different, therefore, is that from the present proceeding, that it furnishes no analogy to warrant it. This is directly a demand against the Sovereign of property in the contemplation of the law, already in possession of the Sovereign.

It has been said that the statute 39 & 40 Geo. 3 (c. 88), having given, or at least regulated, the Sovereign's right to dispose of his property by will, must afford the means of giving effect to his disposition. But such a general deduction is not sufficient, in point of law, to give a new jurisdiction to this Court, which it never before exercised, of proceeding against the reigning Sovereign. That could only be done by clear and express enactment. What inconsistency is there in supposing that the legislature, though it declared and regulated the Sovereign's right of tes-[273]-tacy, chose to leave the mode of proceeding respecting his will where it stood before? Why, is it to be supposed that the legislature meant, in future, to submit the reigning successor to the authority of an ordinary jurisdiction, to which no Sovereign had ever before been subjected, and which would be a departure from, and violation of the principles of, the constitutional prerogatives of the Crown? It was said that it would be a mockery to recognize the power of one Sovereign to make a will, and yet to leave a power in his successor to defeat its operation; and so it would be if the successor could be supposed capable of exercising any power of that sort. It would be in some degree presumptuous, and almost disrespectful, for the Court to express its full conviction of the impossibility of his Majesty, personally, entertaining the slightest disposition to exercise any such power of defeasance. The Sovereign can have no personal wish on this subject but that of doing justice. The law itself, indeed, does not permit the contrary to be even suspected. The King can do no wrong; he cannot, constitutionally, be supposed capable of injustice. If properly applied to in the forms prescribed by law and the constitution, no doubt ought to exist that real justice will be done. What the real justice of the case may be, this Court, in my judgment, has not the authority to decide; and being of that opinion, the Court holds itself bound by law to reject the present application.

[274] HOBSON *v.* BLACKBURN AND BLACKBURN. Prerogative Court, Trinity Term, 4th Session, 1822.—Mutual, or conjoint, wills (so styled), irrevocable by either of the (supposed) testators, unknown to the testamentary law of this country; what effect soever may be given to such instruments in equity. An allegation, propounding an instrument of this species, rejected; and a separate will of the same deceased, of a later date, in effect pronounced for.

[Referred to, *In the Goods of Stracey*, 1855, Deane, Ecc. 6; *In the Estate of Heys*, [1914] P. 196. Distinguished, *In the Goods of Raine*, 1858, 1 Sw. & Tr. 144. Applied, *In the Goods of Lovegrove*, 1862, 2 Sw. & Tr. 453; *In the Goods of Miskelly*, 1869, Ir. R. 4 Eq. 62. Distinguished, *In the Goods of Piazzi-Smyth*, [1898] P. 7.]

Martha Hobson, Susannah Hobson, and Joshua Hobson, sisters and brother, made the following conjoint or mutual will, dated on the 2d day of September, 1794:—

We, Martha, Susannah, and Joshua Hobson, being in health of body and sound in mind, do agree to the following assignment of our property in case of each other's decease, exclusive of five hundred pounds, the disposal of which we propose leaving a memorandum of, according to our particular liking. The remainder of our property we resolve to be left in this manner:—The whole of the interest of it, excluding the above mentioned five hundred, shall devolve to the longest life or lives while continuing single; but, if the survivors marry, the property of the deceased shall be immediately distributed equally amongst our brothers and sisters, viz. William Hobson, Lydia Blackburn, Hannah Blades, and George Hobson, including survivor or survivors of this testament, who are to have an equal share with the rest; or in case of their decease, viz. our above mentioned brothers and sisters, their share to be equally distributed among their children; or in case one of the survivors marrying, the single survivor shall have the interest of the property of the deceased during the time of his or her remaining single, but after marriage to have no more **[275]** claim than any other part of the family; and on the demise of the last of us three, provided he or she remained single during life, the property of the other two shall he equally divided amongst our remaining brothers and sisters; or, in case of their decease, their share to be equally divided amongst their children, with this provision, that the property of the last survivor shall be entirely at their own disposal. We agree to leave each other, with our brothers William and George Hobson, executors, to this our last will and testament, to which we put our hands this 2d day of September, 1794.

Witness, George Hobson.

MARTHA HOBSON.
SUSANNAH HOBSON.
JOSHUA HOBSON.

Joshua Hobson died in the month of October, 1796, a bachelor, and without having altered or revoked his part of the said mutual will; a probate of which, as to the effects of the said Joshua Hobson, was granted in August, 1799, to Martha Hobson, spinster, Susannah Hobson, spinster, and George Hobson, three of the executors named in the same. And Martha Hobson and Susannah Hobson enjoyed the income so derived, arising from the property of Joshua Hobson, till the death of Martha in the month of December, 1820, a spinster, leaving Susannah, also a spinster, still surviving.

On the 30th of November, 1820, Martha Hobson made the following separate testamentary disposition of her property:—

As my last will I leave to my dear sister, Lydia Blackburn, my share of the undivided property in my dear father's estates; to my dear sister, Susannah **[276]** Hobson, I leave the income arising from the whole of my funded property for her life; I also leave to her my plate, books, furniture, and such of my apparel as she may like to take, the remainder of my apparel I wish to be given away to any person my sister Susannah may think proper; and, after the demise of my dear sister Susannah Hobson, I leave the whole of my funded property to be divided equally between my nephew William Blackburn, and my nieces Lydia Blackburn, Eleonora Blackburn, Elizabeth Blades, Caroline Blades, and Laura Blades.

I leave my sister Susannah Hobson, executrix, and my brother George Hobson, executor, to this my will.

MARTHA HOBSON.

Buckwell Hall, Dulwich,
30th November, 1820.
Witness, George Hobson.

Probate of the joint will, as that of Martha Hobson, the party deceased in this

cause, was prayed by George Hobson, one of the surviving executors named in the said joint will, on the one hand; and letters of administration, with the separate will annexed, as that of the same deceased, were prayed by the nieces and two of the legatees named in the said separate will, on the other hand.

The allegations propounding these instruments respectively were, in effect, mere common condidits, except in the following particulars:—The allegation propounding the joint will further pleaded the death of Joshua Hobson, a bachelor, in October, 1796, and that probate of the said joint will, as to the effects of Joshua Hobson, was taken by the deceased in **[277]** the month of August, 1799. The allegation propounding the separate will further alleged, "That at the time of making the joint will, and also at the time of the death of the said Joshua Hobson, the whole of the personal estate and effects of the said Martha Hobson, spinster, the party in this cause deceased, did not exceed in value the sum of 8000l.; and that she was, at the time of her making and executing her true last will and testament [namely, the one propounded], and at the time of her death, possessed of, and entitled to, personal estate and effects of the amount or value of 13,000l. or thereabouts—that the value of the estate and effects of the said Joshua Hobson, at the time of the making of the said joint will, was about 8000l.; and at the time of his death did not exceed the sum of 6650l., and that the value of the estate and effects of the said Susannah Hobson, spinster, at such time [that is, at the time of making the joint will] did not exceed the sum of 8000l."

Of these allegations, that propounding the joint will of September, 1794, was opposed on behalf of the nieces, who propounded the separate will of November, 1820.

Judgment—Sir John Nicholl. I have no hesitation whatever in rejecting the allegation propounding the mutual, or conjoint, will, as that of the party deceased in this cause, on the principle that an instrument of this nature is unknown to the testamentary law of this country; or, in other words, that it is unknown, as a will, to the law of this country at all. It may, for aught that I know, be valid as a compact—it may be operative, **[278]** in equity, to the extent of making the devisees of the will trustees for performing the deceased's part of the compact.(*a*) But these are considerations wholly foreign to this Court, which looks to the instrument entitled to probate as the deceased's will, and to that only. The allegation plainly proceeds upon a notion of the irrevocability of the instrument which it propounds as the will of the deceased. Why this very circumstance destroys its essence as a will,(*b*) and converts it into a

(*a*) As in the case of *Dufour and Perraro*: see the judgment of Lord Camden in that case, delivered 18th July, 1769, in Hargrave's Jurid. Exer. vol. ii. p. 101.

In the *Walpole case*, George Earl of Orford's will of 1756, and Horace Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual will. Horace Lord Walpole died in 1757, without revoking his part of the mutual will, namely, the codicil of 1756. George Earl of Orford died in 1791, when it appeared that he had made a codicil in 1776; and this, by reason of a reference to his last will bearing date in 1752, was construed a revocation of his part of the mutual will, namely, the will of 1756. [Vide pages 38, 39, ante; and 7 Durnf. & East, 138.] A case was then raised, in equity, that the mutual will of 1756 became irrevocable on the death of Lord Walpole in 1757, though it was admitted to have been revocable by either during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the judgment of Lord Camden in *Dufour and Perraro* was mainly relied on in support of that position. The compact of the mutual will was not enforced, however, in the *Walpole case;* but this was chiefly, it seems, by reason of the uncertainty and, in some sense, unfairness of the compact: so that it leaves the principle of Lord Camden's decision in *Dufour and Perraro* wholly unshaken. See 3 Ves. 403.

(*b*) The making of a will is but the inception of it, and it doth not take effect till the death of the testator: for, "Omne testamentum morte consummatum est; et voluntas est ambulatoria, usque ad extremum vitæ terminum." Then shall it be against the nature of a will to be so absolute, that he who maketh the same being of good and perfect memory, cannot countermand it. *Forse and Hembling's case*, 4 Rep. 61.

If a man make his testament and last will irrevocably, yet he may revoke it; for his acts or his words cannot alter the judgment of the law to make that irrevocable which, of its own nature, is revocable. *Vynior's case*, 8 Rep. 81.

contract; a species [279] of instrument over which this Court has no jurisdiction. Upon these broad and, as I apprehend, sufficiently intelligible grounds, I reject this allegation.

Allegation rejected.

DEW *v.* CLARK AND CLARK. Prerogative Court, Trinity Term, Bye-Day, 1822.—Partial insanity may invalidate a will which is fairly to be inferred the direct offspring of that partial insanity. An allegation pleading partial insanity, in order to defeat a will, admitted.

[See further, 2 Add. 102; 3 Add. 79; 1 Hagg. Ecc. 311.]

(On the admission of an allegation.)

Ely Stott, the deceased in this cause, died on the 18th of November, 1821, leaving behind him a widow, and Charlotte Mary Dew, his natural and lawful and only child. The deceased died possessed of a considerable personal property, amounting in value to about 40,000l.

[280] The present question arose as to the admissibility of a plea tendered on the part of Charlotte Mary Dew, responsive to an allegation or common condidit given and admitted on the parts of Thomas and Valentine Clark, the residuary legatees therein named, pleading and propounding a testamentary paper, bearing date on the 26th of May, 1818, as the last will of the deceased.

The allegation (after pleading, in the first article, the death and circumstances of the deceased) went on to plead, in substance—

2. That in the year 1774 the deceased intermarried with Mary Simson, the mother of Charlotte Mary Dew, party in the cause—that shortly after the said marriage he betrayed great violence and irritability of temper especially towards his said wife, and conducted himself as a person labouring under mental derangement—that a few days after his wife was delivered of the said Charlotte Mary Dew, in the month of November, 1788, the deceased, who then practised as a surgeon, directed that she should be taken from her bed and washed from head to foot with cold water—that this order was reluctantly complied with by the persons attending her under the deceased's peremptory injunctions; in consequence of which extraordinary treatment his said wife became very ill, and died in about ten days.

3. That immediately after the birth of the said Charlotte Mary Dew the deceased shewed great antipathy to her, and refused to see her for two or three years—that he laboured under great and continued delusion of mind respecting his said daughter; declaring, whilst she was in her earliest infancy, that [281] she was invested by nature with a singular depravity—was born to become the peculiar victim of vice and evil—was the special property of Satan, &c. That the deceased, as his said daughter advanced in life, persisted in similar assertions, and continued to entertain a similar notion respecting his said daughter at all times to the time of his own death.

4. That the said Charlotte Mary Dew, notwithstanding, constantly felt and expressed a filial affection for the deceased, and behaved to him with respect and attention—that she conducted herself, on all occasions, with decorum and propriety; was a person of strictly moral and religious habits; and was so known to be by many persons of high character and reputation.

The subsequent articles of the allegation, eighteen in number (with the exception of one at the end, reciting and contradicting the condidit), instanced a variety of circumstances, as well evincing the deceased's insane aversion to his daughter, pleaded in the third article, as tending to shew that he laboured under mental perversion in some other particulars, especially on religious subjects.

So Swinburne, in treating of the revocation of testaments, wherein are express clauses, even derogatory of the power of making future testaments, as "I do from henceforth renounce the power of making any other testament," or the like, lays down that such testaments are avoided by testaments of a later date, precisely as if they contained no such derogatory clauses. "The reason," he adds, "is because the clause derogatory of the power of making testaments is utterly void in law; nor can a man renounce the power or liberty of making testaments; neither is there any cautel under heaven to prevent this liberty, which also endureth whilst any life endureth." Swinb. p. 504. See also to the same effect, pages 101, 102, 501, &c.

The admission of this allegation was opposed on the behalf of Thomas and Valentine Clark, as stating, on the face of it, a mere case of great and apparently unfounded, but still not insane, dislike—that nothing could impeach the will short of legal insanity, to a case of which, it was contended, that no proof taken upon this allegation could be expected to amount. In particular, it was argued that the will itself was incompatible with any notion of the deceased's aversion to the party who appeared in [282] opposition to it, being founded in insanity—that the deceased could not be mad quoad hanc by halves—that irrational antipathy must have operated with him to the total exclusion of its object from his testamentary bounty; but that a series of testamentary scripts was before the Court, in each of which the daughter was benefited; and that the very will sought to be impeached bequeathed her 100l. per annum—a legacy which, however inadequate, perhaps, to her views and expectancies, was conclusive to shew that the testator's disaffection to his daughter was not such as to preclude him from exercising a discretion in testamentary matters, even with respect to her; and, consequently, that it could not avail to call in question his general testamentary capacity.

Some objections were also taken to particular parts of the allegation, in the event of the Court declining to reject it as a whole.

Judgment—Sir John Nicholl. The present case is one of a singular complexion; but it is one which I am not disposed to stop, in limine, by repelling this allegation; especially being, as it is, set up on the part of an only child.

The case, in substance, is one of partial insanity—of insanity quoad hoc, upon a particular subject; or rather, perhaps, quoad hanc, as to a particular person—that person being the deceased's daughter and only next of kin. It is alleged, in the plea now tendered to the Court, that the deceased conceived a dislike to this only child, founded purely on illusion; and it is inferred that he was actuated solely by that illusion to dispose of his property in the manner in [283] which it is purported to be conveyed, by the will propounded in the allegation to which this plea is responsive.

Now the possible occurrence of such a case of partial insanity, and that proof of it may invalidate a will, which is fairly presumable to have been made under its direct and immediate operation, must be admitted on the authority of *Greenwood's case*,(*a*) though the last verdict in that case, if I remember, established the will. And this being so, I am by no means prepared to say that no case made out in evidence, taken as upon the plea now tendered, could induce me to relieve the party who tenders it against the operation of the will sought to be impeached. At the same time I must observe, first, that the plea is one of that sort to which it is not very likely that the proof will come up; and, secondly, that, even if it does, I by no means pledge myself to pronounce against the will. Being a case, however, which I cannot determine satisfactorily to [284] my mind against the party who sets it up, in this stage of it, I think that I am bound to admit the allegation, as by so doing I give her the option of proceeding with the cause, if she thinks proper. She must be apprized, however, as well that the burthen of proof rests with her, as that this burthen, in my judgment, is, from the very nature of the case, a pretty heavy one. The present, indeed, may be less difficult to make out than *Greenwood's case*, in one respect, as the delusion under which this deceased is charged to have laboured towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject of religion; although here, as in *Greenwood's case*, the general capacity is, in substance, unimpeached. But she must understand that no course of

(*a*) The following is an outline of *Greenwood's case* (often referred to in argument, but of which the editor is not aware that there is any printed report) as stated in Mr. (now Lord) Erskine's speech on the trial of James Hadfield, for shooting at his late Majesty, at Drury Lane Theatre. "The deceased, Mr. Greenwood, whilst insane, took up an idea that his brother had administered poison to him, and this became the prominent feature of his insanity. In a few months, however, he recovered his senses, and returned to his profession, which was that of a barrister, &c. but could never divest his mind of the morbid delusion that his brother had attempted to poison him; under the influence of which (so said) he disinherited him. On a trial in the Court of King's Bench upon an issue, devisavit vel non, the jury found against the will; but a contrary verdict was had in the Court of Common Pleas; and the suit ended in a compromise."

harsh treatment—no sudden bursts of violence—no display of unkind or even unnatural feeling, merely, can avail in proof of her allegation—she can only prove it by making out a case of antipathy, clearly revolvable into mental perversion; and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity.

Without, then, committing the Court as to what may be its ultimate opinion, even should the facts pleaded in this allegation be proved, it is not an allegation which I think myself justified in precluding from going to proof. The case set up in the plea, to say the least, savours strongly of being one of partial insanity; and it is too much to say, in the first instance, that a will which can be argued, with any face of probability, to have been the direct offspring of that partial insanity if it be proved to have existed, can, upon no such proof of its actual **[285]** existence as may result from the evidence taken upon this plea, be relieved against.

Being disposed, therefore, to over-rule the objections taken to the allegation as a whole; the objections taken to parts of it are of no great weight in my mind. They are nearly all resolvable into this general objection, namely, that the case, as laid, embraces a considerable period of time, and must lead to a considerable bulk of evidence. But these are results to which the setting up of such a case leads unavoidably. It is hardly possible for the Court to form a right judgment of the deceased's state of mind in the particular in question, without his whole history, so far as respects that particular, being laid before it. It was incumbent, therefore, on the party, to go into some minuteness of detail on this point; and to take up the history from an early period. Nor do some objections to one or two articles, of another nature, appear to me altogether well founded. It is said, for instance, that under the 19th article the Court could only be furnished with Mr. Bartlett's opinion. Why, that is not exactly so. Mr. Bartlett, in stating his opinion that the deceased was insane, will, of course, at the same time, state his reasons for it—and his reasons may have weight with the Court, though his mere opinion may have little, if any.

Upon the whole, then, I admit the allegation; leaving it for the party to proceed with or drop the suit ad libitum. Upon the expediency of the former measure she will advise with her counsel; the propriety, under all the circumstances, she must determine for herself.

Allegation admitted.

[286] FILEWOOD *v.* COUSENS AND OTHERS. Prerogative Court, Trinity Term, 4th July, 1822.—A pauper, so admitted in the middle of a suit, may at least be condemned in costs up to the time of his being admitted pauper.

This was a question respecting the force and validity of the asserted last will and testament of Charles Elms, late of Leicester Square, in the county of Middlesex, the party deceased in the cause, bearing date on the 10th of February, 1820. It was propounded by Mr. John Cousens, the deceased's son-in-law, and one of the executors named in it; and was opposed by Harriet Filewood, the sole executrix under a will of the same deceased, dated on the 3d of February, 1810. The suit commenced as long back as in Michaelmas Term, 1820; and counter allegations had been filed; witnesses had been examined on both; and publication was prayed; when on the 1st Session of Hilary Term, 1822, Mr. John Cousens appeared, and was admitted a pauper. Other proceedings were subsequently had on the cause, which now stood for sentence, having been argued upon two preceding days.

Judgment—Sir John Nicholl. [After recapitulating, and commenting upon, the evidence.] Upon this evidence, I have no doubt in pronouncing against the paper propounded, and should have as little in condemning the party, who has been rash enough to propound it, in costs, but from the circumstance of his now appearing before the Court as a suitor in formâ pauperis. In the superior Courts, at least, of common law, paupers, so admitted **[287]** under 2 Hen. 7, c. 12, are excused from paying costs, when plaintiffs, by 23 Hen. 8, c. 15; (*a*) at the same time they are liable, under that statute, to suffer whipping, or other punishment, at the discretion of the Judges: and

(*a*) See 23 Hen. 8, c. 15, in conjunction with 11 Hen. 7, c. 12. The statute of Hen. 8 is limited, however, to particular suits; in which particular suits only it should, therefore, seem that paupers could claim to be exempt from paying costs, at least, under that statute.

it was formerly the custom—(a custom said, however, more than a century back, to have fallen into disuse, even at that time (see 1 Sid. 261. 7 Mod. 114))—to give paupers, if nonsuited, their election either to be whipped, or to pay their costs, notwithstanding their exemption from costs under the statute of Hen. 8, to which I have just referred. But I am not aware that this Court either is, or, indeed, ever was, authorized to order a suitor before it, in formâ pauperis, to be punished by whipping or otherwise, under what circumstances soever of misconduct. And supposing the Court to be at liberty, notwithstanding the statute of Hen. 8, to condemn a pauper in costs, and put him in contempt, &c. for non-payment,(*c*) I should still be unwilling to proceed to that extremity in the absence of a precedent; no instance of the sort having occurred in these Courts, at least that I am apprized of.

[288] Meantime—in order to mark my sense of the iniquity of the present suit, and by way of interposing some check to cases of this description, which have occurred too frequently in recent instances—I adopt a middle course, as to which I feel myself at perfect liberty, by condemning this pauper in costs of the suit, up to the time of his being admitted a pauper; and I pronounce accordingly.

[289] GREEN, FALSELY CALLED DALTON *v.* DALTON. In the Consistory Court of London, Trinity Term, 1st Session, 1822.—A marriage annulled by reason of undue publication of banns [the name of "Augusta" being inserted between the true, and only, Christian, and the surname] under the 26 Geo. 2, c. 33.

Sophia Green, the natural and lawful daughter of William and Maria Green, of Oxford Street, in the parish of Mary-le-bonne, was born on the 31st of December, 1802. On the 26th January, 1803, she was baptized by the name of "Sophia" only, and from the time of her said baptism was called and known by no other name. On the 23d of February, 1820, a marriage was had and solemnized in the parish church of St. Mary, Islington, between Thomas Dalton (the party proceeded against) and the said Sophia Green, in virtue of banns of marriage three times previously published in the said parish church, as between Thomas Dalton and Sophia "Augusta" Green. This was a suit brought by William Green, the father, to annul the said marriage, on the grounds of minority, want of consent, and such undue publication of banns.

It was clearly established in evidence that the minor, Sophia Green, was so born and baptized; and was so known by the Christian name of "Sophia" only. It was also clearly established that the banns were so published, as between Thomas Dalton and Sophia "Augusta" Green, in the church of a parish to which neither of the said parties belonged; that the marriage had, pursuant thereto, was unknown to the said William Green till the month of June following, the said Sophia Green returning immediately to her **[290]** said father's, and living with her parents as before; and that the said William Green expressed the utmost grief and surprize at the discovery of it. It appeared that the banns under which the marriage was had were delivered by the de facto husband; but the entry of the marriage in the parish register book was signed by the wife, Sophia "Augusta" Green. It did not appear that there was any disparity of age or condition in the parties; but the party proceeded against neither gave a plea nor put a single interrogatory to either of the ten witnesses examined upon the libel.

The Judge (*Sir Christopher Robinson*) held that this use of the name "Augusta," in the publication of banns upon the occasion of the said marriage, was to be deemed a fraud of both parties on the rights of a third party, the father; and as intended, by misleading that third party, to effect a marriage, the celebration which might else, possibly, have been prevented. He admitted that the insertion of the name "Augusta" as not entirely confounding the identity of the wife was open to explanation, but held that, as no explanation was tendered even by the husband, he was bound to consider that it admitted of no satisfactory one; and, therefore to conclude

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(*c*) Which, however, the editor apprehends, would have been consonant with the practice of the Chancery in this respect, where a pauper may be committed for filing an improper bill—that is, where the bill may be dismissed with costs; and the pauper be committed in default of payment. See *Ex parte Shaw*, 2 Ves. jun. 40, and *Peirson* v. *Belchier*, 4 Ves. 630.

against the bonâ fides, of the insertion; and, consequently, to pronounce the marriage null and void.(*a*)

End of Trinity Term.

[291] SAUNDER *v.* DAVIES. Arches Court, Michaelmas Term, 1st Session, 1822.—A clergyman suspended, under a proceeding by articles, for drunkenness, profaneness, &c. Quære as to the right of the dean of the Arches, per se, to depose, or deprive, in any case, under the 122d canon.

(By letters of request from the chancellor of the diocese of Oxford.)

Judgment—Sir John Nicholl. This is a cause of office promoted by Samuel Saunder, a parishioner of Charlbury, against David Griffith Davies, licensed curate of the augmented curacy of Ascot, and curate of the parish of Charlbury, both in the county and diocese of Oxford, for drunkenness and profaneness, immorality and irregularity, and indecorum in the performance of divine offices. It was instituted in this Court, in the first instance, by virtue of letters of request from the chancellor of the diocese of Oxford.

In proof of the articles given in and admitted, on the part of the promovent, containing the facts **[292]** charged in due detail, eighteen witnesses have been examined. An allegation has also been brought in and admitted, on behalf of the defendant, but no witnesses have been produced upon it—the defendant suggesting his inability to examine witnesses by reason of pecuniary embarrassments; and now declining, for the same suggested reason, to appear by counsel. This course of proceeding imposes upon the Court the duty of examining the proofs in the cause with the strictest possible attention, in order that Mr. Davies may have the full benefit of any defect or failure of evidence. It is the duty indeed of the Court to bestow this attention upon the proofs in criminal proceedings under any circumstances; but it is more peculiarly its duty where, as in this case, the absence of counsel for the defendant devolves upon it the whole onus of sustaining the defence. For where the Court performs that duty in common with counsel, it may be pretty certain that their zeal and talent will fully obviate any ill effect of its own, possibly relaxed vigilance. But the Court is sorry to say that all its attention to the proofs in this case has furnished nothing which can suggest a doubt even in the defendant's favor. On the contrary, it is bound to pronounce the articles admitted in the cause sufficiently, and more than sufficiently, proved—and that by witnesses, not only competent, but, nearly in every instance, fully credible.

The first article merely pleads the general law applicable to offences of this nature committed by persons in holy orders, and neither is, nor of course requires to be, sustained by oral evidence. The circumstances pleaded in the next following articles to **[293]** the sixth inclusive, namely, the clerical character of the defendant, and his being licensed to the curacies of Ascot and Charlbury, are sufficiently established by the eight first witnesses and the eighteenth witness, the witness to the exhibits. Upon these facts indeed no question has been raised; nor were they attempted to be controverted by the defendant in plea. The criminal charges begin at the seventh article, which objects to the defendant habitual drunkenness and profaneness—being the first of the three branches into which the whole accusation may, not improperly, be considered as dividing itself.

Upon this general article no fewer than sixteen witnesses have been examined. These witnesses, who are persons in various classes and occupations, clearly convict the defendant in both these particulars. They differ something as to the degree of intoxication in which the defendant was in the habit of indulging—but in all other respects they depose, upon this general article, with pretty much of accordance. In short, that the defendant was in the habit of resorting to inns and alehouses in his own and neighbouring parishes "without any honest necessity"—that he was in the habit of drinking to excess, and running up scores there, although occasionally paid for; lastly, that he was in the habit, both there and elsewhere, of profane swearing, and of talking very grossly, immorally, and obscenely — is substantiated by their testimony in too convincing a manner to leave the facts at all disputable. And, which is most extraordinary, Mr. Davies appears to have adopted, and persisted in, this line of conduct, extremely reprehensible **[294]** in any individual, but highly

(*a*) See note (*a*) page 94, ante.

criminal in a clergyman having cure of souls, without any shew of disguise. He commits these excesses, indifferently, in the parlour bar, or kitchen, or any public house in his neighbourhood, according to the class of company into which he happens to fall—this being a matter which, at no time, seems to have occasioned him any sort of anxiety.

Having said that this defendant's habits of drunkenness and profaneness are established to the conviction of the Court, it will not be required of it to descend into the particular instances. It would even be improper, if not absolutely indispensable, for reasons that will readily suggest themselves to every considerate mind. It remains therefore only to say of the three next following articles that they go to particular instances—and that each of the three, one of extreme grossness, is satisfactorily proved. An attempt which has been made to discredit two of the witnesses produced upon these articles, Evans, and a witness named Jonah Smith, by means of interrogatories, has wholly failed.

The eleventh article charges the defendant with being, almost more than, passive to a criminal connexion between his own wife and a young man who had been his pupil. This indeed is a part of the case too odious to be dwelt upon, and which the Court deeply laments the necessity of adverting to. It remains only to say that the charge, incredible as it seems, is positively deposed to, in a manner not to be explained away, by three witnesses—young women who had lived, at different times, in the defendant's service. Two of these again are attempted to be discredited by interrogatories, but **[295]** still unsuccessfully—and the third, a young woman, named Bursom, is a witness above all impeachment. She established, indeed, her own character, by taking steps for leaving the defendant's service the instant she discovered the gross immoralities practised in his family. Her evidence, in conjunction with that of the other two witnesses, satisfies my mind that not a doubt can be entertained of the truth of this charge—incredible, I repeat, as it seems, and revolting in its nature, as it undoubtedly is.

The twelfth article objects to the defendant's irregularity in the time, and indecency in the mode, of performing divine service. Eight witnesses have been examined upon it—whose depositions clearly prove the defendant's culpability in both these respects. As to the last, indeed, which is partly matter of opinion, there is some contrariety again among the witnesses, in point of degree; owing, probably, to their being differently affected, both towards the defendant himself and towards the offices which he had to perform. But that the defendant frequently read the service with most indecent haste, and that, on some occasions of performing divine offices, he has not been perfectly sober, is indisputable upon this evidence. And it is proved upon the thirteenth article, what perhaps would have been matter of just inference, without any proof, that the congregations at the defendant's churches, owing to such conduct on his part, have sensibly diminished. It is also proved that a baptist meeting-house has sprung up now for the first time at Chadlington, which several of the witnesses ascribe solely to the defendant's mode of doing duty in the church of that parish, coupled with the scandal occasioned by his **[296]** general misbehaviour. Hence it plainly appears that he has done a sensible injury to the cause, if not of religion itself, still, of that Church, the interests of which he stood solemnly pledged, by his ordination vows, to sustain and support.

These charges being thus established by proof, the only remaining consideration is the correction to be applied. The articles conclude with praying, generally, that the defendant may be punished "according to the exigency of the law;" but the first article, adverting to correction specifically, pleads that clerks in holy orders are liable, for offences of this nature, to be deprived of their ecclesiastical benefices, and suspended from the exercise of their clerical functions, by the ecclesiastical canons and constitutions of the Church of England, as by law established. And the Court is now given to understand, by the counsel for the promovent, that the sentence prayed against this defendant is the first of these, or a sentence of deprivation.

It appears, however, to the Court, in spite of what has been urged to the contrary, that deprivation is a penalty which it is not at its option to award; that, and deposition, being specially reserved by the canon (*a*) to the diocesan. It would be extremely

(*a*) Vide Canons of 1603. Canon cxxii. entitled, "No sentence of deprivation or deposition to be pronounced against a minister but by the bishop." [See Hagg. 47, n.]

unwilling to do, in the teeth of that canon, what the canon itself seems, in the Court's view of it, expressly framed to exclude it from doing, upon the mere dicta of counsel, however respectable, in the absence of any, or, at most, upon the strength [297] of one (blind) precedent.(*a*) For this, at least then, if for no other reason, the Court declines proceeding to a sentence of deprivation, as prayed by the promovent. And the Court not having, in its own opinion, authority to pronounce this sentence, it is unnecessary, and it might even be improper, for it to suggest whether the merits of this party's offence exact it. The discretion of diocesans ought not to be fettered by opinions on this head, in this view of the matter purely extra judicial, expressed here. It seems also clearly to result from the premises that suspension, the proper sanction of the Court, ought not to be carried to any such ex-[298]-tent in point of time as would render it tantamount to deprivation; for the Court would not be justified to itself in doing that indirectly which it felt itself precluded from doing openly and avowedly, by a precise sentence to that effect, in the first instance. The Court is bound too, in duty, and, it may be hoped, is disposed in inclination, to administer justice in mercy; and not to inflict punishment beyond what it deems necessary, first, to correct the individual himself, and, secondly, to produce due effect, in the way of example, upon others. At the same time it is to be remembered that offences of a grave nature must not be visited too lightly; as dismissing them, when they occur, with comparative impunity, is certainly not to consult best for their future prevention.

Still, however, with the aid of these principles it is difficult to define the exact quantum of any variable and discretionary penalty, incurred by a particular defendant, under all the circumstances, for any given offence. It is peculiarly so in the present instance, because it fortunately happens that few precedents occur in this kind to guide the discretion of the individual judge. I say "fortunately happens;" it being highly creditable to the body of the clergy that, numerous as it is, there has seldom been occasion to resort to any proceeding of a nature similar to the present. The single instance within my memory (now beginning to extend over no short period) is the case of *Dicks and Huddesford*, which occurred here in 1794. The Court suspended the defendant in that case, a clergyman articled against for drunkenness and profaneness, for two years; and directed that, at the end of that [299] period, he should exhibit a certificate from three clergymen in his vicinity of good behaviour in the interim, prior to the suspension itself being taken off or relaxed; condemning him, at the same time, in costs. Upon looking into that case I find it to have been one of by no means equal enormity with the present. There was much, too, in the case which went to shew that the defendant was hardly strictly sane—a consideration which might, and probably did, operate in mitigation of punishment, although the fact of derangement, if it were such, did not appear in the cause in any such shape or to any such degree as could render Mr. Huddesford irresponsible for his conduct altogether. Taking that case, in some measure, for a guide, but looking at the

(*a*) In support of the Court's right to deprive, it had been urged, among other arguments, by counsel for the promovent, that such was the general impression or understanding of the bar, and the Court was reminded that, on a late occasion, this position had been broadly advanced by counsel * before a full commission of Delegates, without provoking any dissent. A manuscript note of Dr. Harris was also introduced to its notice, which was in these words: "In 1689 Sir George Oxenden, as dean of the Arches, deprived one Rich," and, in confirmation of that note, it was said to appear from books in the Arches registry that there was a suit depending in the Court of Arches in the year 1689, entitled *Dr. Rich* against *Gerard and Another*, presumed the first (plaintiff or appellant) to be the Dr. Rich said to have been deprived.

In the course of the hearing the Judge threw out that, under a future similar proceeding, it would be advisable to consider whether a sentence of deprivation might not be had (as by invoking the diocesan or archbishop, or otherwise) so as to avoid a breach of the canon which would result, he conceived, from the Court's proceeding to pass it per se, in the manner then prayed.

* Namely, by Dr. Swaby, in the case of *Watson* v. *Thorp*, Del. Tr. T. 1811. See 1 Phill. 277.

greater magnitude, and, I may add, at the deeper malignity of the offences proved against this defendant, it appears to me that it would be a shrinking on the part of the Court from a due discharge of that duty imposed on it, in order to preserve the discipline of the Church, and for the interests of the public, were its sentence of suspension, in the present case, to be for less than three years. The Court, therefore, on these several considerations, pronounces the articles proved; decrees a suspension of three years, and a certificate, as in *Huddesford's case*, of intermediate good behaviour, prior to its relaxation; and condemns Mr. Davies in the costs of this suit.(*a*)

[301] BARLEE *v.* BARLEE. Arches Court, Michaelmas Term, 3rd Session, 1822.—Imprisonment for a contempt, nature, effect, and remedy of—not, as often erroneously supposed, either in the discretion, or terminable at the pleasure, of the Ecclesiastical Judge by whom the party is pronounced in contempt.

[Referred to, *Weldon* v. *Weldon*, 1883, 9 P. D. 55.]

At the sitting of the Court on this day the registrar, by direction of the Judge, read aloud the following memorial, addressed to the Judge of the Court:—

"We, the undersigned, think the case of Mrs. Barlee, whose petition is hereunto annexed, deserving of the utmost commiseration, and humbly entreat your Honorable Court to accede, if possible, to the prayer of it. "A. H. STEWARD, Sheriff.

"C. BERNERS, B. G. HEATH,
"T. METHOLD, C. CHEVALIER,
"P. GODFREY, G. CAPPER,
"R. PETTIWARD, J. GIBSON,
"J. CHEVALIER,
} Magistrates of the County of Suffolk."

The petition referred to in this memorial (also read aloud by the registrar) was in the following words:—

"The humble petition of Frances Barlee.

"Sheweth,—

"That your petitioner now is, and has been since the 8th of January, 1821, a

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(*a*) The sentence was as follows:—

The Judge, by his interlocutory decree, pronounced the articles proved, &c. and "that the said Rev. David Griffith Davies, clerk, licensed curate of the augmented curacy of the chapel of Ascot, and curate of the parish of Charlbury, both in **[300]** the county and diocese of Oxford, be suspended for the space of three years, to commence from the time of the publication of the said suspension in the parish church of Charlbury aforesaid, from all discharge and functions of his clerical office, and the execution thereof, viz. from preaching the word of God, administering the sacraments, and celebrating all other duties and offices in the said chapel and parish church, and elsewhere, within the province of Canterbury, and from all profits and benefits of the said augmented curacy of the chapel of Ascot, and curacy of Charlbury, and from taking and receiving the fruits, tithes, rents, profits, salaries, and other ecclesiastical dues, rights, and emoluments whatsoever, belonging and appertaining to the said curacies; and did suspend the said Rev. David Griffith Davies, clerk, accordingly; and did condemn him in the costs of this suit: and did order and decree that, at the expiration of the said three years, the said Rev. David Griffith Davies, clerk, do and shall exhibit and leave in the registry of this Court a certificate, under the hands of three clergymen in his vicinity, of his good behaviour and morals during the time of his suspension; and that the said certificate be exhibited to, and approved of by this Court, before such suspension be taken off or relaxed; and that the said suspension shall continue in full force, notwithstanding the expiration of the aforesaid term of three years, until the aforesaid satisfactory certificate shall be exhibited and approved of; and the Judge did direct that a copy of this decree, duly certified, be transmitted to the Consistorial Court of the diocese of Oxford, in order that such sequestration or sequestrations may there be issued, or such other steps be taken as the nature of the case, and the exigency of the law may appear to require; and did also direct the said suspension to be published in the said parish church of Charlbury, on Sunday the 1st day of December next ensuing, or on Sunday the 8th day of the said month, and in the said chapel of Ascot on the said 8th day of December, or on Sunday the 15th day of the said month aforesaid."

prisoner in the gaol of Ipswich, for the county of Suffolk, by virtue of a writ, dated May 21st, 1821, issued by Phillip Bennett, Esq., the then high sheriff of the said county, in pursuance of an order of your Honorable Court, **[302]** consequent upon a monition from the same, addressed to your petitioner, the said Frances Sarah Barlee, directing her to return home to her husband, Charles William Barlee, and upon a subsequent decree, declaring your petitioner to be in contempt of Court. Your petitioner humbly states that it is not in her power to comply with the monition of your Honorable Court, her husband, the said Charles William Barlee, not having, since the year 1815, had any regular house or place of residence, and that she does not at present know where he resides. Your petitioner further begs leave humbly to state that did she know the residence of the said Charles William Barlee, she could not, consistently with her own safety, return to him, as from his threats and ill usage she considers her life to be in danger, and that she has formerly sworn the peace against him. Your petitioner further states that a mutual verbal agreement of separation took place between her and the said Charles William Barlee, on the 5th of June, 1815, but that, on the 6th July following, he seized and confined your petitioner in a house in Vine Street, Lambeth; but that, by the interference of the magistrates of Union Hall, she was enabled to appear before them at the said hall, on the 27th July, 1815, when she there swore the peace against her said husband, who could not then be found. She further states that she had lived in a state of separation from her said husband for upwards of three years previously to his institution of the suit against her in your Honorable Court; and that she is now detained by virtue of a writ in which she is wrongfully designated by the male appellation of Francis.

[303] "Your petitioner further humbly states that she was heiress to a considerable property, part of which was, by her marriage-settlement, reserved to her own use; but the trustees nominated in that settlement being all related to, and acting, as she supposes, under the influence of the said Charles William Barlee, have failed to afford that protection to her person and property which she conceives she has a right to demand; she has, therefore, been obliged, under great difficulties from the want of money, to institute certain proceedings against those trustees, which proceedings are now pending in the High Court of Chancery, but your petitioner, by her present incarceration, is disabled from going on with them properly, whereby her estate and interests are materially injured.

"Your petitioner also further begs leave to state that, since her confinement in the gaol at Ipswich, her husband, the said Charles William Barlee, has totally neglected and refused to supply her with food and raiment, and that she is in want of the common necessaries of life, being reduced to the gaol allowance of bread and water, and a small portion of cheese. That your petitioner, when first imprisoned, was suffering under a liver complaint, for which she was attended by the late Dr. Girdlestone, of Yarmouth; that since her imprisonment that complaint has increased, and that, in consequence of the varied temperature, and other inconveniences of the apartment assigned to her, which is uncieled, and open to the roof of the prison, she has had an abscess in her head, and been severely afflicted with rheumatism; and that she has just ground to fear that another winter's imprison-**[304]**-ment, under her present privations, would be fatal to her.

"Your petitioner, therefore, humbly prays that your Honorable Court would be pleased to take into consideration these statements, and graciously to pardon the contempt into which your petitioner has involuntarily and unhappily fallen, and by giving an order for her liberation, afford her the means of saving her life and property. And your petitioner, as in duty bound, shall ever pray, &c.

"F. S. BARLEE."

Court—Sir John Nicholl. The petition of Mrs. Barlee, which has just been read, together with the recommendation accompanying it from the sheriff and magistrates of Suffolk, gives this Court an opportunity of publicly noticing the case of this unhappy woman, about which some misapprehension apparently exists. By this public notice of it the party herself, and those who take an interest in her behalf, may become informed that, whilst the Court very sincerely commiserates her situation, it is without any power of affording her relief in the manner prayed. Mrs. Barlee is imprisoned for what is termed a contempt. A notion prevails that a contempt must

be some disrespect shewn to the Court, and that the imprisonment is in the discretion, and terminable at the pleasure, of the Judge. This is very erroneous. Contempts are usually incurred by a party's neglect or refusal to do some act which is, in justice, due to the other party in the cause; such as the giving in of answers, the payment of costs, or the like; and the imprisonment which follows is at the prayer of the other party—a prayer to which the Court cannot refuse to [305] accede without a breach of its duty, and a denial of justice. By the law of this country, married persons are bound to live together; and if either withdraws without lawful cause the other may, by suit in the Ecclesiastical Court, compel the party withdrawing to return to cohabitation. The only lawful cause for withdrawing is the cruelty or adultery of the other party; for this Court can take no cognizance of disputes about property or mutual agreements to live separate. To amount to cruelty there must be personal violence, or manifest danger of it; for unkindness and reproachful language on the one side, or vain and unfounded fear on the other, do not constitute any case of cruelty which the law can notice. It need scarcely be added that it is not sufficient to allege and charge cruelty; it must be judicially established by evidence. Mrs. Barlee withdrew from her husband—he instituted a suit to compel her to return—she pleaded cruelty—time was allowed her to produce her evidence—that time was repeatedly extended—till, at length, no witnesses being produced, the Court was forced, in justice to the husband, to conclude the cause, and to decree Mrs. Barlee to return to her husband. A monition was issued against her to that effect. This monition was not obeyed. The Court was continually pressed, on behalf of the husband, to pronounce Mrs. Barlee in contempt for not obeying the monition. Letters were addressed by this lady to the Judge of the Court, to other Judges, and to various persons, complaining of her husband, of her trustees and relations, and of her law agents; and suggesting that all these were in a conspiracy to [306] oppress her, and to rob her of her property. The Judge of this Court of course could neither answer, nor act upon, such letters respecting a matter depending before it; but they exhibited such symptoms of aberration of mind as to induce the Court publicly to throw out a suggestion, on being pressed to pronounce her in contempt, whether her friends could produce any satisfactory evidence of actual derangement; for an insane person cannot be guilty of contempt, so as to be legally responsible. The husband, of course, would have been entitled to controvert the fact. No case of that sort however was brought forward by Mrs. Barlee's friends; and after a considerable lapse of time, and repeated application on behalf of the husband, the Court was at length compelled to pronounce Mrs. Barlee in contempt, and to signify her contempt to the proper temporal jurisdiction. Carrying forbearance to the utmost point, the Court could no longer, without an absolute denial of justice, refuse to take this step on the demand of the husband. Here the authority of this Court ceased—the imprisonment takes place under that of the temporal jurisdiction; nor has this Court the power of releasing at pleasure, but only on the obedience of the party. This Court can no more release in the way prayed, than a Judge at common law can, at pleasure, release a defendant who is imprisoned for non-payment of damages recovered in an action. The imprisonment is here to enforce the legal rights of the husband; and unless the husband will consent to waive his rights, or unless she obeys the monition, or unless it can be shewn that she is not in a fit [307] state of mind to obey, this Court can take no step.(*a*)

(*a*) At the sitting of the Court on the next following, the 4th session, an affidavit of Mr. C. Barlee, the husband of the petitioner Frances Barlee, and a letter addressed to the dean of the Arches by the Rev. Edward Barlee, the brother of Mr. C. Barlee the husband, were read in Court by the registrar, in vindication of the conduct of the husband, and in total denial of nearly all the facts stated in the wife's petition. And on the bye-day a statement forwarded to the Judge by the high sheriff of Suffolk was also read in Court, in direct contradiction of what the petitioner Mrs. Barlee had asserted relative to her treatment in Ipswich gaol.

The Judge, after reprobating all private communications from suitors respecting matters depending before him, and noticing the irregularities into which any attention paid to these in the first instance naturally led, observed,

The Court has permitted these several documents to be read as an act of justice

AUSTEN *v.* DUGGER. Arches Court, Michaelmas Term, 3rd Session, 1822.—If a party committed for non-payment of costs, under an erroneous process, be thereupon released, the Court is bound, at the application of the party to whom they are still due, to issue a new monition for payment of such costs.

[Referred to, *Martin* v. *Mackonochie*, 1879, 4 Q. B. D. 717; *Mackonochie* v. *Lord Penzance*, 1881, 6 A. C. 435.]

(On motion.)

This was an appeal from the Consistorial Episcopal Court of Exeter, where the cause originally depended, being a cause of the office of the judge for quarrelling, chiding, or brawling, in the parish church of Fowey, in the county of Corn-[308]-wall, and diocese of Exeter, promoted by Joseph Thomas Austen, Esq., against Richard Dugger, both of the parish of Fowey (vide 3 Phill. p. 124). By the sentence appealed from, dated on the 5th day of June, 1818, Dugger was dismissed from the suit, and Austen was condemned in costs. But on the 8th of May, 1819, the Court of Arches reversed that sentence, and pronounced the articles fully proved; suspended Dugger ab ingressu ecclesiæ for one week; and condemned him in the costs in both Courts, excepting only such as were occasioned by a certain allegation, exceptive to the character af the defendant's witnesses, given by Austen, the promovent, in the Consistory Court of Exeter.

Those costs were afterwards taxed at the sum of 202l. 8s. 5d.; for payment of which a monition went out, and was returned duly, and personally served upon Dugger; and on the 2d Session of Michaelmas Term, 1819, the Court pronounced him in contempt, and directed him to be signified, for not having obeyed the said monition. A significavit accordingly issued under seal of the Arches Court, followed by a writ de contumace capiendo out of Chancery, pursuant to the statute; under which writ Dugger was taken into custody, and lodged in Bodmin gaol, some time about the latter end of November, or beginning of December, 1819.

In Easter Term, 1822, a rule nisi for a habeas corpus to bring up the body of Dugger, in order to his discharge, was granted by the Court of King's Bench, on the ground of a defect in the warrant of commitment. That rule, upon argument, was made [309] absolute (see 5 Barn. & Ald. p. 791), and Dugger soon after was brought up before a judge at chambers, and discharged.

The present was an application to the Court for a new monition against Dugger for payment of these costs, in order to his re-commitment under a new warrant, in default of payment. It was sworn that neither the said costs, nor any part of them, had been paid, but that the whole were still due and owing to the said Joseph Thomas Austen.

Judgment—Sir John Nicholl. The facts upon which the present motion is founded partly appear upon the records of this Court; and the rest are regularly stated in, and verified by, affidavits. It appears by these that the costs in question have been decreed by the Court, and are still due; and the question is whether the Court, upon this application of the party to whom they are due, can refuse the aid of its process to enforce their payment. Now I am of opinion that the party applying for, under the circumstances, is entitled to that aid; and, consequently, that a new monition must issue. Here has been a former process, and, from an error lately discovered in it, that process has become ineffectual. Could this error be fairly ascribed to the party suing it out; or could it be shewn to have occasioned the other party material, or any, inconvenience, a different consideration might possibly apply to the case. But, on the contrary, I incline to hold that neither the one party is blameably in error, nor the other has sustained any injury. It is true that the Court of King's Bench has held the significavit defective, as not stating, with suffi-[310]-cient certainty, the nature of the cause in which the costs were incurred, so as to fix it within the jurisdiction of the Ecclesiastical Court. But that process issued in the ancient and accustomed form; and the description of the cause in the significavit, viz. "a certain

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to the husband, in consequence of the publicity which it has been the means of giving to the wife's (as it should now seem unfounded) complaint. Here, however, these irregularities must stop, there being nothing before the Court upon which it can make any order.

cause of appeal and complaint of nullity," is literally taken from that in the Court books; so that no blame is justly imputable to the party suing out the process. Had the process again been liable to no such objection, Dugger must have still been in Bodmin gaol; whereas, in consequence of its being erroneous, he has been released from prison, and at large since Easter Term last. He, therefore, has suffered no injury by the process going out in its actual form; or, if he has, it is an injury for which, in my judgment, he must seek his remedy in another forum. Meantime, the costs being, as I have said, due and unpaid, it seems to me that the Court is bound, ex debito justitiæ, to enforce their payment. This Court is not functus officio till it has enforced the execution of its decree; nay, even after payment of costs, had the process been regular, the party, Dugger, must have come here for his writ of deliverance; so that this Court could hardly have been styled functus officio in either alternative. I shall therefore allow the monition to go; not, I confess, without some reluctance; as the party against whom it is prayed has been imprisoned upwards of two years, and may be unable to pay the costs in question; in which case, if aware of it, the party praying the monition is chargeable with proceeding upon purely vindictive, and therefore upon unjustifiable, grounds. The fact, however, may be just the reverse: Dugger may have **[311]** ample funds, and may merely resist from obstinacy, and to defeat the just claims of the other party. After all the monition is only, in effect, in the nature of a rule to shew cause; for it should be distinctly understood that its issue is by no means conclusive. Upon its return the party monished may appear, and pray it to be superseded—a prayer to which, upon cause shewn, the Court may be disposed (as I apprehend that it is at full liberty) to accede. In this character, and subject to these limitations, I direct the monition to issue as prayed.(*a*)

[312] BLYTH, FORMERLY SODEN *against* BLYTH. Arches Court, Michaelmas Term, 1822.—An appeal only suspends the sentence appealed from, does not render it a nullity. Hence, the statute 3 G. 4, c. 75 (which passed after a sentence of the Consistory Court of London pronouncing a marriage null and void by reason of minority and want of consent under 26 G. 2, c. 33, though pending an appeal from that sentence), held, in no degree, to affect the question of such marriage.

An appeal from the Consistory Court of London.

(On the admission of an allegation.)

This, in the first instance, was a suit of nullity of marriage, promoted and brought in the Consistorial Episcopal Court of London by Samuel Blyth, the natural and lawful father of Augustus Frederick Blyth, against Sarah Blyth, otherwise Soden, for the purpose of obtaining a sentence declaratory of the nullity of a marriage had between the said Augustus Frederick Blyth, and the said Sarah Blyth, otherwise Soden, by reason of the said Augustus Frederick Blyth's alleged minority at the time of his said marriage, and of the marriage being had without the consent of his natural and lawful father, the said Samuel Blyth. The marriage was solemnized under a

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(*a*) The monition so decreed was immediately extracted, and was returned, duly served, on the 1st Session of Hilary Term, 1823. On the 2d session a proctor appeared to the monition on behalf of Dugger, the party monished, but under protest; which he was assigned to extend by the 4th session. An act on petition was consequently entered into between the several parties, which was brought in, sped, on the 3d Session of Easter Term, when the proctor for the petitioner Austen also brought in two affidavits in support of that part of his act which alleged Dugger's ability to pay the costs in question. On the 4th Session of Easter Term the Judge over-ruled the protest entered on behalf of Dugger (who did not appear by counsel), and assigned him to appear, absolutely, on the next court-day. On the next court-day, namely, the 1st Session of Trinity Term, 1823, no appearance being given, the Court pronounced Dugger in contempt for not having appeared absolutely to the monition [i.e. the monition last issued], in compliance with its order to that effect; and directed him to be signified pursuant to the statute. A significavit was accordingly again extracted followed soon after by a new writ de contumace capiendo, under which Dugger was re-committed to Bodmin gaol.

licence granted on the usual affidavit, stating "both parties to be of age," sworn by the alleged minor.

The cause was heard in the Court below, on the 4th Session of Trinity Term, in the present year — on which day [the 28th of June] a sentence was pronounced, declaratory of the nullity of the said marriage. From that sentence an appeal was immediately asserted, and was afterwards duly prosecuted to this (the Arches) Court. The usual libel of appeal was brought in and admitted—and was followed by an allegation, tendered on the same be-**[313]**-half—that of the appellant—the admissibility of which was the question now before the Court.

The allegation consisted of two articles.

The first article pleaded that, subsequent to the 28th day of June, 1822, being the date of the sentence appealed from, and pending the appeal—to wit, on the 22d day of July, 1822—an act of parliament passed, which (after reciting that great evils and injustice had arisen from certain provisions of 26 Geo. 2, c. 33, rendering all marriages by licence, where either of the parties, not being a widower or a widow, should be under the age of twenty-one years, without the consent of the father of the minor, if living; or, if dead, of the guardian or guardians, lawfully appointed, or one of them; or, in default of a guardian or guardians, lawfully appointed, of the mother, if living and unmarried; or, in default of a mother living and unmarried, then of a guardian or guardians of the minor's person, appointed by the Court of Chancery, null and void—and after repealing the said provisions, as with respect to marriages thereafter to be solemnized, further) enacted, in the words following—to wit—"That in all cases of marriage had by licence before the passing of this act, without any such consent as aforesaid, and where the parties shall have continued to live together as husband and wife, till the death of one of them, or till the passing of this act; or shall only have discontinued their cohabitation for the purpose, or during the pending, of any proceedings touching the validity of such marriage; such marriage, if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever."

[314] The second article of the allegation pleaded that "the said Augustus Frederick Blyth, and Sarah Blyth his wife, continued together as husband and wife, until the commencement of the suit in this cause in the Court below—and only discontinued their cohabitation during the pending of the proceedings touching the validity of the marriage of the said Augustus Frederick Blyth and Sarah Blyth, formerly Soden, and in consequence of such proceedings."

Judgment—Sir John Nicholl. This is an appeal from a sentence of the Consistory Court of London, pronouncing and declaring a marriage had between Augustus Frederick Blyth, son of Samuel Blyth, the respondent, and Sarah Blyth, otherwise Soden, the appellant in this Court, null and void, under the provisions of 26 Geo. 2, c. 33, the old marriage act. The appeal has been duly prosecuted, and the usual libel of appeal is now followed up by an allegation on behalf of the appellant, the admissibility of which is the point at issue.

The allegation pleads, first, the existing law supposed to be applicable to this case of appeal; and, secondly, the facts requisite to bring it within the operation of that law. But how the law pleaded can be applicable to this case, and, consequently, how the facts can be relevant, I am still to be informed. If the act in question had passed pending proceedings in the Court below, and prior to a sentence pronouncing the marriage invalid, both the applicability of the law, and the relevancy of the facts stated in the plea, would be obvious. But **[315]** passing, as it did, after a sentence pronouncing the marriage invalid, the one should seem to be inapplicable, and the other irrelevant. For the very next following (the third) section of the act referred to, and in part recited, specially provides that "nothing contained in it shall extend, or be construed to extend, to render valid any marriage declared invalid by any Court of competent jurisdiction before the passing of the act." It should seem consequently that this marriage can derive no aid from "any thing contained" in the new Marriage Act—in which case the present plea, as being purely superfluous, must of course be inadmissible.

If, however, the sentence annulling this marriage be itself a mere nullity, as contended, by reason of the appeal, the marriage, I admit, is valid under the new act, notwithstanding such prior sentence of invalidity—is valid, that is, provided the

parties were cohabiting up to the commencement of this suit in the Court below, as alleged, and which I am bound to presume that they actually were, for the purpose of deciding upon the admissibility of the present plea.

The real question, then, before the Court is simply as to the legal effect of an appeal in this particular—in other words, whether it hath, or hath not, the effect ascribed to it of rendering the sentence appealed from a mere nullity. If it hath, the present plea is highly relevant, and clearly admissible—if it hath not, it can have no bearing whatever upon the case, and must as clearly be rejected.

Now that such, an appeal entered, is its legal effect is a doctrine to which I can by no means sub-**[316]**-scribe. It is quite at variance with, and contradictory of, my preconceived notions upon this head, on which, I confess, that no change has been wrought by the arguments of the appellant's counsel. On the contrary, I still hold its legal effect to be a mere suspension, and not the annihilation, of the sentence appealed from. That this is the correct view of the subject is evident from these considerations—the sentence appealed from, if affirmed, that is, if it stands at all, stands as the sentence of the Court appealed from, not the appellate Court—the cause is remitted to the Court below; it is by the authority of that Court that the execution of the sentence is to be enforced; and it remains valid from the day upon which it was pronounced by the Court appealed from, and not from that upon which it was merely affirmed by the appellate Court. In a word, the sentence, on appeal, is dormant only, not extinct, and revives, on affirmance, with every consequence attached to it which would have attached had no appeal been interposed.

The authority adduced in support of the novel position, that an appeal is not merely "suspensio" or "recessio," as it is termed by the civilians primæ latæ sententiæ, but that it actually annuls it, is not more convincing to my mind than the argument; or, indeed, I should rather say, it assists in refuting it. It occurs in Ayliffe (Ayliffe's Par. 71), who defines an appeal to be "a judicial right, whereby the former sentence is for a while extinguished." Now the "temporary extinction" of a sentence is, to my apprehension, the same thing with its "suspension;" **[317]** it is only another mode of expressing the self same idea.(*a*)[1]

Entertaining these notions, for reasons already suggested, I reject this allegation. The appeal of course may proceed, notwithstanding its rejection. If, in the event, it should prove that the Court below has taken an erroneous view, either of the facts of this case as they appear in evidence, or of the application to those facts of the then existing law, it will be the duty of this Court to reverse its sentence: otherwise that sentence must be affirmed; for the appellant can derive no aid from "any thing contained" in the new Marriage Act, the retrospective clause in which I am of opinion in no degree affects the marriage in question in this suit.

Allegation rejected.

[318] SCHULTES *v.* HODGSON. Arches Court, Michaelmas Term, 1822.—Additional articles may be admitted in criminal suits, though not universally, or as a matter of course—in what cases—under what restrictions—and subject to what limitations.

(On the admission of additional articles.)

This was a cause of office, originally depending in the Consistorial Episcopal Court of Sarum, the nature and circumstances of which have been stated in a former part of these reports.(*a*)[2] The present question arose upon the admissibility of additional articles tendered on the part of the promovent, in consequence of the proctor for the defendant refusing to consent to a reform of the original articles (given in and admitted in the Consistory Court of Sarum) out of Court—as suggested by this Court (the Court of Arches), where the principal cause has been retained, at the hearing of the appeal.

Judgment—Sir John Nicholl. When this appeal was before the Court on a former

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(*a*)[1] This whole matter is well summed up by Gail, who says "that an appeal extinguishes the sentence quoad præsentem causæ statum—but that quoad futurum statum, et litis exitum, it only suspends it." Vide Gail, Prac. obs. l. 1. Obs. cxliv. n. 1.

(*a*)[2] Vide page 105 of this volume, ante.

occasion, it suggested to the parties the propriety of amending the articles, by consent, out of Court, if irregular and defective, as urged by the appellant (the defendant in the original suit), in their then subsisting shape. This it did, as being of opinion that the appellant had forfeited his right to be heard in Court, in objection to articles, from the admission of by the Court below he had not appealed within the time prescribed by law; and to which, moreover, of course subsequent to their ad-**[319]**-mission, he had given a negative issue. The Court, in recommending this measure, had the interests of two parties in view—of the promovent, or rather the public, which is manifestly interested in the correction and suppression of offences of the nature of those charged upon the defendant; and of the defendant himself, who had complained, and not without reason, of being placed under a disadvantage with respect to his defence, from the vagueness, and want of specification, of the articles, both as to time and place. I am to remember that I have still the interests of the same two parties to look to, in considering the admissibility of these additional articles. For it seems that a refusal on the part of the defendant to consent to a reform of the original articles, as suggested by the Court (in which possibly he might be right, having merely his own interests to protect), has constrained the promovent to offer those additional articles, which the Court is now prayed, on behalf of the defendant, to reject.

The admissibility of these articles has been attacked, generally, if I understand, upon the broad principle of additional articles being universally inadmissible in criminal suits. I am aware, however, of no such rule as this, urged in argument by the counsel for the appellant; and, indeed, in *Stone's case*,(*a*) which has been referred to by the counsel for the respondent, additional articles were **[320]** actually admitted in a criminal suit, not indeed by this Court, but by the Consistory Court of London, under the able presidency, at that time, of the present Lord Stowell. I am of opinion, therefore, that additional articles may be offered, even in criminal suits. At the same time, they are not admissible as a matter of course, or indeed at all, without special ground for their admission—such, for instance, as this suit presents, in the circumstance of the articles having been admitted, in the first instance, most hastily and unadvisedly, in a Court not, it may be conjectured, much in the habit of dealing with cases **[321]** of this description. And even where admissible at all, additional articles must be such as to occasion, taken in conjunction with the original articles, no substantial breach of the rules of criminal pleading, in order to make good their claim to be actually admitted.

Now, it is matter of perfect notoriety that, in proceedings by articles, the articles must be brought in on the Court-day immediately subsequent to that on which the

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(*a*) This was a proceeding by articles, against the Reverend Francis Stone, rector of Norton, otherwise Cold Norton, in the county of Essex, and diocese of London, in the Consistorial Episcopal Court of London, for advisedly maintaining or affirming doctrine directly contrary or repugnant to the Articles of Religion, as by law established, or some or one of them; and against the statute 13 Eliz. c. 12, intituled "An act for the ministers of the Church to be of sound religion."

The articles in this case were brought in on the 3d Session of Trinity Term, 1807, and were admitted, without opposition, on the 4th Session. On the 1st Session of Michaelmas Term following, an additional article was brought in, for the purpose of exhibiting in supply of proof of the 8th, 9th, 10th, 11th, 12th, and 13th of the original articles, a letter from the defendant to a Mr. Stanes, a bookseller at Chelmsford, pleaded to be of the defendant's hand-writing, and to have been sent from the defendant to Stanes, with some printed copies of a sermon imputed to the defendant in those articles and charged as containing the offensive matter proceeded against, such letter plainly inferring Mr. Stone to have been the author of that sermon.

The admission of this additional article being opposed by counsel for the defendant, the Court directed it to be reformed; but on the 4th Session of Michaelmas Term, 1807, it was admitted, as reformed, together with its exhibit, without further opposition.

In the event the articles were pronounced to be proved, and Mr. Stone was deprived; the bishop (Porteus) in person passing sentence, conformably to the 122d canon. See p. 296, ante.

defendant has appeared; and that, being so brought in, they must contain the charge and the whole charge. It is true that the articles, when brought in, may be reformed and amended under the direction of the Court, prior to their actual admission; but when they are once admitted, and issue is joined, either party, I apprehend, is bound by them. In particular, the promovent is not at liberty to drop in with charges one after another—with perhaps the single exception that offences ejusdem generis, subsequently committed, may be pleaded in subsequent articles. But further articles, as matter of course, containing new criminal charges, or even advancing collateral facts and circumstances in proof of such articles of the original set as are, in themselves and directly, criminatory, ought not to be admitted. And now to apply these principles to the question immediately before the Court:—

The 5th, 6th, and 7th articles of the original set contained, in substance, the whole criminal charge. The first of these, the 5th, charges and objects that the defendant, being a clerk in holy orders, a priest, and vicar of Hagbourn, "within eight calendar months from the commencement of this suit (that **[322]** is to say), in the months of March, April, May, June, July, August, and September, last past, and in this present month of October, 1821 (being the month and year in which the original articles were brought in), committed the foul crime of adultery, fornication, or incontinency, with Rachael Harris; and that for all, some, one or more of the months aforesaid, he, the said defendant, had lived and cohabited with the said Rachael Harris, in one and the same house, in a lewd and incontinent manner." The 6th, in like manner, charges and objects that "during all and singular the several months in the years of our Lord 1819, 1820, and this present 1821, he, the said defendant, oftentimes committed the said foul crime with the said Rachael Harris; and that for all, some, one or more of the months in the said several years, had lived and cohabited with the said Rachael Harris, in the said lewd and incontinent manner." The 7th objects that, "In consequence of such intercourse, the said Rachael Harris had twice, or at least once, within the months and years specified in the last article, conceived or been with child by the defendant, and had been delivered of two children, or at least of one child, within the parish of Hagbourn, or some other parish or parishes; and that such two children, or at least one child, so begotten and born, are, or is, now living within the said parish of Hagbourn." These are the substantial criminal charges upon which issue was joined—and I am of opinion that such of the articles now brought in as contain other charges accumulative upon these, or even adduce collateral facts and circumstances, in corroboration of these charges themselves, so contained in the three origi-**[323]**-nal articles just specified, could, under no circumstances, be admitted. Such, however, of the additional articles as are in neither of these predicaments I propose to admit, under the special circumstances of this appeal—the substantial justice of the case as between plaintiff and defendant, at the same time, suggesting, and even appearing to require it.

Now, the two first additional articles are in neither of these predicaments. They merely plead two exhibits, in proof of the defendant's institution and induction to the vicarage of Hagbourn, in supply of proof of the first original article, which simply charged that the defendant was, and for some time past had been, vicar of Hagbourn. These articles, with the annexed exhibits, I accordingly admit. The exhibits themselves, too, being merely copies of, first, the act, or minute of institution, and, secondly, the mandate of induction might possibly even have been brought in annexed to a deposition, without being specifically pleaded at all.

But the 3d, 4th, 5th, and 7th additional articles, where they are not mere repleaders, either go into new matter of an earlier date, or object collateral facts and circumstances corroborative, and inferring the truth, of parts of the original articles directly criminatory. For instance, the 4th, with reference to the 7th original article (which itself refers back to the 6th) articles and objects that, in consequence of the defendant's criminal conversation with Rachael Harris therein objected, "she, the said Rachael Harris, was, in the month of December, in the year of our Lord 1816, delivered of a **[324]** female bastard child, in the house of the said defendant, situate at Hagbourn, &c." And it has been contended that the promovent is not precluded from a greater specification as to the two bastard children mentioned in the 7th original article, even though it may shew a criminal connexion earlier than that which is there laid. I entertain, upon this head, a different opinion. It appears to me that

this is matter which, if chargeable at all, should have been charged in the original articles; and that the defendant is not bound to answer to it in this stage of the cause. This is not that specification, the want of which in the original articles was objected by the defendant, and to supply which (he, the defendant, having refused his consent to their reform out of Court), is the promovent's ostensible motive for tendering additional articles. So, again, the application of the overseers of Hagbourn to the magistrates, relative to the affiliation of these said bastard children—their appointment of a day for Rachael Harris, the mother, to attend, in order to being examined touching the same—her refusal, at the defendant's suggestion, to attend—her being consequently brought before a magistrate, on a summons—her refusal, still at the defendant's suggestion, to be examined—her consequent commitment for twelve months to Abingdon gaol—the defendant visiting her, and supplying her with money and provisions whilst she remained in the said gaol, and suffering her to return to his house upon the day of her discharge from the same—all pleaded in the 7th additional article—are not a mere reduction of the original, through the medium **[325]** of this additional article, into a less vague and more specific shape; but are a series of collateral facts, inferring the truth of matters directly criminal charged upon the defendant in the original articles; and consequently, in my judgment, for reasons to which I have already adverted, are not admissible in this stage of the cause. The 3d, 4th, 5th, and 7th additional articles must, I think, be rejected.

The 6th and 8th articles exhibit—the former, two original letters from the defendant himself, in relation to the facts pleaded, addressed to the deputy register of the Consistory Court of the Lord Bishop of Sarum—the latter, an original letter from the same defendant to his alleged paramour, Harris, whilst in Abingdon gaol. They are pleaded in supply of proof of the premises charged against the defendant in the 3d and 4th and 7th additional articles respectively. These articles, I think, may stand, after being reformed, by making them refer to the 7th and 8th original articles, instead of to the additional articles now rejected. The letters themselves are rather equivocal; but, however, valeant quantum. Their introduction in this stage of the cause may, for reasons suggested in the course of this judgment, be a little irregular; at the same time it is conformable to the precedent in *Stone's case;* and some latitude in pleading, with respect to exhibits, is allowable, as is well known, in all suits.

Upon the whole, then, I admit the 1st and 2d additional articles, together with the 6th and 8th, after being reformed as suggested, and reject the **[326]** remainder; with the exception of the 9th, which is the usual concluding article, and admissible of course.

Articles admitted as reformed.(*a*).

NORTHEY *v.* COCK. Arches Court, Michaelmas Term, 4th Session, 1822.—Administrations pending suit never granted on motion, but by consent. The principles by which the Court is governed in granting administrations pending suit.

(On motion.)

This was an appeal from the Consistory Court of Exeter, promoted and brought by Emanuel Northey, of the parish of Stoke Damerel, in the county of Devon, and diocese of Exeter, against Richard Cock, of the parish of Liften, in the same county and diocese. It was described, originally, as "a cause of bringing into and leaving in the registry of that Court the letters of administration of all and singular the goods, chattels, and credits of Mary Row, late of Broadwoodwiger, in the county of Devon, widow, deceased, thentofore obtained by Richard Cock, the pretended cousin-german and next of kin of the deceased, and of shewing cause why the same should not be revoked and declared null and void—and why such letters of administration should not be committed and granted to Emanuel Northey, the lawful cousin-german, once removed, and one of the next of kin of the deceased."

[327] This cause was appealed, upon a grievance; on the Judge below having ordered, or decreed, the answers of the said Richard Cock to an allegation given and admitted, propounding the interest of the said Emanuel Northey, which had been

(*a*) In which stage of this proceeding it soon after finally determined by the death of the defendant.

denied by the said Richard Cock, to be full and sufficient answers to the said allegation.

The libel of appeal was admitted on the 1st Session of Trinity Term; and on the bye-day after that term (the respondent's proctor having given an affirmative issue to that libel, and confessed the appeal) the Judge pronounced for the appeal, and retained the principal cause—and therein decreed the said Richard Cock's answers to be insufficient, and assigned him to give in further and fuller answers on the 1st session of the next term.

On the 1st Session of Michaelmas Term the proctor for the respondent exhibited a proxy under the hand and seal of his party; and, by virtue thereof, admitted the appellant to be the cousin-german, once removed, but denied him to be a next of kin of the deceased.

On the 3d session the respondent's proctor propounded the interest of his party, and asserted an allegation—at the same time the proctor for the appellant exhibited the affidavit of a Mr. Edward Abbot, and moved the Court, after reference had to the contents of the affidavit, to grant administration to him (pending suit) of the effects of the party deceased in the cause.

The party upon whose affidavit this motion was founded, in substance, deposed that Mary Row, the party deceased, died on or about the 1st day of June, 1820, intestate—that Richard Cock, one **[328]** of the parties in the cause, who then resided in a house near the deceased's, immediately thereupon took possession of the same, and of cash to the amount of 285l. or thereabouts; and in a few days after, and before Emanuel Northey, the other party in the cause, and claiming to be of kin to the deceased in a nearer degree, could be apprized thereof in time to enter a caveat, obtained letters of administration of the goods of the deceased, as next of kin of the deceased, from the Consistorial Episcopal Court of Exeter, and in virtue of such administration sold or disposed of a leasehold estate of the deceased, and attempted to sell or dispose of other leasehold estates; and by such and other means possessed himself of property of the deceased, to the amount of 800l. or thereabouts. The appearer, after referring to the proceedings had in the Consistory Court of Exeter, and in this (the appeal) Court, went on further to depose that the estate of the said deceased consisted of leasehold and freehold property, money out on mortgage, bills, and other securities, the rents and interest of which could not be received, as well as of the money of which the said Richard Cock had so as aforesaid possessed himself, and still retained; and that, to the appearer's belief, the property would be deteriorated, and its security endangered, unless administration was granted thereof, pending suit. The appearer lastly deposed that he was no otherwise interested in the event of the suit, or with the parties, than as having married the sister of the said Emanuel Northey, and that he was ready to take upon himself the office of administrator, and to give any security required by the Court.

[329] *Judgment—Sir John Nicholl.* This application is irregular in every respect. It is an application for an administration pending suit, ex parte, founded upon an affidavit of the proposed administrator, brought in on the 3d (the preceding) session. Now an administration, pending suit, is never granted upon motion, unless by consent. If the parties are agreed, both that an administration is necessary, and who the administrator shall be, it may be granted on motion. In any other case, an act on petition must be gone into—the necessity for an administration, pending suit, must be shewn—and the Court must be satisfied as to the fitness of the proposed administrator—or must be placed in a condition to determine between the two (its most usual office upon such occasions), an administrator, that is, being proposed by each party.

The affidavit exhibited in this case certainly states that "the property will be deteriorated, and its security endangered, unless an administration thereof, pending suit, is granted." But this may be denied and disputed by the other party, if an opportunity be furnished him of so doing—and again, the indifferency of the proposed administrator, the point to which the Court principally looks, is put out of dispute, even upon that person's own shewing. For he deposes that "he is no otherwise interested in the event of the suit, or with the parties, than as having married the said Emanuel Northey's sister." But in proving himself to be one of the deceased's next of kin Northey must prove his sister to be another—and her husband substantially has her interest. In-**[330]**-stead, therefore, of being an indifferent, he is an

interested, party—a party interested to an equal extent, at least so far as personalty is concerned, with Northey himself.

I have looked into the cases determined by my predecessor, and find that this Court hath been constantly in the habit of refusing to grant administrations, pending suit, merely to take property out of the hands of a litigant party in the actual possession of it. It hath always required it to be shewn that the property was in jeopardy —that the party sought to be dispossessed was irresponsible, and refused, or neglected, to furnish adequate and reasonable security. On the other hand, it hath as constantly declined putting a litigant party in possession of the property by granting administration pending suit to him, always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties. I reject the present application upon both these principles. Cock, the party sought to be dispossessed, is not merely in the actual, but is also in the legal, possession of the effects; for it is stated to be under an administration, although that administration has since been called in; nor is there any proof before the Court (however the fact may be, as to which I determine nothing) that the security of the property is endangered by its continuing in his hands. And Mr. Abbot, the proposed administrator, as already observed, is, upon his own shewing, equally interested, and consequently, in this respect, is identified with Northey himself, the other party in the cause.

Motion rejected.

[331] LAWRENCE, Attorney of Thomas *v.* MAUD AND PICKWELL. Prerogative Court, Michaelmas Term, 1st Session, 1822.—In causes of interest, both cases being disclosed, it is advisable that each party should admit so much of the other's case as he may (the whole, if he may) consistently with, and without prejudice to, his own case. Illustration of this rule.

[See further, p. 481, post.]

(On the admission of an allegation.)

This was a cause of interest between Frances Mary Thomas, wife of Philip Thomas, asserting herself to be the cousin-german once removed, and only surviving next of kin, and Mary Maud, wife of John Maud, and Sarah Pickwell, widow, asserting themselves to be the second cousins, and only surviving next of kin, of Elizabeth Harrison, late of the parish of St. Mary, in the town and county of Kingston-upon-Hull, spinster, the party deceased in the cause, who died, on the 26th of November, 1818, intestate, and as admitted on all hands, without father or mother, brother or sister, uncle or aunt, nephew, niece, or cousin-german.

The interests of the several parties were propounded respectively in two allegations.

On the part of Mrs. Thomas it was in substance alleged that Thomas Harrison, the deceased's paternal grandfather, had by his second wife, Elizabeth Dennison, two sons, Joseph and Peter—that Joseph, the elder, married Eleanor Ridgway, by whom he was the father of Elizabeth Harrison, the party deceased—that Peter, the younger, married **[332]** Elizabeth Pelham—that the issue of that marriage was a daughter, Elizabeth, married to James Ludlow—and that Frances Mary Thomas, party in the cause, was the sole surviving issue of James and Elizabeth Ludlow, and consequently was the deceased's cousin-german once removed, and only next of kin.

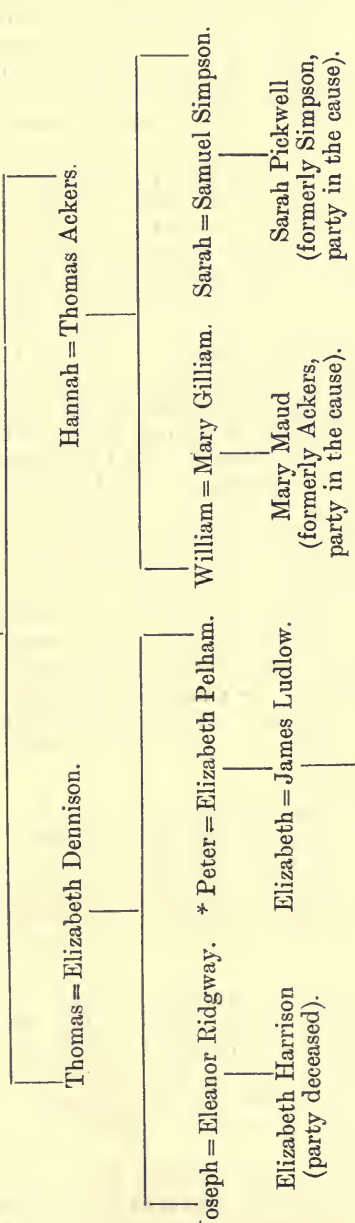
On the part of Maud and Pickwell it was also in substance alleged as above, with this distinction—that Peter (brother of Joseph, father of the deceased Elizabeth) Harrison was alleged, on the part of Maud and Pickwell, to have died unmarried, and consequently without lawful issue. The posterity of Thomas Harrison and Elizabeth (Dennison), the deceased's paternal grandfather and grandmother, being extinct by this event, it became necessary to recur a step higher, namely, to Thomas Harrison and Elizabeth (Bowser), paternal great grandfather and great grandmother of the deceased. The pedigree of Maud and Pickwell was then deduced as follows:—It was alleged that Thomas Harrison, the deceased's paternal great grandfather, left, by his wife Elizabeth (Bowser), a son, Thomas, the deceased's grandfather, and also a daughter, Hannah—that this daughter Hannah intermarried with Edward Ackers —that the issue of this marriage was a son, William, and a daughter, Sarah—that the son, William, intermarried with Mary Gilliam, by whom he became the father of Mary Maud; and that the daughter, Sarah, intermarried with Samuel Simpson, by whom she became the mother of Sarah Pickwell, parties in the cause. Consequently, upon

this shewing, Maud and Pickwell **[333]** were second cousins, and next of kin of Elizabeth Harrison, the party deceased in the cause.(*a*)

[334] In several of the latter articles of the allegation propounding the interest of Mrs. Thomas, extracts were made from certain letters and other documents, such letters and other documents being pleaded to be "in the hands of persons who would produce the same upon their respective examinations as witnesses in the cause." It was objected that these letters, &c. themselves, should be set forth, in order to enable the other parties to form a correct idea of the true import of the extracts made from them—and that the originals should be brought into the registry for inspection prior to the hearing of the cause.

The Court—Sir John Nicholl, after sustaining this objection, and directing the allegation to be reformed accordingly, proceeded as follows:—

(*a*) The PEDIGREES of the several parties, set out in brief, appear as follows:—



* It is evident that the sole point in dispute was the marriage of this Peter Harrison, alleged on the part of Maud and Pickwell to have died a bachelor—in which case Elizabeth, mother of Mrs. Thomas, if the daughter at all, could only be a natural daughter of Peter Harrison.

Now that the cases, on both sides, are disclosed, may not the inquiry, let me ask, be reduced within a very narrow compass? In a considerable part the case on each side is the same. Both parties allege that the deceased, Elizabeth Harrison, was the grand-daughter of Thomas Harrison, and his second wife, Elizabeth Dennison—that she was the daughter of Joseph Harrison, and Eleanor his wife, formerly Ridgway—that she had a brother, Richard Acklom Harrison, who died in 1813 unmarried. Upon this branch of the pedigree, therefore, there is no controversy—it is common to both parties—and no evidence is necessary on either side; for the Crown has not thought fit to intervene in this suit.

It is also agreed that the grandfather, besides the son Joseph, had two daughters, Elizabeth and **[335]** Hannah, who are also agreed to have died without issue—and further, that he had a fourth child, a son, Peter. That fact is alleged by both parties; and it is upon this son, Peter, that the whole case turns. On the part of Maud and Pickwell it is alleged that this son, Peter, also died without issue. Mrs. Thomas alleges that Peter married Elizabeth Pelham, and was her grandfather; that they had four children: Thomas, who died unmarried—Hermione, who married a person named Cargy, but left no children—Isabella, who died young—and Elizabeth, who married James Ludlow; and that she (Thomas) is the daughter and only surviving child of that marriage.

Now, if this case set up by Mrs. Thomas is proved, there is an end at once of the other case; for Mrs. Thomas is descended from the same grandfather with the deceased, and she and the deceased are cousins-german once removed. Maud and Pickwell only allege their descent from the same great grandfather, that is, only allege themselves to be second cousins, a degree more remote, and consequently excluded. Why, then, should both cases go on? or, in other words, why should not the present proceedings be confined to proving the marriage of and descent of Mrs. Thomas from Peter Harrison. If Mrs. Thomas proves that (and her case, I may say, is exceedingly strong, as it stands in plea), Maud and Pickwell can have no claim, and will be liable moreover to the costs occasioned by their opposition to the claim of Mrs. Thomas. If Mrs. Thomas fails to prove it, there is an end of her interest. She can have no concern with the case of Maud and Pickwell. She may leave that **[336]** question to be controverted by the Crown, if the officers of the Crown see any sufficient ground to interfere. But if Mrs. Thomas goes on to controvert the other interest—even in the event of substantiating her own superior interest—she forfeits all claim to be reimbursed, and can have no pretence whatever even to apply for her costs. Under these circumstances, is it not manifestly the interest of both parties that the case should be limited by an act of Court, to be settled by counsel on both sides, to that part of it which is the true and sole point of controversy, namely, whether Mrs. Frances Mary Thomas is, or is not, the lawful grand-daughter of Peter, younger son of Thomas and Elizabeth Harrison, the paternal grandfather and grandmother of Elizabeth Harrison, the party deceased in the cause? Recommending this measure (and a similar one, mutatis mutandis, in every case similarly circumstanced), for the present I dismissed these allegations.

CHASE *v.* YONGE. Prerogative Court, Michaelmas Term, 2nd Session, 1822.—Quære, whether any chancellor, commissary, official, or the like, can be permitted to put the executor, or one entitled to administration of the effects, of a party dying within his diocese, &c. upon proof, other than by oath in his own court, of such party having left bona notabilia in divers dioceses, sufficient to found the jurisdiction of the Prerogative Court, before requiring probate or administration in the Prerogative Court.

(On motion.)

This was a business of proving in common form the last will and testament of James Chase, late of the city of Norwich, deceased. A caveat, which **[337]** was found to have been entered against the same being proved, had been duly warned; and the Court, in the 1st session of the term, had decreed probate to the executor, unless the proctor who entered the caveat was prepared as upon this day, the 2d session, to set forth precisely his client's interest.

On the proctor for the executor now praying the Court to direct the probate to issue the adverse proctor alleged that "he appeared for the Worshipful and Reverend William Johnson Yonge, clerk, Master of Arts, official in and throughout the whole archdeaconry of Norwich, and denied the jurisdiction of the Court."

The Court—Sir John Nicholl. This is a perfectly novel attempt. Is the official (quasi such merely) at liberty to appear and deny the jurisdiction of this Court? I am very much inclined to doubt it. His "interest" I collect to be that accruing from his right to have the will proved in his jurisdiction, if there be no "bona notabilia:" but that this entitles him to put the executor, otherwise than by oath in his own Court,(*a*) [338] on proof of their being bona notabilia, before the will can be proved here, is what I much question. If every inferior ordinary be really at liberty to enter an appearance, and obstruct the grant of a probate or administration, whenever he thinks fit, till the question of bona notabilia, raised by himself, be first determined, the inconvenience to the public in the points of vexation, expence, and delay may be incalculable.

Let the appearance be taken de bene esse only and the matter stand over till the next session. If the official should elect (on being permitted) to proceed in this matter he does it, I will say, at the imminent peril of costs—provided the executor, that is, should succeed in founding the jurisdiction of this Court. But the sufficiency of the official's interest to raise a question about the jurisdiction of this Court, in the present shape at least, is a point as to which I am by no means satisfied.

On the next Court-day the proctor for the official alleged the caveat entered by him to have been withdrawn; and the Judge, at the petition of the proctor for the executor, directed the probate to pass the seal to his party, and condemned the official in costs.

[339] WILKINSON *v.* DALTON. Prerogative Court, Michaelmas Term, 2nd Session, 1822.—A witness who had been repeated and dismissed two years before, not permitted, under the circumstances, to be examined, at the end of that time, upon an article of the plea which she had not been designed to at the time of her production as a witness; and which, consequently, she had not been examined upon in the first instance.

In this case a proctor applied to be permitted to examine a witness (who had been repeated and dismissed) upon one article of the allegation, which she had not been designed to (said through mere inadvertence) at the time of her production.

Court. Has publication passed?

It was replied, by the adverse proctor, in the negative; but he stated that the witness in question had been repeated, in January, 1821, nearly two years back—and that, in this interval, several allegations had been admitted in the cause by which the character and complexion of the cause itself had materially changed.

Court. Under these circumstances I shall certainly not permit this witness to be examined as prayed—at all events, not without affidavits to explain both how the witness came not to be designed to this article of the allegation originally, and the necessity for her being examined upon it now. This is one of those applications which the Court listens to with great jealousy. A precedent of the kind, if established, might be abused to obvious ill purposes.

Application rejected.

[340] IN THE GOODS OF SIDY HAMET BENAMOR BEGGIA, Deceased. Prerogative Court, Michaelmas Term, 3rd Session, 1822.—Administration of the goods of a public functionary of the Emperor of Morocco decreed to a party specifically

(*a*) Vide Canons of 1603, canon 92, intituled, "None to be cited into divers courts for probate of the same will," which enjoins that "if any person cited, or voluntarily appearing, before any chancellor, commissary, official, or other exercising ecclesiastical jurisdiction, touching the probate of any will, or the administration of any goods, shall, upon his oath, affirm that he knoweth, or firmly believeth, that the party deceased, whose testament or goods depend in question, had, at the time of his or her death, any goods, or good debts, in any other diocese or dioceses, or peculiar jurisdiction within the province than in that wherein the said party died, amounting to the value of 5l., then shall such chancellor, commissary, or other, presently dismiss him; not presuming to intermeddle with the probate of the said will, or to grant administration of the said goods—but shall openly and plainly declare and profess that the said cause belongeth to the prerogative of the archbishop of the province; willing and admonishing the party to prove the said will, or require administration of the said goods, in the court of the said prerogative," &c.

empowered to take it on behalf of the Emperor of Morocco—on proof exhibited to the Court of the said Emperor's title (not questioned by the Crown, or otherwise) to the deceased's effects, in behalf of the national treasury, by the Mahomedan law.

(On motion.)

Sidy Hamet Benamor Beggia, late consul of His Majesty the Emperor of Morocco at Gibraltar, died there, in the year 1821, intestate. The deceased was a native of Larache, in Fez, and consequently a natural-born subject of that Emperor. He died a bachelor, without father, mother, brothers, sons, daughters, uncles, aunts, sons of the aunts (by the father), or any other proper heir, by the Mahomedan law, leaving effects at Gibraltar, and in this country, to which the Emperor Muley Soliman became, under the circumstances, entitled, by the Mahomedan law, in behalf of the national treasury.

These facts being authenticated to the Courts of Tangier and Rabal, and decrees founded upon them, having issued from those Courts, declaratory of the law as above, the Emperor Muley Soliman commissioned two of his subjects (Haggi Thaer Al Hial Rebati and Haggi L'Arbi Mahanino) to proceed to Gibraltar, and act there, in his behalf, by taking possession of the deceased's estate and effects; appointing, at the same time, Mr. Judah Benoliel (the deceased's successor in the consulate at Gibraltar), his attorney, to receive the deceased's estate, in the first instance, and deliver it over to the said commissioners.

On the 24th of July, 1821, administration of the deceased's estate and effects was granted, by decree **[341]** of His Majesty's Court of Civil Pleas at Gibraltar, to the said Haggi Thaer Al Hial Rebati, and Haggi L'Arbi Mahanino, on behalf and as commissioners of His Imperial Majesty Muley Soliman, Emperor of Morocco; security being directed to be taken (and which was taken accordingly) under the special circumstances, to meet any claim of creditors or others, upon the deceased's estate, which might be made within a year and a day from that time.

The said commissioners, when about to depart from Gibraltar on their return to Morocco, did, by an instrument of procuration, or power of attorney, under their hands and seals, delegate to the aforesaid Mr. Judah Benoliel, his said Imperial Majesty of Morocco's consul at Gibraltar, all the powers vested in them under, and in virtue of, the aforesaid decree of His Majesty's Court of Civil Pleas at Gibraltar, and also all other powers and authorities which they possessed, as the commissioners of his said Imperial Majesty, to receive and take possession of all monies, estate, and effects whatsoever of the deceased; and to appear before any tribunal or court, whether ecclesiastical or secular; and to do all acts, matters, and things necessary or expedient, touching or relating to the estate and effects of the deceased in all places, countries, dominions, or jurisdictions whatsoever.

Under these circumstances, in proof of which several documents were exhibited, the Court was moved by counsel to decree administration of the effects of the deceased in this country (it being necessary that administration of those effects should be granted to some one, for the use of the party or **[342]** parties eventually entitled) to Mr. Judah Benoliel (on giving sufficient security), for the use and benefit of the Emperor of Morocco—the said Mr. Judah Benoliel, in addition to his other presumed claims to be administrator, stated above, being the sole public functionary of his Imperial Majesty in the British dominions.

Court—Sir John Nicholl. The facts upon which this motion is founded are, I think, sufficiently verified; but I am of opinion that a specific power or commission to some person to take administration of the deceased's effects here is still requisite—the Emperor of Morocco's commissioners, as the attorney of whom it is prayed that administration may be granted to Mr. Benoliel, of effects in this country, having been limited, by the express terms of their commission, to act at Gibraltar.

Upon the question of legal title to the deceased's effects, if any should be raised—as, for instance, by the Crown, or by relatives on the mother's side, who might be entitled here, though excluded by the Mahomedan law—it might be material to shew whether the deceased was an ordinarily domiciled person within the British dominions, or was only a temporary resident, as a mere officer of the Emperor of Morocco. But if no such question be raised, either on the part of the Crown or otherwise, this Court will be disposed to follow the example of the Court of Civil Pleas at Gibraltar; and

to decree the administration to any party specifically empowered to take it, on behalf of the Emperor of Morocco.

Motion suspended.

[343] IN THE GOODS OF SIR THEOPHILUS JOHN METCALFE, BART., Deceased. Prerogative Court, Michaelmas Term, 3rd Session, 1822.—Administration granted limited to certain purposes, of the goods of a party deceased, until his last will (stated by himself, a few days before his death, to be in India), or an authentic copy thereof, should be transmitted from India to this country.

[Referred to, *Hewson* v. *Shelley*, [1914] 2 Ch. 32. See further, *Howell* v. *Metcalfe*, 1824, 2 Add. 349.]

(On motion.)

Sir Theophilus John Metcalfe, late of Fern Hill, in the county of Berks, Bart., was the party deceased in this business. He died on the 16th of August, 1822, having, a day or two preceding his death, informed his relations and friends that he had made his will whilst in India, and that the same was then remaining there. The deceased was a widower, and left an only daughter, a minor of the age of fifteen years and upwards, the sole person who would have been entitled to his effects in case he had died intestate. He also left behind him two brothers, both respectively resident in India, and two sisters, Lady Ashbrooke and Georgiana Theophila Metcalfe, spinster, resident in this country. The deceased had himself resided many years in China; and had only come to this country in the month of April, 1820, for the benefit of his health, with intention of returning to China.

The property of the deceased in this country chiefly consisted of 10,000l. 3 per cent. consols; 7000l. India stock; 20 Globe shares; 4000l. London Dock shares; a bill accepted by the East India Company, and due in May, 1823, for 950l.; money at his banker's, and due from the East India Company (amount uncertain); furniture and effects at the deceased's residence at Fern Hill; and a freehold estate.

These facts were verified by affidavits of Edward Larken, of Bedford Square, in the county of **[344]** Middlesex, Esq., who had been agent for the deceased's affairs in England, and of Miss Metcalfe, the sister of the deceased; and the Court was prayed, under these special circumstances, to decree administration of the goods, chattels, and credits of the deceased, "Limited for the purpose of receiving and investing the interest and dividends due, or to become due, on the deceased's stock, &c.—and for receiving and investing the amount of the said bill—and for otherwise protecting the property of the said deceased to the said Edward Larken, Esq., until the last will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country."

Court—Sir John Nicholl. The Court is disposed, under the circumstances, to accede to this application, although it is one of a novel aspect. The deceased cannot be sworn to have died intestate; having, according to his own declaration, left a will in India. An administration pendente lite is out of the question, as no suit in this Court relative to the deceased's affairs is, or ever may be, depending. Nor can there be an administration as, during absence out of the kingdom, or the minority, of an executor, or the like; for, non constat who the executor is, or even whether there be an executor. At the same time an interval of considerable length must elapse before the deceased's will can be forwarded from India—in which interval it may, as stated and sworn, be very material that some person should be authorized as well to receive and invest the interest due and accruing upon the deceased's stock, &c. as to act, generally, for the protection and management of his **[345]** property in other particulars. Under these circumstances, considering the reasonableness of the application and that all parties apparently interested are consenting, I think that I am bound to comply with this prayer.

Motion granted.

COATES *v.* BROWN. Prerogative Court, Michaelmas Term, 3rd Session, 1822.—The obligation to pay costs, pursuant to a monition for payment, held, under the circumstances, not to be dispensed with by the party to whom they were due, having bound himself to waive them, by an instrument executed out of Court.

(On petition.)

Judgment—Sir John Nicholl. The present application to the Court has risen out

of a question at issue between the same parties, respecting its jurisdiction, determined here in Trinity Term, 1821.(*a*) The Court upon that occasion pronounced for its jurisdiction—and condemned Mr. Coates, one of the parties to the present petition, who had denied it, in costs. Mr. Coates, in the first instance, appealed from that sentence; but subsequently abandoned his appeal. Upon this abandonment of the appeal and consequent remission of the cause to this Court, the **[346]** costs here were taxed: a monition was extracted for payment of them, and was duly served and re-**[347]**-turned. Such costs, however, being still unpaid, the Court was about, in Easter Term last, to en-**[348]**-force obedience to its monition by the usual process, when the party monished prayed to be heard, upon his petition, against being put in contempt—undertaking, of course, to furnish special grounds to induce the Court in effect to revoke its sentence condemning him in costs. Whether he has redeemed that implied pledge, or not, in a manner satisfactory to the Court, is what it has now to determine.

The petitioner Coates then alleges, not that he has paid these costs, but that Brown, the other petitioner, has released him from the obligation of payment; and consequently has discharged him from that of obeying the monition. The act on his part states that, pending an appeal from the sentence of this Court, pronouncing for its jurisdiction, &c. the parties, Coates and Brown, mutually agreed **[349]** to settle

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(*a*) *Brown* v. *Coates.* Trinity Term, Bye-day, 1821.—Question of jurisdiction—pronounced for—and party disputing it, condemned in costs.—Quære, whether the mere holder of a will, monished to bring it in, at the suit of one entitled to administration with that will annexed, has any right to insist on proof of "bona notabilia," in the first instance, and prior to bringing in the will.

(On petition.)

This was a cause or business of bringing into, and leaving in, the registry of the Prerogative Court of Canterbury, the last will and testament of Thomas Brown, late of Ivington, near Leominster, in the county of Hereford, deceased, who died in the month of February, 1820, promoted and brought by Francis Heywood Brown, son of the deceased and one of the residuary legatees named in his said will, against Benjamin Coates, of Eyton, near Leominster aforesaid.

Judgment—Sir John Nicholl. This, in substance and effect, is a question respecting the right of the Court to grant administration, with the will annexed, of the goods of Thomas Brown, late of Ivington, in the county and diocese of Hereford, the party deceased in the cause. In Michaelmas Term last [1820], a monition issued at the suit of Francis Heywood Brown, the son, and one of the next of kin, and one of the residuary legatees named in the will, of the said deceased (the surviving executors having renounced), against Benjamin Coates, of Leominster, in the county of Hereford, the actual holder of the will, respectively parties in the cause, to bring into and leave the same in the registry of this, the Prerogative, Court. Mr. Coates appearing to that monition under protest, and, questioning the Court's right to interfere in the premises, its jurisdiction is propounded on the one side and denied on the other, through the somewhat informal medium of an act on petition; the merits of which the Court has now to determine.

In this act on petition it is stated, in substance, on the part of Brown, who propounds the jurisdiction of the Court, that the deceased had property in the diocese of Hereford and elsewhere sufficient to found its jurisdiction; for that one Cooper, resident within the jurisdiction of the dean and chapter of Westminster, was and is justly and truly indebted to the estate of the said deceased to the amount or value of upwards of 5l., being the balance of the purchase money of certain lands at Ivington, bargained and sold by the said deceased to Cooper in the year 1818. On the contrary, it is denied on the part of Mr. Coates, who disputes the jurisdiction, that any such debt as that alleged is or can be due from Cooper to the deceased's estate; for that the deceased had assigned over all his property, and these lands at Ivington with the rest, to him, Coates, and a Mr. Carpenter, his creditors, among others, to a considerable amount, in trust for the general benefit of his said creditors, in the year 1816, by a deed of lease and release, which is exhibited, annexed to the act; and consequently that the pretended bargain and sale of these lands to Cooper in 1818 was and is invalid; and can found no just demand against Cooper for 5l. or any other sum. The

their disputes and differences out of Court; and that, in virtue of that arrangement, a deed or indenture was made and executed by and between the said parties on the 2d of January, 1822—in which Coates, the one party, undertook to abandon the appeal—and Brown, the other party, engaged to pay the costs on both sides already incurred, as well in the Court of Appeal as in this, the Prerogative Court, touching and concerning the subject-matters in dispute. And it further states that Brown, at the same time, with two sureties, gave a bond to Coates in the penal sum of 500l., conditioned for his due performance of the several covenants contained in the deed. The reply to that statement, on the other part, is that these instruments, this deed and bond, were obtained from Brown unduly, and upon false suggestions at the office of Coates, himself a solicitor, whose clerk had drawn them up—that Brown, a farmer, unacquainted with business, executed these instruments under no professional advice; and consequently that these instruments, the deed and bond, themselves, by reason of the premises, are null and void.

Now, such being the substance of what is alleged upon both sides material to the question before the Court, it appears to me, upon the very face of this act, that sufficient grounds are not laid for inducing the Court to abstain from enforcing obedience to its monition by the customary process. Obedience to a monition for payment of costs must be by their actual payment; and compelling it is less, I think, a matter of discretion in the Court, upon this state of facts, than it is matter of right, demandable ex debito justitiæ, by the petitioner, at whose suit the [350] monition

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rejoinder to this on the part of Brown is a denial of the validity of the assignment to Coates and his co-trustee in 1816, and a re-assertion of the validity of the conveyance to Cooper in 1818 of the lands at Ivington, under circumstances which are stated at great length, but into which it is not necessary for the Court to enter. Such is the substance of those parts of the act material to the question of jurisdiction in this case, both on the one side and on the other.

Now the first question which presents itself in the case, upon this view of it, is whether a mere creditor or trustee or actual holder of a will, or one even who is all these together, which is Mr. Coates's situation, has any right to dispute the jurisdiction of this Court under circumstances like the present. He has no pretence whatever to be administrator; consequently it should seem that his right to moot any questions about what jurisdiction administration shall be taken in is extremely problematical. I very much doubt whether Mr. Coates has any persona standi, in opposition to a call to bring in this deceased's will; strongly inclining to think his putting the other party on proof of "bona notabilia," prior to giving it up, under these circumstances, is a proceeding alike without any foundation either in principle or in precedent.

But for argument's sake, admitting Mr. Coates to have this right ever so incontestably, is there not sufficient upon the merits in this case—sufficient evidence, I mean, of bona notabilia—to justify me in compelling him to bring in the deceased's will? I am of opinion that there is. The validity of this trust deed and the true nature and effect, if valid, are questions which the Court can neither be required to investigate nor is competent to determine. Abstract this from the case, however, and it is not denied that the deceased left "bona notabilia." In the meantime the Court has these admitted facts, that the deceased in his lifetime bargained and sold an estate at Ivington, over which consequently he had, or at least assumed, a disposing power to one Cooper, resident without the jurisdiction of his diocesan, the Lord Bishop of Hereford; and that there actually subsists, on the part of his estate, a claim against Cooper for a sum exceeding 5l., in respect of and due as upon that purchase. And this in my judgment is fully sufficient evidence of bona notabilia to warrant the Court's compelling this party to give up the will pursuant to its monition. Upon the final effect of the complicated transactions detailed in this act on the property of the deceased, it will be for a Court of Equity to determine, if Mr. Coates thinks fit to proceed in equity, for his rights as a creditor and trustee under this deed. Mean time what is suggested on Brown's part is ample, I think, to found the Court's right to grant administration in this case, and consequently its right to compel Mr. Coates to bring in this will, encountered as it is by nothing of an opposite nature which this Court, I repeat, can be required to investigate; or which, if it does, it is competent to decide upon.

Protest over-ruled with costs.

itself, in the first instance, was extracted. This indeed is questioned by the other petitioner merely as with reference to the contents of a deed, not only executed out of Court, and forming no part of the proceedings here, but the validity of which, at all, is disputed and denied upon Brown's part. Consequently, the validity of this deed, independent of every other consideration, is a preliminary question; and is to be proved, in the first instance, before the Court can be required, or can even be expected, to found any proceeding upon it. But this Court is not competent to decide upon the sufficiency of the consideration for instance, and the validity in this and other respects of the deed, even were it inclined to go into the question of its validity. The circumstances, too, under which it was executed, are not proper to be investigated here at all—still less in the shape which this proceeding has assumed, that of a mere act on petition, supported by voluntary affidavits. The deed relied upon by Mr. Coates is either valid or invalid—in the latter case it is, at best, good for nothing, and can found no prayer which the Court would be warranted in acceding to—even in the former it is still, I think, incumbent on the Court to enforce its decree, the more especially as, in taking that part, it can scarcely inflict upon Mr. Coates any permanent injury. For any application to this Court, on the part of Brown, with respect to these costs, being a direct breach of his covenant, Mr. Coates may proceed against him upon that breach in the proper forum, in the certainty, if the deed be valid, of obtaining an adequate compensation in damages. He has even a bond, with sureties, from **[351]** Brown, conditioned, in a large penal sum, for the performance of his covenants—so that these instruments, this deed and bond being valid, as he insists, Mr. Coates, I repeat, can be, ultimately, no loser by the Court's declining, in effect, to rescind its sentence—a departure from its regular practice, which the facts stated in the present petition are not, in my judgment, of a nature to warrant or excuse.

The result of these several considerations is briefly this. A monition having issued —that monition not being obeyed—and the party who obtained it praying the further aid of the Court to enforce obedience, the Court, I think, in spite of what has been alleged and argued to the contrary in this case, is bound to grant that aid. Obedience to a monition for payment of costs can only be rendered by payment of costs; if enforcing it, in this instance, is a breach of the alleged deed, Mr. Coates must seek his remedy over against Brown and his sureties in another jurisdiction, which is competent to investigate and decide upon the validity of this deed and the accompanying bond. Upon these plain considerations I reject the prayer of this petition, and with costs. The costs, indeed, follow that rejection quite as a matter of course. Brown can, with no propriety, be said to have obtained his original costs, if the costs of enforcing the payment of these are withheld from him. In taxing costs, the expence of the monition for payment is always added; and if the monition is not obeyed in the first instance, the further expence seems to fall by a just and even necessary consequence upon that party through whose neglect or refusal to obey, in the first instance, it has been incurred.

[352] Such being the sound general principle, and there being nothing in the character or circumstances of this particular case to exempt it from the operation of that principle (if not, quite the contrary), I reject Mr. Coates's prayer, and condemn him in the further costs of the present petition.

HUDSON *v.* BEAUCHAMP. Prerogative Court, Michaelmas Term, 4th Session, 1822.—A witness shall be compelled to answer as to whether he is or is not responsible, in some way, for the party's expences in whose behalf he is examined explicitly.

(On motion.)

The following interrogatory, among others, was administered to John Stayner, a witness produced and examined on behalf of Humphry Hudson, one of the parties in this cause.

"Will you positively swear that you have not advanced any sum or sums of money to the said Humphry Hudson, or to any one on his behalf, for, or in relation to, carrying on the proceedings in this cause? Are you not in some, and what, way responsible for the expences of this suit?"

The witness Stayner had answered this interrogatory as follows:—

"He will swear positively that he has not advanced any sum of money to the said

Humphry Hudson, but, as his son-in-law, has advanced money to Mr. Glennie, and to Messrs. Milne and Parry, lawyers, on his behalf, in relation to carrying on the proceedings in this cause; and he submits to the judgment of this Right Honorable Court that he is not bound to answer whether he is or is not re-[353]-sponsible for the expences of this suit, and as to which he has given no undertaking."

This answer was objected to for insufficiency, and the Court was moved by counsel to decree a monition against the witness to answer the interrogatory whether he is or is not responsible for the expences of the suit more fully.

On the other hand, it was said, as against the issue of the monition, that the witness had answered the interrogatory sufficiently already by implication—that the witness could only be responsible for the expences of the suit, in consequence of having given an undertaking to that effect; which undertaking, however, he denied himself to have given upon oath. But

(Per Curiam.) I think that this witness is bound, and may be compelled to answer the interrogatory in question explicitly; and, consequently, I direct the monition to issue as prayed.

Motion granted.

LOCK *v.* DENNER. Prerogative Court, Michaelmas Term, 4th Session, 1822.—In a testamentary suit a variety of slight circumstances are pleadable where the case set up by the other party is charged by the party pleading as a case of fraud. General rules as to pleading in such cases.

(On the admission of an allegation.)

Sarah Lock (wife of the Rev. Samuel Lock, D.D., late of Farnham, in the county of Surrey) was the party deceased in this cause. On the 4th Session of Easter Term an allegation was [354] given in on the part of the husband and sole executor, propounding a certain paper writing, bearing date on the 13th of June, 1821, as the last will of the deceased. The present question arose upon the admission of a plea, responsive to that allegation, given in on the part of Thomas Denner, a nephew of the deceased, and admitted to be a contradictor to the said will.

Judgment—Sir John Nicholl. The case made for the husband, to which the plea before the Court is responsive, is long and special. Its general outline is as follows:—It pleads his marriage with the deceased, then Sarah Clinch, widow, in 1810—that the deceased, in virtue of a marriage settlement which is exhibited, held the power of disposing of her property, then amounting to between twenty and thirty thousand pounds, by will—that, accordingly, in 1816, she made and executed a will through the agency of Mr. Hollest, of Farnham, her solicitor, bequeathing the bulk of her property to her husband, Dr. Lock, party in the cause—that, in 1819, whilst her said husband was under pecuniary difficulties, and even consequent personal restraint, Mr. Hollest prevailed with her, by representations that her property if left to him would go merely to benefit his creditors, to make a new will of a different tenor and effect, being that virtually propounded by her nephew, Denner, the other party in the cause—that the deceased, almost immediately, repented of having made this new will, and repeatedly expressed to her female attendant, Luff, to Astlet, her coachman, and to her sister, Mrs. Dean, her displeasure at the [355] part taken by Hollest, and her determination to make and execute a third will coinciding in substance with the first—that at different times she was on the point of invoking the aid, in this respect, of different attornies at Farnham, or in its neighbourhood, but was still prevented by some untoward accident, until she became too ill to carry her intentions into effect through the agency of a professional adviser; finally, that on the 13th of June, 1821, the day before that on which she died, the husband, at her earnest intreaty, wrote and prepared the will now propounded in his behalf; and that the deceased executed the same, by her mark, being, at that time, of sound and disposing mind and memory, and perfectly cognizant of the contents of the instrument; and that she so executed it in the presence of three witnesses, who subscribed their names as such to a common attestation clause. It is also pleaded that the deceased was, on several occasions happening between the latter end of 1819 and the spring of 1821, observed to be writing memoranda upon small pieces of paper, four of which memoranda of a testamentary nature pleaded to have been found after her death among her private papers of moment and concern, are exhibited; strongly inferring the probability, à priori,

that the deceased would do what she is pleaded to have actually done, namely, make or execute a will, giving and bequeathing her property to her husband.(*a*)

[356] The above is a general outline of the husband's case, which, as I have already said, is long and special. The adverse case set up in this plea is that the husband obtained this will from the deceased when in extremis and in a state of utter incapacity, mental and bodily, by gross and direct fraud; and, in proof of this, it branches out into a great variety of particulars, to the relevancy of many of which it is that the principal objections urged to the admission of the plea in its present state have been addressed. In particular the plea charges that the testamentary memoranda exhibited on the part of the husband, and strongly inferring, as I have just said, the probability of a will in his favour, if genuine, are mere fabrications or forgeries; it even expressly alleges that the deceased, who is stated **[357]** to have been a coachman's widow, and in early life a domestic servant, was at all times, and down to the time of her death continued to be, so illiterate as to be incapable of reading any written instrument, or of writing more than her names; which she had been taught to do, with great difficulty, by tracing over the letters, previously written for her, of which her Christian and surname were composed.

Now, where a direct fraud is charged in a suit of this description, as in the present instance, the party charging it has, or should have, a latitude of pleading, hardly to be conceded in any other instance. Cases of fraud, if tolerably well concerted, are, generally speaking, only to be detected and defeated by inductions of particulars, many, perhaps, apparently trivial: so that to exclude these from a plea of this description would tend, in effect, to encourage fraud, by affording it, that is, its best chance for impunity. The sum or substance of the objections taken to this plea is that facts are alleged in it which bear too slightly, it is said, upon the point at issue to have any claim to be admitted. But in such a case it is difficult to say that any facts bear too slightly upon the point at issue which bear at all—for, of course, I do not mean to say that facts are pleadable which are, wholly, either immaterial, or irrelevant.

These observations, I think, go to dispose of nearly the whole substantial matter into which the objections urged against the admission of this allegation, in its present form, are resolvable. The Court will advert, however, briefly to one or two of these, by way of illustration of the general prin-**[358]**-ciples which it conceives applicable to the pleadings, generally, in cases of this nature.

For instance, it is said that the deceased's antenuptial history—her situation in early life as a domestic servant, and subsequent marriage to a coachman, has nothing to do with the case, and ought not to be pleaded. I entertain a different opinion. It is pleaded that the deceased was so illiterate as to be incapable of writing—in proof, this, that the testamentary memoranda exhibited, as I have said, on the part of the husband, are, what they are alleged to be, mere fabrications or forgeries. Now, it neither is nor can be denied that this illiteracy of the deceased is pleadable, as being a material fact in the cause. And being so, I am of opinion that her early history and connections are also pleadable as auxiliary evidences of that fact; to the

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(*a*) These testamentary memoranda were as follows:—

S. L. Christmas Day.

I have received the sacrament from my husband—he shall be executor.—Sisters 200l.—Brothers 200l.

Endorsed, 1819, December.

I shall make Dr. Lock my only executor—my cloathes to my Sisters 200l. each—Watch to Francis. S. LOCK.

Endorsed, Jan^y.,

My dear husband whole and sole executor.

Mem.—To Mr. Niblet, Guilford, to make my will—my husband executor—brothers and sisters 200l.—Mrs. Dean 100l.—nothing to any one else.

S. LOCK.

Endorsed, Watch to Frank—Cloathes to sisters—Dr. to pay Mr. Oke.

March 6, 1821. My dear husband shall be my executor, and have all I die possessed of. S. LOCK.

Brothers and sisters 200l.

Endorsed, Thomas Denner nothing to do with my affairs.

Court's belief of which, without some intimation of these, her circumstances in after life would naturally present a serious, not to say insurmountable, obstacle.

Again—that the husband was under difficulties, and even, notwithstanding his clerical profession, a bankrupt, in the year 1819—that the deceased's goods, and household furniture, secured to her separate use by her marriage-settlement, were repeatedly taken in execution for his debts—that the husband, not merely by undue influence, but by harshness and severity, induced, or compelled, the deceased to sanction his applications to her trustees for advances of money—and that such accordingly were made to him by the said trustees at different times, to the amount of upwards of 12,000l.—all this, it is said, is foreign to the question of whether [359] the deceased executed this will, and is advanced in the plea for no other purpose than to discredit the husband, and by consequence to produce an impression on the mind of the Court unfavourable to his case. If the Court viewed these allegations in this light, it would instantly reject them. But I am inclined to consider them in another point of view. The will of 1819 is virtually set up in opposition to this propounded by the husband; it therefore appears to me that they are material to the real issue in the cause; for they go as well to negative that part of the husband's plea which charges the will of 1819 to have been wrung from the deceased by importunities and false suggestions, as to shew the improbability, under all the circumstances, of the deceased's revoking that will, and disposing of her property, as she is alleged to have done, without restriction or limitation, in her husband's favour.

It is pleaded again that, when the deceased had occasion to communicate with any person by letter, she invariably employed some friend or relative to write such letter for her, to which she usually subscribed her names. The pleading of this fact is not objected to, but an objection is taken to the number of letters so written and subscribed, annexed as exhibits, being altogether no fewer than eighteen, addressed at various times to her nephew Denner, party in the cause. It is observable, however, that these exhibits answer a double purpose. So far as the bodies go, they are material in support of the deceased's incapacity to write, and invariable employment of a third party to conduct her epistolary correspondence; an inference [360] which could not be fairly deduced from merely one or two exhibits of this description. So far, again, as the signatures are concerned, these are serviceable in another way. For it is pleaded that the testamentary memoranda exhibited on the part of the husband will appear, on a careful comparison, not to have been written by one and the same party who signed these exhibits; that party being expressly so pleaded the deceased in the cause. Now, if evidence of hand-writing by comparison be admissible at all, which it is too late to make a question of, at least in these Courts, the more numerous the standards of comparison furnished are, the more satisfactory that evidence is likely to be. So that, considering the double use to which these letters are applicable, I am not disposed to think the number exhibited, under the circumstances of this case, considerable as it is, altogether excessive or objectionable.

Again, it is pleaded that Sarah Luff and Betty Limpus, two of the subscribed witnesses, have repeatedly declared that they were desired to attest the pretended will by the husband, Dr. Lock—that the witness, Limpus, placed her mark, without knowing the nature of the instrument which she was attesting—and that no conversation whatever respecting a will, or the contents thereof, passed between the deceased and those about her at the time of the pretended execution, she being then in a dying state. The objection taken to this part of the plea is, that it goes merely to introduce "declarations," which the Court has been told it is hazardous to admit, and which, when admitted, are of little import. As evidence of fact, I grant this to be true [361] of declarations; but I understand them to be pleaded in this case as evidence to character; and as evidence to character, it is a known rule that declarations are receivable in all cases. It has always been held that the credit of a witness might be impeached, by shewing him to have made statements out of Court contrary to what he has sworn. For the purpose of impugning the testimony (presumed) of Luff and Limpus, these "declarations" may clearly be pleaded, and must go to proof.

Lastly, it being pleaded that Luff, upon quitting his service, was established in business as a milliner by Dr. Lock, near his own house, at Farnham; and that he pays or is responsible for the rent of her shop—this also is objected to as having no bearing upon the question. The husband, it is said, might surely advance an old servant of his deceased wife, without being suspected of bribing her to give false evidence, even

though she happens, necessarily, to be a witness in his cause. To some extent I admit this; and if the witness referred to in this article were a mere casual witness, in an ordinary cause, I should be disposed to reject it. But the features of this case are somewhat extraordinary; in particular, here is a charge of gross and direct fraud—of gross and direct fraud to which, if it be, Luff must be privy, from the whole complexion of the husband's plea. She is not only a subscribed witness to the will, real or pretended, but she is vouched as a witness to nearly every material fact in the allegation which propounds it. Now, I do think that every circumstance, however slightly and collaterally only, affect-**[362]**-ing the credit or character of such a witness in such a case, may be fairly pleaded.

Upon the whole, then, the Court is disposed to consider the entire substance of this allegation admissible. As the present, however, is a case which must necessarily spread out into a great quantity of matter, it is peculiarly desirable to compress the allegation into the narrowest possible compass within which all the relevant facts can be fairly and adequately stated. It appears to me that it is objectionable in this particular in no common degree, and that it may be materially reduced in bulk, without any substantial curtailment, by the process which I am about to suggest. Its actual application would possibly be attended with little benefit in the present case, as nearly the whole extra expence occasioned by the diffuse mode of pleading practised in this instance may have been already incurred. Still, it may be fit that the Court should suggest it; in order to recommend its application in future similar cases.

In the first place, then, this allegation would be materially compressed, without any curtailment in point of substance, by omitting to recite the articles contradicted. The mere recitation of one article only of the former plea, contradicted in the present, occupies, I observe, five sides of paper. This is quite unnecessary and very objectionable, especially where it runs to this extreme length. It would be quite sufficient to plead, generally, that in opposition to such or such an article of the plea given in by the other party, the party proponent alleges and propounds, &c., and so to go on pleading contradictory facts.

[363] But, secondly, this allegation might be still further usefully abridged by not pleading, seriatim that is, contradictory facts even, which the party can produce no witness to, and in respect to which he can entertain no reasonable hope of deriving any benefit from the answers of the other party. For instance, the 21st article of this allegation is made to extend over several sheets of paper, by the statement, furnished by the party who propounds it, relative to the immediate factum of the disputed instrument, being negatived seriatim. As thus—that the said deceased "did not, upon the said 5th of June, 1821, the day of the date thereof, give verbal instructions and directions to the said Samuel Lock, party in this cause, to make and prepare her will—nor did the said Samuel Lock make and prepare a will for the deceased to execute, pursuant to such instructions and directions—nor was the same, after being prepared for execution, read over to, or by, the said Sarah Lock, deceased—nor did the said deceased know, or understand, the contents thereof, and like and approve of the same—nor did she (being from weakness incapable of subscribing her name) set her mark, and affix her seal thereto, or publish and declare the same as and for her last will, &c. &c." The party tendering the allegation plainly relies for success upon being able to prove, not this string of negatives, but the one affirmative fact pleaded at the conclusion of the article, inconsistent with the whole adverse statement respecting the factum of the alleged will—namely, that the said deceased "was, on the said 5th day of June, 1821, had been for some time before, and always afterwards continued to be, of unsound mind, memory and understanding, and utterly incapable of **[364]** any serious or rational act, requiring thought, judgment, and reflection." And this being so, I apprehend that it would have been quite sufficient for the party to have pleaded this one affirmative fact without pleading the string of negatives which precedes it at all, or at least without pleading these negatives seriatim, and in detail.

And here I may further observe that it is at best useless in pleading, generally speaking, to contradict, in detail, any statement which can only be spoken to by witnesses vouched to sustain it in the adverse plea. The party pleading in such case either does, or does not, make his vouchees witnesses. If he does, the other party can get at their evidence much more usefully to himself by cross-examining these, than by

re-producing them upon a counter-plea; and merely to counterplead, without re-producing them (these being supposed the only capable witnesses to the statement), would answer no end. If, on the other hand, the party pleading does not make his vouchees witnesses, still the omission of a formal counter-plea, as to the particular statement, can do no injury, generally speaking, to the other party: for if persons are vouched in a plea, without being made witnesses, the party vouching them not merely fails in proof, but the ordinary, at least, inference is, that the persons vouched would, if made witnesses, have contradicted the plea. I can easily conceive the above liable to many exceptions—still I apprehend it to hold, as a general rule.

With these observations, which may be applied or not to the reform of this particular allegation, at the discretion of the counsel on both sides, as for the present, I admit the allegation.

[365] BELL *v.* ARMSTRONG. Prerogative Court, Michaelmas Term, Bye-Day, 1822. —A next of kin, who has acquiesced in probate taken in common form, and has even received a legacy due to him as under a will, may still be at liberty to call in such probate, and put the executor on proof of that identical will per testes, first bringing in the legacy so received.

(On petition.)

William Bell, formerly of Upper George Street, Portman Square, but late of the Nunnery, at St. Margaret's, in Buckinghamshire, was the party deceased in this cause. He died in July, 1818; and in December, 1820, probate of his will, dated the 14th of April, 1817, was taken, in common form, by Richard Armstrong as sole executor and residuary legatee.

In April, 1822, a citation issued at the suit of John Bell, the brother, and only next of kin, and one of the executors and substituted residuary legatee named in a former will of the deceased dated the 21st of November, 1815, against the said Richard Armstrong (respectively parties in the cause), to bring in probate of the latter will, that of April, 1817, and shew cause why the same should not be revoked; and why the will itself should not be pronounced null and void. Mr. Armstrong appeared to this citation, under protest; and the present question arose upon the merits of that protest, subsequently extended into an act, which act had also been written to on the part of the next of kin.

For the party cited it was, in substance, alleged that William Bell, the deceased, left his house in the neighbourhood of Portman Square, for the benefit of his health, in the beginning of March, 1817, and took up his residence at that of George Saunders, with whom he had been long previously **[366]** acquainted, in the neighbourhood of Hemel Hempstead, where he died, in July, 1818, having first duly made and executed his last will, dated 14th April, 1817, wherein he appointed Richard Armstrong, the party cited, his sole executor and residuary legatee—that the said Richard Armstrong, on or about the 15th of March, 1817, communicated to John Bell, the other party in this cause, then resident in Cumberland, intelligence of such his brother's removal; having previously (to wit, on or about the 11th day of February, 1817) acquainted him with his said brother's precarious state of health, and incapacity to manage his affairs (an incapacity from which he afterwards, for a time, recovered), and advised him to come to town, as upon that account—that after the deceased had made his will as aforesaid (namely, about the 22d or 23d of April in that year), the said John Bell arrived in London, and was informed by the said Richard Armstrong (till then personally a stranger to him) that the said deceased had made his will since he had been at the house of the said George Saunders; and, at the same time, was recommended by the said Richard Armstrong, to go down to the said George Saunders's, in order to see and communicate with his said brother—that the said John Bell accordingly went to, upon the following day, and remained at, the said George Saunders's till the next morning; on which occasion he had full opportunity of seeing and conversing with his said brother, and of making any inquiries he might think fit relative to his said will, or upon any other subject—that in the latter part of 1817 the deceased, having sustained a relapse, was gradually reduced to a state of imbe-**[367]**-cility, in which state certain pretended codicils to the will of 1817 were procured from him, the validity of which, respectively, was contested by the said Richard Armstrong in two suits lately depending in this (the Prerogative) Court, described, respectively, as *Maddy and Scott* v. *Armstrong*, and *Armstrong* v.

Saunders—that the first of such suits was depending from August, 1818, to February, 1820, when the codicil propounded in it was pronounced to be null and void; shortly after which the second commenced, but was voluntarily abandoned by the party defending it towards the close of the said year (*a*)[1]—that, in the December of that year, probate of the said will was taken by the said Richard Armstrong, of which he remained in the undisturbed possession till May, 1822—that shortly after the said deceased's death the said John Bell came to London, and was informed of the said will, and pretended codicils; when, and afterwards, he expressed his entire acquiescence in the said will, and his hope that the said Richard Armstrong would succeed in his opposition to the said pretended codicils—that the said John Bell had full **[368]** knowledge of all the proceedings had in this (the Prerogative) Court in the two suits aforesaid, respecting the validity of the said codicils, and had ample opportunity of, at the same time, disputing that of the said will, had he been so disposed—that the existence of a copy of the deceased's former will of November, 1815, in which the said John Bell was named an executor and the substituted residuary legatee, was communicated to the said John Bell immediately after the deceased's death, who then declined having the same brought forward—and, lastly, that the said John Bell had taken and accepted, from the said Richard Armstrong, after probate, the balance (*a*)[2] of a legacy of 500l. bequeathed to him by that very will, the validity of which he was now seeking to overthrow. Under these circumstances it was prayed that the Judge would pronounce for the protest and dismiss the suit.

In opposition to this prayer it was, in substance, alleged, for the party who took out the citation, that the said deceased did not leave his house of his own accord, as for the benefit of his health or otherwise, at the time specified on behalf of the other party, for that of the said George Saunders; but that he was carried away, for sinister purposes, in pursuance of a plan formed by, and between, **[369]** Richard Armstrong, the other party, and the said George Saunders, to get the said deceased into their power and possession, and to take advantage of his childish and imbecile state, in order to obtain a will from him in their favour—that the pretended will of April, 1817, was not duly made and executed by the deceased; and that the same was prepared from instructions furnished by, and in the hand-writing of, the said Richard Armstrong—that the said John Bell, at the time of his visit to his said brother at Hemel Hempstead, although aware that he had made a will, was ignorant of the contents thereof, and in whose favour the same was made—that he had no adequate opportunity of communicating with his said brother, whom he found in a very weak and imbecile state both of mind and body, on that or any other subject, upon the occasion of such visit, by reason that the said George Saunders, his wife, or one of his family, was about the deceased nearly the whole time the said John Bell was with him; and that he was the less anxious upon that head, as confiding in the assurances of the said Richard Armstrong that his, the said John Bell's, interests should, at all events, be consulted and provided for—that if the said John Bell ever expressed an acquiescence in the provisions of the said pretended will, or a wish that the said Richard Armstrong might succeed in his opposition to the said pretended codicils, he did so in the expectation, created by the assurances of the said Richard Armstrong, that if he succeeded he would divide the said deceased's property among, or would otherwise most materially benefit with it, the family of the said deceased; for which family,

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(*a*)[1] By the will of 1817 the residue, after payment of legacies (among which were legacies to George Saunders and his family, to the amount of 1500l.), was bequeathed to Richard Armstrong. That residue was now alleged, in real and personal property, to amount in value to 17,000l. By the first codicil the residue was purported to be given equally between Armstrong and Saunders—and by the second the whole of the residue was given to Saunders and his family, and only a legacy of 1000l. to Armstrong. The first of these codicils was dated in July, 1817—the second (the codicil, that is, first propounded, viz. in the suit of *Maddy and Scott* v. *Armstrong*) in March, 1818.

(*a*)[2] Namely, 200l. The sum of 300l. on account of the legacy of 500l., to which he was entitled under the will, had been advanced to him, pending the suit, by the administrator pending the suit, who was authorized in that behalf by the said Richard Armstrong, jointly with the other parties to the suit, Maddy and Scott.

he some-[370]-times declared that he was "fighting," and not for his own particular emolument—that the said John Bell had no knowledge whatever of the will of November, 1815, or the copy, prior to the month of June, 1821, when the latter, the copy, was communicated to him by William Harding, by whom the same had been taken or made, at the express instance of the deceased, in the year 1816.(*a*)[1]

In a rejoinder, on the part of Mr. Armstrong, it was denied that he the said Richard Armstrong had ever expressed himself in a manner which ought to, or could, have led the said John Bell to believe that he would divide the deceased's property among his relatives, in the event of succeeding in his opposition to the pretended codicils; but it was alleged that the said Richard Armstrong, having deter-[371]-mined to oppose the said codicils, did make an offer to the said John Bell to share the whole property in the event of being successful, provided the said John Bell was willing to incur, jointly with him, the trouble and expence of opposing the said codicils; which offer, however, the said John Bell declined to accept; expressing at the same time his entire concurrence in the bequest of the property (as his said brother had thought proper to make it) to the said Richard Armstrong.

Judgment—Sir John Nicholl. William Bell died in July, 1818, leaving a widow,(*a*)[2] and John Bell, his brother, and only next of kin. In the month of December, 1820, probate of his will, dated on the 14th of April, 1817, was taken by Richard Armstrong, the sole executor named in it, in common form, with the perfect cognizance, it must at least be admitted, of the deceased's brother, Mr. John Bell. In the month of April, however, in the present year 1822, a citation issued at the instance of this brother, calling upon the executor to bring in probate of this will so taken, and to shew cause why the same should not be revoked, and declared null and void. Mr. John Bell, the applicant, appears not only in the character of the sole next of kin of the deceased, but in that also of one of the executors, and the substituted residuary legatee, in a former will of the de-[372]-ceased, dated in November, 1815, a copy of which (for non constat what has become of the original) is annexed to his affidavit of scripts.

To the citation so taken out the party cited has appeared under protest—alleging grounds upon which he insists that the brother has forfeited his right of putting him on proof of the will, per testes. These alleged grounds have produced a counter-statement from the brother, upon which the executor has rejoined; and the question for the Court to determine is, whether, under the circumstances stated upon the one side and upon the other, the brother is, or is not, barred from putting the executor on proof, per testes, of the will. Now,

Next of kin, as such merely, are entitled to call for proof, per testes, of any deceased's will, of common right. If, indeed, the executor propounds and proves it per testes, of himself, which he may do—duly citing the deceased's next of kin to "see proceedings," all next of kin, so cited, generally speaking, are thereby for ever barred. Nay, if he so propounds and proves it against certain only of the deceased's next

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(*a*)[1] The original of which said will, after being so copied, was deposited in the deceased's iron chest, the key of which was alleged, by the next of kin, to have been taken from the deceased's pocket by Elizabeth Saunders, wife of George Saunders, in the latter end of June, 1817, and to have been delivered to the said Richard Armstrong, for the purpose of opening the said chest—that the said Richard Armstrong came to London therewith, and went to the house of the said deceased; a few days after which the said chest was carried from the deceased's dwelling-house to the house of the said George Saunders, in one of his carts—lastly, that on the said William Harding making inquiries of the said Richard Armstrong concerning the said will, a few days after the deceased's funeral, the said Richard Armstrong said that "it had not been found." The answer to these allegations, on the part of Mr. Armstrong, merely was, that the key of the said chest "had been in his possession in or about the month of June, 1817, but that it had been returned to Saunders, without being made use of, or the chest having been opened by him, the said Richard Armstrong."

(*a*)[2] This widow was admitted to have been under restraint, as non compos, from a period anterior to the death of the deceased in the cause. What, the Court inquired, in the course of the argument, was to prevent her, or some one in her behalf, from calling in the probate, and putting the executor on proof of the will?

of kin, without having cited them all, the others, even though uncited, if to a certain extent privy to, and aware of, the suit shall not put the executor on proof, per testes, of the will, so once already proved, a second time. This was the case of *Newell and King* v. *Weeks*, decided here in Hilary Term, 1814,(*a*)[1] the principle of which has been recognized, and acted upon, in other instances.

But no such bar to the exercise of this common **[373]** right on the part of the next of kin exists in the present case that I am able to discover. The will itself has never been propounded—its validity has never been put in issue by any party. In the suits respecting certain supposed or pretended codicils, lately depending in this Court, no party was before it who had an interest to controvert its validity. Not the supporters of the codicils respectively—on the contrary, the will was the very basis of the instruments which they were seeking to substantiate. The brother, again, had no inducement to intervene in the suits touching the validity of these codicils—if the codicils or either of them, were established, there was an end of any possible interest that he could have to impugn the will. But the codicils being both set aside, he has a manifest interest to impugn it—an interest which I am not of opinion that he is barred from pursuing, by what the executor has alleged, giving him credit even for the truth of the whole of his protest.

Much is insisted in the protest on the brother's acquiescence in the executor's taking probate of the will. Now, without at all adverting to the grounds upon which that acquiescence is said to have been founded, I may observe that a mere acquiescence (that is, an acquiescence accounted for by no special circumstances) on the part of the next of kin, to an executor's taking probate, is no bar whatever to his calling it in and putting the executor on proof of the will. If it were, no probate could be called in by a next of kin, unless immediately upon its becoming known to him that probate had been taken—the very contrary of which is matter of every day's experience.

[374] Nor, again, is acquiescence a bar, even though accompanied, as in this case, by receipt of a legacy, under the very will sought to be controverted. This has been determined in a great variety of cases. For instance, in that of *Core and Spencer*, which occurred here in 1796, where Spencer, the executor, was cited to bring in the probate of a will taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that will for five of the eight years, and she, Core herself, her mother dying at the end of the fifth year, for the remaining three. Spencer, in that case, appeared under protest, as the executor has in this, and contended that Core was barred from putting him on proof of the will. But the Court thought otherwise, and over-ruled the protest. That, however, was an infinitely stronger case to build this argument upon than the present, if mere acquiescence and receipt of a legacy could bar. In the judgment delivered by my predecessor,(*a*)[2] in the case of *Core and Spencer*, he adverted to various cases,(*b*) all authorities to the same point. At the same time it was held in every one of these (and indeed they were principally cited, in that case of *Core and Spencer*, for the purpose of shewing) that the legatee must bring in his legacy before being permitted to contest the will—under the authority of which, I hold that I am bound, in overruling this protest, to direct the legacy to be brought in before the brother proceeds. The bringing in of his legacy will be a test of the since-**[375]**-rity of his opposition to the validity of the will; and will prove it to be not merely vexatious. At the same time it will be a security to the executor, in case of the next of kin being condemned in costs: for I hold that a next of kin (or the executor of a former will, for the same reasons apply in both cases) who calls in a probate once taken, even though in common form, and puts the executor upon proof, per testes, of his will, does it at the peril of costs—his ordinary exemption from liability to costs upon such occasions not extending to one of this particular description.

The case of nearest resemblance to the present, in which a protest was admitted, and the executor dismissed, is that, which has been cited in the argument, of *Hoffman and White* v. *Norris* (see 2 Phillimore, 230). At the same time, though similar to it

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(*a*)[1] See case of *Newell and King* v. *Weeks*, 2 Phillimore, p. 224.

(*a*)[2] Sir William Wynne.

(*b*) *Pyefinch* v. *Palmore, formerly Pyefinch*, Prerog. 1767. *Ashby* v. *Hay and Thrale*, Prerog. 1768. *Legge and Others* v. *Brookman, formerly Cowdery*, Prerog. 1777.

in one important feature, it is distinguished from it in a great variety of particulars. It is true that in that, as in this, case the will had never been propounded, and probate had been taken only in common form. In that case, however, there had been an acquiescence, not even attempted to be accounted for by any special circumstances, of nine years. In a suit, too, in Chancery, arising out of that will soon after probate, Hoffman, the next of kin taking out the citation, in his answers had admitted both the will and the probate (*b*)—a decree in Chancery had followed, operating upon a lapsed legacy in that will—and under that decree (not as upon an intestacy) Hoffman had persisted in acting **[376]** for five years together—namely, by receiving, during all that time, interest upon a portion of such lapsed legacy, to which he was entitled in his character as next of kin. The will itself, again, had been written by the deceased himself, all propriâ manu, nearly five years before his death, in India—and not a circumstance was even suggested which could excite a reasonable suspicion or doubt of its genuineness and validity in that case. Here, on the contrary, independent of other obvious distinctions, the will itself is by no means devoid of suspicion, on the face of the transaction; although (if I have a right impression of the general complexion of the evidence taken in the suit respecting the validity of the codicil) there may be no great prospect of the next of kin opposing it successfully. It is admitted that the deceased, at the time of executing the will, was in a state of considerable general debility—the instructions are in the hand-writing of the executor, and party principally benefited—lastly, a codicil made, after no very long interval, has been actually set aside by the Court on the score of the testator's incapacity. Nor is the situation, both local and pecuniary, of the next of kin, Mr. John Bell, a small farmer in a remote district, the county of Cumberland, a circumstance by any means to be left out of the account. Upon these considerations I over-rule the protest—but shall feel myself bound to dismiss the executor from the effect of the citation, if the legacy be not brought in, so that the suit may proceed within a reasonable time.

Protest over-ruled—question of costs directed to stand over till the final hearing of the cause.

[377] POPPLE *v.* CUNISON AND OTHERS. Prerogative Court, Michaelmas Term, Bye-Day, 1822.—"Instructions for a will," so headed and indorsed, and how imperfect soever in themselves, if proved to have been signed by a deceased (even many years before her death) with intent to render them operative pro tanto, in the event of her dying without any further act done, are entitled to probate.

(On the admission of an allegation.)

Jane Faulding, late of Coventry Street, in the parish of St. James, Westminster, in the county of Middlesex, widow (the party deceased in this cause), died on the 8th day of August, 1822, leaving behind her two sisters, and several nephews and nieces, the children of three deceased brothers, entitled, in distribution, to her personal estate and effects, in the event of her being pronounced to have died intestate.

The following testamentary paper, purporting to be instructions for a will of the deceased, bearing date the 13th of October, 1819, was propounded on behalf of Mary Popple, widow, a principal annuitant, or legatee, named in the same, one of the deceased's sisters, and was opposed on the part of Ann Cunison, widow, the other sister:—

"13th October, 1819.

"Instructions for the will of Mrs. Jane Faulding, of Coventry Street:—25l. per year to Maria Wilson, widow of William Wilson, for life, and after her decease the sum of 500l. to be equally divided between William, Thomas, and Eleanor, three of the children of the said Maria Wilson, to be paid within twelve months after her decease, with interest in the mean time; to Ann Cunison, of Brehwood, sister of Mrs. Faulding, 25l. per year for her life, and after her death the sum of 500l. equally to be divided between her children, to be paid within twelve months after her decease, with **[378]** interest in the mean time; 100l. a-piece to Eleanor, Mary, Jane, and Fanny, daughters of Mrs. Faulding's late brother, Andrew Wilson, late of Stifford, to the period within twelve months after Mrs. Faulding's decease; to Mary Ann Wilson, daughter of Mrs. Faulding's late brother John Wilson, her watch, trinkets, and

(*b*) Namely, by stating in his answers that he believed the deceased to have made his will, and that the will had been duly proved.

clothes; to Mrs. Mary Popple, sister of Mrs. Faulding, an annuity of one hundred pounds per annum for her life, to be payable quarterly, on the usual quarterly days, and as to the residue of Mrs. Faulding's property, the disposition thereof to be deferred for the present; the sum of 5l. each to Mrs. Maria Tipping, of Saint Martin's Lane, Elizabeth, Sarah, and Caroline Reed, of Grafton Street, Fitzroy Square, to purchase mourning rings; to Miss Sophia Stratton, of Kennington, the sum of fifty pounds, to be paid at her age of twenty-one years. "JANE FAULDING."

(Indorsed)

"13th Oct. 1819,

"Mrs. Jane Faulding,

"Instructions for Will."

The allegation propounding this paper pleaded to the following effect:—

1. The first article pleaded that the deceased died on the 8th of August, 1822, at the age of about sixty years, in consequence of an apoplectic stroke on the 5th of August, three days preceding; and that from such period to that of her death she, the deceased, was so greatly affected as to her speech and bodily powers as to be unable to make herself understood by the persons about her.

[379] 2. The second article pleaded that the deceased, for the last eight or nine years of her life, had been intimate with Mr. Christopher Bedingfield, an attorney at Gravesend—that, on the 13th of October, 1819, she advised confidentially with the said Christopher Bedingfield, on the subject of her will, who, in her presence, and pursuant to her instructions, drew up the paper writing propounded in the cause—that the deceased approved of the same and "was apprized that by executing the said paper it would operate as her will in the event of her dying without doing any further testamentary act"—and that, in testimony of such approval, and with intent to render the said paper writing operative in such event, she subscribed the same, and after so doing delivered it to the said Christopher Bedingfield for safe custody.

3. The third article pleaded that, about six months after the above, Mr. Bedingfield called upon the deceased at her house in Coventry Street, and inquired "whether she had determined as to the disposition of the residue of her property;" to which the deceased replied that "she had not then, but would speak to him about it at Gravesend," where she promised to make him a visit shortly.

4. The fourth article pleaded that the deceased actually went on a visit to Mr. Bedingfield, at Gravesend, in August, 1821; but that Mr. Bedingfield misapprehending, from something said by the deceased, that she had been consulting another solicitor on the subject of her will, and being unwilling to obtrude his professional assistance, never mentioned the subject of her will, and that nothing relative to it ever passed between him and the deceased either then or subsequently.

[380] 5, 6. The fifth and sixth articles pleaded merely the hand writing of the signature, and the custody of the paper by Bedingfield from the day upon which it was written till after the death of the deceased.

The admissibility of this allegation was denied, as pleading facts incapable of sustaining the paper propounded. It was said the paper is imperfect as a will in every respect—it is a mere list of legacies, leaving the residue of the deceased's property undisposed of—it appoints no executor—it is headed and it is indorsed "Instructions for a will" merely. To sustain such a paper under the circumstances of the case would require more stringent proof of the deceased's intending it to operate than evidence taken upon this allegation is likely to furnish. The single witness vouched to the material part of the allegation is Bedingfield. All he can be expected to say is that the deceased gave these instructions—that she signed them—and "was apprized" (not stating how, or by whom, or under what limitations) that the instructions so signed would, in a certain event, operate as her will. The just inference from no more being pleaded is that Bedingfield knows, and can say, no more; and it was argued that it would be extremely mischievous, on general principles, to pronounce on such evidence for a paper so imperfect; the very existence of which the deceased had apparently not adverted to for years, and perhaps had forgotten.

Judgment—Sir John Nicholl. I think it is too much for the Court, in this stage of the cause, to anticipate with the counsel against **[381]** the admission of this allegation what may be the final effect of Mr. Bedingfield's evidence upon the allegation. That evidence may be such as to leave the case pretty much in the condition in which he has sought to place it: on the other hand, it may so satisfy the Court, as

to the deceased's persuasion, that this paper would operate, pro tanto, in case of her dying otherwise intestate, as to render it the duty of the Court to pronounce for it, even in its apparently imperfect state. I think therefore that I am bound to let in this evidence, by admitting the allegation. It will be open to the other party, by cross examining, to sift and probe this gentleman as to the grounds of his belief that the deceased's persuasion was that just described, assuming him so to depose—a process which will enable the Court to judge of the extent and degree, to and in which this persuasion was felt by the deceased—assuming her again, that is, to have felt so persuaded at all. If the result should be a conviction, on the mind of the Court, that the deceased signed these instructions, not merely to authenticate them as instructions, but to give them dispositive force and effect, in case of her doing no farther, or other, testamentary act, it will be imperative on the Court to carry her intentions into effect so far, by decreeing administration with these instructions annexed. If the evidence fail to produce that conviction, the party must be pronounced to have died wholly intestate, and a general administration must accordingly be decreed. Without, therefore, at all anticipating what may be the final judgment of the Court in this cause, it is, for these reasons, one which I think myself not au-[382]-thorized to put a stop to, in limine, by rejecting this allegation.

Allegation admitted.(*a*)

(*a*) This allegation was admitted on the bye-day after Michaelmas Term (4th of December), 1822. On the 1st of January following, 1823, Mr. Bedingfield died, without having been examined upon it. On the fourth Session of Hilary Term, the 13th February, a second allegation was given in on behalf of Mrs. Popple, the party who propounded the instructions, pleading the death, character, and hand-writing of Mr. Bedingfield; and, further, in substance, pleading that a copy of the allegation admitted (as above) propounding these instructions had been sent, in the first instance, to Mr. Bedingfield, and that Mr. Bedingfield after examining the same with his clerk, Mr. Pearson, had returned it to the proctor of Mrs. Popple duly settled and approved, with the following indorsement:—"18th November, 1822, examined and settled allegation re Faulding with Mr. Pearson." Annexed to this allegation was the draft allegation itself, so settled and approved, and so indorsed by Mr. Bedingfield. The admission of this allegation was also opposed on the part of Mrs. Cunison.

Court—Sir John Nicholl. I admit so much of the allegation as pleads the death, character, and hand-writing of Mr. Bedingfield, the writer of the instructions. The party pleading is entitled to the admission of this part of her allegation. The loss of Mr. Bedingfield's evidence may be fatal to her case; he may have been, and probably was, the only person who could speak to the deceased's intention that these instructions should operate, in a certain event, as her will. At the same time I cannot assume that Bedingfield was the single witness capable of speaking to this, though no other person is vouched—evidence upon this head may be to be had in some other quarter. The suit therefore may still proceed, notwithstanding the loss of Bedingfield's testimony; in which case the death, character, and hand-writing of that gentleman, he having been the writer of the paper propounded, may, and should, be pleaded and proved.

The rest of this allegation I think inadmissible. Its purpose obviously is to impress upon the Court that Mr. Beding-[383]-field's evidence, if taken, would have sustained the plea. But the Court will infer that, generally, without this part of the allegation now tendered—and with it, it can do no more—so that rejecting this part of it is no real disservice to the party who presses for its admission. The Court may fairly, and will, presume that the original plea was drawn up from instructions given by the solicitor, and that his evidence, if taken upon, would in the main, and generally speaking, have supported the plea. The Court's pronouncing for these instructions, indeed, upon that presumption alone (if the loss of Bedingfield's evidence is really incapable of being supplied, aliunde), is another question.

Allegation admitted as reformed.*

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* This cause came to a final hearing on the fourth Session of Trinity Term (1823), on the evidence taken upon the original plea, and upon this allegation as reformed. But there being, in consequence of the death of Mr. Bedingfield, no evidence whatever upon the material parts of the original plea, namely, that, propounding the instruc-

WARBURTON *v.* BURROWS AND PINFOLD. Prerogative Court, Michaelmas Term, Bye-Day, 1822. — An unexecuted will pronounced for — the presumption against it arising from the testator having delayed to execute it for two months after it had been fair copied for execution, being held to be rebutted by circumstances going to shew that it had received his final approval, and that such delay merely proceeded from a habit of procrastination—the testator having, at last, died suddenly by apoplexy.

(On the admission of an allegation.)

William Chillingworth by his will, bearing date the 19th of February, 1811, executed in the presence of three witnesses, gave and devised certain leasehold and freehold estates, situate and being in the parish of St. Giles, Oxford, to his niece Mary Warburton. The rest and residue of his estate, after legacies of 500l. each, to his brother **[384]** Mr. Thomas Chillingworth, and his brother-in-law Mr. George Warburton, the testator bequeathed to his nieces, the said Mary Warburton, and her sister Hannah Warburton (both of whom the will recites to be then living with him), in equal moieties.

In the month of November, 1821, the deceased gave instructions for a new will, the draft of which, being prepared, was read over to and approved by him, and was fair copied for execution on the 21st of December following. The purport of this instrument was to substitute the testator's niece, Hannah Warburton, for her sister Mary, as devisee of the freehold and leasehold estates—to revoke the legacies of 500l. each to his brother and brother-in-law, Mr. Thomas Chillingworth and Mr. Warburton,(*a*) and to constitute his niece, Hannah Warburton, sole residuary legatee. But on the 20th of February following the deceased died without having executed the same.

The present question arose upon the admission of an allegation, propounding this unexecuted will on the part of Miss Hannah Warburton. It was opposed by Messrs. Burrows and Pinfold, joint executors of the will of 1811, on the ground that the deceased could not be presumed, from the statement furnished by it, to have given the unexecuted paper his final approbation, as nearly two months elapsed between the time of the paper being ready for execution and the death of the deceased, without the allegation assigning, as they contended, any satisfactory reason for this delay.

[385] The allegation in substance pleaded—

1. That subsequent to the will of February, 1811, giving and devising as above, to wit, in February, 1812, the testator's niece, Mary Warburton, intermarried with Edward Bowle Symes, and that the said testator, upon occasion of that marriage, settled by deed upon his said niece the sum of 2000l., payable within the space of twelve calendar months from his decease.

2. That the deceased, having a mind and intention to alter his will in favour of his niece Hannah Warburton, particularly in consequence of the provision made for her sister Mary Warburton, by deed, as above, gave instructions to his solicitor to prepare a new will for him, in or about the month of November, 1821—that his said solicitor prepared a draft will accordingly, which was read over to, and approved by, the said deceased, and was fair copied for execution on the 21st of the following December.

3. That soon after the said fair copy had been so prepared for execution his said solicitor discovered, in conversation with the testator, that he had omitted to specify in his instructions a leasehold estate, situate in Broad Street, Oxford, which he had then lately purchased—whereupon the said testator caused the words, "And also all that my other leasehold tenement, &c. in Broad Street, Oxford," to be interlined (in order to supply a similar omission) in the said fair copy or will. That after the said interlineation the testator was two or three times apprized by his said solicitor, who was in the habit of occasionally calling upon him, that his will was ready for execution —that, in particular, he was so **[386]** apprized one day about a fortnight before his death, when his said solicitor proposed to go home and fetch the will, in order to its being then, presently, executed; upon which the said testator declared that "there was no hurry," and that "he would execute the same another time."

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tions, the Court pronounced against these, and decreed a general administration to the sister Mrs. Popple.

The costs, on both sides, were directed to be paid out of the estate.

(*a*) Quære, whether the latter of these, if not both, had not died in the interval between the two wills?

4. The fourth article pleaded the deceased's sudden death, by apoplexy, on the 20th of February, 1822. And,

The fifth was the usual concluding article, praying the Judge to pronounce for the force and validity of the said unexecuted paper.

Judgment—Sir John Nicholl. William Chillingworth, the party deceased in this cause, made a will in favour of his nieces, Mary and Hannah Warburton. Mary, the elder, was principally benefited, though the sisters were joint residuary legatees. This was in 1811; at which time it appears by the will that both sisters were living with him. In the following year, however, Mary Warburton marries; upon which occasion the deceased settles 2000l. on her, by deed, payable within twelve months after his decease.

Now, this circumstance of the settlement renders it highly improbable that the deceased, at any time subsequent to it, meant to abide by the will of 1811. The settlement was a part execution of the benefit intended for Mary Warburton by the will of 1811. Still, the fact is that no step is taken by the deceased to alter this will of 1811 until 1821, that is, for ten years, when a new will is prepared; and is actually copied out for execution, under circumstances which satisfy me that the testator's mind was, at that time, [387] fully made up to the provisions which it purports to contain.

But this paper is still unexecuted after a lapse of two months, when the deceased dies, and the question is whether the circumstances stated in the allegation are sufficient to repel the legal presumption against it, arising from this delay of the testator to execute this instrument. Upon the whole, I am inclined to think that they are sufficient. The interlineation as to "the leasehold messuage in Broad Street, Oxford," is evidence that the testator adhered to the instrument up to that time. And although, when pressed to execute it about "a fortnight before his death," his declining so to do is a fact from which, per se, the legal inference undoubtedly is that he was wavering and undecided, still, viewed in connection with the circumstances of the case, and the deceased's declarations at the time, it suggests another inference: these, I think, warrant the Court's imputing it to a mere habit of procrastination, and negative any suspicion to which his deferring its execution might otherwise give rise, that the instrument had not received his final approval. The deceased, upon that occasion, suggests no doubt, nor intimates any wish to reconsider—he merely puts off, to a more convenient season, the completion of the instrument—he says, "There is no hurry"—he "will execute it another time." Lastly, the deceased is pleaded to have died suddenly, by apoplexy, on the 20th of February in the present year. Now, these circumstances, considering the high probability that the deceased should alter his will in favour of his niece Hannah, in consequence of the marriage-[388]-settlement upon her sister Mary—considering how deliberately these instructions were given and approved—considering how little this instrument wants of being a perfect will and the late declaration of the deceased that he "would" render it such, although there was "no hurry"—I am disposed to hold that the Court may conscientiously pronounce for the validity of the paper propounded, if the alleged facts are proved; on the ground that the deceased had given it his final approval, and was only prevented from formally executing it by the intervention of sudden death. Accordingly, I shall afford the party who propounds it an opportunity of substantiating her case by admitting this allegation.

Allegation admitted.(*a*)

[389] LEMANN *v.* BONSALL. Prerogative Court, Hilary Term, 1st Session, 1823.—The factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in addition to all the several requisites to its validity, under the Statute of Frauds, being duly proved, to entitle it to probate.

Judgment—Sir John Nicholl. This is a suit respecting the validity of a nuncupative will. Nuncupative wills are not favourites with courts of probate; at the same time, if duly proved, they are equally entitled to be pronounced for with written wills.

(*a*) This cause came to a final hearing on the 4th Session of Hilary Term, 1823—when, the allegation being held to be proved, the Court pronounced for the unexecuted will.

Much more is requisite, however, to the due proof of a nuncupative will than of a written one in several particulars. In the first place, numerous restrictions are imposed upon such wills by the Statute of Frauds (29 Car. 2, c. 3, s. 19); the provisions of which must be, it is held, strictly complied with to entitle any nuncupative will to probate. Consequently, the absence of due proof of strict compliance with any one of these (that enjoining a rogatio testium, for instance (*b*)) is fatal, at once, to a case of this species. But, added to this, and independent of the Statute of Frauds altogether, the factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. This is requisite in consideration of the facilities with which frauds in setting up nuncupative [390] wills are obviously attended—facilities which absolutely require to be counteracted by Courts insisting on the strictest proof as to the "facta" of such alleged wills. Hence the testamentary capacity of the deceased and the animus testandi at the time of the alleged nuncupation must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony. Above all, it must plainly result from the evidence that the instrument propounded contains the true substance and import, at least, of the alleged nuncupation; and consequently that it embodies the deceased's real testamentary intentions, though not so reduced into writing during his or her life as to be capable of being propounded as a written will. For unless the Court is morally certain, by pronouncing for it, of carrying these and no other into effect, it is obviously its duty not to give any alleged will, much less a nuncupative one, the sanction of its probate.

The deceased in this cause was Elizabeth Jones. She died a spinster somewhat advanced in years, in the service of Lord Lisburne, at Crosswood, near Aberystwith, in Cardiganshire, where she had lived, during the last nine years of her life, as housekeeper. The deceased had paid a visit to London in the July preceding her death, returning to Crosswood on the 4th of August. In travelling home she caught a violent cold, terminating in fever, by being exposed to a severe shower on the outside of a stage coach; of which she died in less than three weeks, namely, on the evening of the 18th of August. Her next of kin are a niece and a nephew, if indeed the latter be still living. For this nephew went to South America some years back; neither does it seem to be [391] known whether he is living or dead, nor whether, if the latter, his death did or did not precede that of the deceased in the cause. The niece of the deceased is Mrs. Lemann, the party opposing this will.

Bonsall, the other party who propounds it, and whom it purports solely to benefit, is a young woman of five or six and twenty. She is daughter of Lord Lisburne's game-keeper, at Crosswood, who lives in a cottage upon the estate, distant about half a mile from the mansion-house. This daughter, Mary Bonsall, was hired by the deceased, in the May preceding her death, to clean the house and perform other menial offices, and in fact was the only under female servant at Crosswood from this period to that of the deceased's death, Lord Lisburne's family being abroad. She and a nurse attended the deceased during her last illness.

The words constituting the will propounded are alleged to have been spoken in the Welch language. They are to this effect:—

"Listen you all what I Elizabeth Jones do say—it is my last prayer to give all I possess to the little girl here, Mary Bonsall, and I do not want to see any of my family."

The principal witness to the factum of this will is William Davies, who is described as a farmer, aged fifty-five years, and whose evidence is in substance as follows:—After stating his intimacy with the deceased (whom he says that he used to mend pens for, and assist in writing to Lord Lisburne, &c.), and that he resides within three fields of the house at Crosswood, he goes on to depose that on Thursday, the 17th day of August, 1820, as he well remembers, having heard that the deceased was very ill, he and his wife, Jane Davies, went to see [392] her at Lord Lisburne's house, at Crosswood, about seven o'clock in the evening. They went into her bed-room and found the deceased in bed. She appeared to be in great pain, and the deponent saw, by her countenance, or at least he thought from the appearance of it, that she was going to die—her little girl Mary Bonsall (so called it seems from her diminutiveness in point of size, and not as with reference to her age) was in the room with her, as

(*b*) See *Bennett* v. *Jackson*, 2 Phill. 190. *Parsons* v. *Miller*, ib. 194.

also, the deponent thinks, was Jones the nurse. The deponent's wife shook hands with the deceased, and the deceased said that she was glad to see her; but she spoke with great difficulty, and appeared to be in a good deal of pain, and Mary Bonsall was cleansing her mouth from the phlegm, a considerable quantity of which appeared to be about her mouth, and to impede her utterance. The deponent, seeing the situation of the deceased, did not intend to speak to her; and he accordingly took a chair, and sat down in a corner of the room; but, in a short time, the deceased beckoned him to her, and gave him her hand, and then, addressing the deponent and his wife, desired them to remember her in their prayers—adding some words of ejaculation in the Welch language. The deponent asked her if she had any relations, and, upon her answering "a niece and nephew," inquired whether she would permit him to write to either; but the deceased replied that she did not wish to see either of them. She also said something to the effect that the little girl (meaning Mary Bonsall) was the only person that she wanted to see. The deponent then left the room, and, when just outside the door, called to his wife to accompany him home, as the harvest people would want their supper. The deceased asked what they **[393]** were saying, and, on the deponent's wife saying that she was wanted to go home, the deceased made her promise to see her again the next day. Just then the deceased or Jones (the deponent forgets which) called to the deponent to come back; and, on his returning, the deceased, in the presence of deponent his wife, and Jones the nurse, expressed herself to the following effect:—"Listen you all, &c." This deponent adds the Welch words made use of by the deceased, as nearly as he can recollect them. He says "that the deceased uttered these words in a very serious manner, and apparently quite of her own accord, and in a much firmer tone than any thing she had before said on that evening; and the deponent verily believes that she seriously meant them to remain as her will, and that her property should go as thereby expressed. She did not say anything else to the persons present in allusion to her will that the deponent remembers; but he understood that, by the words deposed of, she meant to desire him, and the other persons present, to take notice, and remember that what she then said was her will, and to bid them bear witness that it was so." He further says that "he verily believes the deceased to have been, at the time of which he has just deposed, of sound mind, memory, and understanding. He saw nothing to the contrary—he did not observe a single word amiss that she said, though she was very ill as to bodily health—she seemed perfectly to know and understand what she said and did." This witness speaks to nearly the same effect, upon interrogatories which have been addressed to him on the part of Mrs. Lemann—and is confirmed, in substance, by the other witnesses, Jane Davies **[394]** (his wife) and Jones, who duly attested the words so uttered by the deceased, after the same had been reduced into writing by the deponent Davies himself, about breakfast time the following morning.

Such is the sum of the evidence tendered in support of this instrument; and I think that it results from that evidence, if not wholly discredited, that it is a good nuncupative will, any thing in the statute of frauds, at least, notwithstanding, provided the words, "Listen all of you what I, Elizabeth Jones, do say," are to be deemed a sufficient "rogatio testium" within the statute. The Court is by no means prepared to say that they are not to be so deemed: but this is a point upon which it would be understood to decide nothing, as the question respecting the validity of this will may be satisfactorily disposed of upon other, and different, considerations. For when the Court looks attentively to the evidence, of which the sum has already been stated, to the factum of this instrument, it is bound to pronounce, especially as contrasted with the adverse testimony, of which I shall say a word, presently, respecting the deceased's capacity at the time of the alleged nuncupation, that it is, in the highest degree, unsatisfactory, and that in the most material particulars.

1. And, first, that the correct substance of the words spoken by the deceased, admitting her to have uttered something of the sort, is embodied in the instrument now propounded to the Court, is very questionable upon this evidence. They are uttered but once—no repetition of them is demanded—no explanation is either given or required. No questions are put, such as "Were these your words?" or **[395]** "Do I rightly understand you?" or "Are such your wishes with regard to the disposal of your property?" No pains, in short, are taken to sift and probe the deceased's intentions on this head—no precaution of the kind is pretended to have been used. The deceased, however, to say nothing, at present, as to her mental capacity, was, at

this period, in a state of bodily infirmity, which must be presumed to have rendered it difficult to collect the true import of what fell from her at all; much more that of a period of this length, only once enunciated. Her dissolution, then rapidly approaching, actually took place within little more than twenty-four hours of that time; and Davies, it will be seen, admits that she "spoke with great difficulty," and that Bonsall was employed in cleansing her lips, from time to time, of phlegm which collected about them so as to "impede her utterance." And yet the omission, or misapprehension, of a single monosyllable, would alter the whole tenor and effect of the will, as propounded. For instance, instead of "all I possess," absolutely, read "all the clothes I possess," or "all I possess here," and the whole effect of the nuncupation is different. It must be admitted, however, that either of these would be a more probable bequest from the deceased to a girl in Bonsall's condition, than that of her whole funded and other property, estimated at 15 or 1600l., the savings of a life of parsimony. But the Court, I have said, is bound not to pronounce for a nuncupative will, under any circumstances, without being assured that it is the true substance and import of the alleged nuncupation which presents itself to it for probate to a moral certainty—a species of assurance on this head, **[396]** which, I am bound to say, is not afforded to it by the evidence in the present case by any means.

And here I may further observe by the way that, so far as the probabilities of the case in general are concerned, these are decidedly hostile to the will. The intention of the deceased to make any will is rendered very unlikely by the circumstance that although her illness was gradual, and she was early impressed with a sense of its probable termination, yet still that she neither expressed nor hinted at any wish to dispose of her property, as by will, at all. And her intention of making a will to the effect of that propounded will appear less likely still, when I say that, independent of proofs of regard for Mrs. Lemann evinced by the deceased during her late visit to London, the evidence satisfies me that she had a strong dislike to the Bonsalls, generally, although perhaps slightly partial to this girl, Mary Bonsall, for services rendered to her in her last sickness. The circumstance so much relied on of her declining to send for Mrs. Lemann in her last sickness, she, Mrs. Lemann, being a wife, a mother, and resident 200 miles off, in London, might have proceeded from a feeling the very contrary to that which it has been ascribed to, namely, disaffection to her niece.

2. But, secondly and principally, how does the evidence stand with respect to this deceased's capacity at the time of the alleged nuncupation? Without going minutely into the evidence on this part of the case, it will be sufficient to state the decided impression of the Court as to its general result.

The nuncupation, it will be remembered, is alleged to have taken place on the evening of the 17th of **[397]** July, the deceased having died on the following evening. Now it is proved completely, to my satisfaction, by the evidence of four witnesses above exception, of Mr. Williams's, senior and junior, the apothecaries, of Mr. Jones, a clergyman, who attended to pray by her on the evening of the same 17th of July, and of M'Cullock, the butler, who was in the house with the deceased during all her sickness, and positively deposes to having seen her four or five times in the course of that day, that at the time of the asserted nuncupation the deceased was delirious and incapable. Williams, senior, deposes to professional visits at Crosswood, on Monday, the 14th; Tuesday, the 15th; and Wednesday, the 16th of July; and to finding the deceased, on the last of these days, in a state of at least incipient delirium. This deponent, being otherwise engaged, did not see the deceased after the 16th—she was visited on the 17th and 18th by his son, and fellow deponent, Williams, junior, who speaks of her, upon both those days, as thoroughly delirious and incapable. Williams, junior, and Mr. Jones, were with the deceased, together, on the evening of the 17th, a very short time only before the asserted nuncupation; and they concur in representing her in the state which I have just described, at that time, in which they are confirmed by M'Cullock. The witnesses last named, I should observe, are examined upon an allegation given in by the next of kin, pleading the deceased to have been in a state of mental incapacity for about four days before, and down to the time of her death. And yet not only Davies and his wife, and Jones the other witness, depose (upon Bonsall's allegation) pretty unreservedly to her capacity on the evening **[398]** of the 17th, the time of the nuncupation; but this last, Jones, who nursed her through her illness, ventures to swear, in answer to an interrogatory, that the deceased at no

time during her illness appeared to her to be insane. She says "there did not seem to be any thing the matter with her mind prior (at any time prior, that is) to her death. Respondent never saw her delirious—nor ever heard her talk in a wild or irrational manner."

Now this evidence on Bonsall's part, as to the deceased's capacity, is not only plainly and palpably untrue, but it induces a strong suspicion that her case is a fraudulent one altogether. And this suspicion is confirmed to my mind by the following consideration:—The deceased, who is represented on the evening of this 17th as breaking forth into this nuncupation, just as Davies and his wife, with whom she had no particular intimacy, had taken leave, all of a sudden, and without any previous intimation, is made to express herself, at the same time, in a manner highly technical; even reciting her name—"Listen you all what I Elizabeth Jones do say." But that the deceased should have practised this formality of a rogatio testium, unless previously suggested to her, is exceedingly unlikely. How was she to become aware of any "rogatio testium" being necessary? Davies's knowledge of this, on the contrary, is easy enough to be accounted for. He, it seems, was a person of some experience in this matter; for he says that his mother had made a nuncupative will, which "came to nothing," by reason of a certain informality. He therefore might, well enough, be acquainted with the several formal requisites to the validity of a nuncupative will; and **[399]** the phrase just recited is much less likely to have fallen from the deceased, in the manner represented, than to be the result of an attempt on Davies's part to bring this case within the Statute of Frauds, as to a "rogatio testium," in my view and apprehension of it.

I pronounce therefore against this nuncupative will, as not satisfactorily proved. And I think that I am bound, as a check upon future attempts of a similar nature, to accompany this sentence with a decree for costs against Bonsall, even although she is suitor in this cause in formâ pauperis. At the same time I reserve this question of costs for further order, on taxation; then to be proceeded in, namely, as to the pauper's liability—should the other party, that is, think it worth while to tax her costs, and to apply for a monition against Bonsall for payment.(*a*)

ANTROBUS AND BOOTH *v.* NEPEAN. Prerogative Court, Hilary Term, 3rd Session, 1823.—A letter written by the deceased to his solicitor, respecting certain alterations to be made in his will, two months before his death, propounded as a codicil—allegation propounding it rejected; it being held—that the letter did not argue the deceased to have fully made up his mind as to the proposed alterations, even at that time—and that, if it did, still the presumption of abandonment arising from a lapse of two months, without any act done, was not effectually rebutted by the facts pleaded.

(On the admission of an allegation.)

Sir Evan Nepean, late of Loders, in the county of Dorset, was the party deceased in this **[400]** cause. In the year 1812 the deceased, who had been appointed Governor of Bombay, left this country for India; prior to which, however, he made and executed his will. He returned to England in 1821—and early in the following year, 1822, he wrote a letter from an hotel in London, at which he was then staying, to his solicitor, Mr. Hutchinson, of Lincoln's Inn, containing various instructions for alterations in his said will, and directing his solicitor to prepare a draft of a new will, conformable to such instructions. This letter is dated 7th of February, 1822. The testator, shortly after, went out of town, to his seat at Loders, where he died on the 8th of October following, after an illness of only half an hour, just as he was about to leave Dorsetshire for London.

This letter to Mr. Hutchinson was propounded as a codicil to the deceased's will, by Sir Edmund Antrobus and Mr. Booth, the executors—and was opposed on the part of Sir Molyneaux Hyde Nepean, Baronet, the eldest son of the deceased, and the residuary legatee named in his will.

The letter propounded was as follows:—

"My dear Sir,—I send you my will. I find I cannot make all the arrangements without consulting Lady Nepean; but in the mean time you will be so good as to consult

(*a*) On a subsequent Court-day this cause was called, "on taxation of costs," but the proctor for Mr. Lemann not pressing it, no order was made by the Court, and the question as to the pauper's ultimate liability consequently merged.

the main point, which is, to leave all my landed estate to my son Molyneaux Hyde, and to his son, for their lives (not allowing them, when the latter shall be of age, to cut off the entail), as I mean that the estate shall descend to their heirs, and continue **[401]** in my family as long as the law will admit of my entailing it.

"My daughter to have 6000l. at my death. She has 1000l. of her own—to make . . . . . 7000l.

Frederic to have 3000l., which, with 1000l. already given him in India, will make . . . . . 4000l.

William to have 2000l., which, with upwards of 2000l. paid for his commissions, will make . . . . . 4000l.

Evan to have 3000l., which, with the next presentation to Loders and Rotherhampton livings, will be more than equal to . 4000l.

"My wife to have an annuity of 1200l. per annum—on her second marriage to be reduced to 500l. per annum. The house, furniture, &c. as in the will, for her life, if she remains single. If not, to my eldest son.

"The money I have in India, and in the public securities, will enable me to pay the fortunes of my younger children.

"You shall hear from me on my arrival in Dorsetshire, before you can have made any considerable progress in the draft.—Your's very sincerely,

"EVAN NEPEAN.

"Thompson's, 7th February, 1822.

"Julius Hutchinson, Esq."

The allegation propounding this paper, in substance, pleaded that Sir Evan Nepean, prior to going out to Bombay, in the year 1812, made and executed his **[402]** last will, bearing date on the 12th of March in that year; whereby he settled and limited his real estates; and provided for his younger children out of his personalty, which was then inconsiderable—that on his return from India in 1821, with his personal property considerably increased, he became desirous of augmenting the provision made by his said will for his younger children—that such intentions were embodied in a letter sent by the deceased to his solicitor, Mr. Hutchinson, dated in February, 1822, accompanying his will; and directing his said solicitor to prepare a draft will, pursuant to the instructions contained in the said letter—that the said solicitor, on the receipt of the said letter, began to prepare for making the draft of a new will, by perusing and abstracting the will of the deceased, and making certain pencil memoranda and references (still apparent) on the margin—that after his return into the country the illness of his wife, Lady Nepean, whom he had expressed a wish to consult on certain points, together with continual engagements respecting some trials at the Dorsetshire assizes, in which his interests were involved (as also his being sheriff of the county), had detained the said testator in the country, and prevented him from completing his intended will within the time originally proposed; but "that he did not, at any time previous to his death, depart from his intention of making a new will, and of providing for his younger children to the extent expressed in his letter to his solicitor;" and that he "meant and intended this letter to take effect, in case of his death before his new will was completed." Lastly, it pleaded that the testator was actually preparing to come to town, **[403]** when he was suddenly taken ill, and expired, at Loders, after an illness of about half an hour, on the 8th of October, 1822.

The admission of this allegation was opposed, on the part of Sir Molyneaux Hyde Nepean, as not stating facts sufficient, if proved, to sustain the alleged codicil.

Judgment—Sir John Nicholl. In order to sustain this alleged codicil, the Court must be satisfied that it expresses the deceased's fixed and final testamentary intentions. In these events, it will be the duty of the Court, ultimately, to pronounce for it—for it may then fairly presume the deceased to have been prevented by sudden death alone from expressing those intentions in a formal testamentary shape.

And here the first question is, how far can this letter be taken to express, upon the face of it, the writer's fixed testamentary intentions? in other words, is the paper propounded such as ought, in itself, to satisfy the Court that the testator's mind, at the time when he wrote it, was quite made up to the bequests which it purports to contain? Now, of this I entertain some doubt. The letter is a mere letter of directions, and instructions—liable, and likely to be varied, if not altogether departed from, on the draft will being, as proposed, submitted to the writer—and as to parts, at

least, of which, it should seem, from the wording of the letter, that the writer was, even then, hardly quite determined. He concludes with promising "further advice" in the matter to his solicitor on his arrival in Dorsetshire, and postpones its final arrange-**[404]**-ment—that is, as I understand it, a delivery of final instructions, or directions, for his will—till he has consulted Lady Nepean. It has been argued, indeed, that the testator's mind was quite made up as to these legacies to his younger children—it was only the settlement of his real estate as to which his solicitor was to look for "further advice"—it was this only as to which Lady Nepean was to be consulted. But this argument has no foundation, that I can perceive, either in the circumstances of the case, or in the words in which the letter itself is couched. It is, to say the least, full as likely that Lady Nepean was to be consulted upon the provision to be made for the younger children, out of the personalty, as it is that she was to be consulted about the settlement of the real estate.

But admitting, for argument's sake, that this letter expresses the deceased's fixed testamentary intentions as to these legacies to his younger children at that time, will it necessarily follow that they were also his final ones? By no means. On the contrary, under the circumstances of this case, the law presumes them, however firmly once entertained, to have been abandoned by the testator—and the Court, I am afraid, will be bound to conclude so, unless that legal presumption be repelled; which, whether it is, or is not, by the facts pleaded in this allegation, is the real question to be determined.

Now, considering how highly probable it is that the deceased fully intended some further provision for the junior members of his family out of his increased personalty, the Court is sorry to say that the facts here pleaded would, in its judgment, not **[405]** have the effect of repelling this legal presumption—the result being, that the utmost proof of which this allegation is capable would fail to sustain the paper propounded in the cause. The allegation certainly pleads that "the testator, at no time, departed from the intention of benefiting his younger children to the extent expressed in the (alleged) codicil." But a mere averment to this effect is insufficient—there must be facts and circumstances in proof of that averment. If it be asked, Of what nature? I answer—of a nature to shew that a new will, embodying the bequests expressed in this letter, was in progress at the time of the testator's sudden death; so as to warrant a conclusion that it was only finally arrested by that event. The parties propounding the paper are fully aware of this, as appears by facts of the kind to which I am adverting, being alleged in the plea—the adversity of their case is that these facts, though right in kind, are still unequal to the effect sought to be produced. The illness of Lady Nepean and Sir Evan's several avocations, public and private, in Dorsetshire, are circumstances much too loose and vague to account satisfactorily for no step having been taken in this matter during the long interval of eight months, which occurred between the date of this letter and the death of the testator—the more especially, from the testator having promised to communicate further with his solicitor on the subject, immediately upon his arrival in Dorsetshire. Had that promise been fulfilled, and had a correspondence ensued, inferring, to a late period of his life, the testator's deliberate approval of, and fixed determination to abide by, the **[406]** original instructions—could even verbal declarations made by the testator have been pleaded and deposed to, that now, at length, at the termination of the assizes at Dorchester (which, it is observable, must have been some time over), he was going to London, in order to execute his will, drawn up pursuant to directions already given to his solicitor—in either of these events this case might have presented itself to the Court with a different aspect. But as it is the Court, with whatever regret for a reason already expressed, is bound to pronounce that the utmost proof of which this allegation is capable would fail to rebut its presumed abandonment in law, and, consequently, would fail to sustain the paper propounded—under which impression it has no choice but to reject this allegation.

Allegation rejected.

LAVENDER AND CHURCHILL *v.* ADAMS. Prerogative Court, Bye-Day, Hilary Term, 1823.—Alterations written by the testator in pencil on the margin of his will, held to be in themselves deliberative—also held not to result from the facts pleaded that the testator was prevented from rendering them operative in them-

selves by any extrinsic circumstance—consequently, allegation propounding such, rejected.

(On the admission of an allegation.)

This was a business of proving, in solemn form of law, the last will and testament, without certain alterations in pencil appearing upon the face thereof, of Richard Adams, late of the parish of Claines, in the county of Worcester, deceased; promoted by John Perks Lavender and James Churchill, the executors named in the said will, against Mary Adams, **[407]** widow, the relict of the said deceased, and a legatee principally interested in the said pencil alterations.

This will, altered as above (i.e. with the said pencil alterations) was propounded in an allegation tendered on the part of a widow, pleading to the following effect:—

1. The first article pleaded that the deceased died on the 30th of August, 1822, having first made and executed his last will and testament, to wit, on the 21st of May, 1821—that the said will at that time had none of the alterations in pencil now appearing on the face of it—that it was shortly after sealed up in an envelope, and delivered to the said deceased, and continued from such time in his possession and custody till he died.

2. That the deceased, meaning and intending to make certain alterations in his said last will and testament, made and wrote, with his own hand, the several alterations in pencil now appearing on the face of it; but at what time the party proponent is unable to set out—and when made, deposited, and locked up his said will, so altered, in a drawer in his bureau, the key whereof he himself kept.

3. That in or about the month of June, 1822, the said deceased informed Mr. James, his solicitor, who had prepared his said will, that "he should have occasion shortly to make some alterations therein, and that he would call upon him for that purpose;" but that he, the said deceased, never did so call on the said Mr. James.

4. The fourth article pleaded that the said will, so altered, was found locked up in the drawer of the deceased's bureau as aforesaid, the day next following that upon which he died—that it was in the envelope in which it had been originally sealed up, **[408]** but the seals whereof had been broken, in order to take it out; and that the said envelope had not been re-sealed.

5. The fifth article pleaded merely the several pencil alterations to be of the true and proper hand-writing of the said deceased.

6. The sixth and last was the general concluding article.

The present question arose upon the admissibility of this allegation, which was denied on the part of the executors, as not disclosing a case which, if proved, would justify the Court in pronouncing for the will, with the said pencil alterations, as propounded by the widow.

Judgment—Sir John Nicholl. It is to be taken for granted that these alterations were made by the deceased himself—the question is quo animo, or, in other words, what do the alterations themselves import; and are they to be taken as final or deliberative? If they are to be taken in themselves as final I need scarcely say that it will be the duty of the Court, in the end, to pronounce for them, although written in pencil—that being an argument, but still, as we all know, not by any means a conclusive one, of their being deliberative. This allegation, in that case, is clearly admissible. But if these alterations in themselves are to be taken as deliberative, it then becomes a question whether the facts pleaded argue the testator to have fully made up his mind to render them final, and to have been prevented from doing so only by some extrinsic circumstance: and the admissibility or the contrary of the plea, in this last case, will depend on that question being answered affirmatively or in the negative.

[409] Now I think that, upon the face of these papers, coupled with what appears of their history in the allegation, these alterations can, in themselves, only be taken as deliberative. It is hardly possible to suppose that the deceased meant them as any thing more than preparatory to final alterations. The will so altered, to be sure, was re-placed in its envelope from which the testator had taken it, for the purpose, it is to be presumed, of noting these alterations; but it is a circumstance by no means immaterial that this envelope remains open, and is not re-sealed. Again, the testator is pleaded to have told his solicitor that "he should have occasion shortly to make some alterations in his will, and that he would call upon him for that purpose." His not having done so raises a presumption—either that he had changed his mind, or

had never finally made it up, in this respect—either supposition alike fatal to the case set up in this allegation. Nor is this presumption at all in effect rebutted by the circumstance of the proposed alterations (for such only I can deem them) being noted in pencil on the margin of the will: for that the deceased contemplated finally altering his will by the agency, and with the assistance of the professional gentleman who at first prepared it, is obvious from the plea.

These alterations, then, being not in themselves final, it remains to consider whether it can be inferred from any fact or circumstance which is here pleaded that the deceased fully meant and intended to render them final, and was only prevented from so doing by some extrinsic circumstance. The facts pleaded justify neither inference. Of the proposed alterations, some are material, and might re-**[410]**-quire deliberation. The very first, for instance, the substitution of an annuity of 200l. to his widow, in lieu of the interest (much less in amount) of his funded property. Nothing is pleaded, however, tending to shew either the probability of such a substitution in itself, or that, probable or not, the deceased had ever finally resolved upon it. Nor, again, is there any foundation whatever laid in the plea for an inference that the deceased was prevented from completing this, and the other proposed alterations by any extrinsic circumstance. Non constat when they were noted in pencil on the margin—they might have been, soon after May, 1821, when the will bears date—they probably were, at least as early as June, 1822, when the conversation between the deceased and his solicitor Mr. James, relative to some alterations in his will, is pleaded to have occurred. But the deceased did not die till the 30th of August in that year; during the whole of which interval he was fully capable, for any thing stated in this plea to the contrary, of making these alterations final, and operative in themselves, if so disposed. The deceased is not pleaded even to have died suddenly. Not that his sudden death standing alone would have entitled these inchoate and imperfect alterations to probate as parts of his will—in order to have produced this effect it must further have been shewn that they were in progress towards being made perfect, and complete, at that time. Upon all these several considerations I reject this allegation—and decree probate of the will, as originally executed, and without the pencil alterations now appearing on the face of it to the executors.

Allegation rejected. Costs directed to be paid out of the estate.

[411] BEST *v.* BEST. Consistory Court of Rochester, Hilary Term, Feb. 21st, 1823.—Suit by the wife for a divorce by reason of the husband's cruelty—adultery charged by the husband, and a divorce prayed by reason of the wife's adultery—both complaints dismissed, and upon what principles.

Judgment—Dr. Swabey. This is a suit brought by Elizabeth Best the wife, against James Best her husband, for a separation à mensâ et thoro, by reason of cruelty; in the course of which suit the husband has not only pleaded responsively to the original complaint, but has also in the same allegation produced a distinct substantive charge—that of adultery—against the original complainant. This adultery is alleged to have been committed within a few weeks of the marriage, but still not to have come to the husband's knowledge until after the wife had been compelled, as she pleads, to quit his house for the safety of her person, in consequence of his violent and unmerited ill treatment of her.

This allegation of the husband was offered at a later period than might have been expected from the nature of its contents; but the Court, with some reformation, thought fit to admit it. Indeed the only plausible objection to its general admissibility was technical merely—arising upon a doubt suggested whether, in strictness, it be competent to the husband, sued for restitution of conjugal rights, to charge adultery against the wife, without (if not instituting a separate (cross) suit, still at least) first taking out a separate citation returnable in the same suit; calling upon the wife distinctly to answer to that charge. The necessity for either, however, ap-**[412]**-peared to me to have been formally dispensed with, by a series of decisions in these Courts.

Anciently, I believe it to have prevailed that in all matrimonial suits wherein adultery was intended to be offered (especially where to be made the foundation of a prayer for divorce) on behalf of the defendant, a cross suit, or at least a citation of the plaintiff, to answer to that charge returnable in the original suit, was held to be requisite. This may partly, for instance, be collected from the following note of a

case in the Consistory Court of London, of the 8th of November, 1752. It is anonymous; but the date is sufficient for the present purpose, and is in these terms:—

"It was made a question between Cæsar and Major" (two proctors of that time) whether in an original suit, brought for restitution of conjugal rights, there could be a divorce? Cæsar said he had consulted all the registrars, and they had answered in the negative. Dr. Paul, Dr. Penfold, and Dr. Jenner, as amici curiæ, said that adultery was pleadable in bar, in a suit for restitution of conjugal rights, but that still in their apprehension, let it be ever so well proved, it could lay no just foundation for a sentence of divorce—the original suit being for restitution. Curia advisare vult. But on the 17th of November the Judge said that, "In a suit for restitution of conjugal rights, a marriage may be pronounced for; and that in such a suit adultery may not only be pleaded in bar, but a divorce may be had in consequence of it, as was solemnly determined by the Delegates in *Sir George Savile's case.*"

[413] By this I do not take the Court to have meant that, in the case of *Sir George Savile*, a divorce had actually been granted; but that the Delegates had solemnly affirmed in that case the principle of adultery being pleadable in a suit for restitution of conjugal rights, not merely in bar, but for the further purpose, if established in evidence, of founding a sentence of divorce. For I believe the fact to be that neither the Court of Arches, nor the Court of Delegates, acceded to the husband's prayer for a divorce in that case, owing to a defect of proof (*a*)[1]—which judgments were afterwards affirmed upon a commission of review.

Sir George Savile's case, however, which began in 1740, was not the first case in which this doctrine **[414]** was held. It was held, for instance, in the cause of *Dynely and Dynely*, which is still more apposite to the question at issue in this cause in 1732. In *Dynely and Dynely* the wife commenced a suit against the husband for separation by reason of cruelty, in the Consistory Court at Hereford; and the husband having appealed (on a grievance) to the Arches, he there brought in an allegation charging the wife with adultery. Now this allegation the dean (Dr. Bettesworth (*a*)[2]) admitted; and further proceedings were had in the original suit. True it is that, either ex abundanti cautela, or for some other cause, the husband's proctor afterwards prayed a citation by letters of request to be granted to him against the wife; under which he appears to have proceeded, as if in a cross suit. Still, however, Dr. Bettesworth's having admitted the allegation of the husband charging the wife with adultery in the original suit is a distinct affirmance, by the Court of Arches, of the principle said to have been afterwards solemnly determined by the Court of Delegates in *Sir George Savile's case.* The husband's cross suit in *Dynely and Dynely* it may be observed was appealed in a grievance, from the Court of Arches to the Court of Delegates; where the husband ultimately, I think, obtained a sentence in his favor; though this does not appear from the process, which is all that I have been able to consult. Nor can I say to a certainty what finally became of the wife's original suit, the cause of cruelty; but am inclined to think that it dropped after numerous continuations, without proceeding to a sentence.

[415] This question, however, seems to have been again mooted before Dr.

(*a*)[1] Quære, whether not, in part at least, owing to a constructive condonation of the wife's adultery by the husband? At least, among the circumstances reported to have been stated by Lord Hardwicke, as grounds to influence the discretion of the Crown in granting a commission of review in the case of *Savile and Savile*, one is that "the sentence tended to establish a proposition of great importance to future cases, and which had not been before established by any decision in this country; viz. that forgiveness of adultery may be collected from facts and circumstances, so as to bar the husband from the right of divorce. This is the law of the civilians and canonists; but he 'Lord Hardwicke' thought that it required more consideration before it should be admitted into the law of England." [See 4 Ves. jun. 202.] The other circumstances were—1. That the weight of evidence was against the sentence; 2. That the question had only been once heard and determined; for the appeal to the Delegates was brought upon a preliminary point only, when the Delegates retained the cause; 3. That the party in possession of the sentence could be no sufferer, in point of costs, in consequence of further litigation, as the expence of all proceedings in the cause necessarily fell upon the husband—the applicant for a commission of review.

(*a*)[2] Dr. Bettesworth the elder. See the next note.

Bettesworth,(*a*) in the cause of *Matthew and Matthew*, in 1769—a proof this of the difficulty of satisfying all minds as to neither a cross suit, nor a separate citation returnable in the same suit, being requisite in these cases. A citation having been taken out by the husband against the wife in that case, in a cause of restitution of conjugal rights, Stevens (a proctor) appeared for the wife, and prayed a libel which was given in. In answer to that libel he confessed the marriage, but otherwise contested suit negatively; alleging further, in bar, commission of adultery by the husband; against whom he prayed at the same time a citation to answer to his wife in a cause of divorce by reason of adultery. Torriano (the husband's proctor) objecting, this matter of objection came to a hearing, "on the petition of both proctors." The Court said, "The question of the day seems to be a question of mere form; and therefore the registrar has been directed to look for precedents. He has found one of *Bently and Bently*, where the Judge decreed a citation as prayed by Stevens in this cause; observing, however, that the adultery might be pleaded, and that being proved a divorce might be had just as well without it. He therefore (Dr. Bettesworth) was of opinion that Mr. Stevens might **[416]** proceed either way." Stevens upon this prayed a citation against the husband in a cause of adultery, agreeable to the precedent in the case of *Bently and Bently*. That a cross suit or separation citation is necessary, however, under such circumstances, has never been asserted that I am aware of, from that time to the present—and the practice of either, thus held to be optional, appears from that time to have been finally dispensed with.

I should not have referred to these authorities in this stage of the cause, but that, having omitted to do so when the admissibility of Mr. Best's allegation was debated, as entertaining myself, no doubt upon this subject, it has again been pressed upon my observation, in the course of the hearing by Mrs. Best's counsel, that the recrimination here introduced by the husband (in the original suit, namely, and under no citation of the wife), is by a different species of charge. So it is; but to found either the one or the other the basis is the marriage—and the parties are the same.

The marriage between these parties, Mr. and Mrs. Best, which is both proved and confessed, took place on the 20th of December, 1817; certainly under circumstances seemingly not the most auspicious. Yet, if they mutually agreed to accept each other as husband and wife, the duties of that relation became obligatory on both. It does appear to my satisfaction that Mr. Best was desirous to treat his wife with kindness and indulgence. This is evinced by his having expended large sums for her gratification in various instances—in particular, he purchased diamonds and other personal orna-**[417]**-ments for her, to the amount in value of 1400l. or 1500l. Mrs. Best had a new carriage built to her taste—there was a saddle-horse kept for her use; and a servant whose business it was exclusively to attend upon her. It would be difficult, indeed, to ascribe this marriage to any thing but attachment on Mr. Best's part. But the wife's paramount object was avowedly different. She looked merely to the husband's fortune; and more especially to procuring from it a settlement by deed, under which she would have been amply provided for, in the event of her surviving, or ceasing to cohabit with him, let her conduct in the interim have been what it might. A provision by will she regarded, in her own language, as "nothing at all," having learnt, in whatever school instructed, the difference between a revocable and an irrevocable instrument. Failing to obtain this latter from her husband by fair means, she appears to have thought herself able to extort it; rashly calculating upon obtaining that end by practising every species of annoyance upon him—by absenting herself from his house repeatedly against his will; and by rendering his habitation, during her presence in it, a constant scene, not merely of verbal altercation, but actual personal conflict. Within three weeks, for instance, from her marriage, she goes to Dover (stopping in the way at Canterbury, under circumstances to which I shall presently have to advert), for the purpose of trying to effect this favorite object of a settlement, through the medium of Mr. Kennett, an attorney at that place. It is from Dover, and at this time, that she addresses the two letters annexed **[418]** to

(*a*) Dr. Bettesworth, the younger, as appears by the date; the elder Dr. Bettesworth having died in 1751. This Dr. Bettesworth, son of the elder (both named John) never rose to be Dean of the Arches, but was Chancellor of London—so that the cause of *Matthew and Matthew* was depending in the Consistory Court of London, at least when this question was mooted.

Mr. Best's allegation, marked B and C,(*a*) thereby making the experiment of declining to return to his house at all, unless he accedes to her terms of a settlement—an experiment, however, which she found to fail. Mr. Wickham, who is clerk to Mr. Best, and apparently much in his confidence, but whose evidence the Court can safely rely upon, says that, within a few days only of the marriage, he had some conversation with her upon the subject of a will, which Mr. Best had prepared to execute. She objected to it, saying she ought to have a settlement. [The deponent had previously said that, upon several occasions immediately after the marriage, he had heard Mrs. Best urging Mr. Best to make a settlement upon her—to the single object of obtaining which her conduct altogether appeared to be directed.] The deponent observed **[419]** to her, that a settlement was what she ought not to expect—that she ought to be grateful to Mr. Best for having raised her to his station in life, and to be satisfied with a provision made for her by his will, the amount of which, of course, would and ought to depend upon her conduct. Mrs. Best replied that a will was nothing at all —she married Mr. Best for a fortune, and she ought to have a settlement—and on the deponent again adverting to the advantages she had acquired by her marriage, she added, that "she was a young woman, and Mr. Best was an old man."

Her witness, Mary English, by whom Mrs. Best was accompanied when she finally left her husband, in August, 1819, and who had lived in her service for the fourteen months preceding, speaks much to the same effect as Mr. Wickham, upon this head, in answer to interrogatories which have been addressed to her on behalf of Mr. Best. On the 12th and 13th interrogatories she deposes to Mr. Best's refusal to make a settlement upon his wife, being the source of constant altercation; and to her gross abuse of him in consequence of that refusal. She deposes to this, in fact, being "the principal cause of their quarrels." She has heard her say that she would not have lived with him if she could have got a settlement, and that "he might be sure she did not marry him for love."

Of the habits and character of this complainant, generally, the history afforded in the evidence is, I am sorry to say, most unfavourable. Of her habitual intoxication, and gross immodesty, both verbal and actual, it would be disgusting to furnish the details—not merely as spoken to by Holt and But-**[420]**-terfield, respectively servants in the family, and witnesses on the part of Mr. Best; but as admitted by her own witness, English, and confirmed, so far as they go, by several of the exhibits proved to be in her own hand-writing. Mr. Wickham, too, deposes to "seldom seeing her towards evening that she was not intoxicated." He says that her manners on those occasions were full of levity and impropriety—and that her language was "very bad," and such as he, as a family man, "endeavoured to avoid attending to as much as possible." The evidence of every witness in the cause upon whom the Court can place any reliance is confirmatory of this.

To the conduct of this lady towards her husband, in particular, so far as the settlement was concerned, I have already adverted. Mr. Wickham, indeed, not unnaturally ascribes her "constant opposition to his wishes in all respects," and her perpetual attempts "to vex and harass him as much as possible," to a preconcerted plan on her part, "either to make him glad to get rid of her upon her own terms," or to provoke him to some acts of violence of which she might be able to avail herself, so as to obtain her avowed end (a separate maintenance) in that way. In this view of the subject, to be sure, her general conduct as a wife abstract from this particular of the settlement, has more or less a reference to it all along. Be the cause, however,

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(*a*) These letters are as follows:—

(B) Dover, January, 1818, from the York Hotel.

My dear Husband,—It gives me plesure to call you so. I am very sorry I am obliged to stay from you so long; but you know it is no more than is proper for me to se myself wrighted; and I am sure you will do Every thing that is honouribley and gust for me. My dear Sir, as I was short of money when I left you, I shall be obliged to you to send me sum by Return of Post, to pay the expences of the Inn.—I am, my dear husband, your's, for ever, E. BEST.

(C) from the York Hotel, Dover, Jaenery 10th, 1818.

Dear Sir,—I am extremely sorry to inform you, that I cannot Return Back to you, unless you make me a settlement from the day of marrege; and I shall wait here until I heare from you.—I am, Sir, your's truly, E. BEST.

what it might, the evidence can suffer no doubt to be entertained as to the effect. Wickham says that Mrs. Best's conduct (her general conduct, that is) to her husband during the whole period of their cohabitation was, as far as it came under his, the de-[421]-ponent's, observation (and this deponent had every opportunity for observation), grossly improper. She frequently abused, and expressed violent resentment and anger against him. She did so upon all occasions—set him completely at defiance, and acted in opposition to all his wishes, seemingly for the sole purpose of annoying him. The deponent hardly knows how to describe her conduct as a wife, otherwise than by saying it was the very reverse of what it ought to have been. "The deponent has frequently," he says, "seen Mr. Best with his face scratched and disfigured—how frequently he does not remember, nor can he of his own knowledge depose to the manner in which his face became in that state." But this chasm in the evidence of Mr. Wickham, as to the actual perpetrator of these outrages, whom he declines to specify as of his own knowledge, is amply supplied by the testimony of other witnesses. Butterfield speaks to having repeatedly "seen Mrs. Best strike Mr. Best, pull his hair, and scratch his face," and to having once seen her throw him down stairs. He says that Mr. Best's face was so much scratched and torn after these assaults that he, the deponent, was unable to shave him for several days together. Once, too, in this deponent's presence, she threw a decanter at Mr. Best, which missed him, but was broken to splinters (owing, I presume, to the force it was thrown with) against the wainscot. He further says that Mr. Best often left the room when Mrs. Best was conducting herself in this violent and abusive manner, and retired to other parts of the house, generally to the servants' hall, in order to avoid her. He has known him to do so as often as [422] two or three times a week; remaining there several hours at a time. He, the deponent, always locked the door upon those occasions; but Mrs. Best frequently followed—would sometimes knock gently, in order to get in, by making him, deponent, believe it one or other of the servants; but at others would knock violently, and insist upon being admitted. The evidence of Butterfield, in all these several particulars, is fully confirmed, not only by Holt, who constantly attended upon Mr. and Mrs. Best, as footman, through the whole period of their cohabitation, and therefore had every opportunity of observing their conduct towards each other, but which is more material and much more satisfactory, by English. Her answers to the interrogatories which have been addressed to her, on the part of Mr. Best, warrant a conclusion that the evidence of Holt and Butterfield, upon these points, if a little too highly coloured, from that degree of bias which must be made allowance for in the evidence of servants of either sex, especially in suits of this description, is still in substance correct. In answer to the 16th interrogatory she says that "Mr. Best used often to go and sit in the servants' hall, to avoid Mrs. Best, but that she often followed him thither; and, on his shutting the door, would force it open and assault him. She would pull his nose or hair, and scratch him, frequently fetching blood—so that his face and person were often much disfigured." In answer to a former interrogatory, the 14th, she had said that she, the respondent, never saw Mrs. Best throw decanters or glasses at her husband; but that she had often removed them from the table, under the apprehension that she, else, would have proceeded [423] to that extremity. It clearly appears, I should observe, by the evidence, that Mr. Best is verging toward seventy, and partly, at least, crippled in one, if not both, hands—and that Mrs. Best is a "strong muscular woman," in the prime of life, having at the time of her marriage been only three-and-twenty. Her witness, English, says, on the 10th interrogatory, that she has often seen her "take him by the arm, and swing him round like a child;" and Holt says, to the same effect, that his master, Mr. Best, was "no match for her."

With conduct like this on her part it could hardly be that the wife should succeed in her suit—that her libel should be proved in that material part of it which represents her sufferings at the hands of her husband as unmerited and unprovoked. It has been repeatedly laid down in these Courts that no wife can solicit their interference with effect to protect her from (even from ill) treatment which she has drawn upon her by her own misconduct—she must first, at least, seek a remedy in the reform of her own manners. If, however, it should appear that even misconduct on the wife's part has produced a return from the husband wholly unjustified by the provocation, and quite out of proportion to the offence, it might still be the duty of the Court to interfere judicially, notwithstanding such, the wife's, positive misconduct.

And this being so, it must be obvious, from what has already fallen from the Court, that this inquiry limits itself, so far as the cruelty charged by the wife is concerned, to a consideration of whether any blame of this sort can be justly said to attach to the conduct of the husband, upon the evidence before the Court.

[424] The marriage of these parties took place in December, 1817, and the first acts of cruelty, specifically charged, are pleaded (namely, in the 5th article of the libel) to have been committed on the 14th and 15th days of March, 1818; I say "specifically charged," because it certainly is pleaded generally, in the introductory part of this 5th article, that the husband began to ill treat and beat his wife "shortly after the marriage." The 5th article of the libel however charges specifically that, "the wife being seated by a window, in the drawing-room, on the first of these days, the husband, without any cause, struck her with a horsewhip across her left breast, which caused her to fall senseless to the ground, and occasioned a swelling, which lasted a considerable time;" and that on the following morning, about five o'clock, "he put a lighted candle under her bed, and swore he would burn her in it alive." And it is further pleaded, in the 6th article, that in consequence of these acts of violence, she, the wife, applied to a magistrate, and swore the peace against him. These to be sure are serious charges, especially the last; an attempt to burn her alive is more than even Mrs. Best's demerits could justify. Let us see how they are sustained in evidence.

The two first witnesses designed to this article are Mary Brooks and Mary Boxall.

Brooks, who at the time of her examination in April, 1820, was only eighteen years of age, says, that in August, 1817, she being then out of place, and resident in Canterbury, was hired as a sort of general servant to accompany Mrs. Best, then Miss Halladay, to Ramsgate, where she proposed to spend a short time. She continued however in her ser-**[425]**-vice; and, upon her marriage to Mr. Best, accompanied her to his house at Chatham, where she remained for about six weeks, until discharged by Mr. Best. She further says that on the 26th of February last [that is, 1820] she re-entered, and was then living in the service of Mrs. Best, resident at Bucklands, near Dover, separate from her husband. And to the third interrogatory she answers that, shortly before so re-entering Mrs. Best's service, she received a message from her, to ask whether she had any objection to come forward and state what she knew about Mr. Best's "taking his pistols to her (a matter, by the way, not charged in the libel) and his other ill treatment of her?" To which she answered in the negative.

Mary Boxall (formerly Halladay) is the sister of Mrs. Best. She says that she went on a visit to Mr. and Mrs. Best, at their house at Chatham, at the time of their marriage, and remained with them there for about six weeks from that time, which agrees with the period of the discharge of the first witness by Mr. Best.

And both witnesses admit not being even in the same house with the parties on or about the 14th of March, 1818, the time when the facts charged in the 5th and 6th articles of the libel are laid to have occurred.

Now with respect to certain acts of violence, prior in date to the 14th of March, 1818, not specifically complained of by the wife, but spoken to by Brooks and Boxall as upon the 5th article of this libel, the Court is disposed to dismiss them from its consideration, pretty much, altogether; as being matter to which Mr. Best has had no opportunity, either **[426]** of counterpleading, or even addressing interrogatories, for want of that specification. I must further, too, observe that both these witnesses, Brooks and Boxall, from their answers to certain general interrogatories administered by the husband, adverted to by his counsel in argument, have rendered themselves in point of credit, to say the least, very exceptionable.

This last objection indeed applies nearly or quite as strongly to the third and only other witness upon this article, Ann Young. She, however, being properly enough designed to this article, as having lived in Mr. Best's service at the time when the acts of cruelty specifically charged in it are alleged to have been committed, it becomes necessary for the Court briefly to consider her evidence upon it.

Her evidence on the 5th article of the libel is to this effect: she says that about a week after she entered Mr. Best's service (where she continued for nearly six months, as his wife's waiting maid), she having been rang for, went into the drawing-room, and on entering it found Mr. Best very angry with Mrs. Best about a little hurt she had

got in her lip, which she said had been done the day before by her parrot, but which Mr. Best, it seems, was inclined to ascribe to the bite of a different species of animal. She says that after swearing at and threatening her for some time about her lip, he fetched a riding whip from an adjoining room, and adding, "Damme, madam, I will now horsewhip you," struck her a violent blow with it across her left breast. She screamed and fainted away, on which the witness and Mrs. Filmer, the house-keeper, went to her assistance, and carried her up stairs, where, after **[427]** bathing her temples and using other remedies, they succeeded in restoring her. She says that the breast was at first a good deal swelled, but afterwards turned black; and that the bruise was visible upon it for several weeks afterwards. Upon the charge of putting a lighted candle under her bed, &c. on the following morning, all which this witness (the only witness upon it) says, is that "one morning, about two or three mornings afterwards, she heard a noise in the bed-room, as if Mr. Best was in a passion with his wife—that presently after the bell rang, and she heard her mistress calling out for her to go to her—that on entering the room she found Mrs. Best just getting into bed again, and Mr. Best not there, but descending the stair case—there was a candle and candlestick lying on the floor, the candle apparently just put out—that Mrs. Best appeared much agitated, and requested the witness to come to bed to her, to protect her." She further says that in the evening of that day, when Mr. Best struck her with a horsewhip, as above, she did go, accompanied by the witness, to a magistrate at Chatham, and complain to him of her husband's behaviour to her. The observations suggested to it by this piece of evidence the Court will reserve until it has an opportunity of remarking upon the testimony of this witness, Young, upon the libel, taken as a whole. But to proceed with the other specific charges of cruelty.

The 6th article pleads that, "In the beginning of May, 1818, Mr. Best, without any provocation, put himself in a violent passion, and beat his wife upon the head with his fist in a very cruel manner—that she escaped from him into the bed-room, and fastened **[428]** the door, when Mr. Best came up stairs with a large kitchen poker and broke open the door—and in the most violent manner threatened to kill her, but was prevented from doing so by the presence and interference of Mrs. Filmer, the house-keeper, who came from her room, it being about eleven o'clock at night, in consequence of Mrs. Best's screams."

Now upon this article, as well as on the last, Filmer, who is vouched as a witness, is not produced, and the sole witness again is this Ann Young. Her account is pretty much to the effect of the plea; there is one discrepancy however. The blows are pleaded to have fallen upon the head of the complainant; the witness says nothing of this, but speaks to her "arm being much bruised from the shoulder to the wrist." This is a discrepancy, however, perhaps not very material.

The next article pleads that "one day in June, 1818, after dinner, Mr. Best knocked his wife off her chair (the parties being then at Southend); and afterwards, on her attempting to get up stairs, followed her and beat her about the head and left cheek and side, in a cruel manner, so as to cause her cheek to swell, and produce a constant pain in her side."

Now upon this article the Court, in part at least, has the testimony of an additional witness, Mary English, upon an interrogatory that is addressed to her by the husband: for Young, again is the sole witness designed by the wife to this article. Young's account is that she was in the bed-room, over the drawing-room, where Mr. and Mrs. Best were sitting at their wine after dinner, when she heard a violent scream, and running down stairs **[429]** encountered her mistress coming out of the drawing-room, crying very much—her hair was about her shoulders, and the comb which usually fastened it up in her hand. She went up stairs into the bed-room accompanied by the witness, but was immediately followed by Mr. Best, who exclaimed on seeing her, "Oh! you are here, madam;" and advancing to her, began beating her violently about the head, face, neck, and body, with his doubled fists. Mrs. Best resisted a little, and presently after struck him again; but he overpowered, and knocked her down, and then went away. The housemaid who had ran up stairs on hearing the noise, after endeavouring in vain to part them, ran to assist Mrs. Best as soon as Mr. Best left her on the ground. The witness says that Mrs. Best complained of being much hurt, and unable to go down stairs, and went to bed almost immediately —and that bruises were visible on her face, neck, and bosom.

Such is the substance of Young's evidence upon the 7th article. But that of

English, upon an interrogatory addressed to her, as I have said, by the husband, places the whole transaction in a very different light. English is the person designated by the last witness as the "housemaid" who interfered upon the occasion in question. She at that time was housemaid, but afterwards became Mrs. Best's personal attendant. She says that upon going up stairs (as spoken to by Young) she found Mr. and Mrs. Best fighting on the landing-place, each beating the other. Mrs. Best then went off into a fit, and the respondent assisted to recover her: to be sure, when recovered, Mrs. Best did "complain of Mr. Best's beating her." She said she had been sit-[430]-ting by the window, when a gentleman passing by happened to look up at her; upon which Mr. Best without any provocation knocked her off her chair. The respondent further says, however, that Mrs. Best at the time in question was intoxicated; and that when in that state she often abused, struck, and fought with Mr. Best. It appears from the answers of this witness that Mrs. Best had often fits when intoxicated ("her fits," she calls them) without receiving any blow.

The above is the substance of Young's evidence upon the 5th, 6th, and 7th articles —articles to which she in effect is the only regular designed witness: for the evidence of Brooks and Boxall upon the 5th article, for reasons already assigned, is pretty much out of the question; and English's testimony, as upon the 7th article, is merely drawn out upon an interrogatory. Now the answer of this witness, Young, to the several interrogatories administered to her on the part of the husband, and in brief, her general evidence, as contrasted with that of nearly every other (I may say of every other credible) witness in the cause, do, as already hinted, detract most materially from the credit due to her; in fact, they render it impossible for the Court to rely upon her evidence, unless confirmed by that of some other witness. But Young being, in effect, the sole witness upon the 5th and 6th articles, and the collateral testimony of English, as upon the 7th article, not only not corroborating that of Young, but substantially disproving it, there is a total failure of proof upon these articles—there is even something more; for I do think that Mr. Best's answers upon these articles, which have been read by the counsel [431] for Mrs. Best, and which certainly represent these matters very differently from the plea, more than counterpoise the single testimony of a witness of Young's description.

The single witness upon the 8th, 9th, 10th, and 11th articles of the libel is Mary English. English I admit with the counsel for both parties to be a fully credible witness; but her evidence in my judgment is so far from convicting the husband of legal guilt that it goes some way to exculpate him from moral blame. What is her evidence upon the 8th article, for instance: she says that between six and seven o'clock one evening in the month of December, 1818, the bell having been rung for her, she went up stairs into the breakfast room, where Mr. and Mrs. Best were then taking their wine after dinner—when she entered the room Mrs. Best was standing by the mantle piece, leaning against it, and Mr. Best was desiring her to leave the room. Mr. Best told the deponent to take her mistress out of the room, and again desired Mrs. Best to leave it; to which she replied that she would not; for that she had as much right to any part of the house as he had. Mr. Best then pushed her, as if to remove her from the mantle piece, and again told the deponent to take her away. Mrs. Best rather resisted the push, and told Mr. Best that "if he attempted to touch her again she would wring his nose off;" upon which he immediately struck her a violent blow with his fist, which knocked her down, and struck her head against the chimney piece as she fell. She was senseless from the effect of the blow; and Mr. Best, stooping as if to lift her up, laid hold of her by the hair; but on the deponent's remonstrances [432] shifted his hold, and, assisted by the deponent, lifted her by the arm to a sofa which was just by. The deponent at the same time asking Mr. Best how he could use his wife so? he replied, "Damn her, she has been praising her favorite man, Captain B.; saying, what a charming fellow he is, and that I am a snuffy old fool." Mrs. Best recovering in a few minutes, on the application of some vinegar, Mr. Best again insisted on her leaving the room, but she said she would not, and taking a chair seated herself at the table. Such is her evidence in chief. In answer to an interrogatory which has been addressed to her as with reference to this particular transaction, she says, "The blow was a hard blow, because it broke the comb in Mrs. Best's head; and that Mrs. Best did fall on the floor senseless, and remain so for some minutes—in one of her fits. She was intoxicated, however, at the time, and had been abusing Mr. Best in the usual manner." She further answers that

she cannot say whether the fit, upon this occasion, proceeded from the blow. She had often those fits when in liquor, from that cause, when she had received no blow.

Now upon this account of the witness, can it be said that what occurred (which is charged as a specific act of cruelty in the 8th article) was without great provocation? She had indulged herself in comparisons (proverbially odious upon all, and certainly not least so upon such subjects) between her husband and Captain B., her "favorite man," as he styles him. [English says, by the way, that she often reproached him in this manner, namely, by casting in his teeth the praises of her "favorite men," which always put Mr. Best in a passion. She would some-**[433]**-times say, "Now I will make him as jealous as the devil," and then would begin praising gentlemen whom she said she had met when out walking, although she (English), who had accompanied her, well knew that she had met no such persons. And this perfectly accords with what Holt and Butterfield have deposed of her conduct in this particular, although in terms too indelicate, as very much of this evidence is for recital in open Court. But to return.] The husband, upon the occasion in question, does not immediately proceed to resent this sort of language by any personal harshness, but desires her to leave the room; which she not only refuses to do, but accompanies her refusal with menaced violence if he attempts to compel her. Actual violence, as might be expected, does ensue; and probably it was intended that it should. And if the wife suffered by it, can it be said that she was not the authoress of the whole by her grossly improper conduct? I am clearly of opinion that she was; and that the conduct of the husband in this instance, so provoked, unjustifiable as I admit it to be, does not come up to the notion of legal cruelty.

Observations of a similar import apply to this witness's depositions upon the 9th, 10th, and 11th articles; but it is unnecessary, and it would be disgusting to state and observe upon them in detail. It may be proper, however, that the Court should briefly advert to her evidence upon the 12th article, being the article which contains that material averment of the party complainant having finally quitted and ceased to live and cohabit with her husband in August, 1819, from considering her life in peril by reason of his cruel and violent conduct towards her.

[434] English deposes that there had been disputes and differences between Mr. and Mrs. Best a few days before they separated, upon the old subject of the will. She sent several messages to him by the deponent to say that unless he satisfied her as to what he had left her in his will, she would not live with him; to which he replied to the effect that he had left her enough if she conducted herself well; but that if she did not, that would be taken away. In the course of these disputes she speaks to having been the bearer of a note from her mistress to Mr. Best, about two days before they separated, and to the exhibit, No. 6, annexed to Mr. Best's allegation, being that identical note. It is conceived in terms of such irritating and scurrilous reproach (terms far too gross for recital) that it could only be designed to provoke the husband to some act of violence. It is impossible, I think, to put any other interpretation upon it. The above circumstances, connected with the final separation of the parties, are described by the witness, English, in her answers to the 34th and 35th interrogatories. Upon her examination in chief, she says, to this article of the libel, That for some time previously Mrs. Best had expressed herself determined not to live with Mr. Best, in consequence of his behaviour to her; but she did not hear her express any fear that her life would be in peril by remaining. Two or three days before she left the house she told the deponent that she "meant to go and see her friends;" that she was aware Mr. Best would object, and that then she intended "to kick up a devil of a row, and set off the next morning." Now how utterly inconsistent this evidence is with an averment that she, the party complainant, **[435]** quitted her husband's house at Chatham in August, 1819, under a sense of present peril to her person from continuing to reside with him, need scarcely be observed upon. No breach of the peace in fact appears to have occurred—the lady quitted her abode without actual disturbance: not that if it had, so studiously provoked on her part, it would at all have amended her case—a case which I have no hesitation in pronouncing to be disproved altogether, and not to entitle her to the relief which she seeks. I accordingly dismiss her complaint, and proceed to consider that of the husband.

It may first be fit, however, that the Court should express its sense of the utter impropriety of that frequent recourse which Mr. Best is proved to have had to personal

violence, even although it admits at the same time that upon most, if not upon all, occasions of his so doing he did not want for great provocation. It attaches, too, no small degree of blame to the use of that language, whether given or retorted, in which his reproofs were usually conveyed—reproofs abounding in epithets always ungrateful to female ears, and which possibly become more ungrateful in nearly what proportion the epithets themselves are less inappropriate. Mr. Best should peculiarly have avoided the use of these epithets, pending cohabitation, even had he believed her guilty of nuptial infidelity. As to any antenuptial immorality that had been purged quoad him, by his consenting to take her for his wife. What, again, could be well more reprehensible than, if not his groundless suspicions, still his gross modes of giving vent to them—at one time, for instance, by insisting that the coachman was in bed with his wife—at an-[436]-other, by searching the closets in her bed-room, and under her bed, as suspecting them to conceal some gallant. Throughout that course, too, of excessive drinking, which led to most of their personal conflicts, it cannot be overlooked that the husband does not appear to have interposed, as he was undoubtedly called upon to do, any sort of restraint; he, on the contrary, in their afternoon sittings seems to have been usually a sharer in such compotations. Of what Mrs. Best's counsel have said, however, namely, that the wife's indelicacies in language and conduct (too gross to be specified) were not foreign to the taste of her husband, I see no proof. On the contrary, the witness, English, says that he often expressed high disapprobation of them; saying somewhat coarsely indeed, "He would be damned if he could bear it" —that "she ought to be ashamed of herself, and was worse (in these respects) than a common prostitute." But to proceed—

Mr. Best accuses his wife of adultery with a person named Meers, a farmer, resident at Chilham, near Canterbury, and with whom she had been acquainted previous to her marriage. His allegation charges that, on her journey to Dover, soon after the marriage, upon the occasion, to which I have already adverted, of consulting her solicitor, Mr. Kennett, she stopped at Canterbury; and that at the house of Isabella Elder, situate in Ruttendean Lane, in that city, being a house of notorious ill fame, she met this Meers by appointment, on or about the 5th of January, 1818; and then and there had a criminal connexion with him—little more that a fortnight, it will be seen, this from the wedding day. Upon this charge two questions arise—1. Is [437] the adultery proved? 2. What, being proved, under all the circumstances of the case is its legal effect?

1. The witnesses examined in support of this charge are a man named Wash, Meers himself, and Charlotte Morgan. The two first of these, at least, are to be heard with caution; but it is of necessity that "in re lupanari, testes lupanares admittentur;" and I see nothing in the nature of the evidence which these persons have given, confirmed as it is by circumstances, and by the whole complexion of this case, which induces me to consider them as having deposed untruly.

Wash deposes to having been dispatched by Elder with a message to Meers from Mrs. Best, whom he had known for years before, at the time articulate, desiring him to meet her at Elder's that evening—to his delivery of this message to Meers, and to Meers's reply, which was that he was coming to Canterbury, and would be at Elder's at the time appointed—and to his report of that answer to Mrs. Best in person, then at Elder's, who expressed her delight at the prospect of a renewed intercourse with Meers, in terms as spoken to by this witness, so grossly indecent that the Court is compelled to dispense to itself with the obligation of recording them.

Morgan, who was perfectly acquainted with the persons both of Meers and Mrs. Best, from Mrs. Best having lodged at her (the deponent's) mother's previous to her marriage, and from her having been visited there occasionally by Meers, deposes positively to having seen Meers and Mrs. Best go together into the house of Mrs. Elder, next door to that in which the deponent then lived with her mother, in Ruttendean Lane, Canterbury, a few weeks after [438] her marriage—a fact which alone would suffice to found a sentence of separation, and not the less so in this than in any other case, from Mrs. Best's antenuptial habits and acquaintance with the mistress of such a house; which, I should observe, was indisputably a house of ill fame, and is spoken of as such by all witnesses.

Lastly, Meers, the "particeps criminis," has deposed to having met Mrs. Best at the time and place articulate, and to the fact of adultery having been then and there committed between them.

Such is the parol evidence. Added to which a verdict is exhibited, obtained by Mr. Best against the adulterer in an action, judgment in which, however, went by default. Such a verdict, in no case, would be evidence of adultery against the wife; it being res inter alios acta, a proceeding to which she was no party. However, as a circumstance merely of the case, it was entitled to be pleaded, and the Court is bound, as such, to notice it.

Added to this, again, are two letters from Mrs. Best to Meers, leaving no doubt of the existence of a criminal attachment between the parties. There is, I admit, something alarming in Meers having delivered up these letters to the agent of Mr. Best; but this does not detract from their authenticity, and the hand-writing of Mrs. Best to the letters is not only pleaded, but proved. They certainly afford evidence strongly confirmatory of the parol testimony given by the witnesses who have been examined in proof of the charge—a charge against which it only remains to observe that Mrs. Best has set up no defence—she has not counterpleaded to the fact alleged—she has suggested no previous connivance, **[439]** nor has she insisted upon any subsequent condonation. Under all these circumstances the Court, I think, is bound to hold that the adultery charged is sufficiently proved. Next for its legal effect.

2. Now the Court has been very properly urged, as with reference to that effect, to take into its consideration the conduct of the husband, who it has been contended does not stand before it as a party entitled to relief for several reasons. It is objected, for instance, that the husband could expect no other, or better, from the antenuptial habits and character of the party whom he had chosen to make his wife. But the Court can only notice these as requiring a stricter attention on her part to her conduct as a wife—they, at least, cannot be urged with effect to have authorized, in the first instance, or to protect her, if committed, from the consequences of a wilful violation of her marriage vow. The culpability of the husband's conduct, in the several particulars instanced by the Court in disposing of the wife's complaint, has also been insisted upon, as lessening and detracting from his claim to relief upon his own. But the complaints are not in pari delicto—nor could the one, if established ever so clearly, as in the case of mutual adultery, be received by way of compensation for the other. Dismissing these objections, therefore, at least for the present, I proceed to consider whether a detected epistolary correspondence between Meers and the wife, followed by no inquiry, no vigilance, no restraint, does not constitute, as charged, such a case of constructive condonation of this single fact of adultery, after a "probable knowledge" of it on the part of the husband, as under all the circumstances, and together with **[440]** what else of unfavorable to the husband's case, results, as I shall presently observe, from his conduct in this particular, precludes it from justly founding a sentence of divorce—especially considering that the effect of such implied pardon, assuming it to be, is weakened or effaced by no subsequent misconduct in this kind, even imputed to the wife, either with Meers or with any other; and that she, the wife, is the prior petens, the complainant in the suit—the husband only hunting back upon this scent to find matter for a defensive allegation to his wife's charge of cruelty—an allegation itself, by the way, not concluding with a prayer for a separation, that being only introduced at the final hearing of the cause.

The letters to which the Court alludes are two letters, dated respectively the 10th and 15th of February, 1818, found by Mr. Best in his wife's drawers (probably very shortly after her receipt of them), plainly written to her by Meers, though addressed under cover to her sister Mary Halladay, then, it will be recollected, on a visit at Mr. Best's. They are no (direct) evidence, of course, against the wife, introduced in the mode in which they come before the Court, being merely annexed by Mr. Best to the interrogatories administered on his part to the witnesses upon his wife's libel. The Court is now adverted to them, not to criminate the wife, but as affording some test of the conduct of the husband.

It is not necessary that the Court should descend into the particulars of these letters, some parts of which, indeed, are not very intelligible. It will be sufficient to observe that they abound in expressions of ardent attachment, and must have satisfied Mr. **[441]** Best that his wife maintained a correspondence, by letter at least, with Meers, and through this Elder, whose character and office Mr. Best, if ignorant of (which can scarcely be presumed), might easily have made himself acquainted with. He insists upon the "lock of her hair which she, Mrs. Best, had promised him," in a brooch; he hopes to have the pleasure of seeing her soon "at the old place, for he wants to see her very much," and so on.

Such is the general tenor and import of these letters—to the propriety of Mr. Best's conduct on becoming possessed of which no objection can reasonably be taken. It appears that he then, or soon after, produced them to his friend or agent, or both, Mr. Wickham, and to his solicitor, Mr. Jeffries; and that he acted in some sort under their advice in making light of the matter, does in part relieve him from that culpability attaching, in my judgment, to his subsequent conduct. On the 21st article of the allegation (the article which pleads that Mrs. Best's adulterous conduct did not come to her husband's knowledge till after she withdrew from his house in August, 1819, and that he has never since lived or cohabited with her) Wickham deposes that, prior to this final separation of the parties [indeed upon the discovery of these letters as results from a comparison of this gentleman's evidence with that of Jeffries upon the same article], Mr. Best had shewn him a letter purporting to have been addressed to Mrs. Best from Meers, couched in very familiar terms, and had desired him to make inquiries about it, which he did, but could trace nothing criminal to Mrs. Best. Sometime, however, after Mrs. Best had finally quitted her husband, the de-**[442]**-ponent received certain information respecting the parties which he communicated to Mr. Best, who, thereupon, directed him to make further inquiries, which, in a word, led to a discovery of Meers and Mrs. Best having been criminally connected. The deponent saith that, from all that passed between him and Mr. Best upon the subject deposed of, he is satisfied that, though Mr. Best might have some loose suspicions of impropriety between Meers and his wife, he had no sufficient ground to conclude, still less any actual knowledge, that a criminal intercourse had subsisted between them until after the deponent had communicated to him the result of the further inquiries just deposed of—"subsequent to which" he goes on to express his conviction that "Mr. Best has not cohabited with his wife." The evidence of Mr. Jeffries on this 21st article of the allegation, which it is not necessary to state in detail, is precisely to the same effect, with the addition that he (Mr. Best's professional adviser, it is to be observed) not only expressed his opinion to Mr. Best that the letters amounted to nothing like proof of a criminal intercourse, but also that, knowing him to be of a jealous disposition, he treated the matter "rather lightly." Now the evidence of these gentlemen, that of the last especially, I repeat, partly relieves Mr. Best from the charge of acquiescing too tamely under a discovery of letters of this description received from Meers by the wife; and it, perhaps, frees him altogether from the imputation of having cohabited with her after being fixed with actual knowledge of her postnuptial incontinence. Still, at the same time, that he should not merely have cohabited with her after a circumstance **[443]** so pregnant with suspicion as the discovery of these letters, but that he should have done so uninterruptedly, and without a remonstrance, or even a hint to the wife herself on the subject, so far as appears, not only falls little, if at all, short of a constructive pardon of any prior connexion between Meers and the wife, after probable knowledge of it, but savours much more strongly, in my judgment, of that blind attachment to her person which led him to make her his wife, "with all her frailties upon her head," predisposing him to acquiesce in any advice which might justify him, to himself, for continuing to cohabit with her, than of that proper feeling for his own honor, which the husband must have evinced, to entitle him to a sentence of separation, by reason of his wife's adultery; of which I am given to understand, from the arguments of his counsel, that Mr. Best is now, at length, desirous.

But granting, for an instant, that Mr. Best can be justified or excused for dropping so summarily (if, indeed, he can fairly be said to have instituted) any inquiry into the nature of his wife's connexions with Meers, upon the discovery of these letters, did no cause occur for its renewal in those journies in which Mrs. Best was in the habit of indulging (under the pretext indeed of visiting her friends) to Dover, the direct road to which from Chatham lay through Canterbury, in which, and in its neighbourhood, Elder and Meers still resided? I am of opinion that cause, and sufficient cause, did repeatedly occur. Such inquiries Mr. Best would, and must have made, had he felt as he ought to have felt, for his own honor; and if equal diligence to that which appears to have been exercised after his wife finally withdrew from **[444]** his house for the purpose of instituting this suit, and by way of furnishing a defence to it, had been used at any time antecedent, I see no reason why it should not have been attended with the same result. Meers, if apprized that Mr. Wickham was in possession of his letters, would as readily have delivered up Mrs. Best's at

one as at another time. What ground is there for presuming that his horror of incurring the imputation of "falsehood" was any greater after, than it was before, Mrs. Best withdrew from her husband's protection? (*a*) Subse-[445]-quent to his wife's quitting him Mr. Best has, undoubtedly, brought his action against Meers; and he has set up his wife's adultery, though at a somewhat late period, yet still before the conclusion of her suit for cruelty, in his defensive allegation. That adultery, in my judgment, is sufficiently proved; but something more than this, namely, an absence of all impropriety, at least as connected with this charge, on his part, is still requisite to found a sentence of separation. It is true that the adultery complained of is a single fact; and that her knowledge of Meers's letters having fallen into the hands of Mr. Best would, naturally, lead to a greater degree of caution in the wife's management of her future correspondence, if any, of this description, whether by letter or otherwise, either with Meers or with any other gallant. This might render a detection of the wife's guilt difficult, or, to give the argument full weight, impossible, with such means of information as the husband then possessed, had he taken pains to detect it, and made inquiries to that end, recenti facto. But that he should have taken no pains—should have made no inquiries—upon occasion either of his discovery of Meers's letters, or of his wife's frequent (subsequent) journeys to Dover, until when, after a cohabitation of nearly two years, they had finally [446] ceased to cohabit on the wife's preferring against him a substantive legal charge of cruelty; and that he should then at last only have had recourse to these, at least in the first instance, by way of getting at something in the nature of compensation, or set-off, to the wife's complaint, either amounts so far to a constructive condonation of the single fact of adultery charged (of which, if it be, the effect, I again say, is weakened or effaced by no suggested repetition of the offence so constructively pardoned), or it argues such misconduct, as connected with this charge, in the husband, whether owing to negligence, or to something equally culpable, namely, wilful blindness on his part that in either view of it, in my judgment, it precludes the Court, in the exercise of its public duty, from founding upon this single fact of adultery a sentence of separation—at the tardy prayer of the husband, more especially, and under all the accompanying circumstances, not in themselves a little remarkable, of this case. I shall therefore dismiss both parties from all further observance of justice in the present suit—not without the consolation that, if the impression which I have formed upon the evidence before me

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(*a*) The witness Meers, as with reference to these letters, deposed, on the 20th article of the allegation, "that he gave them up to Mr. Wickham, clerk to Mr. Best, on being served by him with a writ in an action for damages brought against him by Mr. Best for criminal conversation with Mrs. Best. The deponent gave them up voluntarily, as soon as he found that Mr. Wickham knew all about the business. And on the 14th interrogatory, that "he had no other view in delivering up the letters, than that he imagined he might lie under the scandal of being a false young man if he kept and denied having them, after it was well known that he had them. He had no idea at the time that they would be brought forward against Mrs. Best in this cause, nor did he give them up with that view. He thought that he had done wrong, and was willing to make what reparation he could by acknowledging his fault, and giving up the letters."

Wickham deposed, on this 20th article of the allegation, that "on serving Meers with the writ, &c. he explained to him in the course of conversation some of the evidence which Mr. Best could bring against him. He, Meers, then stated to deponent that he had received letters from Mrs. Best, and endeavoured to exculpate himself, as having been led into what had passed by her invitation." He afterwards produced the two letters in question to the deponent, and assented to his taking them away. In answer to the 14th interrogatory, this witness in substance deposed that neither he nor any other person, to his knowledge, had given or promised, directly or indirectly, any compensation or reward to Meers, either for the surrender of these letters, or for suffering judgment in the suit at common law to go by default, or for his (Meers's) evidence on behalf of the producent in this cause. It was sworn by Jeffries that the damages assessed by a sheriff's jury at 50*l.* (the judgment going by default) had been paid by Meers, he, Mr. Jeffries, having, as Mr. Best's solicitor, actually received them.

should be erroneous, my decree may be corrected, on revision, by the appellate jurisdiction.**

[448] SMITH AND BLAKE *v.* CUNNINGHAM. Prerogative Court of Canterbury, Easter Term, 1st Session, 1823.—Questions of revocation, all, to some extent, questions of intention. Hence, testamentary instruments (regularly executed ones, in particular) are hardly to be deemed revoked by mere inference and implication, under any circumstances; but are certainly not to be under circumstances tending to shew that the testator's intention was not to revoke them.

[Referred to, *Thorne* v. *Rooke*, 1841, 2 Curt. 812; *Green* v. *Tribe*, 1878, 9 Ch. D. 255; *Follett* v. *Petman*, 1883, 23 Ch. D. 341; *Ffrench* v. *Hoey*, [1899] 2 Ir. R. 472.]

John Robley, formerly of Russell Square, in the parish of St. George, Bloomsbury, in the county of Middlesex, but late of the island of Tobago, in the West Indies, Esquire, was the party deceased in this cause.

The deceased quitted this country in the year 1808, immediately prior to which he made and executed his last will and testament, in the presence of three witnesses, and thereof appointed his wife, Caroline Robley, his brother, George Robley, Messrs. Smith and Blake (parties in the cause), and Mr. Charles Brook, executors and trustees. The deceased executed this will in duplicate, one part of which he took with him to the West Indies.

Between this period and that of his death, in November, 1821, the deceased made and executed several codicils to his said will.

The first codicil to the said will is dated Tobago, 18th July, 1812. By this codicil, executed in the presence of three witnesses, the testator revokes two prior codicils, bearing date, the first at Tobago, the 13th of October, 1808, the second at St. Vincent, the 30th November, 1809,(*a*)[1] and, after mak-**[449]**-ing several bequests as therein contained, confirms his said will.

The second codicil, executed in the presence of four witnesses, is dated 30th August, 1813. It confirms the will and codicil of July, 1812—and revokes the appointment of Mr. Brook, whom it expressly excludes from acting as executor or trustee under the said will and codicil.

The third codicil, executed in the presence of three witnesses, is dated 15th June, 1817. The deceased, by such codicil, after making a variety of bequests, confirms his will, and two codicils, dated as above, and appoints James Cunningham, Esq., of the island of Tobago (party in the cause), executor and trustee of his said will and codicils, and guardian and trustee of his natural daughter, Phillisaida, and his other natural children, if any—in which trust he afterwards joins his cousin, Paul Kneller Smith, Esq.,(*a*)[2] by the same codicil.

The fourth codicil bears date the 18th of June, 1817. It is written and signed by the deceased, but not witnessed. It contains a single bequest, that of a legacy, to "Miss Eliza Robley."

*** This sentence was confirmed, on appeal, by the Court of Arches, on the 4th Session of Trinity Term [1823], the dean (Sir John Nicholl) not merely concurring with the Court below in its view of this case, in both parts of it, but further intimating that he had some doubt whether, upon a nice consideration of the evidence, the adultery charged to have been committed by the wife was sufficiently proved to have entitled the husband **[447]** to his remedy of a divorce (in a case of this nature, and under the circumstances), supposing, that is, the husband not to have been barred (as he concurred with the Court below in thinking him) by his conduct, viewed in reference to this particular charge, from his title to a divorce, upon that ground, specially.

During the argument the Court inquired whether the counsel were in possession of any case where, cruelty being charged by the wife, and adultery by the husband, both charges were held to be proved; and, if so, what had been deemed the legal effect.

The counsel replied that they were not aware of the existence of any such case; nor presumed to conjecture what the legal effect would be.

(*a*)[1] These two codicils were not found—and are presumed to have been destroyed by the deceased.

(*a*)[2] This gentleman, Mr. Kneller Smith, is not the Mr. Smith, an executor under the will and party in the cause.

By the fifth codicil, bearing date on the 9th of January, 1819, the deceased bequeathed certain legacies, and executed the same on the day of the date, but without any witnesses. This being pointed out to him, when about to execute the next following codicil, to wit, on the 26th of October, 1821, he, on that day, re-executed this fifth codicil, in the presence of the three witnesses who at the same time attested the execution of the sixth codicil.

[450] The sixth codicil bears date on this 26th of October, 1821. The testator thereby confirms and republishes his will, recited as bearing date "in the month of December, 1807, or in the month of January, 1808," and "the several codicils thereto, respectively bearing date in or about the month of August, 1813, and in or about the month of January, 1818 [by error for 1819 (see note (*a*), page 452)] by him made and executed"—omitting all mention of any other codicils. By this codicil the deceased also nominates a Mr. Irvine, of Tobago, one of his executors and trustees. It makes several bequests, and is executed as above, in the presence of three witnesses.

The seventh and last codicil is one of bequests merely. It bears date on the 29th of October, three days after the preceding; and this also is executed in the presence of three witnesses.

A caveat having been entered at the suit of Mr. Cunningham, executor under the fourth codicil, against probate passing, to the executors, of the will and confirmed codicils, the same was warned, and an appearance was given for Messrs. Smith and Blake, praying that probate of the will of the deceased, and four codicils, dated respectively 30th August, 1813—9th January, 1819—26th October, 1821—and 29th of October in the same year, might be granted to them, as two of the executors named in the said will; and declaring that they opposed the codicils dated the 18th of July, 1812—the 15th of June, 1817—and the 18th of July, 1817. The three codicils, so opposed, were propounded, on the **[451]** part of Mr. Cunningham, in an allegation, consisting of eight articles, of which the following was the substance:—

1, 2, 3. The three first articles of the allegation pleaded merely the facta of the three codicils of the 18th July, 1812, the 15th of July, 1817, and the 18th of July, 1817, in manner as already stated.

4. The fourth article pleaded that the deceased, after making these, placed the same, together with another codicil bearing date the 30th August, 1813, in an envelope or cover, upon which was written, "Codicil to the will of John Robley, Esq." "To George Robley, Esq. Studley Park," under which there appeared a line drawn, and thereunder was written, "Thomas Bird, Esq. Sherwood Park—James Cunningham, Scarborough" (*a*)—that the said envelope was then enclosed, together with the will, in another envelope, endorsed, "George Robley, Esq. or James Cunningham, Esq. Scarborough," the words, "James Cunningham, Esq. Scarborough," being in the deceased's hand-writing—that the said (outer) envelope was then sealed, and deposited in a box in the deceased's writing-room, in the house in which he then resided, at Golden Grove, in Tobago.

5. The fifth article pleaded that the deceased, after the making and execution of the first codicil pleaded and propounded, viz. that of July, 1812, occasionally opened the same, and made alterations, by substituting, in divers places, other names for **[452]** those originally written—viz. "Frederick" and "Phillisaida," the names of two natural children, for "Edward" and "William," the names of two other natural children of him, the deceased, and the name and addition "William Brasnell, Esq." for those of "Thomas Bird, of Sherwood Park"—that the said Thomas Bird died in July, 1813, and the said Edward and William Robley, respectively, in the months of July and November, 1814—that Phillisaida was not born until the 21st of August, 1815, and that Frederick died about the month of April, 1817.

6. The sixth article pleaded that the codicil of 20th October, 1821, was prepared at the request of the deceased by Christopher Irvine, Esq., one of the deceased's executors named in such codicil—that the deceased, at that time, was not resident in the house in which the will and former codicils were deposited, but in a new house, situate in the same Golden Grove; so that, in giving instructions for preparing such codicil, he was unable to describe the exact dates of the will, or former codicils, that

(*a*) A town of that name in the island of Tobago, not Scarborough in Yorkshire. This is to be understood where Scarborough is named in the case throughout.

bearing date the 9th of January, 1819, being the only one in the house, and not produced to the said Christopher Irvine until the morning (*a*) following that upon which the instructions were given, when it was executed—and that the said Christopher Ir-[453]-vine, as such executor, had duly proved the will of the deceased, and the whole of the said seven codicils, in the Court of the Ordinary of the island of Tobago.

7. The seventh article pleaded that, at the making and execution of the said codicil of the 26th of October, the said deceased neither desired nor directed Mr. Irvine to revoke any codicil by him before made, and that he neither meant nor intended, by such codicil, to revoke the codicils now propounded, nor adverted specifically to the said codicils, or any of them, upon such occasion—and that the deceased's will, together with the first four codicils, remained in the envelope in the box at the deceased's former residence—and the last three codicils at his latter residence—and were so found after his decease.

8. The eighth article pleaded merely the deceased's continued regard for, and correspondence by letter with, Mr. Cunningham, up to the time of his decease.

Two additional articles to this allegation were afterwards admitted. The first pleaded the deceased's affection for his natural children, especially his daughter Phillisaida, expressed to his several friends—and that once, especially, about the month of May, 1817, in conversation with a friend, Colonel Campbell, he declared his intention to leave this daughter, Phillisaida, 10,000l. The second addi-[454]-tional article merely exhibited three letters (annexed) from the deceased to Mr. Cunningham, dated respectively 28th March, 1819, 9th August, 1821, and 21st of October, 1821, in supply of proof of the premises mentioned in the eighth article of the original allegation.

This cause was heard upon the answers of Messrs. Smith and Blake to the above allegation—admitting generally the facts as pleaded—and submitting to the law, and the judgment of the Court, what codicil or codicils, if any, the deceased did mean and intend to revoke by the codicil bearing date the 26th of October, 1821.

Judgment—Sir John Nicholl. The deceased in this cause executed a will and seven codicils. The will bears date on the 19th of January, 1808—the first codicil, on the 18th of July, 1812—the second, on the 30th of August, 1813—the third, on the 15th of June, 1817—the fourth, on the 18th of June, 1817—the fifth, on the 9th of January, 1819—the sixth, on the 26th of October, 1821—and the seventh, and last, three days after, on the 29th of October in the same year. The deceased died on the 3d of November following.

Of these several testamentary instruments, the will and four codicils, the second, the fifth, the sixth, and the seventh, are not opposed. The first, the third, and the fourth, on the contrary, are opposed by Messrs. Smith and Blake, the executors in the will—and are propounded by Mr. Cunningham, an executor named in one, the fourth, codicil. These codicils are said to be revoked under the sixth co-[455]-dicil, that of the 26th of October, 1821, whereby the deceased "confirms and re-publishes his will, bearing date in the month of December, 1807, or in the month of January, 1808, and the several codicils thereto, respectively bearing date in or about the month of August, 1813, and in or about the month of January, 1818," omitting any mention of, or reference or allusion to, either of the other three. Now,

The revocation contended for in this instance is clearly one by implication. If at all, it is under the sixth codicil; in which codicil neither the codicils said to be revoked are specifically adverted to—nor has it, though supposed to revoke the codicils omitted, any general clause of revocation. That revocation, if at all, then, is to be made out by mere inference from the passage of the sixth codicil just recited—which,

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(*a*) When the following memorandum was added, at the foot of this codicil of 26th October, 1821. "Memorandum—That it being observed that the codicil herein mentioned to bear date in the month of January, 1818, was not duly witnessed to pass real estate, it was this day re-executed by the said John Robley, immediately before the execution hereof, and witnessed by the witnesses hereto—the true date of the said codicil being the 9th day of January, 1819. Signed, William Downe, John Pomeroy, Angus Ross," being the witnesses to the codicil of 26th October, 1821—in which codicil itself is the date January, 1818, by mistake, it thus appears, for January, 1819.

whether it has or has not, under the circumstances, the effect sought to be ascribed to it in law, is the sole question for adjudication.

All questions of revocation are questions, to some degree, of intention; for every fact of revocation is said to be equivocal. If so, the question in this instance is peculiarly one of intention; as the fact, itself, of revocation alleged must be admitted to be peculiarly equivocal. It remains then to consider the other facts of the case, I mean those indicative of the deceased's intention, in order to determine the legal import and effect of this fact of revocation so, in itself, as I have just said, peculiarly equivocal. I will only premise that two of the three codicils opposed, being regularly executed, and attested by three witnesses (the nature of the [456] third, that of the 18th of June, 1817, hardly suggesting that formality, as conveying a mere pecuniary legacy of no large amount, yet still that, as well as the two others, being all written by the deceased himself), the intention to revoke these must be clear and unequivocal in order to effect their actual revocation—all legal presumption being obviously in favor of instruments so prepared and executed.

And, first, is any thing to be collected as to the testator's intention with respect to these instruments from the place and company in which they were left by the testator, and found after his decease? Something is to be collected from these, and that decidedly in favor of the instruments. They are found inclosed in the same envelope with the codicil of August, 1813, expressly ratified and confirmed by the codicil of October, 1821, and so admitted to be operative; and, again, this envelope is sealed up in another envelope (together with the will, ratified and confirmed as above), addressed by the deceased to his executors. If the rule "noscitur è sociis" at all applies, this circumstance is material; for even their opponents must admit that these codicils make their appearance in good society.

But the question of intention as to these codicils may, I think, be decided by other and clearer indications; some of which are the following:—

Both envelopes of which I have just been speaking are addressed to "James Cunningham, Esq.;" the one in conjunction with Mr. Bird; the other in conjunction with Mr. Robley. The words "James Cunningham, Esq.," in the outer envelope, that addressed to him, in conjunction with Mr. Robley, being in the deceased's handwriting. But it is one [457] of the codicils alone (that of June, 1817), now said to be revoked, that appoints Mr. Cunningham an executor, and together with the deceased's cousin, Mr. Kneller Smith, the guardian and trustee of the deceased's natural children. And these appointments of Mr. Cunningham are in the following emphatical words:—"And I hereby declare that I appoint as an executor and trustee of my said will and estate, James Cunningham, Esq., of this island, to whom only, and to him, in intire confidence, I confide my private papers in Tobago; and I expressly request him to be, and I hereby appoint him, guardian and trustee of my natural daughter Phillisaida, and any other natural child I may have."

Now that the deceased, had he meant to revoke these appointments, should leave his meaning to be collected from mere inference and intendment, is improbable enough in itself, especially as contrasted with what appears on the face of the codicil of August, 1813, where, meaning to revoke the appointment of Mr. Brook as executor, he does it in formal and direct words: "I hereby exclude Charles Brook, Esq., from being an executor and trustee under my will." And the improbability of any such revocation is rendered still greater by the circumstances which are both pleaded and proved, that his correspondence with Mr. Cunningham continued until, and was only interrupted by, the deceased's death; and that it was not only or chiefly of a mercantile or commercial nature, as suggested in the answers of Messrs. Smith and Blake, but, on the contrary, was a correspondence of the most intimate and confidential sort; as I think sufficiently appears from the letters annexed to the allegation. Nor does [458] any inference to the contrary, as contended, at all result from Mr. Irvine's appointment as an executor and trustee, by the codicil of 1821, to my judgment. There is nothing tending to shew that he was substituted in the place of Mr. Cunningham—he is not appointed sole executor—the deceased expressly, and in terms, appoints him "one of his executors and trustees," to act in conjunction with his "other executors and trustees"—from the number of which "other executors and trustees" I am satisfied that it was not his intention to exclude Mr. Cunningham. Consequently, I am of opinion that it was not his intention to revoke this codicil of

June, 1817; and, by necessary inference, not the two others, said to be revoked together with this codicil of June, 1817.

But, further, the deceased, on executing the codicil of 1821, which is said to revoke the three prior codicils omitted to be specified, re-executed the codicil of January, 1819. Now the object of that codicil is to convey a further provision to his natural children through the medium of Messrs. Cunningham and Kneller Smith, as their guardians and trustees. Can it then be supposed that in the same instant and almost by the same act the deceased revoked the codicil of June, 1817, the instrument on which alone rests the appointment of these gentlemen as such guardians and trustees? And I may further observe that the codicil of October, 1821, expressly confirms the codicil of 1813; which, itself again, expressly confirms the codicil of 1812, now, by the operation of this same codicil of October, 1821, argued to be revoked.

Again, the codicil of 1812 (said to be revoked as above) is the only one by which the deceased's house-[459]-keeper (as he terms her), M'Kenzie, the mother of these natural children, has any thing like an adequate provision. But the last and latest act of the deceased's life, so far from implying diminished regard or affection for M'Kenzie, which the revocation of this codicil would imply, infers the direct contrary; for only three days after executing the codicil said to revoke that of 1812, to wit, on the 29th of October, the deceased executes a further codicil for the sole purpose of still further providing for M'Kenzie; in which, after stating his anxiety for her future welfare, and that she may live with the comforts she has thentofore enjoyed, &c. he expressly desires that she shall be permitted to occupy his house at Golden Grove until his executors and trustees can make arrangements for her in the town of Scarborough—that during that time she shall have the attendance of all the servants and domestics who have thentofore been in the habit of waiting upon her—that his said executors and trustees shall build her a commodious house in the town of Scarborough aforesaid, &c. &c. How utterly inconsistent all this (which supposes M'Kenzie in the possession of an adequate provision) is with any intended revocation of the codicil of 1812, on the part of the deceased, is too obvious for a comment.

Upon these considerations, to which others might be added, I am quite satisfied that Mr. Cunningham remains an executor, and that all these codicils, so meant by the testator, ought to be taken as parts of his will; although the sixth codicil recites the will, and two only of the five prior codicils as for confirmation. Had he meant it to be otherwise, the testator would have signified this plainly, as in the [460] codicil of 1812; where, meaning to revoke two prior codicils, he does so by a distinct reference to each of them, and in words directly expressive of a revocatory intention.(*a*) The whole difficulty of the case has arisen from, and is to be accounted for by, this sixth codicil having been drawn up at a late period of his life, in the absence and without any accurate recollection on his part as to the number, or dates, of his former testamentary instruments; and from its not having been written by the deceased himself, but prepared through the agency of Mr. Irvine, wholly a stranger to his former testamentary acts. That Mr. Irvine, however, had no suspicion of the deceased meaning to revoke the unrecited codicils by this sixth codicil is evident from the circumstance of his having applied for, and taken, probate of the will, and the whole seven codicils, in the Court of ordinary, in the island of Tobago.

I have only to add that if, upon a true construction, the legacies to the natural children in the several codicils are, as they are suggested to be, accumulative, it may possibly be as argued that the natural children will be provided for more largely than the deceased can be reasonably supposed to have contemplated.(*b*) This, though

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(*a*) "I, John Robley, do hereby completely and for ever revoke the two codicils to my last will and testament, dated on or about the 19th of January, 1808, the said two codicils bearing respectively the dates of Tobago, 13th of October, 1808, and St. Vincent, 30th November, 1809." Codicil of July, 1812.

(*b*) By the first codicil, that of 1812, as altered by the deceased subsequent to her birth in 1815, his daughter Phillisaida was bequeathed 1000l. and 100l. per annum. The second codicil, that of 1817, bequeathed her, specifically, 1546l. (a principal sum then in the hands of Mr. Kneller Smith, the deceased's cousin) with interest, together with the several sums of 1000l. and 4000l. Lastly, the third codicil, that of 1819, bequeathed her 5000l. and 250l. per annum. Supposing, therefore, the legacies

the Court may [461] lament, it has not power to control; nor can it suffer any consideration of the sort at all to influence its judgment as to what codicils are, and what are not, entitled to probate. It is the province of another Court to put a right interpretation on the instruments pronounced for—a province into which this Court (which has only to determine what instruments ought to be pronounced for) has neither the inclination nor the right to obtrude itself. Being satisfied that the deceased meant all these codicils to operate, the Court has no choice but to decree probate of the whole to Mr. Cunningham, jointly, of course, with the other executors.

[462] FOSTER *v.* FOSTER AND OTHERS. Arches Court, Trinity Term, 1st Session, 1823.—A will and codicil torn into pieces by a testator's eldest son after the death of the testator—the pieces saved however; by which, and by oral evidence, the Court, arriving at the substance of these instruments, in effect pronounced for them, and condemned the spoliator, though proceeded against in pœnam merely, in costs.

(By letters of request from the chancellor of the diocese of Lincoln.)

This was a cause of proving, in solemn form of law, the last will and testament, with a codicil, of Charles Foster, late of the city of Lincoln, deceased, promoted by Ann Foster, widow, the relict of the deceased, and a legatee in the same, against Charles Foster, eldest son, and several, the other, children of the deceased. These other children, seven in number, were before the Court, consenting that this will and codicil propounded should be pronounced for. No appearance had been given for the eldest son, Charles Foster, and the proceedings as against him had been in pœnam throughout. This suit was instituted in the Court of Arches, in the first instance, by virtue of letters of request from the chancellor of the diocese of Lincoln.

Judgment—Sir John Nicholl. The facts of this case are briefly the following:—

The deceased, early in June, 1822, had been for some time unwell, and was advised by his solicitor, and by his medical attendant, to settle his affairs; [463] and it appears that he only deferred complying with this advice until certain estates, held by himself and his brother Thomas Foster (formerly in partnership with him as a builder) in joint tenancy, were severed, by deeds of partition, so as to oust the right of survivorship incident to estates so held, and leave each brother at liberty to dispose of his several share. Instructions for effecting this partition had been given to Mr. Bromhead, the brother's solicitor, who prepared the necessary deeds of partition; and these were finally executed by and between the two brothers at Mr. Bromhead's office, in Lincoln, about ten o'clock on the morning of Wednesday, the 22d of June, the day upon which the deceased actually died. The deceased returned home on horseback, and was visited there, about one o'clock on that day, by his medical attendant. That gentleman, finding the deceased considerably worse, and apprizing his wife of this, left by her desire a message at the office of his solicitor, Mr. Swan, that a Mr. Cook, one of his clerks, should be sent to the deceased for the purpose of making his will as soon as he came in—Mr. Swan himself being absent from Lincoln, and Cook not just at that time in the way. Cook attended the deceased accordingly, though not till about five o'clock, and took instructions for his will, the purport of which he immediately reduced into writing in the deceased's presence. He then withdrew at his desire with his brother Thomas Foster into an adjoining room, in order to calculate more nicely the value of his property, and to consider the best and easiest mode of carrying his testamentary intentions, explained as above by the deceased himself, into full and final effect. [464] Certain alterations were made in the instructions, as originally taken, in the course of this conference; which alterations, however, the brother, Thomas Foster, afterwards explained to the deceased, who approved of them; and desired that a will

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in the several codicils to be accumulative, and not substitutive [i.e. supposing the legacy in each succeeding codicil to be accumulative upon, and not in lieu of, that in the codicil preceding it], this daughter Phillisaida alone would be entitled to no less a sum than 12,546l. and 350l. per annum. And as the codicil of 26th October, 1821, bequeathed to the testator's other natural daughters, Sybil and Clara, "an estate similar in all respects" to that given by former codicils to Phillisaida, the provision for these three natural children alone would, upon this construction, amount to 37,638l. and 1050l. per annum; a provision, it was argued, quite out of reason, and ruinous to his estate, and which the deceased therefore could never be supposed to have contemplated.

should be prepared, immediately, pursuant to the original instructions thus altered or modified. The deceased shortly after fainted away, and became so rapidly worse and worse that Cook, who had instantly set about preparing a will, was repeatedly urged to dispatch, and was at last obliged to conclude, somewhat abruptly, in order that the deceased might execute it so as to pass real estate, of which his property principally consisted.(*a*)[1] The will, in this state, was taken to the deceased, and was duly executed by him in the presence of three witnesses. This main object of the parties being thus secured, Cook, the writer of the will, began drawing up a codicil, by way of explaining the will, and expressing the deceased's intentions more fully and distinctly; but before this could be accomplished, though he wrote with the utmost possible expedition, he was apprized that the deceased had expired. These instruments are the will and codicil severally (virtually) propounded in this cause. I should say that the son, Charles Foster, was fully aware of these transactions, and was actually present at the execution of the will.

On the seventh day, the 29th of June following, this will and codicil were produced to, and read in the presence of, the several members of the family, assembled on the occasion of the deceased's funeral. **[465]** After supper, the eldest son, Charles Foster, desiring to see this will and codicil, they were handed to him, together with the "instructions," by the brother, Thomas Foster, who, soon after, retiring for the night, left his nephew, apparently perusing these, merely desiring him, when he had done with them, to give them to his mother for safe custody; instead of which, however, it appears that he left the room, and presently the house, abruptly, taking them with him. Of the subsequent history of these several instruments all which is known to a certainty is that the fragments of them were found on the following morning scattered in several closes or fields adjoining the river Witham, near the deceased's house: but there is no question that this son Charles Foster had attempted to destroy these several instruments altogether, by so tearing them to pieces, and scattering the fragments where, as I have just said, they were found by one of the brother Thomas Foster's children, on the next succeeding day.

It further appears that the fragments of this will and codicil (all carefully collected) were, on or about the 7th of July following, pasted on two several sheets of paper, now before the Court, marked A and B; and that Mr. Cook, shortly after, copied out these fragments, filling up, at the same time, from memory and recollection, those parts, the fragments of which could not be found. Such copies are also before the Court, being the papers marked C and D,(*a*)[2] in which the words, not to be found

(*a*)[1] The deceased's real property was estimated at about 9000l. in value; his personalty, at only about 3 or 4000l.

(*a*)[2] Paper C was as follows:—The words and letters printed in italics being those supplied by Cook, the writer of the will, from memory, underscored, to distinguish them from the others, in the original paper.

This is the last will *and* testament of me Charles Foster, of *the city of* Lincoln, *builder*, which I make in manner *following*, that is to say, *I give and* devise unto my son, Charles Foster, *all that* messuage or inn, com*monly called* the Roy*al Oak*, with the close, or paddock, and other hereditaments *thereto belonging*, situate *in the city* of Lincoln, aforesaid, and now in the occupation *of my said* son Cha*rles Foster*, to hold the same, unto and to the use of my *said son Charles* Foster, h*is heirs* and assigns, for ever, subject nevertheless and charged, *and chargeable*, with *the payment* of the sum of one thousand four hund*red pounds to* be *paid to my* executors herc*in*after named, within twelve calen*dar months next after my decease.* I give and devise all that my messuage or dwel*ling-h*ouse, *with the garden* and paddock thereto adjoining and belonging, and situate in *the parish of St.* Botolph, and no*w* in my occupation, unto my dear wife *Sarah* * *Foster*, and her ass*igns*, for, *and* during the term of her natural life, if *she shall* so long con*tinue my widow*; and from aud after *her* decease, or *marry*ing again, wh*ich should first happ*en, I give and de*vise* the same unto, and to the *use of my son David* Foster, his heirs *and* assigns for ever. I *give and* devise un*to* John *Coupland*, of the said city of Lincoln, merchant, and *John* † *Dixon*, of *the* same *place*, maltster, all and every my messuages, lands, tene*ments and hereditaments situate*, lying, and being at Haddington, and *Thorp* on the *Hill*, *in* the co*unty of* Lincoln, to hold the same, with

* This should be "Ann." Vide note (*b*), page 468.

† This should be "Richard." Vide ibid.

among the fragments, and so supplied by Mr. Cook, [466] from memory, are underscored to distinguish them from the others. And I am satisfied from the whole [467] evidence in the case, particularly that of Cook and the brother, that paper C contains the whole substance of the deceased's will; and that paper D expresses the true tenor and effect of the codicil so drawn up by Cook, pursuant to the deceased's directions, in his life-time—the writer breaking off immediately on being apprized of his death. The original instructions, I should add, being written very close in a small hand, and on both sides of a sheet of paper, the fragments of these could not be put together like those of the will and codicil. They are before the Court, indeed; but still as fragments only.

Such are the facts of this case, the application of the law to which is attended with little difficulty. The evidence, I think, establishes the factum of the alleged will—and also that the codicil, so far as it goes, is conformable to instructions given by the deceased, and was reduced into writing during his life. Consequently, not only this will, if in ex-[468]-istence would be entitled to probate, but, under the circumstances, the codicil also, though unexecuted, upon principles too familiar to all of us to suggest to the Court any need of repeating them.(*a*) And the Court being satisfied—first, that these instruments have ceased to exist (to exist, that is, in their integral state) only under the circumstances just described—but that, secondly, the true tenor and effect at least, of these, though not all the very words, are still before it in papers C and D—under these circumstances, it is no less its duty to pronounce for papers C and D, than it would have been to have pronounced for the original instruments themselves, if total and entire. Accordingly, I decree administration to the widow, with papers C and D annexed.(*b*)

[469] Costs were prayed against the son, Charles Foster.

Court. I feel some difficulty about condemning this party in costs. Of the gross impropriety of his conduct there can be but one opinion: it can scarcely be reprobated in language severe enough. But he has given no appearance—the proceedings, as against him, are had in pœnam merely; and I observe no mention, either of costs, eo nomine, at least, or of the act of spoliation of which this son Charles Foster now stands convicted in the "decree" which has been served upon him "to see proceedings." I am aware of no instance of a party having been condemned in costs under such circumstances. The case cited by the counsel, that of *Blackmore and Thorpe* against *Brider* (2 Phillimore, page 359), was a criminal suit. Question reserved.

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the appurtenances, unto, *and to* the use *of, the* said John Coupland, and John Dixon, *their* heirs and *assigns, for ever*; *nevertheless* upon the trusts *hereina*fter mentioned, *that* is to say, *upon trust*, &c. &c.

Paper D was similar in general appearance to paper C—the words supplied from memory bearing nearly the same proportion to the others in this as in paper C. It was not thought necessary, however, that either this or the whole of paper C should be printed.

(*a*) See *Wood and Wood*, 1 Phillimore, 357. *Sikes* v. *Snaith*, 2 Phillimore, 355, et al. pass.

(*b*) The sentence was as follows:—

The Judge, &c. "pronounced for the force and validity of the true and original last will and testament, with a codicil thereto, of Charles Foster, the deceased in this cause, the said will being without date, and the said codicil without date or subscription, as contained in two paper-writings, marked respectively with the letters C and D, now remaining in the registry of this Court, annexed to, and pleaded and referred to in, a certain allegation given in, and admitted in this cause, on the part and behalf of Ann Foster, the lawful relict of the said deceased, and a legatee named in the said will, and bearing date on the 4th Session of Hilary Term, to wit, Monday, the 10th day of February, 1823—and directed the Christian names of the said Ann Foster and Richard Dixon, in the said will and codicil called Sarah Foster and John Dixon, to be altered—to wit, the said name Sarah to be altered to Ann, and the said name John to be altered to Richard."

It appeared, as should be stated, in order to explain this last part of the sentence, from Cook's evidence that, in supplying from memory, the defective parts of the will and codicil, in papers C and D, he had written John instead of Richard Dixon, and Sarah instead of Ann Foster (the deceased's widow), merely inadvertently, or by mistake.

On a subsequent day—per Curiam. I think that the Court is justified in giving against this party the costs as prayed. The "decree" intimated that, in case of his not appearing, &c., the Court would proceed through the several intermediate steps, to the giving of a final sentence in the cause, "according to law and justice:" and it does appertain sufficiently to both of these, in my judgment, to condemn in the costs of this suit the person whose gross misconduct has principally occasioned it. I say "principally," because these parties must have come before the Court to establish the codicil had there been no act of spoliation.

[470] THOMAS AND HUGHES *v.* MORRIS. Arches Court, Trinity Term, Bye-Day, 1823.—Quære, whether the ordinary is absolutely barred, in the exercise of his discretion, from granting a faculty confirmatory of certain alterations made in a parish church, by reason of some omission (granting it to be) of legal form in the publication of notice of the vestry at which such alterations were resolved upon by the parish; and the churchwardens were empowered to make them.

(An appeal from the Consistory Court of St. David's.)

This was an appeal from the Consistory Court of St. David's, where originally it was an application for a faculty to confirm the erection of a vestry-room and gallery, in the parish church of Laugharne, in the county of Carmarthen.

A process was taken out at the suit of Thomas and Hughes, churchwardens of the parish, reciting, "That at a vestry held on the 27th of April, 1820, and, by adjournment, on the 29th of the same month, it was resolved that the churchwardens should construct, and they were empowered to construct, a vestry-room and gallery in the said church, according to a plan then produced; and that, in pursuance of this order, the vestry-room, and gallery over it, were constructed and completed; and that they prayed a faculty, approving and confirming the work." Accordingly "the vicar, churchwardens, and parishioners are cited to shew cause why the faculty should not be granted," with the usual intimation, "that if they do not appear, or appearing, do not shew sufficient cause against it, the faculty will be granted."

An appearance was given for some of the parishioners, but Morris was the only party who continued the opposition. The grounds of opposition were stated in "an act upon petition," and replied to; and affidavits in support of the different state-**[471]**-ments were filed on each side. The matter came on for hearing in the Consistory Court, on the 28th of November, 1822, when the surrogate, presiding in that Court, refused to grant the faculty, and dismissed the suit, but without costs on either side. From this decree the churchwardens appealed to the Court of Arches; and the appeal now came on for hearing.

In opening the cause on the part of the respondent it was stated that the objections to the grant of the faculty principally relied on were, first, that the vestry was not legally held, there being no proof that the notice of holding it, after being published in the church, was affixed to the church-door as required by the late act of Parliament (*a*); and, secondly, that the additions were not necessary for the accommodation of the parishioners.

On the part of the appellants it was stated in the opening that there was direct proof that notice of the vestry and its particular object was duly published in the church—that the vestry was held in the usual manner and continued by adjournment—that the general concurrence of the parish was evident—that the work was done, and no **[472]** objection taken till long after it was finished, when disputes arose upon other subjects—that even if there were some omission of legal form (but which was not proved, nor could be presumed) in respect to the notice, however it might expose the churchwardens to risk, in regard to the expence, if the alterations should not be approved by the ordinary, still the objection was not fatal in this case; and did not

(*a*) 58 Geo. 3, c. 99. "An Act for the regulation of parish vestries," which provides, s. 1, that "no vestry, or meeting of the inhabitants in vestry, of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry; by the publication of such notice in the parish church or chapel on some Sunday, during, or immediately after divine service; and by affixing the same, fairly written or printed, on the principal door of such church or chapel."

bind the ordinary in the exercise of his discretion, in the grant of a faculty confirming the work when done, if in itself the erection was proper to be confirmed. It was further stated that the affidavits, taken in their just result, fully established the want of increased accommodation in the church—the general concurrence and approbation of the parishioners—the making of a subsequent rate to defray the expence—and that the opposition manifestly grew out of disputes which afterwards arose respecting the allotment of the seats in the new gallery: which allotment had nothing to do with the present question and would not in any degree be affected by the grant of this faculty.

The Judge—Sir John Nicholl, then observed that, having read all the papers and affidavits, he was strongly disposed to concur in the view of the case as stated in the opening by the appellants' counsel; and he asked the counsel for the respondent whether they could hope in the argument to maintain with success, either that the faculty could not legally be granted; or that, under the circumstances resulting from the affidavits, it would not be a proper exercise of the discretion of **[473]** the ordinary to confirm the erection of these useful accommodations in the church of so populous and opulent a parish? and whether their party would not be content to submit to a reversal of the decree appealed from, and to a grant of the faculty, provided the Court, in the hope of promoting conciliation, and restoring harmony in the parish, should be disposed in that case to give no costs?

This proposition being acceded to on both sides, the decree was so made by the Court.

BRIDGWATER, FORMERLY HAYWARD *v.* CRUTCHLEY. Arches Court, Trinity Term, Bye-Day, 1823.—A marriage by licence deemed null and void under 26 G. 2, c. 33, by reason of minority and want of legal consent—a nullity held under the circumstances not to be cured by 3 G. 4, c. 75, s. 2.

(By letters of request from the chancellor of the diocese of Llandaff.)

Judgment—Sir John Nicholl. This is a suit of nullity of marriage under the statute 26 Geo. 2, c. 33 (one of the last, probably, which this Court may be called upon to entertain), brought by the mother and guardian of a female minor, Charlotte Ann Hayward, against Josiah Crutchley, the de facto husband. The suit is had in pœnam against Crutchley, who has been personally served however (not indeed with the citation which issued in the first instance in this cause, for a personal service of that could not be effected, but) with a citation (to the same effect) by ways and means, and also with a decree to see proceedings; **[474]** and who appearing to neither of these processes has been formally and regularly put and pronounced in contempt.

The libel states the facts necessary to be proved, and the depositions of fourteen witnesses who have been examined on the libel prove those facts in a manner highly satisfactory. The proofs indeed (which the Court always expects to be precise in ex parte matrimonial suits) are peculiarly so in the case now before it. That case as pleaded, and as it appears thus fully in evidence, is briefly as follows:—

Charlotte Ann Hayward, the minor, whose marriage is sought to be dissolved, is the daughter of Joseph Arno and his wife (now Bridgwater and party in the cause), and was born at Lyme, in Dorsetshire, on the 23d of March, 1804. In 1810 the father of the minor died intestate. The mother soon after the father's death removed to Brecon with her family, a son and four daughters, where they have ever since resided; and in 1811 took the sirname of Hayward from respect to her maternal grandfather so named; by which name of Hayward and not that of Arno her children from that time have passed, and are still known, as she herself had passed and was known till her marriage with Mr. Bridgwater, which is pleaded and proved to have taken place subsequent to the de facto marriage of her daughter, the subject of the present suit. This removal of the family from Lyme to Brecon, and their adoption of the name of Hayward, are only material on the score of identity; or, in other words, for the purpose of connecting the Charlotte Ann Arno born at Lyme in 1804 with **[475]** the Charlotte Ann Hayward married to Crutchley at Merthyr in 1822, and thus establishing the minority of the person so married, at the time of that marriage. The mother's subsequent marriage with Mr. Bridgwater was material on two accounts; first, on the score of identity again, that is to identify her as the mother of the minor; and, secondly, in order to shew that her own marriage was subsequent to her daughter's—the marriage at issue in the suit. For on the mother's widowhood at that time,

plainly depended her right of consent to her daughter's marriage; and consequently her title to institute the present proceeding. In the mother, being a widow, the sole right of consent to the marriage of her minor daughter clearly vested: for the father, I have said, died intestate; and it is pleaded and has been proved in the usual manner, namely, by a search into the records of that Court, that no guardian of the person of the minor had been appointed by any order of the Court of Chancery.

The circumstances of the marriage, and what immediately preceded and ensued upon it, are these:

The party, Josiah Crutchley, being the son of a man who had formerly kept the Angel Inn at Abergavenny, but who then lived on a farm near that town, and whose mother and sisters at that time kept and managed a public-house, the Bell, at Brecon, procured a licence, as for this marriage at Llandaff, by an affidavit, false in at least two particulars. For, first, he swore this minor to be of age; and, secondly, he swore her to be of the parish of Merthyr, where the marriage was meant to be, and afterwards actually was celebrated. Mrs. Hayward and her family retired as usual for the **[476]** night, on the day preceding the marriage, namely, on the 22d of March. Between two and three o'clock in the morning of the 23d the minor, Charlotte Ann Hayward, left her bed in which she slept with a younger sister, called up a maid servant, Webb, a girl younger than herself, whom she had previously engaged as her confidante; and, accompanied by Webb, made her escape through the dining-room window, dropping a note with which Crutchley had furnished her to mislead the family by holding out that she was going to be married to Crutchley at Carmarthen. Webb and Miss Hayward went directly to the Bell at Brecon, kept by Crutchley's mother and sisters, where they were joined by Crutchley himself; and these with a fourth person, Crutchley's sister, immediately set-off for Merthyr in a chaise from Abergavenny, previously hired and kept in readiness by Crutchley. At Merthyr the party arrived about seven in the morning: and there, after breakfast, the marriage ceremony was performed by Mr. Jones the curate, whose services in that behalf Crutchley had bespoke whilst breakfast was preparing at the inn. Crutchley's sister was left at Merthyr; the others, with Webb, proceeded in the same chaise through Abergavenny to Hereford, where they arrived about five in the evening and put up at "the hotel" kept by a Mr. Bennett. There they dined in a room below stairs, and Morgan, the chaise driver, was soon after, namely, about seven o'clock, paid and discharged, with an injunction from Crutchley to conceal the place where Miss Hayward and himself had alighted, should this be inquired after. In compliance with which, this Morgan having, on going out of Hereford, actually **[477]** encountered Mr. Bridgwater, who afterwards married the mother, and Mr. Augustus Hayward, the brother of the minor, in pursuit of her, told them that he, Morgan, had left her with Crutchley, at the Green Dragon. The alarm given by the one sister, on discovering the absence of the other, the distress of the mother at the news of the daughter's elopement, the pursuit of Mr. Bridgwater and Mr. Augustus Hayward, first in the Carmarthen direction; next, finding that a wrong scent, across the country to Merthyr, where they received intelligence of Crutchley's actual marriage to Miss Hayward; and, lastly, to Hereford, at the entry of which city they encountered Morgan, as I have said, are circumstances all spoken to very fully by the witnesses in the cause, and account for the arrival at that precise time, of the persons in pursuit of these parties, at Hereford. In the mean time Crutchley, suspecting a pursuit, from hearing that a chaise and four, with two gentlemen, had just arrived, took the alarm, and decamped with his bride, from Bennett's hotel to another inn, called "the Commercial Hotel," kept by a person named Woakes, leaving Webb at the house where they had first alighted. But the pursuers, having at last discovered the retreat of the fugitives, through a porter sent to convey their luggage from Bennett's hotel, arrived at the Commercial Hotel so close after them, that the coffee, which, according to the landlord Woakes's evidence, they had ordered upon their arrival, had not yet at that time been served up. The minor then, after some persuasion, consented to go back to her mother's at Brecon, where she arrived at about four or five o'clock on the next morning, that **[478]** of the 24th of March; and she has since resided there with her mother, without any suggested intercourse or communication with Crutchley.

Now the daughter's minority—the mother's sole right of consent to her marriage—her prior ignorance of, and when known, her total dissent from, her daughter's marriage, that of the minor in question in the suit—and, lastly, that such marriage

was had under and by virtue of licence, are facts in this cause which are all proved beyond any possibility of doubt or question. And it need scarcely be said that, upon this state of facts, cohabitation or not, the marriage is, under the statute of Geo. 2, clearly a nullity.

But as with reference to a later statute, to which the Court's attention must now be directed, cohabitation or not, in other words, the circumstances ensuing upon this marriage are highly material to the question of its validity; so that the legal effect of these still remains to be considered. I will only premise that the circumstances themselves as narrated above are fully proved by the several persons mentioned by name, in the course of the narrative, by the sister and brother of the minor; by Webb, the maid servant; by Mary, sister of the party Josiah Crutchley; by Morgan, the chaise driver; and by Bennett and Woakes, the masters of the respective inns at Hereford. And I must add to this, that the effect of their evidence, which reaches uninterruptedly, from the minor's elopement from, to her rescue at, Hereford, and subsequent return to her mother's at Brecon, is such as to satisfy my mind, not only that these parties have never cohabited, but that their de facto marriage has never been consummated.

[479] The later statute to which the Court has alluded is that of 3 Geo. 4, c. 75; the second section of which has provided, that "in all cases of marriage had and solemnized by licence, before the passing of this act, without any such consent as is required by so much of 26 Geo. 2, c. 33, as is recited in, and repealed by the first section,(*a*)[1] and where the parties shall have continued to live together as husband and wife, till the death of one of them, or till the passing of this act, or shall only have discontinued their cohabitation for the purpose, or during the pending, of any proceedings touching the validity of such marriage—such marriage, if not otherwise invalid, shall be deemed to be good and valid, to all intents and purposes whatsoever."

Now, with respect to the effect of the above clause upon the validity of this marriage, it is obvious that the single question must be—Did these parties only discontinue their cohabitation for the purpose of some proceeding touching the validity of this marriage? For the parties are both still living; and the act in question did not receive the royal assent till the 22d of July, 1822, the cohabitation of the parties having finally ceased (if indeed they can be said, with any propriety, ever to have "cohabited" at all) on the 22d of March preceding the very day of the marriage.

I am satisfied that the case before the Court is neither within the words, nor within the intention, of this clause of the act, under the provisions of which, as being an act ex post facto, it clearly ought not **[480]** to be included, by construction or implication. Not within the words, for a reason already hinted; namely, that a cohabitation can scarcely, with propriety, be spoken of as discontinued which had never commenced: there can be no end, properly, of what has no beginning. Not within the intention; for the intention of this clause was obviously in my judgment, if not to include a particular case, yet still, only to confirm marriages, which the parties themselves had previously confirmed (so far as in them lay) by a subsequent cohabitation, subsisting at the passing of the act, or only suspended for the institution of some proceeding, in order to ascertain thereby, this being doubtful, the legal validity of such marriage. Consequently, I am of opinion that this marriage, null and void under the former act, is not rendered valid by the retrospective provisions of this recent statute, of which it comes, I have just said, neither within the spirit nor the letter; but that it still remains a nullity, which I pronounce it. And I am further of opinion that the licence under which this marriage was had, having been procured by the wilful false swearing of Crutchley, the de facto husband, he ought, though proceeded against in pœnam merely, to be condemned in costs—a measure for which the Court, it seems, has a direct precedent;(*a*)[2] and I accordingly condemn him in the costs of this suit.

(*a*)[1] Namely, all that part of 26 Geo. 2, c. 33, which required (any) consent to the marriage of a minor by licence, under pain of such marriage being null and void for want of it.

(*a*)[2] Viz. in the case of *Porter* v. *Buckingham;* a cause of nullity of marriage (not said, however, upon what grounds, or in what Court) in 1772—cited by counsel.

[481] LAWRENCE, Attorney of Thomas *v.* MAUD AND PICKWELL. Prerogative Court, Trinity Term, 1st Session, 1823.—Quære, whether the Court has power to rescind the conclusion of a cause, after sentence, against the sense and consent of the party for whom it was given. Parties praying to be heard upon their petition, as to any question, in the exercise of any other than a sound discretion, do so at the imminent risk of costs.

(On petition.)

This was an application to the Court to rescind the conclusion of a cause, after sentence, but with a question still outstanding as to costs,(*a*)[1] under the circumstances, and for the purpose stated in the judgment, made in behalf of Mary Maud and Sarah Pickwell, and opposed on that of Frances Mary Thomas respectively, parties in the cause. It was made, in the first instance, on a motion which, being opposed, the Court declined acceding to. It was then renewed, as were also Mrs. Thomas's objections in the present "act on petition," which was sustained in the usual manner on both sides by exhibits and affidavits.

Judgment—Sir John Nicholl. This was originally a cause of interest (see page 331, ante) between Frances Mary Thomas, alleged to be cousin german once removed, and Mary Maud and Sarah Pickwell, alleged to be the second cousins of Elizabeth Harrison, the party deceased in the cause. The interests of the parties were propounded re-**[482]**-spectively in two several allegations; but it was agreed (*a*)[2] that evidence should be taken upon that of Mrs. Thomas alone, she being alleged of kin to the deceased in the superior or nearer degree. The parties entered into this agreement in consequence of the recommendation of the Court (see pages 334-336, ante), founded upon a suggestion that Maud and Pickwell, in the event of Mrs. Thomas proving her allegation, had no interest upon their own shewing; and that, failing to prove it, she, Mrs. Thomas, had no concern with the case set up by Maud and Pickwell; which, whether proved or not, must, to her, be matter purely indifferent.

Accordingly, evidence was taken upon Mrs. Thomas's allegation only, or rather upon such articles of it (being those subsequent to the 11th article inclusive (*c*)) as went to the single fact really at issue **[483]** between the parties, namely, the marriage of Peter Harrison, uncle of the deceased and grandfather of Mrs. Thomas, with Elizabeth (Pelham) her grandmother, and the consequent lawful descent of Mrs. Thomas from this Peter Harrison, whom Maud and Pickwell alleged to have died a bachelor. And upon publication of this evidence, and its perusal by both parties, the fact of such lawful descent of Mrs. Thomas from Peter Harrison appeared to be so fully substantiated, that administration of the deceased's effects was decreed to Mr. Lawrence, as her attorney, without opposition on the part of Maud and Pickwell, their proctor declaring that "he proceeded no further" in the cause. This decree passed on the 4th Session of Hilary Term in the present year; and the question of costs stood for the bye-day. In the mean time, however, the proctor for Maud and Pickwell received from America certain documents to the effect which I shall presently state, upon which the present application founds itself; in disposing of which the first point for consideration is the precise nature and object of the application itself.

(*a*)[1] In pronouncing for the interest of Mrs. Thomas, the Judge had refused to give costs; whereupon her proctor, on behalf of his party, had prayed to be heard on his petition, as to this question of costs on the bye-day.

(*a*)[2] This could only be by agreement—the rule being, in causes of interest, that the parties shall propound their interests and proceed throughout in proof of them, pari passu, even where the alleged next of kin, as in this case, are in different degrees of relationship. This rule also obtains in the case of an executor setting up a will, and a party claiming to be next of kin, whose interest is denied. But where an administration has been fairly and regularly taken the rule varies; for the administrator in such case is not bound even to propound his interest till that of the party questioning it has first been both propounded and proved. See *Dabbs* v. *Chisman, &c.*, 1 Phill. 155.

(*c*) The proctor for Maud and Pickwell had admitted in an act or minute of Court Mrs. Thomas's allegation, as laid to the 11th article inclusive, in return for permission given him, in the same act or minute, by the adverse proctor, to question or deny the rest of the allegation, without propounding (for the actual admission of Maud and Pickwell's allegation stood over) and going on to prove his clients' interest to question or deny it in the first instance—that is, in other words, without proceeding pari passu in the cause.

Now this application made at first, namely, on the bye-day after Hilary Term, on a motion, and since renewed in the present act on petition, is one, it must be admitted, of a novel kind. It is not to rescind the conclusion of a cause before sentence, but, in effect, to revoke a sentence itself—a sentence, too, given with the concurrence of the other parties, testified by their proctor's declaring that he "proceeded no further in the cause." It may be doubted how far the Court is empowered to revoke a sentence so given against the declared sense and **[484]** consent of the party in whose favour it is given. At the same time, it clearly appearing, prior to the actual conclusion of any suit, that a sentence in it, even purporting to be a final one pronounced by the Court, had proceeded in error, or been procured by fraud—the Court would undoubtedly go the utmost warrantable length in either of such cases to find itself the means of revising that sentence, in furtherance of, what would then be, the demands of real and substantial justice. In the present instance, however, the party in possession of the sentence has not questioned the right of the Court to proceed as prayed. She has joined issue fairly upon the merits; and what she denies is, not the power of the Court to accede to the prayer of the petitioners, Maud and Pickwell, but merely the propriety of its exercise under the circumstances stated, on their part, in the petition. Let us see, therefore, upon what grounds this application rests.

This application then, being of the nature which I have described, rests solely upon two documents received, among others relative to the Harrison family, from America, by the proctor for Mrs. Maud and Mrs. Pickwell, between the 4th Session and the bye-day of Hilary Term last. These documents are styled, in the act on petition, "an official copy of a grant of administration of the effects of Peter Harrison aforesaid to Mary Harrison, as widow of the said Peter Harrison, on the 18th day of May, 1775;" and "an official copy of an inventory of the said deceased's estate, made and given in by the said Mary Harrison, as such administratrix, on the first Monday in July of the same year." And they appear in the shape of extracts from the record book of the Court of Probate of Newhaven, in the State **[485]** of Connecticut in America,(*a*) where this Peter Harrison died, in the year 1775, having been for many years prior collector of the customs at that port. Hence it is inferred that Elizabeth (Pelham), who is pleaded by Mrs. Thomas to have survived her (alleged) husband Peter Harrison, neither was nor could be his lawful wife; upon the (supposed)

(*a*) These documents were as follows:—

No. 1.

At a Court of Probate, held at Newhaven, in Newhaven district, May 18th, 1775.

Administration on the estate of Peter Harrison, Esq., late of Newhaven, deceased, granted to Mary Harrison, widow of said deceased, on bond of 1000l. money with surety.

A true copy of record. Attest. JOHN HUNTZ, Clk.

No. 2.

At a Court of Probate, held at Newhaven, in Newhaven, district, on the first Monday of July, Anno Domini 1775.

Mary Harrison, administratrix on the estate of Peter Harrison, Esq., late of Newhaven, deceased, exhibited an inventory of said deceased's estate, which is accepted and approved for record.

[Here, in the original, follows the inventory.]

The above and foregoing is a true copy of record.

Attest. JOHN HUNTZ, Clk.

And I further certify, that the copy of the appointment of administration, and the foregoing inventory [the documents No. 1, and No. 2, printed above], is all that I can, after diligent search, find on the records of this Court appertaining to the estate of said deceased. Attest. JOHN HUNTZ, Clk.*

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* Clerk, that is, of the Court of Probate and Administration, in and for the district of Newhaven, in the State of Connecticut, in the United States of America, and keeper of the records thereof, said Court being a Court of Record; so certified [27th December, 1822] under the hand and seal of office of the Judge of that Court; as also under those of his Britannic Majesty's consul for the State and city of New York.

[486] proof of which fact the Court pronounced for the interest of Mrs. Thomas. And the Court is prayed to revoke that sentence, in order to afford Maud and Pickwell an opportunity of controverting the fact of Mrs. Thomas's lawful descent from Peter Harrison, by aid of that new light which the receipt of these documents has furnished them. Accordingly, it is further prayed that Maud and Pickwell may have leave to alter their original plea, which alleged Peter Harrison to have died a bachelor, and to plead that "he had married one Mary (leaving a blank for her maiden name), who survived him."

When this application was first made to the Court, upon motion, and before the documents themselves, upon which it is founded, were brought in, the Court suggested that the Christian name of "Mary" might probably be a mere clerical error for that of "Elizabeth." But taking these documents (now brought in) in conjunction with the evidence upon Mrs. Thomas's allegation, and with the affidavits exhibited in support of the averments on her behalf made in the present act, I entertain no doubt whatever of the fact being as I originally supposed it. It is a clerical error, and one that, I think, might occur without any great difficulty. The first document is a mere minute or memorandum in the register book that the administration passed, or was granted on such a day—it is not, what the act states it, "an official copy of the grant of administration" itself; and in such mere minute, or memorandum, the entering clerk might easily, in the hurry of business, have written "Mary" for "Elizabeth." Nor, as to the other document again, is this an official copy of an inventory, given in by the administratrix as [487] "Mary Harrison," and so subscribed. The inventory itself has no signature or subscription. It is true that the heading of the inventory states it to be of the exhibiting of "Mary Harrison, administratrix of Peter Harrison, &c.;" but this heading was obviously written by the clerk, as appears from the words "which is approved, &c." at the foot, who in writing it would naturally, the error not being detected, make it correspond, in this respect, with the former minute.

Now these being the sole foundation for the present application, and these at most only inferring that the lawful widow and relict of Peter Harrison was "Mary" and not "Elizabeth," how does the other case stand (not merely) inferring (but proving, I think, in a manner most satisfactory) that the lawful widow and relict of this same Peter Harrison really was Elizabeth (formerly Pelham) and not Mary?

1. And, first, how does this matter stand in the evidence taken upon Mrs. Thomas's allegation in the original cause. The marriage, de facto, of Peter Harrison with Elizabeth Pelham, in June, 1746, is fully proved in such evidence. It is fully proved that they lived and cohabited as husband and wife, with mutual acknowledgment and general reputation, from that time to the death of Peter Harrison in 1775—he, too, being in a public situation, that of collector of customs at Newhaven. It is proved that they had four children, a son and three daughters, baptized, acknowledged, and reputed as legitimate—that on the death of the son here, in England, in 1772, letters were written by relatives here condoling with the parents, as upon the loss of a [488] legitimate child; and, lastly, that two of the daughters (the third, Isabella, having died young), namely, Hermione, afterwards Mrs. Cargy, and Elizabeth, afterwards Mrs. Ludlow, and mother of Mrs. Thomas, actually inherited property from the parents, as legitimate children. How is all this at all consistent with the mother of these children not being the wife, or at least not the lawful wife, of Peter Harrison, but a Mary (something)? for even to this instant the parties Maud and Pickwell do not pretend to furnish her original sirname: nor can they, to this instant, pretend to any knowledge of Peter Harrison's marriage with a female of such Christian or baptismal name, other than that derived by mere inference from these documents.

2. But, secondly, it is quite clear in my judgment upon the affidavits now brought in in support of Mrs. Thomas's act, that administration of Peter Harrison's effects was granted to Elizabeth, and not to Mary Harrison, as his widow and relict; and, consequently, that the occurrence of "Mary" instead of "Elizabeth" in these documents is, and must be, a mere clerical error. For instance, Mr. Curgenven, who was well acquainted with the family of Peter Harrison, whom he succeeded as collector of customs at Newhaven, deposes to having himself seen the original letters of administration under the seal of the Probate Court at Newhaven, of the effects of Peter Harrison, granted to Elizabeth (not Mary), as his widow and relict. He further deposes to Elizabeth (grandmother of Mrs. Thomas) acting as such adminis-

tratrix throughout. This deponent himself was actually examined as a witness on the trial, at a court of common law held at Newhaven, of a [489] suit (the particulars of which he also deposes to brought against this Elizabeth, as widow and administratrix of Peter Harrison's effects, and in that character solely. Even the inventory itself said to be exhibited by a Mary Harrison, as administratrix, furnishes, in conjunction with the affidavits, a pregnant proof that the real administratrix was this Elizabeth. The inventory specifies a negro man named Apollo; a negro woman named Lucy; and two paintings, one of the "Crucifix" (meaning, I suppose, the crucifixion) and the other of "St. Francis." Now it distinctly appears from the affidavits of Mrs. Thomas herself, of Mr. Curgenven, and of a Miss Brenton, that Mrs. Thomas's grandmother, Elizabeth, actually had in her service and possession this very negro and negress, and these very pictures so specified in this inventory: how otherwise acquired than as the administratrix of Peter Harrison, and consequently the person who exhibited the inventory, it would be difficult plausibly to conjecture even.

I, therefore, reject this petition, and I think that I am bound to reject it with costs. In renewing their application to the Court by petition, upon such insufficient grounds, Maud and Pickwell seem to me not to have exercised a sound discretion; the effect of which, in strictness, undoubtedly is to render them liable to Mrs. Thomas in the costs of this proceeding. It may be commendable, perhaps even prudent, in Mrs. Thomas, under all the circumstances, to waive her costs; but I hold that the Court is bound, in strictness, to give her the means of recovering these from Maud and Pickwell, if so disposed.

Petition rejected.

[490] DICKENSON *v.* WHITE. Prerogative Court, Trinity Term, 4th Session, 1823. —A. dies, leaving, by will, his wife B. sole executrix and universal legatee. Allegation propounding a codicil to A.'s will, found subsequent to B.'s death, on behalf of a legatee (B.'s executor refusing to take administration of A.'s unadministered effects with his will, and this codicil annexed) admitted to proof.

(On the admission of an allegation.)

John Whitehead, the party deceased in this cause, died on the 28th of February, 1819. In the month of July in that year probate of his will, bearing date on the 3d of November, 1817, was taken by his widow and relict, Hester Mary Whitehead, as sole executrix. In virtue of that probate the widow, who was also, under this will, universal legatee, collected and administered the deceased's personal estate and effects, valued, after payment of his debts and funeral expences, at about 1600l.

On the 9th of February, 1823, Hester Mary Whitehead, widow of the deceased, died, leaving several testamentary papers, probate of which was duly taken by James White, party in the cause, her sole executor. Subsequent, however, to the death of Hester Mary Whitehead, a codicil (so said) to the will of John Whitehead, deceased, was first discovered. But White refusing, when called upon so to do, as executor of the wife, to accept letters of administration, with the will and codicil annexed, of the effects left unadministered by the wife of her late husband, the party deceased in this cause, whom she, the wife, had survived and represented as above—the latter, this codicil, was propounded in an allegation which now stood for admission, on behalf of Mary Dickenson, one of the universal legatees for life named in the said codicil, the other party in the cause—the party, namely, promoting it against [491] White, as sole executor of Hester Mary Whitehead, the widow and relict of the deceased.

This allegation propounding the codicil, after pleading the factum of the will in November, 1817, and that of the codicil (alleged) bearing date on the 31st of July, 1818 (this last expressly pleaded to be all in the deceased's hand-writing), as also that probate of such will only was taken by his widow, Hester Mary Whitehead, on the death of the deceased in 1819, went on to plead, that

"Hester Mary Whitehead, the widow and relict of the said John Whitehead, the testator in this cause, departed this life on or about the 9th day of February, in the present year 1823—that, immediately after her decease, Alexander Hale Strong, of Lincoln's Inn, in the county of Middlesex, solicitor, attended at the house of the said Hester Mary Whitehead, for the purpose of searching for her will; and having there met John White, party in this cause, and others of the family and friends of the said deceased, several testamentary papers which had been found were then read over by

the said Alexander Hale Strong, in the presence of the said John White, and the said other persons—that the will and other testamentary papers of the said Hester Mary Whitehead, deceased, having been deposited in different places, a further and final search was afterwards made by the said Alexander Hale Strong, in the presence of the said John White and others of the family and friends of the said deceased, in order to discover whether any further or other will, or testamentary paper, had been overlooked; and a trunk, or portmanteau, having been found in a closet in one of the garrets of the said deceased's house, con-**[492]**-taining old bills and receipts, and a variety of other papers, which had not been before examined, the said trunk, or portmanteau, was brought down into a bed-room, for the purpose of being so examined; and at the bottom of the papers therein contained was discovered a small roll of paper, sealed, and having the following indorsement, in the hand-writing of the said John Whitehead, the deceased in this cause:—'This paper to be opened by F. Le Man, Esq., in case of death'—that the said paper, on being so discovered, and appearing to be of a testamentary nature, was delivered to the said John White, party in this cause, and was by him taken to F. Le Man, Esq.; and thereupon the seal of the said paper was broken, and the same was read over by the said F. Le Man, and found to be the very codicil now pleaded and propounded in this cause."

The codicil so propounded was in these words:—

There is 1700l. in the Bank of England, consisting of 2000l. consolidated 3 per cents. annuities, in my name, belonging to my wife Mrs. Whitehead; this sum, with the value of 3000l., a policy of insurance on my life,(*a*)[1] in case of my own, or both of us dying, is designed as a provision for the niece Mary Dickenson, and the nephew James Dickenson, to be appropriated for their use solely, and to be secured so as to be protected from any claim that may arise from any other applicants in point of con-**[493]**-sanguinity; and the principal money to be secured in the Court of Chancery during their minority, and afterwards appropriated for their use only, with the personal property belonging to myself, so that the capital may be undisturbed during their lives, and afterwards to be divided equally between my wife's brother's and sister's children.(*a*)[2] Witness my hand, this 31st July, 1818.

J. WHITEHEAD.

Judgment—Sir John Nicholl. I have no hesitation in admitting this allegation to proof. The paper which it propounds is perfect in form, as well as testamentary in effect; and having been written (so pleaded) by the testator subsequent to his will, it must, on this and the other facts stated in the allegation connected with it appearing in evidence, beyond all question, be entitled to probate as a codicil to his will. I presume that its being overlooked upon the testator's death, and the widow, consequently, taking probate of the will alone, was purely accidental.

At the same time, as this whole case must depend upon hand-writing, and finding (not inconsiderably on the latter) it would be material to connect the alleged codicil with the testator, by pleading (that is, the fact being such) that the trunk in, and other papers among, which it was found had formerly belonged to the testator. It would also be proper, at any rate, to introduce into the plea who the Mr. **[494]** Le Man is, to whom the opening and execution of this paper purports to be confided, and how connected with the deceased.

With these corrections, one or both, I admit the allegation.(*a*)[3]

Allegation admitted.

(*a*)[1] It is to be observed that there was no such sum as that expressed, or any other in the bank, belonging to the testator at the time of his death. The policy of insurance, however, was in existence, and the sum of 3000l. was actually received upon it by Mrs. Whitehead.

(*a*)[2] James and Mary Dickenson were children of a sister of Mrs. Whitehead; the codicil only styles them the nephew and niece, without saying whose nephew or niece.

(*a*)[3] These corrections being effected in Court, viz. by inserting, after the words "bills, receipts, and a variety of other papers" the following—"Which had belonged to the said John Whitehead, deceased"—and after the name and addition "F. Le Man, Esq.," the following—"Who was a confidential friend of the said John Whitehead, deceased, in his life-time," the allegation stood admitted to proof.

WEBB *v.* NEEDHAM. Prerogative Court, Trinity Term, 4th Session, 1823.—Widow usually preferred to a next of kin in the grant of administration, notwithstanding her having married again.—Administration, upon what principle only, granted to a creditor—can only be, failing any other representative. A next of kin being also a creditor, a reason against his being preferred in a contest for the administration, either with the widow, or, probably, any other next of kin.

(On petition.)

Thomas, Needham, the party deceased, died in the month of December, 1809, intestate, without child or parents, leaving a widow, Louisa Needham, and one brother, Ralph Needham, his only next of kin.

In the month of March, 1823, this Louisa (formerly Needham, but then Webb, wife of William Webb) applied for administration of the goods of the deceased, as his lawful relict, and was duly sworn, and had entered into the usual bond, when a caveat against the grant was found to have been **[495]** entered on behalf of Ralph Needham, the brother, who subsequently appeared and prayed that administration of the deceased's effects might be granted to him as next of kin.

The substance of the allegations on either side, as contained in an "act on petition," supported in the usual manner by affidavits, is stated in the judgment.

Judgment—Sir John Nicholl. Thomas Needham, the deceased, died in the month of December, 1809, intestate. Administration of his effects is now applied for both by the intestate's wife and by his brother, and the Court has to determine between their several claims.

Administration of the goods of an intestate may be granted either to his wife or to a next of kin. At the same time it is well known that in practice, at least in modern practice, the wife is preferred in this matter under ordinary circumstances. In the present instance, however, it is attempted to be shewn that there are special reasons for reversing this order and giving the brother a priority. The special reasons alleged are two: the first of these is that the wife has married again and is now under coverture. The second is that the brother is not only next of kin (indeed the sole next of kin), but that he is also a creditor of the deceased's estate to a large amount; in fact, to nearly the whole amount of the effects to be administered.

1. The single objection made to the widow is her having married again. Now this, under the circumstances, is, I think, no valid objection. The party who raises it, the brother, is entitled only to a **[496]** moiety of the effects; it is not as if the deceased had left children, one of which children, supported by the rest, applied for administration in preference to the mother. There the children being entitled to two-thirds, and the mother to one-third only, of the distributive property, this circumstance of the mother having married again might induce the Court to grant the administration to a child in preference. That, however, is not this case; and it will be time enough to determine what is fit to be done in that case when it occurs. But, as in contest with the brother, I think that the wife's having married again is no valid ground of objection to her; and I find it to have been so held in a case determined in Dr. Andrews's time, of which I have a manuscript note, where, as in the present, it was urged against the wife by the brother of an intestate. I will only add that, if a re-marriage is no defeasance of the wife's title to a priority in this matter, generally, there is nothing whatever in special to make it such in the present case. The second husband is stated and sworn to be a man of some property independent of his business, that of a perfumer; thus affording the brother a sort of extra security for the custody and due distribution of the distributive property. The wife, too, has been actually sworn administratrix, and has given bond with sureties, who are also stated upon oath to be in respectable circumstances; which sureties themselves, thus able, probably are willing at the same time to justify.

2. Dismissing this part of the case, it remains to see whether the brother has made out his claim to a preference on the other matter alleged—that of his also being a creditor of the deceased.

It appears that the estate and effects of the de-**[497]**-ceased consist of 450l. 3 per cent. consolidated bank annuities, devised to him by the will of his father, Ralph Needham, deceased, payable on the death of his mother, ——— Needham, which happened only in the month of July, 1821; which stock, together with the dividends accruing since the death of the mother, is valued at about 340l. Now the brother alleges that for divers monies lent to the deceased prior to his departure from this

country for New York, in 1807; for other sums sent, to and advanced for him whilst at New York; and for funeral expences, the deceased's estate is truly and justly indebted to him, the brother, in the sum of 300l. and upwards; that is, in nearly the whole sum at which the effects are valued. To this it is replied, on the part of the wife, that the estate of the deceased is indebted to the brother in no such or in any other sum; that the pretended advances in question to the deceased were really made by the mother through the brother's medium or intervention only; and that the brother's claim is now advanced for the first time, the deceased having died in 1809.

Now here, in the first place, this circumstance of the brother being also a creditor of the deceased's estate, on which he relies for sustaining his claim to a priority, is positively denied by the wife. The parties then here are distinctly at issue; and this, being a question purely extrinsic and collateral, is one into the merits of which, most assuredly, the Court will decline to enter. But the brother's having disputable, or at least disputed, claims upon the intestate's property is a circumstance rather adverse to than in favour of his pretensions to the administration, in my view of the case. Administration is only granted to a creditor failing any other repre-[498]-sentative; in which case there being nobody to sue, the creditor not being himself administrator, and so able to pay himself, must almost of necessity lay out of his debt. But where a person whose duty and interest it is to contest claims on the deceased's estate is before the Court willing to undertake the administration, he or she it is that is entitled to the grant, and not the creditor, both in law and reason. As creditor merely, indeed, it is obvious that Mr. Ralph Needham could only obtain letters of administration on the widow (and next of kin) refusing or declining to take them. This union of the two characters in his single person is rather, I repeat, adverse than favorable to his claim to be preferred, in my apprehension of its effect.

On these grounds I am of opinion that neither of the reasons alleged are good in defeasance of the widow or relict's prior title to be administratrix. As for the matter of laches objected to her in the argument—the parties in this respect are in pari delicto; nor is the one that I see at all in a condition to employ it with effect as an argument against the other. The deceased's estate, save as to the monies now coming into distribution, is admitted on all hands to have been insolvent. Administration was applied for as soon as, or within a reasonable time after, the death of the mother furnished any thing to administer; and that, at least for any practical purpose, was time enough.

Upon the whole, I decree administration to the wife; and I think that, in order to deter parties in future from attempting to gain undue advantages, or those denied them in law, by vexatious experiments of this nature, I am bound at the same time to condemn the brother in costs.

[499] MILLER *v.* BLOOMFIELD AND SLADE. High Court of Delegates, Trinity Term, 19th June, 1823.—A libel, pleading a church rate, including "stock in trade," admitted to proof.

(An appeal from the Court of the Peculiar and Exempt Jurisdiction of Great Canford and Poole.(*a*))

The Judges who sat under this commission were Mr. Baron Garrow, Mr. Justice Best,(*b*) Dr. Arnold, Dr. Jenner, Dr. Daubeny, Dr. Gostling, Dr. Dodson, and Dr. Lee.

This was an appeal from an order or decree made on the 8th day of October, 1822, by the Wor-[500]-shipful and Reverend Charles Bowle, Clerk, Master of Arts, Principal Official of the Peculiar and Exempt Jurisdiction of Great Canford and Poole, in a certain cause or business of subtraction of church rate then depending before him in

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(*a*) The parish of St. James in Poole is within, and forms part of, the royal peculiar of Great Canford and Poole. The official, who is the ordinary of this peculiar, is appointed by the lords of the manor of Great Canford, of which manor Poole is a part. [See Hutchins's Dorset, vol. i. p. 12-14.] From the official of a royal peculiar the appeal lies not to the bishop of the diocese, or to the metropolitan, but immediately and in the first instance to the King in Chancery; that is, in other words, to the Court of Delegates.

(*b*) Mr. Justice Richardson was also named in the commission, but was too indisposed to be present at the hearing of this appeal.

judgment, between Joseph Barter Bloomfield and Robert Slade the younger, churchwardens of the parish of St. James, in the town and county of the town of Poole, the parties promoting the said cause or business, on the one part; and Richard Miller, a parishioner and inhabitant of the said parish, the party against whom the said cause or business was promoted, on the other part; whereby the said Judge admitted to proof a certain libel, and exhibit annexed, given in on the part and behalf of the said Joseph Barter Bloomfield and Robert Slade the younger, the respondents.

The libel and exhibit given in on behalf of the respondents, from the decree for admitting which this appeal was interposed, were in substance as follows:—

1. The first article of the libel pleaded that on or about the 12th day of December, 1821, several of the parishioners, &c. of the parish of St. James, in the town and county of the town of Poole aforesaid, duly met in vestry, pursuant to public notices previously given for that purpose, in order to make a church rate for the use of the church of St. James in the said parish, and the repairs and ornaments thereof, and other matters and things, and relating thereto; and did then and there resolve and order that a church rate of three shillings in the pound should be allowed the churchwardens accordingly; and that the same should be made agreeably to the **[501]** then present poor rate, and according to the usual mode of making the church rate within the said parish.

2. The second article merely pleaded the exhibit, in part supply of the premises, annexed to the libel, to be a true copy of the order of vestry, made as pleaded in the preceding article.(*a*)

3. The third article pleaded that, in conformity with such order, a rate of three shillings in the pound agreeable to the then present poor rate, and according to the usual and customary mode of making the church rate within the said parish, was made and assessed on the inhabitants and others of the said parish of St. James, liable to payment of the same, to wit, on the 28th day of December (as would appear by the said original rate to be produced at the hearing of the cause); that the said rate was subsequently confirmed, under the usual conditions, by the official; and that, in conformity thereto, most or some of the said parishioners, &c. had paid the se-**[502]**-veral sums respectively assessed upon them in the said rate.

4. The fourth article pleaded that Richard Miller (the defendant) was and is a parishioner of St. James, occupying certain messuages, &c. within the same; and that, by the rate so duly made as aforesaid, he was and is justly rated and assessed, agreeable to the usual mode of making the church rate within the said parish, in the sum of 13l. 7s. in manner following—to wit, for a tenement in Hill Street, of the annual value of 22l., the rate or sum of 3l. 6s.; for a malt-house in Hill Street, of the annual value of 40l., the rate or sum of 6l., being at the rate of three shillings in the pound for the annual value of the same; and the sum of 4l. 1s., being at the rate of nine shillings for every hundred pounds in value of the stock in trade of the said Richard Miller, which said several sums he, the said Richard Miller, should and ought to pay as his proportion of the said rate.

5, 6, 7, 8. The fifth, sixth, and seventh articles merely pleaded the circumstances usually pleaded, mutatis mutandis, in libels for church rate, namely, that Slade and Bloomfield (the plaintiffs or promovents) were duly elected, sworn, and admitted into the office of churchwardens of the parish of St. James in the said town of Poole, and were such at the time of making the said rate, and at the commencement of the suit—that Miller, the defendant, though once or oftener requested, refused or delayed payment to the said churchwardens of his proportion of the rate aforesaid; and that

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(*a*) The exhibit was as follows:—

At a vestry duly holden this 12th day of December, 1821, at the usual place, for the parish of St. James, in the town and county of Poole, pursuant to public notice.

We, whose names are underwritten, do approve and allow of the aforegoing account of Joseph Barter Bloomfield and Robert Slade, jun., the churchwardens, by which there appears to be due to the parish the sum of 178l. 7s. 8d.

We hereby order that an assessment or church rate of three shillings in the pound be allowed the churchwardens, and that the said rate be made agreeable to the present poor rate, and according to the usual mode of making the church rate.

(Signed) J. B. Bloomfield. George Kemp, &c. &c.
Robert Slade.

he, Miller, was a parishioner of the said parish, within the peculiar and exempt jurisdiction of Great Canford and Poole; [503] and therefore, and by reason of the premises, was subject to the jurisdiction of the Court. The eighth was the usual formal concluding article, praying that the defendant might be condemned in the sum so rated and assessed upon him.

For the appellant—Swabey and Lushington, Doctors, and Mr. Tindal. The question at issue in this suit is one of considerable importance, though not, as it appears to us, of equal difficulty. It may be stated generally as the liability of stock, under the circumstances pleaded, or similar to payment of church rate—a practice, we apprehend now for the first time, submitted to the test of legal inquiry.

The object then of this suit is to enforce a church rate embracing, among other property admitted to be liable, stock in trade. Now we contend that, under the circumstances pleaded, the vestry or churchwardens must, in the end, fail to enforce a rate including stock in trade; and consequently that this libel, pleading a rate so made, ought to have been rejected.

Is it meant to be pleaded as a "custom," in the strict legal sense of the word, to rate stock in trade to the church within this particular parish? If so, the pleading is faulty: the "custom" should have been pleaded in the usual legal mode of pleading a custom; and the libel must be so reformed. The legality of a custom so understood, to rate stock in trade to the church within this particular parish, is a question not raised upon the present plea. Indeed were this pleaded as a "custom," the first thing to be proved would be its existence; which, were either the Court below or this Court to pro-[504]-ceed to try, it would of course be ground for a prohibition.

If, however, which we rather suppose, it is meant to be pleaded as usual, or a practice merely, to rate stock in trade to the church at Poole, we maintain it to be one utterly untenable. It may for some time have existed in the absence of opposition: an objection taken to it at any time must have been sustained.

It has probably been usual, as pleaded, in this parish to include stock in the church rates. But in the instance of no former rate (from the small amount in value possibly either of the stock rated, or of the rate itself, by reason of the church not requiring any extensive reparation, or for some other cause) does any opposition to this mode of rating appear to have been made. This circumstance leaves the question as to the legality of that practice still open. We maintain it, viewed in what light soever, to be clearly illegal.

Church rate is invariably so held a personal demand indeed—but in respect of real estate only; and not in respect of personal estate, either alone or jointly with real estate. We at least are aware of no instance of church rate formally levied or imposed on any other than lands and tenements only. If our opponents are more fortunate than ourselves in the knowledge of any, we shall have the benefit of their discovery: if they are not, this absence perhaps of all actual, but certainly of all legal, precedent, furnishes a nearly unanswerable argument against the legality of the rate now sought to be recovered.

[505] The wisdom of the law upon this head, as we understand it, needs no vindication. All personal property is of a fugitive kind; and stock in trade is one of the most fugitive kinds of personal property. For these, as well as other obvious reasons, it is one of the least proper subjects that can well be imagined of strict investigation, either for this purpose of taxation or for any other. That it has been, and must again be, where the law authorizes or requires it, will be readily conceded; but we submit that the law must authorize and require it strictly and specifically, in order to its being subjected to any such inquisition, with any sort of propriety.

Again, a practice of rating stock in trade seems to us unjust, as subjecting trade to a demand from which persons not in trade, though having stock (as farmers, for instance) are exempted. It is very unequal too, even as between different trades, some of which require a large stock, and others comparatively hardly any, to enable those who pursue, to conduct them advantageously. All these are arguments against any irregular practice of taxing stock in trade, being fixed and confirmed, as it is now sought to be, by legal sanction.

The only authority, if authority it be, for rating stock to the church under any circumstances which occurs to us, is the judgment of the thirteen civilians assembled at Doctors' Commons, and printed in Godolphin (Repertorium Canonicum, App. s. 31, p. 11), which does, in substance, seem to lay it down as a general proposition that the

levy may be either upon stock or land. We allude to a certain "order or direction," as it is termed, "touch-[506]-ing the liability of property to the reparation, more immediately of the church and church-yard of Wrotham, in Kent:" but "to be applied generally," as the order expresses it, "upon occasions of like reparations to all places in England whatsoever;" printed as above. Now here, in the first place, by what authority these thirteen civilians met and drew up any such "order," no where appears. Nor further does it appear, at least on Godolphin's shewing, that they ever met, or drew up any such order at all—a matter which is fairly open to suspicion at least, from the questionable character of the "order" itself. It occurs, not in the useful repertory of ecclesiastical law as published by Godolphin, but merely in the appendix set forth, non constat by whom, to a second edition of the repertory published by the booksellers, at a time when its author was no more.(*a*)[1] After all, the rate here sought to be recovered derives little or no aid from these "instructions" for making church rates, even admitting them to be genuine. All which they purport to sanction is a levy either upon land or stock—"even for the best," as they phrase it, but not on both. Here the rate sought to be recovered is both on land and stock.

We are aware that it is usual in places to levy poor rate on personalty; but that, we contend, in [507] no sort infers the propriety of levying church rate. Levies to the church are not, like those to the poor, dependant upon, or growing out of, any statute. The general law imposing the reparation of the church upon the parishioners, and of course, at the same time, regulating the levy of those sums necessary to that reparation, must obviously have been settled long prior to any consideration of poor rates; which, it is well known, were unheard of prior to the reign of Hen. 8; and were only placed upon their present footing by a statute late in the reign of Elizabeth.

Upon these grounds it appears to us that this libel ought to have been rejected in the first instance; and, consequently, that the Court is bound to reverse the order for its admission; and by so doing, in effect, to dismiss the appellant from all further observance of justice in the present suit.

For the respondents—Phillimore and J. Addams, Doctors, and Mr. W. P. Taunton. It is pleaded, and for the purpose of the argument may be taken as proved, that it hath been usual, or the practice, in Poole, to levy church rate on personalty or stock in trade.(*a*)[2] The continuance of that practice (for as a practice merely, in contra-distinction to a legal custom, it is, and was meant to be pleaded) is now, for the first time, opposed; and the point immediately at issue is, whether the practice in question has any thing so revolt-[508]-ing, on the face of it, as to subject the libel in which it is pleaded to instant and summary rejection.

Our opponents have undertaken to shew that it is a practice of this revolting description, and that if sustainable at all, it could only be in virtue of a strict legal immemorial custom of rating; which custom, however, say they, is not pleaded, and the existence of which, were it pleaded, we admit to them that neither the Court appealed from, nor this, the appellate, Court, is competent to try. But that the practice itself in question partakes any thing of the nature or character sought to be ascribed to it, we by no means admit; on the contrary, we are both prepared to deny this, and to sustain that denial by what appear to us valid arguments. For if it is, it must be deemed so, either upon principle or upon authority: but neither the one nor the other of these, in our view of them, seem to sanction any such inference.

And first as to principle—is there any reason, upon principle, why personal property, especially why visible personal property, yielding a profit, within the parish, should not pay to the reparation of the church as well as real property. We are aware of none. Church rates are admitted, on all hands, to be taxes, not upon property so much, as upon persons in respect of property (5 Co. 67. 1 Bulstr. 20.

(*a*)[1] Godolphin died 1678 (4th April). The second edition of the "Repertorium Canonicum," with the appendix, only made its appearance in 1680. The appendix sets out with stating that, "The former tract being written only by way of essay, it was thought expedient by the friends of the bookseller to make some brief additions to this second impression concerning some things that are of daily use." Among these "additions" are this "order and direction."

(*a*)[2] This appeared by the church books from as far back as 1751. The church books prior to 1751 were said to be lost; and that evidence of their being so lost or mislaid had been given by the vestry clerk of Poole in an action as long ago as 1791.

Degge, 166); and why not upon persons in respect of personal property, as well as upon persons in respect of real property, we, upon principle, are at a loss to imagine. Every parishioner is bound, of common right, to the repairs of his parish church. "Ad refectionem ecclesiæ debet omnis populus, se-**[509]**-cundum legem, subvenire;" by a law as old as King Canute.(*a*) "Unusquisque parochianus," say Lyndwood and John of Athon, "ad reparationem ecclesiæ tenetur, &c." (*b*) "All the parishioners and landholders," says Degge,(*c*) "are bound to the charge;" apparently distinguishing between the two, and making both liable. Now every parishioner being thus, of common right, and upon principle, bound to contribute to these repairs, why the holder of stock should be exempted to the necessary imposition of a double onus upon the holder of land is to us, upon every general principle at least, wholly undiscoverable.

But it has been objected, and even dwelt upon as a principal head of objection, that the nature of personal property is such as to render levies upon it, howsoever to be applied, if not impracticable, still obviously so inconvenient that they are not to be resorted to but under some strict or overwhelming necessity. But we submit that no great, if any, practical inconvenience from the levy of church rate upon stock need be apprehended. We admit that any tax upon stock must, to a certain extent, be arbitrary and unequal. But the tax itself of church rate is, ordinarily, too inconsiderable to render any trifling inequality in its collection a sensible grievance; nor is it necessary to its collection to institute **[510]** any thing like that strict inquisition into the circumstances of private persons, which would brand it as arbitrary, in any perceptible degree, on that account. Indeed levies on stock, much more considerable, have, at all times, and continue to be, raised upon the subject, if not possibly wholly unobjected to, yet still without furnishing any real matter for complaint. The old "dismes and fifteenths" were assessments on personal property only, originally the actual tenth, or fifteenth, of the subject's moveables; not attended in their levy with any practical inconvenience that we are aware of. The same may be said of "subsidies," which succeeded these dismes and fifteenths, and were levies involving, like the church rate in question, real and personal property in one common assessment, being taxes upon persons in respect of their property, real and personal, at the (nominal) rate of four shillings in the pound for lands, and two shillings and eightpence for goods. Nay, at this very day the land-tax, at the usual rate (four shillings in the pound) is a fifth (a nominal fifth), not only of the rent of all the land and all the houses, but of the interest of all the stock in the country; that only excepted which is lent to the State, or employed in the cultivation of land.

But apart from any consideration of dismes and fifteenths, &c. as admitting these to be wide of the mark, further perhaps than, at most, in the way of general illustration, let us see whether a review of those levies constantly making at this day, throughout the kingdom, for the relief of the poor, suggests any thing applicable to this part of the case. For to levies of poor rate and church rate the self-same considerations so nearly apply that, property of any particular description being rated with sufficient fa-**[511]**-cility to the former of these, to raise any question about the difficulty attendant upon rating property of that same individual description to the latter, would seem almost absurd. Nor, viewed in this light, is the distinction between these, as to their origin, at all material; though our opponents have, artfully enough sought to insinuate, that the one being due under the general law, and the other under a special statute, constitutes so great a difference as to bar all reasoning from the one to the other in all respects. As with reference to the purpose for which we are now placing them in juxta-position, that distinction makes no difference in the case whatever.

The statute of 43 Eliz. for raising poor rates is evidently large enough to comprehend all species of personal property under the term "the ability" of the parish: there is

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(*a*) Ll. R. Canuti. apud Brompton, Col. 929. The editor is unable to find any such law among the laws of King Canute in the great collection of Labbe and Cossart. Vide Concil. tom ix. pp. 915-935.

(*b*) Lindwood, De Eccl. Adif. C. Licet Parochiani v. Reficiendarum Ecclesiarum. Et De Officio Archidiaconi verb. Reparatione. Johannes de Athon in Othob. C. Improbam. verb. Ad hoc tenentur.

(*c*) P. 164.

nothing whatever in the statute which limits or confines that term, in this application of it, to real property. A series of determinations however, founded on the best and wisest principles, has excluded from rateability to the poor all personal property not visible and yielding a profit: but still leaving personal property situate locally within the parish, and at the same time visible, and yielding a profit, liable to poor rates. That series of determinations has done something more; for owing to some inconvenience, partly perhaps real and partly supposed, attending this matter of taxing stock in practice, Courts have always (or at least till lately have always (*a*)[1]), been guided by the **[512]** usage thentofore had with respect to taxing stock in trade in the place in question. But still, under all these restrictions and modifications, wherever it has been usual or the practice to assess the inhabitants of any city, town, or borough, for and in respect of their personal property, or stock in trade, to the poor rates, they have uniformly, without a single instance to the contrary, confirmed assessments made upon that principle, and held such personal property or stock in trade to be liable. We say wherever it has been the "practice:" for it must be obvious that there can be no legal "custom" of levying poor rates, which themselves only originated in the reign of Elizabeth—centuries, that is, within time of legal memory. It would be idle to enumerate authorities for so well known a position; (*a*)[2] but it is material to observe that here in Poole the poor rates, at this day, are levied upon stock in trade (having apparently been so from their very origin), under a decision of the Court of King's Bench, made specifically as with relation to this very town of Poole.(*b*) Therefore any arguments, ab inconvenienti, against rating stock in trade to the church in Poole ipso facto merge. It is easy to say, in **[513]** the way of objection, what is stock in trade? how is this to be fixed or ascertained? how, when fixed, is its value to be estimated? and so on—the difficulties attending this mode of rating are all but insurmountable. We reply to all this that here, in Poole at least, what is stock in trade must somehow be fixed or ascertained—upon the value of that stock, when fixed or ascertained, some estimate must be put—the difficulties, if any, attending this mode of rating in Poole must be surmounted in order to the making of levies for the relief of the poor. This, we repeat, is an answer at once to all arguments deduced from the supposed inconvenience of taxing stock to the repair of the church, at least in this particular instance. Levies to the poor, on an ordinary average, exceed those to the church in a vast proportion; and if no practical inconvenience is found to result from levying upon stock those much higher rates, which are necessary to the maintenance of the poor in Poole, surely none is to be apprehended from a continuance of the practice of levying, from time to time, upon that same stock those by far less considerable rates which ordinarily suffice to sustain, and repair, and decorate the single church in Poole.

It should seem then that no great inconvenience need be apprehended from laying church rates upon stock, as well as upon land, generally. But, further, we contend that in Poole some inconvenience at least would result were this not so. For we apprehend that some inconvenience does, and ever must, attend taxing the parishioners of any parish to the poor upon one principle, and to the church upon another, a contrary or at least a different principle; considering the close analogy which, we re-**[514]**-peat, that these rates bear to one another, in all points respecting (not of course their appropriation but) their levy.

It is well known to be generally prevalent in parishes that the church rate shall be made "according to the poor rate," or, in other words, that the latter, as by far the most frequent and most considerable of the two, shall be taken to some extent as a

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(*a*)[1] That is, till the Court of King's Bench delivered an opinion upon the general question, which they were long averse to do, determining every case upon its own particular circumstances. But the liability of stock to the payment of poor rate seems to be now established as a general principle: so that the Court of King's Bench will confirm a rate, if not otherwise objectionable, including stock, without any reference to the prior usage of the particular place. See *Rex* v. *Ambleside*, 16 East, 380, &c.

(*a*)[2] Some of the leading decisions are the following:—*Reg.* v. *Barking*, 2 Ld. Raym. 1280. *Rex* v. *Andover*, Cowp. 550. *Rex* v. *Hill*, Cowp. 613. *Rex* v. *Rodd*, Cald. 147, &c. &c.

(*b*) In *Rex* v. *White and Others*, Trin. Term, 22 Geo. 3. See 4 T. R. 771.

rule and measure of the former. The convenience of this in saving double valuations or assessments, and consequently preventing in many instances double appeals, and in other obvious respects, must, we think, be admitted. Nor is this merely a convenient and very general practice; it is also one which has prevailed ab antiquo. This appears sufficiently from the "libels in causes of subtraction of church rate," printed as precedents in Oughton, in most of which the rate sought to be recovered is pleaded to have been made "according to the poor rate," or "agreeable to, and in proportion with, the poor's book," for the year preceding, or to that effect. See, for instance, in page 350, where the making of the rate is laid in this form:—"Quod guardiani, sive æconomi, &c. post publicam in dictionem conventus (Anglicè a vestry) convenerunt, &c. et (habitâ consideratione, &c. decasuum et defectuum ecclesiæ, et de pecunia levanda, pro eorum refectione, &c.) statuerunt, et decreverunt, inter se, taxam, sive ratam, imponendam in dictæ parochiæ parochianos, omnes et singulos, qui in rotulo, sive libro, pro sustentatione pauperum censebantur, sive inscribebantur—scilicet, ut quilibet solveret quadruplo summam in dicto rotulo, sive libro, descriptam; ac sic ratam sive taxam fecerunt, in, et erga, re-**[515]**-parationem dictæ ecclesiæ,(*a*)[1] &c." But this mode of making church rate, so obvious, so convenient, so prevalent, ab antiquo, is impracticable in parishes where "personalty," whilst it must be included in the one rate, is necessarily and under all circumstances excluded from the other.

If then no general objection applies either to levies on personal property or stock, generally, or to levies upon it, for this particular object of church repair—nay, more, if it seems that, in Poole at least, some inconvenience will attend a departure from the practice of levying church rate upon stock, more antiquo, the Court, we apprehend, will be inclined ultimately to sanction the rate sought to be recovered in this suit, and, consequently, of course to admit the present libel; unless, indeed, it can be clearly shewn that, in so doing, it will go counter to the whole stream and current of authority. For if it can, indeed, be said, consistently with legal truth and propriety, that the current of authority is uniformly adverse to the practice pleaded in the libel; this in itself we are constrained to admit is amply sufficient to constitute a fatal objection to its continuance, in spite of all that can be urged in its favor deducible from general secondary considerations. But the current of authority, viewed as we view it, does not suffer this to be said of the practice in question, with legal truth or propriety. We grant that the prevalent usage is, and may long have been, to levy church rate upon lands and tenements only. We say the "prevalent usage;" for we deny its be-**[516]**-ing the usage universally, or even nearly so, though our adversaries have represented it as such, to the latter extent at least, if not to the former. We are aware, nor have the slightest objection to a disclosure of the names, of very many places, some of equal extent and population, where as in Poole a different usage prevails, and where the church rates are uniformly levied upon stock as well as upon lands. Now "prevalent usage" is not the same thing with positive law; nor is a practice which happens to be at variance with the former, necessarily illegal, from that being so which sets itself up in wilful and perverse opposition to the latter. And so far is the current of authority from affirming this non-rateability of stock to the church to be "law," without exception or limitation, that it infers (not to say affirms or goes little short of affirming) a principle the very reverse. We shall, of course, be expected, and are not unprepared, to fortify our assertions upon this head by reference to specific authorities.

And, first, what say John of Athon and Lyndwood, "the antientest and best of our canonists," on this matter of church rate? They, at least, are decidedly ours; for the words of the latter, as taken out of the former, are distinct that stock is taxable as well as land. "Unusquisque parochianus," says Lyndwood, "tenetur ad reparationem ecclesiæ juxta portionem terræ quam possidet infra parochiam, et secundum numerum animalium quæ tenet et nutrit ibidem." (*a*)[2] It is so obvious as to render it nearly superfluous to insist that "animalia" stands in this **[517]** passage for stock of any species or stock generally. This is so understood by Peck, by Prideaux, and, indeed, we apprehend, by all others. Prideaux's words (*a*)[3] are, "According to the

(*a*)[1] Oughton, Ordo Judiciorum, p. 350. See also pp. 327, 364, &c.

(*a*)[2] Lyndwood, De Eccl. Ædif. Et De Offi. Archidiaconi. Et Johannes de Athon in Othob. ubi supra.

(*a*)[3] Directions to Churchwardens, p. 63.

ecclesiastical law that hath prevailed in this realm, the laying of the church rate ought to be according to the lands and the stock [the stock generally] which the parishioners have within the parish; and so say John of Athon and Lyndwood [namely, in the passage just cited, which then follows in Prideaux], the antientest and best of our canonists." Peck,(*b*) in a commentary on this same passage out of Lyndwood, explains it in the same sense, and plainly construes it as sanctioning rates on parishioners for church repairs, "pro modo et ratione rerum suarum," or "pro modo et facultate bonorum," as he styles it in different passages, both to the same effect. Indeed, flocks or herds "animalia," constituted at that time the very principal, not to say the sole, stock. Tradesmen with any thing like stock to be taxable in the modern acceptation of the term, stock in trade, there were plainly, at that time, few or none. The only tradesmen at that time, except perhaps in some few cities or great towns, were people who used to travel about from fair to fair, like the hawkers and pedlars of modern times. Their wares [stock in trade] could of course be subjected to no parochial (local) burthens. Taxes used indeed to be levied upon these, known by the several names of "passage," "pontage," "lastage," "stallage," &c.; (*c*) but these were in the nature of transit duties, as at certain passes **[518]** or bridges, or of tolls, as for the erection of booths, or stalls, in particular places—the collection of which in no sort argues them fit or capable even subjects of local taxation.

It clearly results then that "stock" was liable in the opinion of Lyndwood and John of Athon; and it either has appeared, or will presently appear, that with Lyndwood and John of Athon, those "antientest and best of our canonists," as Prideaux styles them upon this head the principal text writers on our national ecclesiastical law, as Prideaux himself, Gibson, Degge, Watson, and others in substance concur. But are these the only authorities for our position? Far from it. It may be fortified, we contend, at least by plain inference and deduction, from authorities for which we are not driven to resort to civilians or canonists; although these last, it is to be observed, are, if the phrase be allowable, the natural authorities, to which upon a matter like this of church rate, recourse is to be had.

Cases that involve questions of litigated church rates are not of any frequent recurrence, as might naturally be expected, in reports of cases at common law. It is singular, however, that the very earliest of such cases which we have been able to discover (in substance, as follows) is one that distinctly recognizes the rateability of stock. It occurs in the shape of an action of replevin, which came before one of the Courts at Westminster in Trinity Term, 44 Edw. 3, where the party who had distrained the plaintiff's goods justified his act by pleading "that the parishioners of E. had made or levied a church rate of sixpence on every carucate of land, a penny farthing on every cow, and a farthing on every ten **[519]** sheep, in order to raise a sum of 10l., necessary to the reparation of the parish church of E.; and, further, that they had ordained two collectors, whereof the defendant was one, with power to distrain on parties who were liable, but refused to pay—that the plaintiff was a parishioner, &c. and had land, cows, and sheep, for which he was duly assessed in a certain sum, to wit, nine shillings; and that, refusing to pay, the defendant had distrained his goods—and that such had always been the custom." The plaintiff first objects to the validity of the custom so pleaded to distrain; but the Court, over-ruling this objection, he is then compelled to reply, merely "that the parishioners never assented to the rate;" and upon that issue, namely, whether a majority of the parishioners ever assented to the rate in question, the parties go to trial, the validity of such rate, if made with the assent of a majority of the parishioners, being thus fully admitted; nor seeming, indeed, ever to have been questioned, as by reason, that is, of its purporting to include chattels (Year Book, Trin. Term, 44 Edw. 3, 13).

But, in looking to the series of common law reports, we are at no loss for cases which recognize the rateability of stock to the church, at least by necessary intendment and implication. We allude to those cases in common law reports in which distinct levies appear to have been sanctioned—the one for the repair of the fabric of the church, the other for the ornaments. For instance, we may refer to that known as the *Churchwarden's case*, in the 20th of James I. reported by Rolle (Roll. Rep. 153); the rule collected out of which by Rolle, the reporter, him-**[520]**-self, in his Abridg-

(*b*) De Ecclesiis Reparandis, c. x. and xi.
(*c*) Brady's History of English Boroughs, p. 3.

ment (2 Rolle, Abr. 262, 270, 291), is what he also says was expressly laid down by the Chief Justice in that case; viz. that "for repairing the fabric of the church the charge is real, and charges the land, and not the person; but for the ornaments of the church it is personal; upon the goods, and not upon the land:" and this distinction, he goes on to say, has been observed in other cases.

From these cases, a position has been drawn by text writers, as by Rolle himself again, in his Abridgment (ibid.); by Sir Simon Degge, in his Parson's Counsellor (Degge, 166, &c.); by Bishop Gibson, in his Codex (p. 196); by Dr. Watson (or Mr. Place), in his Clergyman's Law (Addenda, 642); by Dr. Wood, in his Institute (page 90), &c.—as if there should be properly two rates—one upon land and houses, which should concern the freehold of the church, the other upon personal estates and stock [the very words of Wood], to defray other expences. This, however, they say, would create confusion, and so is seldom practised. We concur with them in their implied censure of this practice, as apt to "create confusion;" but we do not collect from it either the necessity or their approval of exempting stock from paying to the church altogether. They, in effect, say, instead of two rates, one upon "lands," for the "fabric," and another upon "goods," for the "ornaments," or for "other expences," blend the two into one, and make one rate **[521]** serve for both. But is not this matter of fair inference; namely, that in their apprehension that one assessment should be upon goods, as well as land? Otherwise, the principle of rating stock to the church altogether is departed from, upon no reason that we see, but certainly without any necessity.

It should seem, then, that either explicitly or by implication, this rateability of stock has been recognized in a series of cases at common law, out of which a principle to the same effect has been extracted, as by Rolle, and Wood, and others, who hardly come within the description of civilians or canonists. But, by aid of these last, the natural authorities upon questions of church rate, this notion of the absolute non-rateability of stock to the church may be clearly refuted. The authorities of Lyndwood and John of Athon, for rating stock to the church, have already been cited; and the principal writers upon our national canon law have been shewn to concur with them in this. The "order, &c." in Godolphin (appendix, s. 31, ut supra) warrants an assertion that no doubt as to the liability of stock existed among the civilians of that day. Some opprobrium has been attempted to be thrown upon this "order, &c." as if not really emanating from the authority to which it is ascribed. We can only say that, had this been so, it must have called forth something in the nature of a disclaimer from the learned persons whose names are set to it—which that it never did we are authorized to presume, from finding it quoted by Prideaux, and other almost contemporary writers, without intimating any suspicion of its integrity. **[522]** It is observable, too, that it is not set down as an "order, &c." made by thirteen civilians assembled at Doctors' Commons, &c. merely—but as an "order, &c. made by Dr. King, Dr. Lewen, Dr. Lynsey, Dr. Hoane, Dr. Sweit, Dr. Steward (nominatim), and other doctors of the civil law, to the number of thirteen so assembled." As to the distinction "land or stock, but not both," this does not appear to us so unreasonable as to warrant the order itself being treated slightingly upon that account. The only stock in question must have been "farming stock." What, a century and a half ago, could the "stock in trade," at Wrotham, have been? Now, as to farming stock, we apprehend the distinction to be highly reasonable. Stock, to a certain extent, is absolutely essential to the proper cultivation of the farmer's land: so that were this (farming) stock to be rated—the land being also rated—the farmer would, in effect, pay twice for the same thing. And the phrase, "all places in England," in the "order," must, in reason, be restricted to "all places in England similarly circumstanced with Wrotham in this respect"—Wrotham being the direct immediate subject of the order. We, however, have no concern, either to ascertain the origin of this distinction, or to vindicate its propriety. All that we refer to the "order" for is, to shew that no such notion as that of the absolute and essential non-liability of stock to the payment of church rate (upon which our opponents have been forced to take their stand in arguing against the admissibility of the present plea) prevailed in Doctors' Commons at that day: which that this "order" is effectual to, who can doubt?

[523] But to dwell no longer upon authorities from text writers, let us briefly consider what the practice, the admitted recognized practice, as it should seem, of

ecclesiastical courts in this particular suggests, as with relation to the present question. Has that been uniformly adverse to the rateability of stock, of all descriptions, to the repair of the church? Certainly not. We admit that, if challenged to produce any instance in which the rateability of stock to the church has been solemnly pronounced for, we are unprepared with any; and for the obvious reason that the legality of this has never, that we are aware of, been questioned at law. Our opponents are, at least, as unfurnished with any instance of a sentence against its legality. This, to be sure, is no answer to a challenge to produce a sentence in its favour, if rating stock really be, as said, a thing unheard of in legal practice. But to maintain this argument it must first be shewn that rating stock is a thing unheard of in legal practice—and we, on the contrary, not only proclaim, but can prove, it to be quite the reverse. In many parishes, possibly, stock has never been so rated—in others, where it once was, it has since ceased to be by consent—in others, again, where it once was, nor has ceased, by consent it still continues to be rated: and this is the first instance of an individual stepping forward to allege the illegality, and to object, on that ground, to paying his proportion of the rate. Poole is one place among many in this predicament—the practice in all which, hitherto used and approved, is now, for the first time, sought to be unsettled by a sweeping decision against the rateability of stock to the church merely, for any thing **[524]** that appears to gratify the caprice, or litigiousness, or what else, of certain individuals of Poole in particular, of course against the expressed wish and consent of a majority of the inhabitants of Poole even. Poole, too, we shall take leave to observe, is one of the last places where an experiment like the present ought to have been tried; as the omission of stock in Poole would, from known local circumstances, throw the burthen of these assessments on those least able to bear them, and would press upon the few landed proprietors with very considerable hardship indeed—and this, the more especially, now; when rates are in a course of being levied, for the payment of a large debt contracted by the parishioners for actually pulling down and rebuilding the parish church—a debt, no doubt, so contracted by the parishioners, in the faith of their ability to make rates for the discharge of the same, more antiquo, that is, including stock in trade. But to proceed.

Among the precedents in Oughton, already referred to for another purpose, are libels in suits of this description, both asserting, in terms, the rateability of stock to the church, and proceeding upon that rateability, without any such affirmance, as deeming it fully admitted. For instance, in vol. ii. p. 351, is furnished, as a precedent, a libel in a cause of subtraction of church rate, purporting to have been instituted by the churchwardens of Richmond, in Surrey, against one Southwell, in the Consistory Court of the Lord Bishop of Winton. In this libel it is pleaded [art. 1] as follows:—"Imprimis, Quod tam de et ex quibusdam constitutionibus provincialibus [quarum una sic incipit—Ut Paro-**[525]**-chiani, &c. altera vera sic incipit, licet parochiani, &c.] quam ex longa, laudabili, legitimeque præscripta consuetudine, a tempore immemorato huc usque inviolabiliter et inconcusse usitata et observata, ac in contradictorio judicio sæpius, seu saltem semel, obtenta, parochiani cujuslibet parochiæ Cantuariensis provinciæ, terras, tenementa, possessiones, bona, jura et credita in eadem habentes, oblinentes, et possidentes (consideratis possessionum suarum prædictarum quantitatibus) ad reficiendum, restaurandum, et reparandum easdem ecclesias suas parochiales, et ad quævis alia onera, quando et quoties opus fuerit, contribuere et pecunias suas exponere, tenebantur et tenentur." (*a*) In the same book, page 347, again is a libel (purporting to have been delivered in the Court of Arches in a suit of this description, between the churchwardens of Mestham, within the deanery of Croydon, &c. and Best, a parishioner), in which, to be sure, the law as above is not formally pleaded, but in which it is proceeded upon as fully admitted—a circumstance, we submit, which renders this precedent still more in favour of our argument than even the one to which we before referred. This libel [art. 1] pleads the rate sought to be recovered to have been made (without any previous formal pleading of the law, in conformity with which it was so made) on the several parishioners and inhabitants "juxta et pro rata bonorum, et terrarum, et facultatum suarum infra dictam parochiam." The second article pleads that Best, the defendant, at the time of laying this rate,

(*a*) Oughton, Ordo Judiciorum, vol. ii. p. 250.

was a parishioner [526] of Mestham, "ac bona terras, et facultates, ibidem habuit, occupavit, et possedit"—and the third article, that he was rated at such a sum, "habitâ consideratione facultatum et conditionis ejus." (*a*)[1] Those which follow are the usual articles, of the defendant being within the jurisdiction of the Court, &c. &c. and need not be stated.

The inference furnished by these precedents against the position contended for by our opponents, of the non-rateability of stock to the church, is too obvious to be insisted upon. If it be objected that the libels cited are mere printed forms, non constat whether ever exhibited even, still less whether ever admitted, in any court, it might be sufficient to reply that, had but a plausible ground, or grounds, of objection to their admission been apparent upon the face of these, Oughton could hardly have suffered them to stand in his book of "precedents," to the necessary defeat and mortification of all who might be led to adopt them as such. But what if we should be able to prove from a series, not of printed forms, but actual cases, that rates made upon similar principles have been pleaded in suits for subtraction of church rate, in numerous instances—that not merely such pleas themselves have been tendered and admitted, but that payment of the rates specifically pleaded in these has been resisted with all conceivable art and industry—that in the progress of such suits objections have been heaped upon objections—that from decrees in such suits appeals have been prosecuted upon appeals—that in the course of such prohibitions have been [527] applied for, under which all the proceedings have been submitted to courts of common law, whilst presided over by Judges of the first ability—and yet, with all this, that apparently it never once occurred, either to any court to suggest the invalidity of these rates, or to any individual to resist the payment of them, as by reason of their purporting to be levied upon stock as well as land? why, then, we apprehend that the admissibility of this libel admits of no further question; unless, indeed, it can be shewn that what was the law then upon this head is not the law now; that is, in other words, unless it can be shewn that, in the interim between the time when those cases occurred and the present, the law in respect to levies of church rate has undergone something at least in the shape of authoritative alteration.

It only remains then to shew that a series of cases warranting these deductions is actually producible—with which view we solicit the Court's attention to the following, the whole of which are furnished from processes extant in the registry of this Court, the Court of Delegates. The libels pleading the several rates plainly purport such rates themselves to have been levied, in some shape or other, upon stock —and the rest we submit to be clearly implied by the proceedings had, together with the defence or defences set up, in each several case. And we put it to the Court, with some confidence, whether a question being mooted as to the rateability of stock in no one of these cases does not fully warrant this conclusion, namely, that such its rateability was at that time actually considered to admit of none, as well by parties and practitioners, as by the Courts [528] themselves, both of civil and common law. And we further submit that the libel in each of these cases is a precedent directly in point for the admissibility of this in the present, and involves the affirmance of a legal position the very contrary of that upon which the objections urged against its admissibility have mainly, if not solely, relied. And first, as to the libels in the several cases.

The first case, then, to which we refer the Court for this purpose is that of *Freggleton and Hubbolt* against *Acton*.(*a*)[2] The libel here is substantially as follows:—

1 and 2. The first and second articles contain merely the necessary formal averments of the defendant Acton, being a parishioner of Claverly, and the promovents, Freggleton and Hubbolt, the churchwardens.

3. The third article pleads, nearly in conformity with the first precedent from Oughton, "Quod tam de et ex quisbusdam constitutionibus provincialibus quarum una incipit—'ut parochiani' altera vero 'licet parochiani'—quam ex longa, laudabili, legitimeque prescriptâ consuetudine a tempore immemorato huc usque inviolabiliter et inconcusse usitata et observata, ac in contradictorio judicio sæpius obtenta, parochiani cujuslibet parochiæ Cantuariensis provinciæ terras, tenementa, bona jura et catalla

(*a*)[1] Oughton, Ordo Judiciorum, vol. ii. p. 347.

(*a*)[2] *Freggleton and Hubbolt* (*Churchwardens of Claverly, in the County of Stafford and within the Peculiar Jurisdiction of Bridgnorth*) against *Acton*.—Delegates, 1699.

et credita in eâdem obtinentes habentes et possidentes, consideratis quantitatibus possessionum prædictarum, ceterorumque emolumentorum suorum, ad reficiendum, restaurandum, et re-**[529]**-parandum easdem ecclesias suas parochiales, et ad quævis alia onera et ornamenta earundem, quoties et quando opus fuerit, contribuere, et pecunias suas expendendere, tenebantur."

4. The fourth article pleads in substance that Claverly church being out of repair, &c. a "lewne," or assessment, was required, to the amount of 28l. 10s., or thereabouts.

5 and 6. The fifth and sixth articles plead the notice of vestry, &c.

7. The seventh article pleads the making of the rate sought to be recovered in these words—that on such a day "the minister and churchwardens, together with other the parishioners, at the time and place appointed, met together, and by them a general lewne and assessment, for the uses aforesaid, was agreed upon, and indifferently and proportionably set down to be paid by the said parishioners of Claverly aforesaid, for and towards the uses aforesaid, unto the churchwardens for the time being, according to the quantity and quality of their several lands, goods, and chattels, which every of them held within the said parish; and that the said lewne hath accordingly been justly and duly paid by all, or the major part, of the said parishioners."

8. The eighth article pleads "that the said Thomas Acton had held, occupied, and possessed, within the said parish of Claverly, divers lands, houses, and tenements, goods and cattle; for and in respect whereof he, the said Thomas Acton, in the aforesaid lewne, was indifferently and proportionably rated and assessed for and towards the uses aforesaid, in the whole, at, and in, the sum of 1l. 4s. of lawful money of England."

[530] In *Ash* against *Williams and Smith* (*a*)[1] (not to state all these with the same particularity as the foregoing) the libel is express that every person is liable to the payment of church rate, having "terras, tenementa, possessiones, bona, jura, et credita consideratis possessionum, jurium, bonorum, emolumentorumque suorum quantitatibus" [Anglicè, according to the quantity and quality of their lands, goods, and chattels]: and Ash, the defendant, is expressly pleaded to be rated towards the reparation and restoration of the church in question [that of Pembridge], and the ornaments thereof, "in respect of divers lands, houses, and tenements, goods, chattels, and credits, within Pembridge aforesaid."

In *Woodward* against *Makepiece and Ladbrook*,(*b*) (a proceeding by articles; and, therefore, à fortiori to our purpose, from the known strictness in point of pleading, &c. requisite in criminal suits of all descriptions) the articles, which here stand in place of the libel, pleaded the general law thus—quod "omnes et singuli quicunque facultates, possessiones, sive prædia, in quibuscunque parochiis provinciæ Cantuariensis habentes, obtinentes, et possidentes, in ipsis degentes aut alibi, ad reparandum navem ecclesiæ parochialis ejusdem, una cum campanile, companis, et fulcro pro compensura earundem,(*c*) **[531]** fuerunt et sunt astricti, cogendi, et coercendi. Et hoc est verum, &c." And the making of the actual rate is pleaded thus—that the parishioners in vestry assembled levied "taxam, censum, ratam, sive impositionem de et super parochianis dictæ parochiæ, aliisque quibuscunque terras, bona, domus, sive facultates, infra eandem parochiam habentes, possidentes aut occupantes, quantitatibus terrarum, bonorum, domuum, et facultatum uniuscujus cunque in ea parte taxandi, consideratis."

In *Cuthbert* against *Simmonds* (*a*)[2] (a proceeding also like the former, by articles) the pleading is, that the parishioners meeting in vestry pursuant to notice &c. did "rightly and duly make a rate, tax, or levy, wherein they did justly and equally rate and tax every parishioner and inhabitant of the said parish [Northmersten in Bucks] according

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(*a*)[1] Churchwardens of Pembridge, in the county and within the diocese of Hereford. —Delegates, 1685.

(*b*) Churchwardens of Dasset Magna, alias Burton Dasset, in the county of Warwick and within the diocese of Lichfield and Coventry.—Delegates, 1691.

(*c*) That is, "The nave of their parish church, together with the belfrey, the bells, and the beams, or frame, for suspending these." It was for refusing to pay his proportion of a rate towards "a re-casting, &c. of the bells," that the appellant in this case (the defendant in the first instance) had been proceeded against.

(*a*)[2] Churchwarden of North Merston in the county of Bucks and within the diocese of Lincoln.—Delegates, 1698.

to his estate, or the number of acres, and yard-lands, or stock, any person had, held, or possessed within the said parish, after the usual way of rating the parishioners towards the repairs and charges aforesaid." And the articles then proceed to charge and object that he the said Cuthbert, the defendant, rents so much land within the parish, "and keeps a considerable stock of sheep, cows, and other cattle," for and in respect of which he ought to be taxed and rated.

In the case of *The Churchwardens of Louth* **[532]** against *Atkinson* (*a*)[1] the libel (for this again, like the two first, was a civil suit) pleads art. 4, that "Louth is a place of great trade and traffic, wherein one or two markets are weekly kept, and two or more general fairs are yearly held; and the inhabitants of which are for the most part tradesmen that keep general shops, and live by a free and general trade."

5. The fifth article pleads it to have been a custom, anciently kept and observed within the parish of Louth, "to make the taxes and rates for the repairs of the parish church there, and the common charge of the churchwardens, at the discretion of the inhabitants and parishioners; and therein to charge, as well tradesmen as occupiers of land and keepers of stock and cattle, going, lying, and being in the said parish, according to their ability, due regard and consideration being had to every man's trade and profession, and to the value of the lands and stock every one hath in his own occupation."

6. The sixth article pleads the rate to have been made upon this principle truly and indifferently after due notice.

7. The seventh article pleads that "when the said rate was made, and for several years before, the said David Atkinson was a freeholder of Louth, and had an estate which he occupied and stocked to the value of 50l. a year and upwards;" and that, "over and above the said stock kept upon the said ground, he also then and for several years before did keep, and had kept, a very great number of cattle upon **[533]** the commons belonging to the said parish;" and then goes on to plead that, in respect of the several items, he the defendant "was duly assessed in the sum of forty-seven shillings for his rate and proportion to the said tax."

In *Welby* against *Abbot* (*a*)[2] the libel pleads [art. 3] "That the town of Boston is a sea-port town, and a town of great trade and commerce, and also a borough town incorporated with a mayor, aldermen, and common councilmen, and also is very populous: that several of the inhabitants are gentlemen and have good estates, but the generality of them are tradesmen that live by their trades, and are chiefly assessed to the church assessments, according to their way of trading; whereas, were they to be assessed according to the rents they sit on, and by any other way than by will and doom, which is the constant way of making and levying such assessments in the said parish, their contributions thereto would not raise and advance so much money as they do; and that, moreover, the greatest burthen of such assessments would then fall upon such as are not well able to bear the same:" and

The fourth article pleads that, it being necessary to raise 125l. for repairs, &c. the parishioners agreed in vestry to nominate three persons (who are specified) assessors, according to the usual way and manner—who subsequently laid the assessment by will and doom: "i.e. having due regard to every one's estate, quality, ability, way, and circumstances of living;" and therein duly assessed the defendant, Welby, in so much.

[534] Such in substance are the libels in these several suits, from which it plainly appears that the rate itself, the subject of the suit, in each purports, in some shape or other, to include or affect stock. And that this objection was resorted to in no case as one of the means (of which various were used in each) to assail the legality, and so to avoid the payment, of the rate, as clearly results from the defence or defences set up, and the proceedings had in each several suit.

It would be tedious, however, and at the same time, we apprehend, quite unnecessary to state and comment upon the specific ground of opposition taken in each of these cases, and the proceedings had in each severally in detail. As for these latter, the very circumstance of each of these cases having found its way through, at least two

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(*a*)[1] *Guardiani de Louth* [*County and Diocese of Lincoln*] versus *Atkinson*.—Delegates, 1688.

(*a*)[2] Churchwardens of Boston, county and diocese of Lincoln.—Delegates, 1706.

inferior courts,(*a*)[1] to the court of last resort in these matters, is ample to shew that the opposition to the rate in each, upon whatever grounded, if not commenced in wisdom, was at least kept up with vigour. The general nature of the defence set up will sufficiently appear from the following abstract of the objections taken to the rate in each of the above cases:—

In *Freggleton and Hubbolt* against *Acton* the objection taken is to the defendant being charged with respect to certain lands, formerly in the demesne of Master Gatacre, which it was insisted were not liable to be rated to the church by reason of their being obliged to keep in repair two chancels adjoining the church. In *Ash* against *Williams and Smith*, the ground of objection, stated in two **[535]** words, is "general inequality." In *Cuthbert* against *Simmonds* it is that he the defendant rented the glebe land of Dr. Say, the impropriator, who had lately been at large expence in repairing the chancel; and, therefore, that neither he nor his tenant ought to be taxed or rated, in any rate for the aforesaid parsonage and glebe land, towards the reparation of the church. In *Woodward* against *Makepiece and Ladbrook* the following is the defence: namely, that the vestry had been held without due notice, in which any "re-casting of the bells" had been agreed upon; and that the churchwardens, mero motu, had departed from the order of vestry by re-casting the old bells into six instead of five, whereby the bells themselves had become so reduced in point of compass that he, the defendant, whose land was situate at some distance from the church, was unable to hear, and, consequently, was deprived of the fair use and benefit of them. It is also observable that, in this case of *Woodward* against *Makepiece and Ladbrook*, a prohibition was moved for in the Court of King's Bench, still, however, upon a quite distinct ground, namely, that of a citing out the diocese—a prohibition ultimately refused, for reasons that need not be stated by the whole Court of King's Bench, with that eminent person Sir John Holt at its head (see 1 Salk. 164)—this, however, like the rest, tending completely to shew the determined opposition made by the defendant to payment of the rate. In the case of *The Churchwardens of Louth* against *Atkinson*, again, the principal ground of opposition is "general inequality." Its more particular nature **[536]** may be inferred from the defendant's answers (subsequently shaped into an allegation upon which evidence was taken); which answers admit the custom of Louth to be as pleaded, but deny the necessity of a rate to the amount sought to be raised; and further say that "the churchwardens, together with a select and confederate party of the parishioners of Louth, which were neither of the better sort and quality, or major part of the parishioners of Louth aforesaid, upon a free vote, did by will and doom, and unjustly and illegally, make the rate in question, without any due consideration had, either of the ability of the party taxed, or value of the lands and goods or stock every one had farmed, and kept in the said parish, to the great oppression of the major part of the parishioners and inhabitants of the said parish." Lastly, in the case of *Welby* against *Abbot* the objections are, 1st, that he, Welby, "is no house-keeper, but merely a tabler [i.e. a boarder] in Boston, resident with his sister, Mrs. Rebecca Welby;" 2dly, that "laying the assessment by will and doom is arbitrary, and contrary to the legal and equal way of laying assessments, viz. by pound rent, or upon land and stock, or separately, as persons shall most abound in;" as also that the said assessment is "manifestly unequal," &c. &c. In this case another more technical objection seems also to have been partly relied on, namely, that the presentment of the defendant Welby for non-payment of the rate (the foundation of all the subsequent proceedings) was by the name of John not Henry, the true name, to which it was only altered in the course of the proceedings—an objection, again, serving clearly to shew that this defendant, like Wood-**[537]**-ward in the prior case, stuck at nothing to assail the legality of the rate, or at least to avoid the payment of it in his own particular person.

We shall trouble the Court but with one case more, that of *Watkins* against *Seaman and Webb*,(*a*)[2] suggesting the same conclusion, though from somewhat different premises. There the rate purports to be levied in the most usual mode, even at that time, namely, upon lands and tenements only; and the objection, the principal objection rather, to the legality of the rate in that case actually is the circumstance of stock not

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(*a*)[1] Namely, the Diocesan Court, and the Court of Arches.

(*a*)[2] Churchwardens of Payneswicke, county and diocese of Gloucester.—Delegates, 1685.

being rated. The allegation responsive to the libel pleading the rate specifically charges "that Walter Lawrence, clothier, has 400l. stock, for which he is not rated—that Zachariah Hyett has personal estate worth 500l., for which he is not rated," and so on; and distinctly denies the legality of the rate, by reason of its omitting to rate the said stock. What ultimately became of this objection we have no means of ascertaining; nor is it at all material that it should be ascertained. For supposing it, for argument's sake, to have been over-ruled by all the several Courts to which it was successively addressed, even that supposition which is, obviously, the one least favourable to our case, still suggests nothing adverse to it. For our case is, not that personalty of all descriptions is liable to payment of church rate in all places, and under all circumstances, but only that personalty of one particular description, namely, stock in trade, is liable to payment of church rate in Poole, under the circum-[538]-stances pleaded in the present libel. Meantime this, like the former cases, warrants a conclusion that no notion of the non-rateability of personalty to the church, under all circumstances, prevailed at that time, how rife and familiar soever it should seem to be in a certain quarter at the present.

Upon the whole, then, we submit that of the two mediums through which our adversaries have sought to establish the inadmissibility of the present libel, the first, the supposed inconvenience of the practice pleaded in it, proves to be a mere nothing—while the second, its supposed illegality, as deduced from the equal and similar absence, first, of authority in its favour, and, secondly, of precedent for its use, rests upon two assertions, both of which have been clearly shewn to be totally unsupported by the fact.

If an objection be taken to our cases in support of the practice which we contend for, as by reason either of their scarcity is point of number, or their remoteness in point of date, be it remembered that they are all derived from the registry of a single court—that court, too, the court of ultimate appeal in such matters, into which questions of litigated church rate can rarely be expected to have travelled at any time; while in modern times, for obvious reasons, the instances are extremely few. The number of these within the last century perhaps does not exceed six or eight—only two have occurred within the last seventy years. It is true that a cursory inspection of the processes in most, perhaps the whole, of these suits has not led us to suppose that the rate sought to be recovered in any one of them was a rate including stock. But this, again, infers nothing adverse to the rate, the sub-[539]-ject-matter of the present suit; for we have admitted, and still admit, that the prevalent usage is, and has long been, to levy church rates upon lands and tenements only.

Which contrariety, so admitted, of the rate set up in this libel, to "prevalent usage," appears to us the only even plausible objection to its admissibility, not already fully obviated in the course of the foregoing reply. To this, if still insisted upon, we answer that, if here, in Poole, as in most places, church rates had been usually levied on lands and tenements alone, so that this suit were to recover of a church rate now, for the first time, including stock, the objection would undoubtedly be one of great weight, and might, perhaps, even of itself, be sufficient to enure to a defeasance of the suit, by the rejection of the libel, in the first instance. But the object here is not to originate a new, or even to revive an obsolete, mode of rating, but it is merely to continue one which, quoad Poole, has been uninterruptedly used and approved, from time whereof "the memory of man," in the actual, though not perhaps in the legal, sense of the phrase "runneth not to the contrary." Now, it does seem to us that the present question of church rate—a church rate including stock—under such circumstances presents to this Court a very similar aspect to that which questions of poor rate, including stock, long presented to the Court of King's Bench. And we humbly submit that the safest and wisest course for this Court to pursue is to abide by the precedent set to it by the Court of King's Bench, in its treatment of such questions of poor rate; the upshot of which will be that the [540] Court will suffer evidence to be taken upon the present libel; and the usage or practice of Poole, in this particular, being proved or confessed to be as pleaded, that it will ultimately be pleased to sanction levies of church rate upon stock in Poole, leaving the question of its liability to payment of church rate generally open, if mooted at any future period, to future inquiry; that being a question upon which a sentence to the purport which we solicit, not only obviously determines nothing, but which it seems to us not calculated, in the slightest degree, to prejudice or affect.

The leading counsel for the appellant having waived his privilege of being heard in reply to the cases, the Court, after some deliberation, made the following

DECREE.

The Judges having heard the libel and exhibit read, and advocates and proctors on both sides, by their interlocutory decree, pronounced against the appeal; and that the Judge from whom the same is brought hath proceeded rightly, justly, and lawfully; and they affirmed the decree or order appealed from; but, at the petition of the respondent's proctor, they retained the principal cause.

[541] SEAGER *v.* BOWLE. High Court of Delegates, Trinity Term, 20th June, 1823.—An allegation responsive to articles in a cause of office, promoted by the ordinary of a royal peculiar, calling upon the defendant, 1st, to answer to "having set up a monument in a church in his jurisdiction without a faculty; 2dly, to shew cause why he should not be decreed to remove the same—pleading, 1st, "That the said monument was erected by leave of the minister and churchwardens;" 2dly, "That it was ornamental to the said church, instead of injuring it or disfiguring it"—admitted to proof.

[Referred to, *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 10.]

(An appeal from the Court of the Peculiar and Exempt Jurisdiction of Great Canford and Poole.(*a*))

The Judges who sat under this commission were, Mr. Justice Holroyd,(*b*) Mr. Justice Burrough, Dr. Arnold, Dr. Jenner, Dr. Daubeny, Dr. Meyrick, and Dr. Haggard.

This, in the first instance, was a proceeding by articles in the Court of the Peculiar and Exempt Jurisdiction of Great Canford and Poole, promoted, in virtue of his office, by the Worshipful and Reverend Charles Bowle, clerk, Master of Arts, Principal Official of the Peculiar and Exempt Jurisdiction of Great Canford and Poole, against James Seager, Esq., of the parish of St. James, in the town and county of the town of Poole. It commenced in the Court below by a citation, issued on **[542]** the part of the said official, calling upon the defendant to "answer certain articles, heads, or interrogatories, touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, to be objected against him by virtue of his (the said official's) office: and, more especially, for his having illegally erected and set up, or caused to be erected and set up, in the church of the said parish of St. James, a certain monument, of considerable dimensions, to the memory of his late wife, and of others, by his own mere authority, in usurpation of the power of his ordinary, and without any legal licence or faculty first obtained for that purpose: and also to shew good and sufficient cause (if he has or knows any) why he should not be decreed to remove, or cause to be removed, such monument, as having been so erected and set up without the licence or faculty of his ordinary, or other lawful authority in that behalf." The appeal to this Court (the Court of Delegates) was against an order or decree made by the official (the promovent), rejecting a certain allegation brought in on the part of the defendant, responsive to the articles.

Of the tenor of the articles it is sufficient to say that it precisely accorded with that already described of the citation. That of the "responsive allegation," the subject of the appeal was as follows:—

1. That the said James Seager, party in this cause, now is, and for many years last past hath been, a principal parishioner and inhabitant of the parish of St. James, in the town and county of the town of Poole, within the Peculiar and Exempt Ju-**[543]**-risdiction of Great Canford and Poole, in the county of Dorset; and that, in or about the month of January, in the year of our Lord 1822, Amy Seager, wife of the said James Seager, having departed this life, was interred in a vault in the churchyard belonging to the said parish church of St. James, in Poole aforesaid—that he, the said James Seager, did thereupon cause to be erected and set up, in the said church, near his own pew, at the east end of the south gallery thereof, a certain monument to the memory of his said late wife, Amy Seager, and others of his family who had

(*a*) See note (*a*), page 499.

(*b*) Mr. Baron Wood was named at the head of the commission; but had resigned his seat on the Bench, as one of the Barons of his Majesty's Court of Exchequer prior to, and was not present at, the hearing of this appeal.

previously departed this life—that no judicial or other notice or complaint whatever was at any time, by any person, taken or made of the erection of the said monument, until on or about the 20th day of July last past; soon after which the said James Seager was served with a certain citation, to appear on the 28th day of August last past, and answer the complaint in this behalf. And this was and is true, &c.

2. That it has been usual and customary, in the said parish of St. James, in Poole aforesaid, previous to the erection of any monument, to obtain the consent of the minister and churchwardens of the said parish, but not to apply for the consent of the said ordinary, except in particular cases—that, accordingly, previous to the said monument being so erected and set up in the said parish church, he, the said James Seager, applied for and obtained the consent of the minister and churchwardens of the said parish, to erect and set up the said monument in the said parish church.

3. That the monument so erected and set up by the said James Seager, in the parish church of **[544]** St. James, in Poole aforesaid, is a mural monument, and does not project from the wall more than three or four inches, or thereabouts, except in one particular part, where it projects five inches, or thereabouts; and no part of it projects or stands out so far as a pillar close to it—that the said monument does not in anywise injure or disfigure the said church, but, on the contrary, is a great ornament thereto, the same being of highly-polished marble, and executed in a superior manner —and that there is nothing in the design of, or inscription on, the said monument, which is at all unsuitable to the place; the same consisting merely of one side of an obelisk of black and gold marble, with a female figure, of white marble, weeping, and leaning on, or reclining over, an urn of marble of the same sort, and having underneath a tablet with the name, age, and time of death of the said Amy Seager, and others of the family of the said James Seager, engraved thereon.

4. The fourth was the usual concluding article, averring the truth of the premises.

For the respondent, Mr. Adam, and Drs. Swabey and Dodson. The allegation responsive to the articles in this suit was, and is, inadmissible, as pleading no sufficient legal justification of the erection of the "monument," the subject of the suit. We contend the rule of law to be that which, in substance, the articles affirm, namely, that no monument can be set up in a church, without a legal licence or the faculty of the ordinary first duly had and obtained: and we also contend that if this rule of law be infringed, it will not only be sufficient to found the **[545]** censure of the ordinary; but that he is invested with full authority to decree a removal. And it is no answer to articles calling upon the defendant to shew cause against the infliction of these penalties for erecting a monument without the ordinary's leave, to say that he erected it, forsooth, with the leave, or by the consent, of the minister and churchwardens.

The circumstance of this monument being an ornament to the church (presuming it to be), instead of disfiguring it, will not alter the rule of law: since its being erected without a faculty is equally illegal, whether it be ornamental or otherwise. It is no defence to a charge of having "usurped the ordinary's authority," to say that no prejudice to any, in the instance in question, or even that the contrary, has resulted from it. The offence charged is "the having usurped the ordinary's authority," which is the same in either case—and the legal penalties of its usurpation in this instance are those already described.

The fitness and convenience of the rule which the articles so affirm is as obvious as the rule itself is clear and certain. If the ordinary be the sole legal judge of the propriety of any additions to the fabric of the church, of which there can be no doubt, it follows, necessarily, that he ought to be consulted, in the first instance, or prior to any such being made. His power, in this respect, is not arbitrary. His consent to any being unduly withheld, when properly applied for, will found an application—it is to be presumed, a successful application—to his ecclesiastical superior. This is the rule to be collected from the case of *Cart* v. **[546]** *Marsh* (Mich. 11 Geo. 2. Strange, 1080); not that an appeal well lies against the ordinary for promoting his office against those who make additions to the fabric, without applying for his consent at all. This would, in effect, be limiting his privilege to that of removing such, after first, at his own risk, proving them to be nuisances; a position utterly untenable, but one, at the same time, which, we apprehend, this allegation being admitted, would go but little short of affirming.

The authorities for a position diametrically opposite to this are sufficiently numerous and sufficiently precise. Of monuments in churches (the additions to the fabrics in

question), Sir Edward Coke (3 Inst. 110), indeed, only says, generally, that the erection is lawful, if it be done "in a convenient manner." But satis liquet, both from other text writers and from decided cases, that this to be done in a convenient manner, and, consequently, to be lawfully done, must be done with the consent of the ordinary. Such are the doctrines of Gibson (Codex, pages 453, 454), Degge (Parson's Counsellor, p. 1, c. 12), and Prideaux (Directions to Churchwardens, 64)—with which the dicta of Lord Stowell, sitting in the Consistory Court of London, in the cases of *Bardin and Edwards* against *Calcott*, and *Maidman* against *Malpas*, respectively (1 Hag. Con. pages 14, 205), strictly, in substance, concur. Lastly, it clearly results from adjudged cases—more especially from that of *Bury* versus **[547]** *The Bishop of Exeter*, reported in Strange,(*a*)[1] not only that the ordinary is the sole judge of what monuments, or the like, are fit to be set up in a church, but that, if set up in a church without his consent, he may proceed by suit to remove them, for that reason [in the words of the printed report, "as being set up without his consent"] merely; and without any reference whatever to the question of their being ornamental, or otherwise, to the fabric of the church.

For these reasons, and upon these authorities, we call upon your Lordships to pronounce against this appeal.

For the appellant, Lushington and J. Addams, Doctors, and Mr. Mereweather. We contend that the supposed impediment here, the want of a faculty, taken absolutely and per se, is, at most, in the nature of the impedimentum impeditivum merely, and not of the impedimentum dirimens; in other words, that if, in the absence of a faculty, the ordinary may interfere to prevent the erection of a monument, still, that the actual erection without a faculty is no ecclesiastical offence—à fortiori is none that can justify a decree of removal—in the event, that is, of such monument being proved to have been lawfully erected, at least in other respects; and also, at the same time, to be in itself neither inconvenient nor unseemly.

If, indeed, a monument were set up in a church in defiance of the ordinary's prohibition, after notice special, or general even, not to erect without a fa-**[548]**-culty, this might possibly (supposing, for argument's sake, the ordinary's present right to prohibit) be good ground for decreeing a removal without any reference either to the lawful erection in other respects, or to the fitness and convenience (or the contrary) of the structure itself. Probably the case in Strange, upon which so much stress has been laid, proceeded upon some special considerations of this sort, though not appearing in the printed report, which is contained, literally, in six lines.(*a*)[2] But the case set up here rests upon no such grounds. The official neither is, nor can be, shewn to have given any notice not to erect, either special or general even, as it was competent to him to have done; for instance, by exhibiting articles to the churchwardens of Poole at his visitations, or at some one of them, particularly interrogating them as to the practice of erecting tombs in the parish church of Poole, and calling upon them to present all persons erecting them without a faculty. Nothing of this sort is pretended; and, in the absence of every thing, we maintain the rule to be that which has just been stated.

It should seem, however, as already intimated, by no means certain that the mere erection of a monument without a faculty, even after a notice (purely **[549]** gratuitous) from the ordinary not to erect, is a punishable offence at all, especially at such same ordinary's own instance at the present day. We admit the strict rule of law, antiently, to have been that no monument should be erected without a faculty; at the same time it must in return be conceded to us that the observance of that rule has been dispensed with by common consent in all modern instances. Of all the numerous monuments, tablets, and grave stones erected to the memories of deceased persons

(*a*)[1] Sub nomine *Palmer* v. *The Bishop of Exeter*, Mich. 10 Geo. 2. Strange, 576.

(*a*)[2] It is in these words: *Palmer* against *The Bishop of Exeter*. Sir Thomas Bury set up his arms in the church of St. David's, in Exeter. The ordinary promotes a suit in the Spiritual Court to deface them, as being set up without his consent. It was moved for a prohibition, on the authorities, that action lies by the heir for defacing the monument of his ancestors. But Eyre and Fortescue, Justices, said the ordinary was judge what ornaments were proper, and might order them to be defaced. The same was afterwards moved in the Court of Common Pleas, and denied there also. Strange, 576.

within that period, applications for faculties to erect any have rarely, if ever, occurred in the recollection of the oldest practitioners in Ecclesiastical Courts. The last and latest instance upon record of any interference on the part of an ordinary to check or control this known practice of erecting monuments without faculties is that reported in Strange; for which we have to go back more than a century. This, we submit, makes it questionable whether, at the present day, the mere absence of a faculty, under any circumstances, can or should be deemed sufficient to constitute the erection of a monument in any church or chancel an ecclesiastical offence at all. Meantime, the practice so acquiesced in, on all hands, of erecting monuments without faculties, has had one certain result, namely, that were ordinaries, generally, now to proceed to a removal of the monuments erected without faculties in their several jurisdictions, indiscriminately—as the rejection of this allegation would infer them at liberty to do—it would go, this, to the demolition of nearly all the monuments in the kingdom erected within the last 100 years; not, **[550]** probably, without material injury, in many instances, to the actual fabrics of the churches themselves.

Be this, however, as it may, we recur confidently to our first position, that the setting up of this monument under the circumstances is no ecclesiastical offence, still less is one that can justify a decree of removal, in the event of its being proved that it was lawfully set up in other respects, and is neither, in itself, inconvenient nor improper. Consequently, the defendant's responsive allegation pledging him to prove all this was and is admissible. The current of authority uniformly flows this way—abstract the single case in Strange, which proceeded, it may fairly be inferred, on some such special consideration as that already suggested. Of Gibson and Prideaux, cited as authorities by the counsel for the respondent, we shall speak presently. As for the judgments said to have been delivered by Lord Stowell, in the case of *Maidman* against *Malpas* and the other, it is obvious, even on a slight inspection of these, not to descend into particulars, that they have no pretence whatever to be cited as authorities upon the present question. Degge, too, may be put out of the case—he speaks of the licence of the ordinary, or the consent of the parson and parish, in the alternative, as if either would suffice to justify the erection of a monument in a church. This is clearly erroneous—whatever becomes of the necessity for the ordinary's consent, that of the parson must at least be had—both may be necessary—but that the former either includes or dispenses with the latter is obviously a mistaken notion. The authority of Degge, therefore, we repeat, is of no weight. The real authorities then in point are Gibson and Prideaux; no mean authorities, **[551]** we admit, in the absence of any, or at most in the presence of a single adjudged case; which, however, might well be, and most probably was, decided upon some special circumstances of its own. But we contend that, instead of making against us as insisted, they are on our side; that they are with us to the fullest possible extent of making the facts pleaded in this allegation a good defence against the ordinary's proceeding to decree a removal of the monument, hardly admits of a question. Gibson hopes that "if monuments erected without consent, upon inquiry and inspection, be found to the hindrance of divine service" [or as the rule may fairly be extended, be found, upon inquiry and inspection, otherwise inconvenient or improper], he "hopes it will not be denied that the ordinary in such case hath sufficient authority to decree a removal;" plainly intimating that he, Gibson, could even conceive or imagine him to have sufficient authority to decree a removal in no other case. Gibson, however, is the writer least likely to compromise any fair right of an ordinary—no person had higher notions of the power and jurisdiction of the ordinary in all matters appertaining to the church than Bishop Gibson.(*a*) **[552]** Prideaux's authority is equally

(*a*) The whole passage in Gibson is as follows:—

Monuments, coat-armour, and other ensigns of honor, set up in memory of the deceased, may not be removed at the pleasure of the ordinary or incumbent. On the contrary, if either they or any other person shall take away, or deface them, the person who set them up shall have an action against them during his life, and after his death the heir of the deceased shall have the same, who, as they say, is inheritable to arms, &c. as to heirlooms; and it avails not that they are annexed to the freehold, though that is in the parson. But this, as I conceive, is to be understood with one limitation—if they were first set up with the consent of the ordinary. For though (as my Lord Coke says) tombs, sepulchres, or monuments may be erected for the

precise and to the same identical point. "The monuments, coats of arms painted in the window, or elsewhere, penons, hatchments, &c. put up in the church for the memory of the deceased buried there, if regularly set up with the consent of the minister who hath the freehold" [not a word about a faculty], "cannot be pulled down again either by the churchwardens, minister, or ordinary. But if any of the said particulars be an incumbrance, or any annoyance to the church, or in any way hindering or incommoding the minister in performing any of the divine offices, or the parishioners in partaking of them, in this case the ordinary hath power to give his order for their removal." True it is, he adds, "And therefore no one can be safe in any new erection in a church who hath not had the bishop's licence for the same; especially in setting up altar monuments which are most-an-end (most generally) a nuisance and incumbrance to the church wherein they are placed" (see Directions to Churchwardens, 64). But this, the dictum upon which our opponents mainly rely, well consists with our interpretation of what precedes it; and the effect of the whole we **[553]** apprehend to be this. If monuments are regularly set up with the leave of the minister singly, the ordinary has power, indeed, to remove; but only in the event of their proving nuisances or incumbrances. But if erected by the bishop's licence as well, those who erect them are then "safe"—safe, that is, at all events—and the erections themselves cannot be removed; but, at least in point of strict law, are entitled to stand as long as the fabric of the church itself, nuisances and incumbrances, or not. So much for Gibson and Prideaux. As for the case of *Cart* v. *Marsh*, cited also out of Strange (p. 1080), it is clearly in point neither way—all which can be collected from it to the purpose is that ordinaries should exercise in such matters a prudent, as well as a legal, discretion. Now, that the official of Great Canford and Poole is proceeding imprudently in this most vexatious interference, altogether, we apprehend, can admit of no question; even granting him, which we deny, to have proceeded legally in rejecting this allegation.

Upon these grounds we insist that your Lordships are bound to pronounce in favour of the present appeal.

DECREE.

The Judges, having heard the allegation read, and advocates and proctors on both sides, by their interlocutory decree, pronounced for the appeal made and interposed in this behalf, and for their jurisdiction, or rather for that of our Sovereign Lord the King—reversed the order or decree of the Judge of the Court below appealed from, and re-**[554]**-tained the principal cause; and therein directed the first sentence of the second article of the said allegation,(*a*) and also the word "accordingly" in the second sentence to be expunged, and, so reformed, admitted the said allegation.

End of Trinity Term.

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deceased in church, chancel, &c. in convenient manner, the ordinary must be allowed the proper judge of that convenience; inasmuch as such erecting (for so he adds) ought not to be to the hindrance of the celebration of divine service. And if they are erected without consent, and (upon inquiry and inspection) be found to the hindrance of divine service, it will not (I hope) be denied, in such case, that the ordinary hath sufficient authority to decree a removal, without any danger of an action at law. Gibson's Codex, 453, 454.

(*a*) Which stood, as reformed, "That previous to the said monument being so erected and set up in the said parish church, he, the said James Seager, applied for and obtained the consent of the minister," &c. See p. 543. The Court, by directing this, may be taken to have expressed its final judgment that "no practice can absolutely legalize the erection of a monument without a faculty."

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By J. ADDAMS, LL.D., an Advocate in Doctors' Commons. Vol. II. Containing Cases from Michaelmas Term, 1823, to Trinity Term, 1825, inclusive. In Continuation of the ECCLESIASTICAL REPORTS of Dr. PHILLIMORE. London, 1825.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

STREET *v.* STREET. Arches Court, Michaelmas Term, 2nd Session, 1823.—Sentences of local ordinaries as to the amount of (especially permanent) alimony not to be disturbed on slight grounds. An appeal by the husband, complaining that too large a sum had been allotted to the wife for permanent alimony pronounced against, and the cause remitted.

(An appeal from the Consistorial Episcopal Court of Exeter.)

This was an appeal by the husband from an allotment of permanent alimony to the wife, made by the Consistorial Episcopal Court of Exeter; where the wife had obtained a sentence of divorce from the husband by reason of adultery.

Judgment—Sir John Nicholl. In this suit, which was originally depending in the Consistory Court of the Lord Bishop of Exeter, the wife, the respondent, has obtained a sentence of divorce from the husband, the appellant, by reason of adultery. The appellant acquiesces in the sentence so far. But the wife has also been allotted the sum of 160l. per annum, payable by the husband as for per-[2]-manent alimony. It is this allotment of alimony which the husband objects to; and from which he has prosecuted the present appeal.

I am still of opinion, as in the case of *Cook and Cook* (2 Phillimore, page 40), to which I have been referred, that it requires a strong case to disturb the sentence of the local ordinary upon a question of alimony. If that sentence were extreme either way, the Court would undoubtedly interfere; in the one case to modify or reduce, and in the other to augment, the alimony, so, in either case, on that supposition, egregiously misallotted. But it is not any mere slight difference of opinion as to the propriety of the allotment in point of amount which would justify this Court to itself in exercising such an interference; and for this reason in particular. The Court below must have been better informed than this Court can be, with respect to the real merits of the whole case as between the parties. It had better means, consequently, of forming its judgment upon the question, agreeably to those general principles of equity which are nearly the only ones capable of being brought to bear upon this species of question. For instance, the Court below had means of estimating the true nature and degree of the husband's delinquency; with respect to which this Court is comparatively uninformed; for the "process" only includes that part of the whole case connected with the subject-matter of the appeal, in particular.

The appellant, in his answers to the allegation of faculties, admitted an income of 502l. 16s.: and, without suspecting him of perjury, I am justified [3] in thinking

him inclined to make the best, in those answers, of his own case; more especially from a circumstance to which I will presently advert. Now taking this amount of income at his own statement, I am of opinion that the allotment of alimony complained of is by no means exorbitant. Not that the Court below was not well founded in rating, as it probably did, the appellant's income something higher than he admitted it. For instance, in his answer to the 4th article of the allegation of faculties, he estimated the profits of his business, that of a coachmaker, at 250l. per annum; and that without exhibiting his books, or producing any sort of vouchers. But of two witnesses upon the allegation of faculties, who should seem to be competent judges, one is of opinion that "the appellant's business nets between 3 and 400l." and the other, "that he does not clear by it more than 500l. per annum." And there was a circumstance in the case, as already hinted, which fully justified the Court in concluding that the appellant would go at least the utmost warrantable length, for the advancement or maintenance of his own interest. The appellant had sworn in his answers that the respondent was possessed, in her own right, of certain premises, which he, the appellant, was ready and willing to take, for a term of years, at a net rent of 30l. But it was in proof that on the respondent offering to close with this proposal of the appellant, he not only refused to take the premises in question at a net annual rent of 30l., but said that "he would have nothing to do with them at any price." Lastly, these premises themselves were sworn by a builder and surveyor not to be worth more than 16l. 5s. per annum, net **[4]** rent. And upon this evidence the Court which had given credence, in the first instance, to the husband's statement, in allotting the alimony, pendente lite, afterwards directed the additional sum of 1l. 2s. 6d. per month to be paid to the wife: being the monthly difference between the real value of these premises so ascertained and that sworn to by the husband; at which the Court, as I have said, had been content to take them, in allotting the alimony, pendente lite, at the commencement of the suit.

But taking the husband's statement as correct, what is the result? The joint income of the parties is 527l. per annum, the wife appearing to be possessed of a separate income of 25l. per annum in her own right. Add to this the annual sum of 160l. payable to the wife by the husband under the sentence appealed from; and the wife's annual income is 185l., leaving that of the husband 342l., nearly double that of the wife. She has rather more than two-fifths of the whole; no unusual proportion, for Courts have, not unfrequently, given a moiety, and surely not an excessive proportion in a case like the present. For the husband, in this case, had originally no property. He seems at least to be indebted for all his prosperity to this marriage,(*a*)[1] from the obligations of which he **[5]** has broken, and the duties of which he has neglected to fulfil.

But the parties have one child, a daughter, and it appears in the process, by the appellant's answers to the allegation of faculties, that he pays for the education and maintenance of this daughter (pursuant to a stamped agreement) the sum of 200l. per annum, which, "under the degrading circumstances of her late situation, cannot be less:" and the appellant claims that his income of 502l. shall be taken, less the sum of 200l. per annum, which he so pays for this daughter's maintenance and education. Of what these "degrading circumstances" alluded to in the process are, this Court is, judicially, uninformed; (*a*)[2] but the local ordinary, though probably better, in fact, acquainted with them, declined acceding to the husband's prayer in this behalf. It is quite impossible for this Court, uninformed as it is on the subject, to pronounce that, in so doing, he acted erroneously. It is equally so to maintain that, independent of

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(*a*)[1] It was in evidence for the respondent that Street, the appellant, was an apprentice to his wife's first husband, and that he had no property at the time he married her. On the other hand, however, it was sworn by the appellant that the wife's whole property at the time of the marriage had been settled upon her to her own separate use, that her business at the time of the marriage produced very little profit, and that its afterwards becoming more profitable was solely owing to his industry and perseverance.

(*a*)[2] At the hearing affidavits were tendered on the part of the appellant, stating that his daughter, at the age of 15, had eloped from Exeter with a strolling player, at the mother's instigation, &c. &c. But the counsel for the respondent objected to the admission of these affidavits, and the Court sustained their objection and refused to permit the affidavits to be read.

this, or upon general considerations, the father's improvident bargain with respect to the child can operate any way to the prejudice of the mother. Upon the whole, nothing before the Court enables it to pronounce that the sentence appealed from was founded upon a view of the case at all erroneous; under which impression it is the duty of the Court to affirm it, and to remit the cause.

Sentence affirmed.

[6] CURLING *v.* THORNTON. (IN THE GOODS OF THE LATE COLONEL THORNTON.) Prerogative Court, Michaelmas Term, 4th Session, 1823.—An allegation, responsive to a condidit—suggesting the will of a British-born subject to be invalid by the law of France; where he died, and of which country he was alleged to have died a "domiciled inhabitant;" and that the effect of that invalidity was to defeat its claim to probate in the courts of this country —rejected.—The succession to the personal estate of a British subject dying domiciled in any part of the British Empire, intestate, is to be regulated by the law of that part of the British Empire which was his domicil at the time of his death.—But quære, whether a British subject can so far "exuere patriam," as to render his property here liable to distribution according to any foreign law, even in case of his intestacy?—Though admitting this to be, it would by no means follow that his will, to be valid here, must conform to that foreign law, either upon principle or upon authority.—The rule that where property is to be distributed under a certain law, in a case of intestacy, it must be so distributed in the absence of a will valid by that law, only applies to cases in which, there being no conflict of domicils, the law by which the case must be governed, whether ultimately to be deemed a case of testacy, or one of intestacy, admits of no question.

Thomas Thornton, Esq., the party deceased in this cause, died at Paris in the month of March, 1823. Probate of his will being opposed on behalf of his widow and relict, it was propounded by his executor in a common condidit. The present question arose, on the admission of an allegation, tendered by the widow, responsive to that plea.

This allegation pleaded, in substance,

1. That the said Thomas Thornton went from England to France about the end of the year 1815, and for a considerable time resided in that kingdom—that having determined to settle there, he arranged all his affairs in this country, "so far as was necessary or practicable," and towards the end of the year 1816 finally withdrew therefrom, as a permanent place of abode, and fixed his place of residence at Paris—that, in pursuance of such determination, and in order to acquire civil rights as a domiciled inhabitant of that kingdom, he applied for, and obtained, a "Royal Ordinance," bearing date 30th January, 1818, permitting him to "establish his domicil in France," and securing to him "the enjoyment of all civil rights so long as he should continue to reside in France"—that, from the time when the said deceased obtained the said Royal Ordinance, he continued constantly to reside in France, until his death in March, 1823; save that once only, happening in Sep-[7]-tember or October, 1818, he visited this country on matters of business; and, having remained here only so long as such business required his presence, immediately returned to France—that nearly the whole of his moveable effects were removed to France, and that, in July, 1817, he purchased a considerable landed estate in that kingdom, and assumed the title of Marquis de Ponté, and continued to occupy that estate till his death, though he had entered into an agreement for the sale thereof a year or two preceding his death—that the said deceased had wholly abandoned all intention of returning to England; and that his sole establishment was in France during the last six years of his life, where he died "a domiciled inhabitant of that country;" and that, by reason of the premises, "the personal estate of the said deceased ought to be disposed of according to the laws, customs, and usages prevailing in the kingdom of France, with respect to the personal estate of persons dying domiciled therein."

2. The second article merely pleaded the exhibit No. 1, annexed to the allegation, to be a true copy of the "Royal Ordinance" mentioned in the preceding article.

3. That by the laws, usages, and customs of France, an alien, who shall have established his domicil in France by virtue of a "Royal Ordinance," is entitled to all the civil rights and privileges of a natural-born French subject, during his residence

in France—that by the said laws, &c. the personal property of an alien, dying in France so domiciled, is "regulated, disposed of, and distributed" as if the same belonged to a natural-born French subject dying [8] in France; and that the said deceased having died in France, so domiciled therein, his personal estate "is regulated, disposed of, and distributed" in the same manner, and according to the same rules, as if the same had belonged to a Frenchman.

4. That by the said laws, usages, and customs of France, a French or alien so domiciled in France as aforesaid, and dying therein, cannot by will deprive his lawful widow and child of the whole of his personal property, nor bequeath, to his adulterous offspring and its mother, "an hereditary portion," but, that a will of that tenor is, by such laws, &c., null and void, to all intents and purposes whatsoever.

5. That Thomas Thornton, the deceased, left behind him Elizabeth Thornton, widow, his lawful relict, and William Thomas Thornton, his natural and lawful son, a minor—that by the will pleaded and propounded in this cause on behalf of the executor the deceased's lawful widow and child are "almost wholly" excluded from any share of the property left by the deceased; and that the same is bequeathed, by the said will, to an illegitimate daughter of the said deceased, and to her mother—consequently, that by the laws of France, the said will is null and void, and that the property in question devolves, by succession, upon the widow and lawful child, the same as if the said deceased had died intestate.

6. That in June last (1823), the said Elizabeth Thornton, widow of the said deceased, applied to the civil tribunal of First Resort for the Department of the Seine, at Paris, for letters of administration of the goods of the deceased in the kingdom of France, as dying intestate by the laws of France, and was [9] opposed in that application by the executor named in his said pretended will (the parties, respectively, in this cause)—that in August, 1823, the president Judge of the said Court, after hearing advocates and solicitors on both sides, adjudged the possession of the personal estate and effects of the said deceased to his said widow, and constituted her administratrix thereof, provisionally, or pending suit—but that "all questions as to the legality, operation, or effect of the said will, still remain undecided in the said suit, though judgment therein is shortly expected to be pronounced." (*a*)

7, 8. The 7th article only pleaded the exhibit No. 2 to be an official copy of the proceedings aforesaid in the French court, on the grant of administration, provisionally, or pending suit, to the widow; and the 8th was the usual concluding article.

The "Royal Ordinance" being the exhibit No. 1, was as follows:—

Præfecturate of the Department of the Seine.

Louis, by the grace of God, King of France and Navarre, to all, &c.

Art. 1. Mr. Thomas Thornton, a native of London, aged sixty years, residing in Paris, is admitted to es-[10]-tablish his domicil in France, for the purpose of enjoying all civil rights, so long as he shall continue to reside therein.

Art. 2. Our keeper of the seals, minister, secretary of state in the department of justice, is charged with the execution of the present ordinance, which shall be asserted in the bulletin of laws.

Done at Paris, 30th January, A.D. 1817, and of our reign the 22nd.

(Signed) LOUIS.

The exhibit No. 2 is omitted, as furnishing nothing material to the question at issue.

Judgment—Sir John Nicholl. The present question respects an alleged will of the late Colonel Thornton.(*a*)[2] It was made and executed in this country, bearing date the 2d of October, 1818; and the testator died at Paris on the 10th day of March, 1823. It begins as follows:—"This is the last will and testament of me Thomas

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(*a*)[1] Accordingly—(subsequent however to the sentence in this Court, the Prerogative Court of Canterbury), the Court of First Instance at Paris has come to a decision, pronouncing the will null and void, and condemning the executor in costs—a decision, perhaps, the more extraordinary, as British interests alone were involved in the question: for no French subject or subjects apparently were entitled to the deceased's property, or to any part of it, in either alternative; in that of the will being pronounced for, or in that of the deceased being held to have died intestate.

(*a*)[2] The deceased was commonly known as Colonel Thornton, having formerly been Lieutenant-Colonel of the Second Regiment of York Militia.

Thornton, of Falconer's Hall, and Boythorp, in the East Riding of Yorkshire; and of the principality of Chambord, near Blois, and Pont le Roi, Department de St. Aube, in the kingdom of France, Esq." Such is the testator's description of himself in the heading of this instrument. The instrument itself gives and be-**[11]**-queathes all the testator's real and personal property to his executors, in trust, for payment of his funeral expences, debts, and legacies. It directs that Priscilla Duins shall be allowed to select whichsoever of his houses, either in England or France, she thinks fit, as her residence, and shall have and enjoy all the household furniture, plate, china, linen, and other household effects which shall be in and about such house, for and during the term of her natural life; together with an annuity of 500l. It provides for the maintenance and education of Thornvillia Diana Rockingham Thornton, his natural daughter by the said Priscilla Duins, till she attains her age of twenty-one; and gives her a life interest in all his property,(*a*) which it strictly entails, first on her issue, and in failure thereof then, successively, on different branches of his own family. It authorizes the trustees to sell or exchange any part or parts of the real estate in England or France; but estates purchased with the produce of such sale, or those taken in exchange, must be in England only. It directs that the surplus of the personal property shall be invested in the purchase of estates, but still only in England. Lastly, it provides that furniture (in general) and other moveable effects shall be sold, and become a part of the surplus so to be invested, except plate, books, paintings, and drawings, which last shall be heir-looms, and belong, in succession, to the tenant for the time **[12]** being of the entailed estates. The instrument in question is very long, occupying twenty-eight sheets of paper; it is drawn up in English, manifestly with reference to English forms and the English law; and it was regularly executed by the deceased in this country, in the presence of three witnesses.

The allegation which is offered on the part of the widow, and the admissibility of which the Court is now called upon to determine, does not deny the factum of this will, as I have described it. What it does is this. It suggests, first, that the will is invalid by the law of France; and, secondly, that under the circumstances pleaded the effect of that invalidity is to defeat its claim to probate in the courts of this country.

The counsel for the executors have taken a sort of general preliminary objection to the admission of this allegation, namely, that the question sought to be raised upon it is not one which this Court, a mere Court of Probate, ought to entertain. They have contended that the will propounded in this cause being such as I have described, and having been made and executed here, in England, by a British-born subject, is absolutely, and at all events, entitled to probate in this Court, de jure, on due proof of the factum of the instrument—be its effect, or operation, what it may. Upon these last they have argued, it rests not with this Court, but with a Court of Construction, the Court of Chancery, to decide; which, being satisfied; first, that the law of France ought, in substance and effect, to govern this case; and secondly, that that law is what it is pleaded to be in this allegation, will make the executors who **[13]** have taken probate here, mere trustees, for the benefit of the lawful widow and child. I am not prepared to say that the objection so taken in limine is quite unfounded; but it may be unnecessary to settle that point upon the present occasion. It neither is, nor can be, denied that a will of the description of Colonel Thornton's is entitled to probate primâ facie—and that to oust its title to probate, it must not only clearly appear to be invalid by the law of France, but, by reason of such invalidity, to be also invalid by the law of this country. I proceed, therefore, at once to inquire whether such would be the just legal result of the facts stated in this allegation; taking them, for the purpose of the argument, to be not merely capable of proof, but actually proved—upon the result of which inquiry must plainly depend the question immediately at issue before the Court; the admissibility, namely, or the contrary, of the present allegation.

The facts relied upon in the allegation, by way of defeating the claim of this will to probate, are these—that, in 1815, the deceased went to France, and finally withdrew from England in 1816, the following year—that, in 1817, he applied for, and obtained, a "Royal Ordinance," authorizing him to fix his domicil in that country, and

(*a*) With the exception of a few pecuniary legacies, of no great value in the whole —among which, however, is a bequest of 100l. to the testator's son, described in the will as the "son of Mrs. Thornton." By the will no provision is made for the widow.

assuring to him, during his residence there, the enjoyment of all civil rights—that he continued resident in France from that time till his death there, in March, 1823, only once in that time coming over to England, merely to transact matters of business (one of such matters of business plainly, from its date, being the making of the will in question)—finally, that he removed nearly all his **[14]** moveable effects to France, and purchased an estate or estates there in 1817, which estate or estates he actually retained to the time of his death.

The counsel, who argued in support of this allegation, have cited a variety of cases (*a*)[1] tending to shew that the succession to the personal estate of a British subject dying domiciled in any part of the British Empire is regulated by the law of that part of the British Empire which was his domicil at the time of his death. Thus, of a Scotchman dying domiciled in this country, the effects, both Scotch and English, are to be distributed according to the law of this country, and not according to that of Scotland, the intestate's domicil of origin—and vice versâ. The plain reason seems to be that, of British domicils, a British subject is free to select whichsoever he pleases —and, dying domiciled in any part of the British Empire, other than his domicil of origin, intestate, the fair presumption is that he intended his property to be distributed conformably to the known law of that part of the British Empire for which his domicil of origin was so, lawfully as well as in fact, abandoned. Again, if a foreigner die abroad, in his own country, leaving property here, as in the British funds, the succession to that property is to be regulated by the law of his own country, and not by that of England—for England, in such case, is merely the locus **[15]** rei sitæ, the law of which has little to do with the question of distribution, according to modern decisions.(*a*)[2] These are points definitively settled: but no case has been cited conveying to my mind that a British subject who has abandoned (if, indeed, a British subject can abandon) his forum originis for **[16]** a foreign domicil, is liable to the law of that foreign domicil for the distribution of his property here, even though dying intestate. I speak only of his property situate here—for it is obvious that the Courts of this country, even if entitled de jure, are empowered de facto to determine nothing with reference to the distribution of his effects situate locally in a foreign country.

(*a*)[1] See the principal of these, if not all these, referred to in the case of *Somerville* v. *Lord Somerville*, 5 Ves. 750, et seq. where the various cases and authorities on the subject of domicil, as connected with this particular question of succession to personal property in cases of intestacy, are stated, and commented upon, in the argument and sentence, at great length and with great ability.

(*a*)[2] This point is said to have been completely settled in *Balfour* v. *Scott* (*Lady Titchfield's case*), in the House of Lords, 11th April, 1793. Accordingly, in the Annandale cause (*Bempde* v. *Johnstone*, 3 Ves. 198), the Lord Chancellor took the question as concluded; intimating, however, a doubt of his own upon it, if the question was still open. His Lordship said, "I am bound by repeated decisions in the House of Lords to make the decree I intend to make; that the deceased had that domicil in England that decides upon the succession to his personal property, and carries the succession according to the law of England. The point has been established in the cases in the House of Lords, which, if it was quite new and open, always appeared to me to be susceptible of a great deal of argument: whether in the case of a person dying intestate, having property in different places, and subject to different laws, the law of each place should not obtain in the distribution of the property situated there. Many foreign lawyers have held that proposition. There was a time when the Courts of Scotland certainly held so. The judgments in the House of Lords have taken a contrary course; that there can be but one law: they must fix the place of the domicil, and the law of that country where the domicil is decides, wherever the property is situated. That I take to be fixed law now. The Court of Session has conformed to those decisions; according to which the Courts of Great Britain, both Scotch and English, are bound to act."

In the Somerville cause the Master of the Rolls expressed himself "as having some reason to think that our Spiritual Courts once inclined to the lex loci rei sitæ, as well as the Courts of Scotland; and that this might have furnished the rule of decision upon similar questions there, if the authority of the House of Lords had not interfered." See 5 Ves. 791.

None of the cases then, with which I am acquainted, or to which I have been referred, are in point to the case contended for by the counsel for the widow, to an extent beyond that which I have already stated. Meantime, they go fully to demonstrate one thing, namely, that the forum originis is hardly shifted—that it continues at least till it is completely abandoned, and another taken. This rule is to be collected in particular from the Somerville cause,(*a*) where the Master of the Rolls held the intestate's Scotch domicil, his domicil of origin, clearly to prevail over his English domicil—consequently holding that his personal property was liable to be distributed according to the law of that country, and not according to the law of England; although the intestate **[17]** had been principally resident, for a long series of years, and actually died, in England. In the Somerville cause, however, the question lay between two domicils, either of which, as being both British, the deceased was free to select. The difficulty of a British-born subject shifting his forum originis (not for another British, but) for a foreign domicil, to say the least, must be infinitely greater, and more considerable. It may even be doubted whether this can be—whether a British subject is entitled so far "exuere patriam," as to select a foreign domicil in complete derogation of his British; which he must, at all events, do, in order to render his property in this country liable to distribution according to any foreign law. But however that be, this is certain, that the only abandonment of his forum originis by a British subject, which is adequate to this effect, must be a total and complete one; supposing him capable, that is, of any such total and complete abandonment of his forum originis; a matter which not only rests upon no authority, but which is somewhat doubtful, I think, even upon principle.

Now to what does the case before the Court, viewed as with reference to these principles, really and substantially amount? Stript of mere averments of intention, as of fixing his sole domicil in France, and so forth (and such averments of intention, not deducible from the facts pleaded, are of no avail whatever in the cause), the allegation amounts to this—that Colonel Thornton, some years prior to his death there, went to reside in France, and soon after applied for and obtained a "Royal Ordinance," as-**[18]**-suring to him certain privileges, so long as he should reside in France; and that, during his residence there, he purchased an estate, or estates (which, by the way, he had contracted to sell, though they are pleaded to have been in his actual occupation at the time of his death), assuming from this, or one of these, a territorial title, that of Marquis de Ponté. But was his British domicil completely abandoned during this interval, and was France, if his domicil (properly speaking) at all, his sole domicil? By no means: this instrument, the will, itself furnishes pregnant proof to the contrary. It proves that the deceased never sold or disposed of his mansions in England—it proves that he neither parted with, nor removed to France, his valuable (I may presume his most valuable) moveables even, as plate, books, paintings, and drawings; for the will makes, or purports to make, these heir-looms upon his English estates. In short, it proves, as with reference to provisions upon which I shall presently observe, that the deceased, in his own mind and apprehension, never ceased to be an Englishman; and that as this country was the place of his own nativity and personal sojourn during, by far, the greater portion of his life, so to this country it is that he himself was looking as the fixed seat and permanent habitation of his successors and posterity. Why upon these considerations, upon the application of these principles, if correct, to the case before the Court it can entertain, perhaps, little doubt that the personal property of the deceased ought to have been distributed according to the law of this country, and without any reference to that of France, even though he had left no will, and the case had been one of intestacy.

(*a*) "The third rule I shall extract,"* said the Master of the Rolls, in delivering judgment in the Somerville cause, "is, that the original domicil, or, as it is called, the forum originis, or the domicil of origin, is to prevail until the party has not only acquired another, but has manifested, and carried into execution, an intention of abandoning his former domicil, and taking another as his sole domicil." 5 Ves. 787.

* Namely—from the opinions delivered by Lords Thurlow and Loughborough, the former in *Bruce* v. *Bruce*, the latter in *Ommaney* v. *Bingham*, in the House of Lords; and from the cases and authorities referred to, and brought forward in those cases.

[19] But the case in question is not a case of intestacy. The deceased left a will. Now admitting, for argument's sake, that this Court would have been bound to defer to the law of France in the supposed case, that of an intestacy, will it necessarily follow that it is also bound to defer to it in the actual one, that of the deceased having left a will? This, again, appears to me somewhat questionable, even upon principle. Cases of testacy are subject to different considerations from those of intestacy, in this respect, for obvious reasons. In the latter case, for instance, the question lying between two domicils, the intestate's property is to be distributed according to the law of this or that, in virtue of his own implied directions to that effect: to ascertain which the real question in every such case is, which of the two is it to be presumed that the testator himself considered to be his domicil? But there can be neither room nor need for any such inquiry in the case of a will: testacy supposes, ex vi termini, express directions from the testator relative to the disposal or distribution of his property: and that law must obviously govern, in the case of every will, to which the will itself is found (not by a mere casualty, but technically, and, therefore, on the testator's part designedly) to conform—provided, that is, the testator be entitled to a voice in the premises. Hence it should seem by no means to follow universally, even upon principle, that a will to be valid must strictly conform to that law which would have regulated the succession to the testator's property, if he had died intestate. But whatever be the supposed foundation for a different notion upon principle, it **[20]** plainly rests upon no footing of authority. No adjudged case, not even a single obiter dictum, has been cited which can be taken to countenance that notion. In the Somerville cause, for instance, it was ruled that, the deceased dying intestate, the succession to his property was to be regulated by the law of Scotland. But is it any where hinted, even arguendo, in the long and elaborate report of that cause, that had the deceased left a formal, technical, will, strictly valid, in consequence, by the law of this country, its non-conformity to Scotch law, under the circumstances, would have amounted to a total defeazance of that will? Is it any where hinted, in other words, that the deceased in that cause was only testable (and as to all his property) in the precise manner and form, and subject to the strict rules and limitations imposed by the law of Scotland upon testacy? I am confident that nothing occurs throughout that report upon which such an inference can be fairly raised. Not that if it had occurred it might have furnished any rule of very strict application to the present case. Scotland, in the Somerville cause, was the forum originis. Here the forum originis being this country, and the will being such as I have described, it might possibly, at all events, be entitled to probate here, even though null and void by that law (as, for instance, the law of Scotland or of Jersey, could the deceased be argued to have been domiciled there), according to the provisions of which this Court would have been bound to decree a distribution of his effects, had he left no will but died intestate.

[21] At the same time it is true with all this that, where property is to be distributed under a certain law in a case of intestacy, it ought to be so distributed in the absence of a will valid by and according to that law. But this rule only applies to cases in which, there being no conflict of domicils, it admits of no question by what law the case, whether ultimately to be deemed one of testacy or intestacy, ought to be governed. Upon this principle the Court proceeded in a case to which I shall presently advert, that of *Nasmyth*.(*a*) But the Court is quite prepared, were it necessary, to deny the fit application of that rule to a case circumstanced like the present; both for reasons which have appeared and for others to be stated in the sequel, which may possibly render its unfitness of application to the present case still more apparent and still less disputable.

The case set up on the widow's part is one, I have said, utterly destitute of authority. On the contrary, a case has been cited by the counsel for the executor which is pretty precisely in point the other way. The Duchess of Kingston made a will at Paris, which (being neither holographic nor executed in the presence of two notaries, nor executed in the presence of two witnesses and one notary, but in the presence of three witnesses merely), according to the then custom of Paris, [1786], was absolutely null and void. But the testatrix being by birth an Englishwoman, and the will being in English and duly executed according to English forms, it was

(*a*) See note subjoined at the end of this case, page 25.

not only admitted to probate here,(*b*)[1] (which is ample to make it point **[22]** to the question at issue), but it was also deemed valid in France, if the judgment of a French lawyer of eminence (*a*)[1] is to be relied on—whose opinion to that effect, taken expressly upon this very case, is printed and published in the first volume of the "Collectanea Juridica." The duchess, however, had not only taken up her residence in France (where she also died), under "letters patent registered in the Parliament of Paris," couched in terms of privilege, it should seem, full as ample as Colonel Thornton's "Royal Licence," but her will, the instrument in question, was actually made and executed at and in Paris. Here the will was made in England—during the testator's stay in which his French domicil was at least suspended; and his rights as a British subject, supposing them to have been ever waived or forfeited by, clearly reverted to him.

And this, by the way, together with some provisions of the will itself, upon which the Court is pledged to advert, suggests another principle fairly invocable into the case, and by which, were it necessary again, the claim of this will to probate might be still further strengthened and sustained.

It is said, in substance, by Lord Mansfield in the case of *Robinson and Bland*, as reported by Mr. Justice Blackstone,(*b*)[2] that contracts are to be ex-**[23]**-pounded according to the lex loci or law of the place in which they are made, save only where the parties, at the time of making them, had in view a different place; an exception which makes the rule itself well consist with Huber's principle (*a*)[2] that contracts are to be expounded according to the lex loci in which they are to be executed.

Now, taking the principle, mutatis mutandis, to be as applicable to wills as to contracts, what does this principle suggest with reference to the case before the Court? The instrument in question is not only made in this country, but it is to this country that the testator himself limits its full and final effect and operation. The surplus of his personal effects is to be invested in the purchase of estates in England only—such estates as he dies possessed of, either in France or England, are made liable to be exchanged for others at the discretion of his executors and trustees, but such other estates, so taken in exchange for any that he dies possessed of, are expressly required to be in England only. Here, then, the will was both made and was to be finally executed; and these provisions, again, plainly negative the case set up in the allegation of a voluntary total abandonment of his native country by the testator; and prove him, upon his own shewing, to have never ceased to be an Englishman.

[24] In *Nasmyth's case*,(*a*)[3] which has been deemed so precisely in point by the counsel for the widow, the principal material circumstances were almost the reverse of these. The deceased was a Scotchman by birth, and though he died here, it was merely in transitu; for it is not suggested that either in law or fact he was ever domiciled in this country. Scotland, too, was the locus in quo the will was made; in which it was found; and in which, properly speaking, it was to be executed. Upon a question touching the validity of such a will made by such a testator, the Court thought (and still thinks) that it was bound to defer to the law of Scotland—this country being merely in *Nasmyth's case* the locus rei sitæ—the place in which the property, or rather a part of the property, purported to be conveyed under the will, was locally situate. In the present case this is the forum originis—it is also quoad hoc, I think, the forum domicilii; for I very much question whether this deceased, at all events, was ever so domiciled in France as to render his property here liable to distribution according to the law of France, if he had died intestate—this, again, so

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(*b*)[1] Probate was opposed here, non constat upon what grounds by the next of kin. But the cause proceeded no further than to the examination of witnesses on a common condidit propounding the will. The opposition of the next of kin was then withdrawn: and the Court thereupon in 1791 decreed probate to the executors.

(*a*)[1] Monsieur Target. See Collectanea Juridica, vol. i. pp. 323, 331.

(*b*)[2] Sir William Blackstone's Reports, vol. i. pp. 234, 248, and 256, 264. See also Burrough's Reports, vol. ii. p. 1077.

(*a*)[2] Verumtamen non ita præcise respiciendus est locus in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus. Contraxisse unusquisque in eo intelligitur, in quo, ut solveret, se obligavit. Hub. de Confl. Leg. l. 1, tit. iii. s. 10.

(*a*)[3] See note subjoined at the end of this case, p. 25.

far as regards the property which a sentence of this Court can affect, is the forum rei sitæ, a circumstance, perhaps, not wholly immaterial, taken in conjunction with others, though of little or even of no moment standing alone—this, lastly, is the forum contractus as it were; for the will was made in this country; was to be executed in this country; and was drawn up plainly with reference and in strict conformity to the highly technical requisites, in **[25]** that behalf, of the law of this country. Under these circumstances, how totally inapplicable the case of *Nasmyth* is to the position contended for by the counsel for the widow in the present case, must, after what has already fallen from the Court, be too obvious to require any comment.

Upon the whole, being satisfied that the facts pleaded are insufficient to affect the validity of the will which has been propounded in this cause, the Court has no difficulty in saying that the present allegation must be rejected.

Allegation rejected—costs were prayed against the widow, but the Court refused to give costs.

HARE AND OTHERS *v.* NASMYTH. (IN THE GOODS OF DR. JAMES NASMYTH.) On the validity of a will made by a domiciled inhabitant of Scotland the Court here will differ to the law of Scotland: and will pronounce in favour of the will, or that the deceased died intestate, according as that question is determined by the Scotch Court of Probate.

[Distinguished, *Curling* v. *Thornton*, 1823, 2 Add. 21. Followed, *De Bonneval* v. *De Bonneval*, 1838, 1 Curt. 870. Referred to, *Croker* v. *Marquis of Hertford*, 1844, 4 Moo. P. C. 360.]

The suit of *Hare* v. *Nasmyth*, twice referred to in the "judgment," or rather that part of it material to any question of domicil, was briefly as follows:—

The deceased in that cause, Dr. James Nasmyth, usually resided at Hope Park, near Edinburgh; (*a*) but in the year 1812 he came to London, where, though intending from time to time to return into Scotland, he remained till his death, which took place on the 7th of December, 1813. He left behind him certain testamentary papers, which were propounded in Hilary Term, 1815, by the asserted executors, in the Prerogative Court of Canterbury (the deceased having left large personal property within the Province of Canterbury (*b*)); and the admission of the **[26]** allegation propounding them was opposed by counsel for the next of kin upon grounds, however, quite distinct from any question of domicil. The Court [Sir John Nicholl] expressed itself as inclined to think that the legal presumption against the papers propounded was, as contended, too strong to be encountered by the circumstances pleaded, and consequently that the allegation was inadmissible; as laying no case capable, if proved, of giving the papers propounded legal validity according to our law. At the same time, it appearing on the face of the proceedings that the deceased was a domiciled subject of Scotland, the Court itself suggested (a suggestion upon which it subsequently acted after mature deliberation) the propriety of suspending its proceedings until a suit, stated to be then depending in the Courts of Scotland, touching the validity of the identical papers propounded in this (the Prerogative) Court should be decided; for the reasons and upon the principles stated and illustrated to the foregoing judgment—intimating that it might feel it its duty to pronounce for the validity of the testamentary papers, or that the deceased had died intestate, according as the Courts of Scotland should determine that question, either upon general principles, or upon principles applicable to the subject, if any, peculiar to Scotch jurisprudence.

Proceedings in the Prerogative Court were accordingly suspended, and the admissibility of the allegation propounding the asserted will and codicils of the deceased was never finally debated. For the papers in question having been, in effect, pronounced for by the tenor of three interlocutors of the Lord Ordinary of Scotland, bearing date on the 18th day of May, the 9th of June, and the 14th November, 1815; and also of an interlocutor of the Second Division of the Court of Session there, bearing date the 7th day of June, 1816, the next of kin of the deceased declined any further opposition

(*a*) The deceased in early life went to India: but he returned to Scotland in 1798; and from that time to 1812 he usually resided at Hope Park House, as above.

(*b*) The deceased, in addition to considerable real and personal property in Scotland and the Island of Jamaica, was stated to have left personal property in this country to the amount in value of 70,000l.

to probate passing in the Prerogative Court; and probate of the asserted will and codicils was thereon decreed, by the Prerogative Court, to the executors on the second session of Michaelmas Term, 1816; official or authenticated copies of the sentences of the Lord Ordinary and of the Court of Session in Scotland being first brought in.

Subsequent to this, however, the next of kin appealed from the above interlocutors of the Lord Ordinary and of the Second Division of the Court of Session in Scotland to the House of Lords; [27] and that appeal, having been duly prosecuted, came to a final hearing on the 27th of June, 1821; when their Lordships were pleased to reverse the said interlocutors and to find that the asserted will and codicils were of no effect or avail in law as testamentary dispositions. Upon this a proctor on behalf of the executors brought in the probate of the said asserted will and codicils of the deceased, decreed as aforesaid by the Prerogative Court of Canterbury and consented to the same being revoked—whereupon the Court, on the fourth session of Michaelmas Term in that year, proceeded to revoke the said probate of the asserted will and codicils; and, finally, to decree administration of the goods of the deceased as dead intestate (according to its own original impression) to certain next of kin—an official copy of the judgment of the House of Lords, above referred to, having first been brought into Court by the proctor for the next of kin.

HULME *v.* HULME. Consistory Court of London, Michaelmas Term, 3rd Session, 1823.

—Cruelty may be without actual personal violence; and such cruelty (at least), when coupled with adultery, may found a sentence of separation on both grounds. (On the admission of the libel.)

This was a cause of separation, à mensâ et thoro, by reason of cruelty and adultery, promoted by Harriet Hulme, of the parish of St. George, in the county of Middlesex and diocese of London, against her husband, John Hulme, of the same parish, county, and diocese.

The libel pleaded "that the parties were married in the month of January, 1819, and that they continued to live and reside together from that time till the beginning of February, 1820; that the said Harriet Hulme then quitted her said husband by reason of his violent conduct towards her, pleaded and set forth in the libel, and that she had never since lived or [28] resided with him: it also pleaded that in the same month of February, 1820, the said Harriet Hulme exhibited articles of the peace against her said husband, the said John Hulme, at the General Sessions held, for the county of Middlesex, at the Sessions House at Clerkenwell, and that thereupon the said John Hulme was bound by the justices to keep the peace towards his said wife, himself in 200l. and two sureties in 100l. each."

In objection to the admission of this libel, so far as it went to set up a case of legal cruelty, it was argued that the cruelty was laid to consist in menaces only, it not being pleaded that the husband had carried these or any of them into execution; even so far as to be betrayed, in a single instance, into the commission of actual violence towards the wife. The case was distinguished in this respect from that of *Otway* v. *Otway* (2 Phillimore, 95); in which a similar objection had been taken and over-ruled (*b*) —as, though menaces were principally relied on in that case, still some (minor indeed) acts of violence were also charged on the husband, in order to found the prayer of the wife. The different circumstances of the parties to the two suits respectively in point of age, condition, &c. were also insisted upon: and the case of *Otway* v. *Otway*, throughout, was shewn to be materially distinguished from the present in many particulars; especially with respect to the more specific nature of the charges and the time within which the proceed-[29]-ings were commenced in the case of *Otway* v. *Otway*. The menaces, or even acts of inchoate violence (so calling them), charged in this libel, were admitted to be of the grossest description; (*a*) it was also admitted that menaces only suggesting the probability of great personal violence might possibly

(*b*) Namely, on the admission of the libel; though no report of the argument or judgment is in print that the editor is aware of.

(*a*) For instance it, was pleaded that the husband threatened on one occasion "to cut his wife's arm off and beat her brains out with it;" and on another (a few days after her confinement) "to pull her out of bed and kick her up and down the room:" also that he "once seized a red hot poker and brandished it and threatened to run her through with it," and that he often attempted to strike her, &c. &c.

constitute a case of legal cruelty. But the ground of holding the fitness of divorce, by reason of cruelty consisting in menaces only, was argued to be this—the probability of menaced violence, especially of a certain description, leading to and terminating in actual violence, of which Courts are bound to interfere, not only for the redress, but also for the prevention. Hence it had constantly been inquired in such cases, was the court to wait till the mischief was done, till the offence was consummated, before it intervened? Here it was said that argument does not apply: the parties have been separated upwards of three years, nor is it suggested that the husband is seeking either to compel, or even to persuade, the wife to return to cohabitation. Added to this, the wife has exhibited articles of the peace against the husband: and the husband is actually bound to keep the peace towards her, himself in 200l. and two sureties in 100l. each. Consequently, the Court is not called upon, in this instance, to interfere for the prevention of mischief—the wife has resorted **[30]** for that to another tribunal, the interposition of which she does not suggest to have been ineffectual: so that the ordinary ground for dealing with menaces as with legal cruelty seems to fail in this case. But,

The Court was of opinion that the husband's conduct as pleaded, notwithstanding all this, was of a nature to found a case of legal cruelty, and consequently that the libel was admissible in toto.(*a*)

MILLER *v.* BLOOMFIELD AND SLADE. High Court of Delegates, Michaelmas Term, 1823.—An allegation—responsive to a libel thentofore admitted in the cause, pleading a church-rate including "stock in trade." [See vol. i. p. 499]—suggesting, 1st, that the parishioners were omitted to be rated for "shipping;" 2dly, that several parishioners possessed of stock in trade were altogether omitted to be rated in the said rate, and consequently that the rate was invalid—directed to go to proof.

This was a question as to the admission of an allegation responsive to the libel thentofore given and admitted in the cause: for which, and for the nature and circumstances of this cause, see ante, vol. i. p. 499, et seq.

The allegation (in substance pleaded)

Art. 1. That the church-rate, the subject of the suit, was not made agreeable to the then present poor-rate for the said parish as pleaded in the said libel; for that parishioners and inhabitants of the said parish, the owners or proprietors of ships of the burthen of twenty-four tons register each and upwards, were rated and assessed for the said ships or vessels to the said poor-rate, but were wholly omitted to be **[31]** rated and assessed for the same to the said church-rate for the said parish. And the article went on to plead that the several parishioners whose names were set forth in a paper writing or exhibit annexed, marked A, were proprietors of the several ships or vessels expressed of the tonnage expressed, and were rated and assessed, for the said ships or vessels, at the sums expressed to the poor's rate in force for the said parish at the time of making the said church-rate; but that such parishioners were altogether omitted to be rated and assessed for such ships or vessels to the said church-rate.

2. The second article pleaded that the mode of making the church-rate within the said parish had not been uniform, but had varied from time to time, in manner following, viz. "That from the year 1751, or thereabouts, until in or about the year 1773, lands, messuages, and tenements within the said parish, and personal property or stock in trade, including therein ships belonging to parishioners and inhabitants of the said parish, but not money in the public stocks or funds, or otherwise at interest, were rated and assessed to all the different church-rates"—that "from the year 1773, until in or about the year 1792, lands, messuages, and tenements, within the said parish, and personal property belonging to the parishioners and inhabitants of the said parish, including therein ships and money in the public stocks or funds, or otherwise at interest, were rated and assessed to all the different church-rates:" —that "from the year 1792, until in or about the year 1800, such lands and tenements, stock in trade, and ships only (but not money at interest in the stocks or otherwise, as in the interval between 1751 to 1773) were so rated **[32]** or assessed"

(*a*) This cause came to a final hearing on the by-day after Trinity Term, 1824, when the libel was held to be proved in both particulars; and a divorce was consequently pronounced for on both grounds.

—and, lastly, that "from the said year 1800, till the present time, such lands and tenements, and stock in trade, but neither money at interest, as above, nor ships, had been rated and assessed to the different church-rates made for the said parish." And the article further pleaded that Miller (the defendant) "was not by law rateable to the said church-rate both for his messuages, tenements, and hereditaments, and also for his stock in trade in the said parish, and that, therefore, he was not justly rated and assessed to the said rate or assessment as aforesaid," nor was such rate or assessment made agreeable to the usual mode of making the church-rate in the said parish, as pleaded in the libel.

3. The third article pleaded—that the several parishioners, twelve in number, whose names were set forth in the paper-writing or exhibit marked B annexed, were then, and at the time of making the said rate, possessed of stock in trade within the said parish: but, together with other persons also possessed of stock in trade in the said parish at such times, were altogether omitted to be rated, either to the said poor's rate, or to the said church-rate for the same.

4. The fourth was a general concluding article; praying that the said church-rate might be pronounced to have been unduly made, and assessed, and that Miller, the appellant (the original defendant), might be dismissed from the suit, and from all further observance of justice therein.

The counsel for the appellant were proceeding to argue against the admission of the allegation, but were stopped by the Court.

[33] Per Curiam. Mr. Justice Best. The rateability of stock in Pool to the church, generally, was determined, at least sub modo, by the Court upon the admission of the libel; a decision with the principle of which none of the facts pleaded in the allegation about to be debated seem to the Court materially to interfere. They even establish the substantial averment of the libel, that stock has uniformly been rated to the church in Pool; though the practice under circumstances may have varied, as to the particular kinds of stock included, from time to time, in the several rates. Accordingly, the allegation must, at all events, be reformed, by striking out that part of the second article which pleads that the appellant was "not liable to be rated, both for his lands and tenements, and also for his stock in trade." At the same time, we are clearly of opinion that, of the objections taken to this particular rate, one at least must ultimately be fatal. If stock in trade be taxable to the church, so also must shipping be, especially in Pool; where shipping are taxable, in common with other stock to the poor, under a decision of the Court of King's Bench, made as with reference to this town of Pool in particular.(*a*) Again, of parishioners holding stock in trade in Pool, some are pleaded to be omitted altogether in the rate. This also would probably be fatal to the rate; but that the prior objection would be (of course taking the fact to be as pleaded, namely, that shipping are omitted to be rated altogether) seems to the Court to be nearly certain. Under these circumstances, would it **[34]** not be advisable for the vestry to desist from enforcing the present rate; and to make a new rate, including both shipping, and the stock, if any, of parishioners omitted in the present rate? Such a rate this Court might hold to be valid; and, probably, neither the present appellant, nor any other parishioner, after this intimation of the Court's opinion, would object to the payment of his proportion of a rate so constructed. Should this suggestion be acceded to, it will preclude the necessity of counsel going through a detail of their objections to the admission of the present plea.

The counsel for the appellant and respondent, after some deliberation, having mutually, for themselves, conditionally acceded to this suggestion.

Per Curiam. As for the present, the allegation, with the suggested omission, must stand admitted.

The Judges who sat, upon the admission of this allegation, were Mr. Justice Garrow, Mr. Justice Best, Dr. Arnold, Dr. Jenner, Dr. Daubeny, Dr. Gostling, Dr. Dodson, and Dr. Lee.

[35] OLIVER AND TUKE *v.* HEATHCOTE. In the Prerogative Court, Hilary Term, 1st Session, 1824.—"Personal answers" are not confined to being mere echoes of the plea, accompanied with simple affirmances or denials; but the respondents are further at liberty to enter into all such matter as may fairly be deemed not

(*a*) See the case of *Rex* v. *White and Others*, 4 T. R. 771.

more than sufficient to place the transactions as to which their answers are taken in what they insist to be the true and proper light.—An objection taken to "answers" for redundancy, held, upon this principle, not to be sustained; and, consequently, over-ruled.

(Upon an objection to "personal answers.")

Josias Cockshut Twisleton, the party deceased in this cause, late of Osbaston Hall, in the county of Leicester, died the 30th March, 1821, aged 82 years. A will of the deceased, bearing date the 4th of March, 1818, was propounded on behalf of the Reverend John Oliver, and John Tuke, two of the executors named therein; and was opposed on the part of Mary Heathcote (wife of Bache Heathcote, Esq.), his only child.

It had been pleaded on her part, in reply to a condidit given in on behalf of the executors, that the deceased, for many years prior to the date of the will in question, was labouring under mental delusion, of which her allegation had also stated a variety of supposed instances; and, that he was not in possession of testamentary capacity at the time when the said will purported to bear date.(*a*) It was pleaded by **[36]** the executors in rejoinder that the deceased, though a man of singular and eccentric habits, and profuse in his expenditure, or an "unthrift," never laboured under mental delusion until several months subsequent to the month of March, 1818, the date of the will. And in affirmance of that averment they had proceeded to state numerous matters of moment and concern, in which the said deceased was engaged up to that period, and which he personally transacted; with the knowledge and approval (so pleaded) of the very parties now setting up that he was insane at those times, and had been so for years preceding.

Among other specific instances of the deceased's capacity, up to the period aforesaid, pleaded by the executors, was the following, as stated in the ninth article of their rejoinder, or second allegation:—

"That, after the said Josias Cockshut Twisleton, the party in this cause deceased, had made and executed his last will and testament, bearing date the 4th day of March, 1818, to wit, on or about the 9th day of the said month of March, he, the said deceased, went from his said house at Osbaston, to an inn at Burton-upon-Trent, known by the sign of the Queens, and did there meet Mr. William Osborne, of Burton-upon-Trent, aforesaid, attorney-at-law, by appointment; for the purpose of entering into, and he did then and there enter into, and sign, a contract or agreement with the said William Osborne, as the attorney of Messrs. Peels, near Derby, for the purchase of an estate near Derby, called the Pastures, adjoining or contiguous to an estate then the property, or in possession of, the aforesaid Bache Heathcote, for the sum of thirteen thousand pounds, or thereabouts. That the terms of the said purchase had been **[37]** previously settled by or between the said William Osborne, as the attorney for the vendors, and the aforesaid Cockshut Heathcote, Esq., the grandson of the said Josias Cockshut Twisleton, Esq., the party deceased, on the part of him the said deceased. And he, the said Cockshut Heathcote, Esq., was the person who, on behalf of the said deceased, corresponded with the said William Osborne respecting the said purchase. That on the said occasion when the said deceased so went to Burton-upon-Trent, and entered into such contract or agreement, he was accompanied thither, in his carriage, by the said Sarah Cockshut Twisleton, his wife, and the said Cockshut Heathcote, his grandson; and he, the said Cockshut Heathcote, was present with the said deceased and the said William Osborne during the whole of the time that was occupied in transacting the said business. That when the contract for the said purchase was so entered into and signed, he, the said deceased, gave a draft for the amount of the deposit money to the said William Osborne, drawn on a Mr. Robert Plummer Weddall, who [as pleaded in the seventh article of the allegation] had contracted for the purchase from him, the said deceased, of a part of his estate at Goole in the county of York; and he,

(*a*) In the month of November, 1818, the deceased had been found a lunatic, and to have so been without lucid intervals, for the space of two years then last past, under a "commission in the nature of a writ de lunatico inquirendo," which issued about that time out of Chancery, on the petition of Sarah Cockshut Twisleton, his then wife. And Mr. and Mrs. Heathcote respectively, his son-in-law and daughter, afterwards petitioned for and obtained a "commission of lunacy" against the deceased; and were appointed committees of his person and estate under that return.

the said deceased, as a reason for paying the said deposit by such draft, told the said William Osborne that he had then lately sold an estate to the said Robert Plummer Weddall, and that he had not the least doubt of such draft being duly honored, or to that effect: but the said draft was not honored. That the said Josias Cockshut Twisleton, the party in this cause deceased, was, at and during all the time hereinbefore mentioned, perfectly rational and sensible, and well knew and understood [38] the nature of the contract or agreement which he then signed or entered into; and well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of contracting for the purchase of the said estate, called the Pastures, and of doing any other act of that or the like nature. That the said Bache Heathcote is now in possession of the said estate, called the Pastures, under the contract or agreement hereinbefore mentioned; and the said Cockshut Heathcote acted, throughout the transaction as to the said contract or agreement, by the directions or with the knowledge and approbation of the said Bache Heathcote, or of Mary Heathcote his wife."

The "personal answer" of Mrs. and Mr. Heathcote, the next of kin, and her husband, to this article of the executor's allegation was as follows:—

"To the ninth position or article of the said allegation these respondents answer and say, they believe that in the course of the said deceased's journey from York to Osbaston, in the month of February, 1818, he heard that an estate in Worcestershire was on sale; and that the said deceased, then labouring under the delusion that he had very extensive estates, producing a rental which he at various times stated to amount from 30,000l. to 70,000l. a year, and that he had large sums of money at his bankers, unproductive of interest, declared his determination to stay at Osbaston a few days only; and then of proceeding from Osbaston into Worcestershire, and of purchasing that estate; and that he also expressed a wish to purchase other estates which he heard were to be sold: and the respondents, being apprehensive that the said deceased [39] would, under such aforesaid delusion, proceed into Worcestershire, and involve himself in further pecuniary difficulties by entering into a contract with parties perfectly unacquainted with him for the purchase of estates of great extent and value, the consequence of which might be ruinous to himself; and with the view of diverting his mind from his proposed journey into Worcestershire informed him that the articulate estate, called the Pastures, was to be sold. That the said deceased immediately declared his intention of purchasing it, and desired the respondent's son, the said Cockshut Heathcote, to go over to Burton and buy the said estate. That the said Cockshut Heathcote, having afterwards informed the said deceased of the price asked for the said estate, he, the said deceased, without having seen the same, or knowing the quantity or quality of the land, or having taken the opinion of any one as to its value, or ever asked a single question respecting it, declared that the said estate was very cheap, and that he would purchase it; that the respondents, finding that the said deceased was determined to purchase some estate, and to prevent his making an injurious purchase which might involve him, and his family, in embarrassment and litigation; as the said estate called the Pastures was an advantageous purchase, on consulting some of their friends, were advised to let the said deceased purchase the said estate; and the terms of the said contract having been settled without the said deceased taking any part therein, save as hereinbefore set forth, and the contract having been prepared for execution, the respondents admit," &c. &c. [40] i.e. admit the actual purchase of the estate, &c. nearly in effect, as stated in the plea.

This "answer" was objected to upon the grounds, and for the reasons, stated in the

Judgment—Sir John Nicholl. This answer is objected to on the score of redundancy. Redundant in some sense it undoubtedly is; but the question to be determined is whether it be viciously so. For the rest, I have always understood that answers were not confined to being mere echoes of the plea, accompanied with simple affirmances, or denials; but that respondents are at liberty to go into all matter not more than sufficient, in fair construction, to place the transactions as to which their answers are called for in, what they insist to be, the true and proper light. And in accordancy with this principle, instances have occurred within my memory in which, where "answers" had been partially read by counsel, I mean the answer to some one article, for instance, or position of a plea, the Court has itself directed other parts of the same answers to be also read; in order that the true course, as represented in the

answers taken as a whole, of that transaction to which the answers in that part of them read by counsel immediately related might appear in evidence. And this I take to be due less ex gratia to respondents than to be what they are entitled to ex debito justitiæ.

Now if this be the true principle applicable to "personal answers," the exception taken to those before the Court can hardly be sustained. Who does not see that the transaction to which this answer re-**[41]**-lates is placed in a very different light by the answer to that in which it stood under the plea? The fact, per se, would undoubtedly be strong to shew, not only that the deceased at the date of this transaction was a capable agent; but also that he was so treated by the very persons now seeking to impeach his sanity. Accompanied with its history furnished in these answers (and which the respondents are precluded from furnishing by no rule of law that I am acquainted with), it assumes at least a different aspect; though to what precise extent the suggested motive is a satisfactory explanation of the admitted fact in this instance it is needless at all events for the present to inquire.

The objection, as I collect from the argument, founds itself upon this, that the matter excepted to should have appeared in plea; for that appearing as it does, merely in answers, it is matter to which the executors can have no opportunity of cross-examining. But this objection applies equally to every statement made in answers, and it is one which seems to me for other reasons hardly to be tenable. Extra articulate matter in a deposition is reasonably objected to on this principle, namely, as being matter to which no interrogatories could be addressed by the adverse or objecting party. But then a deposition, if unobjected to, is evidence in the cause. Answers only become so if read by the adverse party, which, being at liberty either to do or omit, it rests with the adverse party either to make or to exclude them from being evidence in the cause by a very simple process. Nor does it materially alter the case in this respect that the Court is privileged to look into the answers, even **[42]** though unread, for it may be safely left to the Court's discretion to make all such deductions and allowances as the case requires; so as in no instance to attach any undue weight or influence on the respondent's side to answers which, not being read, are not before the Court, strictly and properly, as evidence in the cause. Again, much of answers, perhaps usually the most stringent part, consists of matter which is not capable of being put in plea. All such matter then is admissible in answers; and yet is matter to which the other party has no opportunity of cross-examining. How, in this very case, for instance, could the motives by which these parties were actuated, as they insist in assenting to, or rather in not dissenting from, the purchase of this estate by the deceased, be put in plea? or, if put in plea, who was capable of deposing to them? But were the respondents bound to admit the fact without an accompanying statement of these motives? Certainly not. For all these reasons it seems to me that the answers are not viciously redundant in this part of them; and that I am bound to over-rule the present objection.

Objection over-ruled.

DOKER *v.* GOFF. Prerogative Court, Hilary Term, 3rd Session, 1814.—A regular attestation clause without any subscribed witness affords but a slight presumption against the legal validity of a testamentary paper, perfect in other respects: but that presumption is infinitely slighter where the writer's intention to have it regularly attested is to be collected only from the single word "witnesses" at the foot of the paper.—Quære, whether a paper so circumstanced can, in all cases, be considered an unfinished paper so as to let in evidence against it? and note to what that evidence must (at all events in some cases) be confined.

John Goff, formerly of High Street, in the borough of Southwark, a police officer, was the party deceased. He left a widow (party in the cause) and **[43]** nine children. From the month of June, 1821, the deceased had been resident in Holland, whither he had gone in order to avoid being arrested by the creditors to whom he had become liable as the security of a person named William Goff; and where he died on the 28th of November, 1822: the deceased was accompanied to Holland by Elizabeth Smith Doker (the other party in the cause), with whom he had previously cohabited; and with whom he continued to cohabit, in Holland, until her return to this country, at the time and under the circumstances stated in the judgment. The question before the Court was the validity of a paper set up as the will of the deceased by this Elizabeth Smith Doker.

The paper in question was as follows :—

28 day of October 1821.

In the Name of God Amen.

I John Goff, of N°. 15 in Koe Straat in the City of Amsterdam in Holland formerly of the Borò of Southwark in the County of Surry being of sound memory mind and understanding do make this my last Will and Testiment here by from all former Wills and Testiments at any time heretofore made—in the direction of my first place I desire to be decently buried at the ʌ Executrix Elizabeth Smith Doker my preasent Housekeeper and after the payment of my Funeral and Expences for Adminestraing to this my last Will aforesaid to and all the debts I may owe at the time of my decease I give and bequeath unto Elizʰ. Smith all my worldley Property.

Witness my Hand JOHN GOFF.

And that I the said John Goff doth nominate **[44]** and appoint the said Elizʰ. Smith Doker to be the Executrix to my Natural Daughter Louisea Daniels and that she Receves the sum of ten pounds per year from the Bank of England Invested in the Long Annuities, and if her Death should before the Termination of her Mother's Will hapen unto her that the said Elizʰ. Smith Doker shal have said every privelage and Authorty as I the ʌ John Goff had according to the said to act Will and that I have given her the full and extent power ʌ for her maintainance the the same as I had whilst I was living.

Witness my Hand JOHN GOFF.

dated 28 of October 1821.

Given und my Hand and Seals.

JOHN GOFF. L.S. JOHN GOFF. JOHN GOFF. L.S.

Witnesses.

the Last and only Will of John Goff.

Judgment—Sir John Nicholl. The Court, in determining this cause, must be governed by the same principles as if the property at stake were more considerable: (*a*) and by the same, it is sorry to say, as if the case set up on the part of the executrix had a less unfavourable aspect than that with which it actually presents itself.

The deceased left this country in June, 1821, accompanied by this woman Doker, with whom he **[45]** cohabited until March, 1822, when she returned to England, after much mutual altercation, not unaccompanied with some personal violence on both sides, principally, it should seem, in consequence of the deceased having formed a connexion with a Dutch woman named Blawmn, whom he picked up in Holland. After he had been in Holland four or five months, though probably before his acquaintance with this Dutch female, he wrote the testamentary paper propounded by Doker. Neither the handwriting of the paper, nor the testamentary capacity of the deceased at the time of writing it, is questioned: the real and sole question is, whether the deceased did or did not consider it a finished and operative paper in its present state. If the Court is bound to conclude it to have been such, in the deceased's view and apprehension of the matter, there is an end of the case. No proof of his having intended to make another will, or to dispose of his property differently, will or can, in that event, avail to defeat it: and the Court will be bound to decree probate to the executrix, how inofficious soever this paper may be, and how repugnant soever it may be to the feelings of the Court to pronounce in its favor.

The first thing to be the regarded is the form and appearance of the paper itself. It is a large sheet of thick paper; and such a one as a person might naturally select about to make a final disposition of his property. The date "28 day of October, 1821," is twice written; it is twice sealed, one of the two seals bearing the deceased's initials, the other a common device, but both seals appearing to have belonged to the deceased; it is signed by the deceased in five **[46]** places. On the margin is also written, "The

(*a*) Its probable amount was £600 or £700.

last and only will of John Goff." The purport of this paper is to give all the deceased's "worldly property," after payment of his debts and funeral expences to Elizabeth Smith Doker, whom the testator appoints by it his sole executrix, and the guardian of his natural daughter Louisa Daniels.

The will, of course, would have been perfect if the testator had stopped here: but he has written at the foot of the paper the word "witnesses:" and this is the single circumstance on the face of the paper upon which it can be argued to be an unfinished paper. It is a circumstance, however, in my judgment, in the highest degree equivocal in any case. Even a regular attestation clause, without any subscribed witness, affords but a slight presumption against the legal validity of any testamentary paper; and that presumption is infinitely slighter, and has always been so held, where the testator's intention to have it regularly attested is to be collected from the single word "witnesses" appearing at the foot of the paper. But in the present case that presumption is (nearly, if not altogether) rebutted by the following circumstances, for which the Court has not to revert to extrinsic evidence, but collects from the paper itself. In the first place, the word "witnesses" is written so near the bottom edge of the paper as hardly to leave room for witnesses to have undersigned it; and, secondly, there are these words in the margin, "The last and only will of John Goff," which I must presume to have been the words last written by the deceased as pleaded, although there is no direct proof of this. Nor is the deceased's condition, obviously an illiterate man, as **[47]** appears from the wording of the instrument, not to be taken into the account. Better general information, à fortiori, technical professional habits, might have founded a different inference: but nothing is, I think, more improbable than that this testator should conclude the paper in question imperfect from its not having been regularly attested, notwithstanding the species of attestation clause (if it can be so called) apparent on the face of the paper.

Upon these considerations, to which others might be added, as, especially, the pains obviously bestowed upon it, I have some difficulty in considering this an unfinished or imperfect paper on the face of it—the only circumstance which can render parol evidence against it admissible. At all events, under the circumstances, the parol evidence in this case must, I think, be confined to shewing that the deceased himself did not regard this as a dispositive instrument in its present shape; but only as a preparatory will, or one in progress merely towards actual completion.

Now what is the case set up in opposition to this paper? In the first place, it is pleaded, and witnesses have been examined to prove, that subsequent to the date of the paper, the deceased and Doker had violent quarrels, which terminated in the latter finally quitting the deceased, and returning to this country, as I have said, in March, 1822. And several declarations are also pleaded and spoken to by witnesses (exclusive of some others which I shall notice presently), that "Doker should never have a sixpence of his money," but that "the whole should go to his wife and children," or to that effect.

[48] Here, however, in the first place, the witnesses examined to these particulars speak with a warmth, and in a tone of evident exaggeration, which puts the Court on its guard against relying too implicitly upon their testimony. The conduct of the witnesses in this respect is natural, nor is it quite inexcusable. The widow, subsequent to her husband's decease, went over to Holland, and was received into the house of Mr. and Mrs. Binns (the principal witnesses to these particulars), with whom the deceased and Doker, then passing as husband and wife, had resided during the period of their joint residence in Holland. The subject of this will, and the deceased's whole conduct towards his family, was of course, and is admitted to have been, much canvassed between the widow and these parties: it was natural, consequently, that they should feel a warm wish to set it aside, as being a will made in favour of a prostitute, to the total exclusion of the deceased's lawful widow and children. There is one circumstance in particular indicative of this bias of the witnesses. They represent the deceased as professing himself at all times, after Doker's departure, a penitent husband, anxious to efface the remembrance of his former conduct to his wife by his future treatment of her: they do not say a word about the Dutch woman, Blawmn, with whom he was notoriously cohabiting, from the time of Doker's departure till his death; and who appears to have been the principal, if not the sole, cause of Doker's leaving him at all. The suppression of that fact alone would suggest to the Court the necessity of considering this part of their evidence with some grains of **[49]**

allowance. But, after all, to what do the facts and declarations so spoken to amount? Admitting these quarrels between the deceased and Doker, to any extent—admitting the deceased to have made the declarations, and to have been sincere in making them (though not improbably he was insincere, and merely made them, supposing him to have made them, to reconcile himself to, and to ingratiate himself with, these people, the Binns's), they are both quite consistent with the deceased having considered this to be a finished will; in which case no change of intention, however probable in itself, or however probably deposed to, can have the slightest effect in defeating its validity; the deceased being admitted to have died without doing any other, or further, testamentary act. It remains also to be observed that there are facts in evidence, at variance with the statements of the witnesses upon one of these heads in many particulars. For instance, it is in evidence, in spite of the total rupture between the deceased and Doker, as they represent it, that the deceased furnished Doker with money for her expences on her return to England; that he also gave her an order to a person with whom he had deposited a bed and some bedding to deliver it up to her for her use; that immediately upon her arrival in England she took up her residence at his brother's, in compliance with the wishes of the deceased, where she continued to reside till after his death; that he made frequent inquiries respecting her welfare; and that, on one occasion (in May, 1822) he sent her a note (which is exhibited), in which he says that he "freely forgives" and promises "not to forget her."

[50] But the deceased is also pleaded by the widow to have repeatedly declared that the will in Doker's possession was good for nothing—that she, Doker, had stolen a paper from him, purporting to be a will, but that the same was not witnessed, and that she could make no use of it to deprive his wife or children of his property. If this were so, it were something—these are stringent declarations as pleaded, and come at once to the point. But the witnesses who depose to them are so inconsistent with each other, and are so flatly contradicted by the face and appearance of the paper before the Court,(*a*) that it is quite impossible **[51]** for it to place any reliance upon this part of their evidence. On the other hand, there are two persons **[52]** much in his confidence, examined upon Doker's allegation, who speak to direct recognition by the

(*a*) For instance, John Binns deposed that a day or two before Doker left Holland she produced to him, the deponent, a paper-writing, saying, "Mr. Binns, here's a will Mr. Goff has made, and if you and your wife will sign it" (meaning, according to the deponent's impression, as witnesses) "it may come into use sometime." This the deponent declined, saying, "He would not do it for all Amsterdam." The paper so produced was not read by the deponent, nor, though acquainted with the deceased's hand-writing, can he depose to its having been written by the deceased. He remembers just looking at it to see if it was signed, which it was not: of that he has no doubt: he cannot swear that there was no signature to it, but he does swear that he saw none, and that he believes that if the same had been signed he must have observed it.

Ann Binns deposed that, whilst at Rotterdam with Doker, whom she had accompanied thither just before her sailing for England, Doker, in her search for something at the inn there which she had misplaced, put her hand on a paper, which she pulled out, saying to deponent, "Here's a will of old Goff's; it is neither signed nor sealed, but it would have been good if I had been his wife; will you sign it?" On deponent's refusing, she said, "There are plenty of people in England who will, and it may be of use one day. I'll read it to you." It began, "I leave to Elizabeth Smith Wayling,* my present housekeeper, all my property," &c.

And both these witnesses, Binns and his wife, deposed that on subsequently acquainting Goff that Doker had got something of a will of his "he flew into a violent rage, and at first talked of sending a 'police man' after her, but was quieted by reflecting that it could be of no use to her from its not being signed," adding, "he had put his hand to no paper. No," said he, "Jack Goff does not do so."

A witness named Jane Ribbing deposed that, some days after Doker had left Holland, Goff told the deponent (who had previously heard him say that he had written part of a will, but would not sign it) that she, Doker, had got that paper from

* It is to be observed that, according to Binns's deposition, Doker had first passed as Mrs. Goff. After she knew her not to be Goff's wife she passed by the names of Mrs. Smith or Mrs. Wayling. Binns says she never heard of her by the name of Doker, nor knew that to be her true name till after the death of the deceased.

deceased of this instrument, as an effective will in Doker's hands. In the course of a conversation between the witness Raitt and the deceased, relative to the state of his affairs in the May preceding his death, the deceased said, "I have settled all that; I have made my will:" and on Raitt expressing some surprize at the deceased never having shewn it to him, he added, "I have it not: it is in England;" plainly alluding to the will in Doker's hands, for there is no vestige of any other. The evidence of the brother, George Goff, is even still more explicit: he speaks to having been told by the deceased, whilst on a visit to him at Rotterdam, in the September only preceding his death, that "Betsey had got his will." The words, he says, were as he, the deponent, best recollects them, "I have made a will, and Betsey has got it with her." And I see nothing to justify the Court in repudiating the evidence of this witness, confirmed as it is by facts in the cause; though it might otherwise, for reasons that need not be stated, be entitled to little credence.

Upon these considerations I hold that I am bound by law, in deference to established precedents, to pronounce this to be a valid will; and I decree probate of it as such to the executrix. And I also think that, in directing the expences of this suit to be taken out of the estate, I am bound to except those occasioned by the allegation given in on the part of the widow (which the registrar will ascertain in the best way that he is able); and which, I regret to say, must be borne by the widow.

[53] ROBSON AND WAKEFIELD *v.* ROCKE. (IN THE GOODS OF THOMAS CHARLES PATTLE, Deceased.) Prerogative Court, Hilary Term, 4th Session, 1824.—A will propounded—the direct evidence to the factum of that will stated and held to be sufficient, corroborated by various facts and circumstances to entitle it to probate, if not itself impugned and discredited in the strongest manner—attempts to impugn it by attacking, 1st, the character of the witness; 2d, the probability of the disposition; 3d, the genuineness of the signature, stated and held to fail—the will pronounced for, and the opposing parties condemned in costs.

Judgment—Sir John Nicholl. This is a case of some weight and novelty, considered with respect to the magnitude of the property at stake, and the nature of the several proceedings in the cause—especially as viewed in connection with that (extraordinary) application which has been made to the Court at the instance of one of the parties since the cause was concluded. In order to furnish a distinct view of the case it is necessary that the Court should state the history of the deceased and his several testamentary acts—an outline of the principal proceedings in the cause—the proof adduced in support of the instrument propounded—and the grounds upon which that proof is sought to be impugned. Upon the general result will depend the propriety of the Court's proceeding at once to a sentence; or of its opening the case to farther investigation in the manner, and for the reasons, stated in that application to which it has just adverted; but of which it postpones, accordingly, a particular consideration to that of the other parts of the case.

The deceased in the cause, Thomas Charles Pattle, died at Macao, in China, on the

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him, for he could not find it, but that it was of no use to her, for that it was not signed nor sealed nor witnessed. "Jack Goff," he said, "don't put his name to a paper."

And another witness, Benjaman Rolf, deposed to having been told by the deceased "that he had made no will—that he had given a woman with whom he formerly cohabited, whom he called Mrs. Smith,* a false will, being neither signed nor sealed nor delivered; which could be of no service to her; a copy of which he then shewed the deponent, who read part of it: but all that he remembers of the contents is that it purported to bequeath certain property to Elizabeth Wayling,* or a person of a name very similar to that.

It must be obvious upon this evidence that these witnesses were either deposing at random, or of some other paper, or were purposely deceived and misled either by Doker or by the deceased himself; in any of which cases, as observed by the Court, their evidence could be of no avail to defeat the instrument now propounded by Doker.

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* It is to be observed that, according to Binns's deposition, Doker had first passed as Mrs. Goff. After she knew her not to be Goff's wife she passed by the names of Mrs. Smith or Mrs. Wayling. Binns says she never heard of her by the name of Doker, nor knew that to be her true name till after the death of the deceased.

26th of November, 1815; leaving a wife and one daughter, an only child. The amount of his property, which was wholly personal, is not precisely ascertained; but it may be safely estimated at 140 or 150,000l. He had been **[54]** many years abroad in the civil service of the East India Company; he came to England in 1802, but returned to China in 1805; attained a high station in the council of the factory of Macao; and died there, as I have said, in 1815. Upon going out to China in 1805 he left his wife and daughter in this country, where they continued to reside till his death.

Previous to this departure in 1805 the deceased made a will, which is before the Court, bearing date in April of that year. By this will he bequeathes his whole property to his wife and daughter. The deceased had also living at that time a father, two brothers, three sisters, an uncle, Mr. Haselby, who attests this will, and numerous friends; but the will of 1805 has no legacy to any one of these. It is to be observed, however, that the deceased's property at this time amounted to from between 10 to 20,000l. only.

It is in evidence that in the year 1814 the deceased had made, or said that he had made, another will, the substance of which is in some measure before the Court in Sir Theophilus Metcalf's affidavit of scripts. It will be sufficient to say of this at present that it should seem to have been a will in which his collateral relatives and friends were largely remembered; probably about one-half only of his property, which had then very much increased, being given to his wife and daughter. Letters, too, are before the Court written by the deceased in January and February, 1815; the one to Mr. Haselby, the other to his friend Mr. Becher. In the former he tells Haselby that he has given him 3000l. by his will; in the latter he tells Becher that he has "put down" Haselby for 5000l. in his will; adding that he should not object **[55]** to pay him interest as on that sum until his death puts him in possession of the principal.

At this time the deceased's health had began to fail. Upon his return from Canton (whither it was his duty to go up, as it is termed, at certain periods) to Macao in the beginning of the year 1815 symptoms of dropsy and water in the chest had appeared. In the summer, however, of that year, being something better, and having been recommended a sea voyage, he accompanied Captain Langford of his majesty's ship "Alpheus" to Manilla, whence he returned about the middle of August; Captain Langford kindly consenting, at some inconvenience if not loss to himself, to return at once to Macao, on the deceased becoming suddenly much worse at Manilla. During this voyage to Manilla and back the deceased was attended by the ship's surgeon, Mr. Edwards, and his assistant Mr. Allen, with the attentions of which latter he was so much pleased that on his return to Macao he prevailed on Captain Langford to give Allen his discharge. From that time till his death Allen continued much about the deceased; occasionally writing letters for him, which the deceased merely signed and so forth.

In the months of September and October preceding his death the deceased's dropsical disorder, in the whole, increased upon him; though, like most dropsical patients, he was better sometimes, and at other times worse. His usual medical attendants at Macao were Messrs. Pearson and Livingstone, gentlemen attached in that capacity to the factory; but the first of these, Mr. Pearson, accompanied the factory to Canton in September (1815) and did not return **[56]** thence to Macao till after the deceased's death. From September, consequently, Mr. Livingstone was his sole medical attendant.

In a letter written by Livingstone to the widow, soon after his death, accompanying a watch which the deceased had desired him, Livingstone, to forward to his wife if he did not recover, are the following expressions:—After entering into some particulars of his last illness, and stating that he suffered little subsequent to his return to Macao, until his death, on the 25th of November, "with his mind powerful, and memory perfect, to the last," except from "two severe attacks of difficulty of breathing," indicative of water on the chest, the writer thus proceeds: "After one of these, which did not give way till all the usual resources of medicine had been tried, he had seen me a good deal alarmed; he inquired whether I considered him to be in much danger; I told him frankly that another attack might destroy him in an hour; he said he was not afraid to die, but wished to have my real opinion that he might have his affairs properly arranged; this was on the 18th of October: he informed me he meant to send for Mr. Croft, a law gentleman from Bengal, &c." of course, though not so expressed, to assist him in such proposed arrangement. It is a will alleged to have been made

by Mr. Croft under these circumstances, dated the 20th October, 1815, that is propounded in this cause.

The contents and form of this will are briefly these: The interest of 20,000l. is given to the deceased's father, Thomas Pattle, for life, the principal at his death to the wife of the deceased; or in the event of his father surviving her, to the daughter; **[57]** 20,000l. are given to his wife, and 30,000l. to his daughter, on her attaining her age of twenty-one, absolutely; 15,000l. to his brother James Pattle; 5000l. each to his three sisters, Mrs. Rocke, Mrs. Mitford, and Mrs. Lay. The residue (after payment of these and other legacies; among which are 1000l. to Mr. Livingstone; 1000l. to Mr. (originally Pearson, but altered to) Shank; 3000l. to the two Mr. Ross's, father and son; and 1000l. each to his five executors) is directed to be equally divided and distributed between the children of his brother James Pattle, and his sisters, Mrs. Rocke, and Mrs. Lay. Such, in substance, are the contents of this will. As to its form, it is written on two sheets, and occupies five sides, of large thick paper; there are several little alterations, the principal being the substitution of the name of Shank for that of Pearson, which I have already noticed, on the third side; and the interlined additional bequest, on the fifth side, of a pipe of Madeira, to each of his executors—this latter is evidently written by the writer of the will—the name of "Shank" is written in a different hand, and with different ink—the instrument is subscribed, "Thomas Charles Pattle," but there are no witnesses.(*a*)[1]

[58] Immediately upon the death of the deceased, namely, upon the 26th of November, the day following, this instrument, such as I have described it, was found amongst the deceased's papers, in a sealed-up envelope thus indorsed, "the last will and testament of Thomas Charles Pattle, Esquire," addressed, "to Sir Theophilus James Metcalf, Bart.; George Templar, Hastings Nathaniel Middleton, William Frazer, and Charles Magnac, Esquires, executors; to be opened by either two of them that are in China at the time of my death." It is accordingly opened by two of the executors then in China, Mr. Frazer and Mr. Magnac; and they at Canton, on the day following, the 27th of November, make an affidavit before Mr. Elphinstone, the chief of the factory, as to the plight and condition of the instrument when found; with respect to those erasures and interlineations, of which I have just spoken, still apparent on the face of it.

The will, with this affidavit and envelope attached to it by a sealed tape, is immediately sent to England; and brought into this Court, where probate of it is taken by two of the executors; the one, Mr. Middleton, being sworn on the 29th of May, 1816, and the other, Mr. Templar, on the 21st of June, the month following. At first it should seem that the body of the will was supposed to have been written by the deceased: for when Mr. Allen, a friend of the deceased, acquainted with his manner and character of hand-writing attended here, on the 30th of May, 1816, as one of the two persons selected to authenticate the instru-**[59]**-ment in that respect (this being requisite prior to probate, as a will, of any unattested paper actually passing to the executors) he does, I make no doubt very innocently, though somewhat too precipitately, subscribe and make an affidavit that "the whole body, series, and contents of," as well as "the signature to" this will, are of the deceased's hand-writing.(*a*)[2]

(*a*)[1] To explain this circumstance of there being no witnesses, Croft had deposed that this was pursuant to his advice; he not conceiving it to be necessary, as the deceased had no real property; and as it appeared to him that having it attested might create unnecessary difficulties, there being persons in England who could easily prove the deceased's signature to it. "The possible difficulty," he says "which he, the deponent, contemplated was, that as the only persons who could be procured as witnesses were those resident in China, it might become necessary, in the event of there being a dispute respecting the will, to send out a commission to China, to examine them." He had before deposed that the only person actually present was a half-cast Chinese woman; who did not understand English.

(*a*)[2] On the attendance of Mr. Larken, another friend of the deceased, who, as proposed, was to join in Mr. Allen's affidavit, on the 16th of June (prior to Mr. Templar's being sworn) he discovered the mistake. His name accordingly was struck out of this affidavit, in which it was originally intended that he should join with Mr. Allen. And Mr. Larken was sworn to a separate affidavit, which went to the hand-writing of the subscription only.

And really, the body of the instrument propounded in this cause is written in a hand so similar to the subscription, in point of general character, that a person recognizing the latter by inspection, and making this sort of affidavit pretty much as a matter of form, without any circumstance whatever to excite his suspicions, or to suggest to him the necessity of any critical examination of the body of the instrument, might have fallen into this error very excusably. It is neither a circumstance of any great moment in itself: nor does it seem to have excited any doubt or suspicion among the parties interested at the time: for,

In June, 1816, the widow, on behalf of herself and daughter, filed a bill in Chancery; calling upon the executors to pay into Court the legacies due to them under this will, assumed, of course, to be valid. Accordingly, the sum of 70,000l., to which their legacies (that to the father inclusive) jointly amounted, was actually paid by the executors into that Court; [60] and the widow and daughter have, in consequence, enjoyed their share of the deceased's property bequeathed to them by this will, ever since the month of April, 1818. But in 1819, three years after, the probate is called in; and the executors are put, by these same parties, on proof of the will, per testes.

The daughter, however, though still a minor, had married a Mr. Wakefield in this interval; and he should seem, from what now appears, to have been the principal mover of this suit, to which he was party, as the guardian, and in right of his wife, from the very beginning. It is quite impossible therefore for the Court to consider him, in effect, as a mere intervener, although formally he does appear in that character; having been cited as the person upon whom her interest devolved, on the death of Mrs. Wakefield, in the progress of the suit. But it is manifest, from the whole course of the proceedings that he is, and has been, from the very beginning, the effective party opposing this will: such I am bound to consider him, and as such principally responsible for the whole conduct of this cause. He it is who instructs the proctor: he it is who collects, I might almost say instructs, the witnesses: it is on his behalf that the proctor and counsel originally retained in the cause are acting at the hearing; although Mr. Wakefield now suggests an interest separate from that of the widow, who, it should seem, had the preferable claim at least to their services; to which Mr. Wakefield indeed, in his character of intervener in the suit, could have no claim. I should say that the widow, having married again, is the party, Mrs. Robson, and that the third party, Mr. Rocke, appears as guardian of the resi-[61]-duary legatees, in the room of two of the executors in whose name it was commenced; but who have died in the course of this suit. I must here too observe that this suit has occupied nearly four years, as the first allegation, or that propounding the will, was given in in February, 1823. Where the blame of this lies I do not at present stop to inquire. I notice it, principally, in order to protest against the time which this suit has occupied being deemed the fault of this Court, or of its forms; it might have been brought to a hearing, for any thing that appears to the contrary, in one-fourth of the time, if the parties had wished it.

Having thus furnished a general outline of the case itself, and the proceedings had in it, it now becomes time to inquire whether the executors have answered the demand which has been made upon them to prove the factum of this will in a satisfactory manner—taking into consideration the time and the circumstances under which they are so called upon, and the following circumstance in particular.

Upon the first allegation, that propounding the will, being given in by the executors, they applied to the Court for a requisition to China in order to examine witnesses there upon it; which application was resisted by the parties opposing the will, on account of the expence and delay which it would occasion, in common, to both parties. To that application, so resisted, the Court, under the circumstances, refused to accede: but in refusing, it did so upon this special implied condition, namely that the case on the part of the executors should be fairly met by their opponents, and that secondary evidence, to some extent, in favour of [62] the will, should be acquiesced in, on their parts, as the executors were deprived, in all probability, of primary evidence in its favour, solely in consequence of the Court's acceding, in effect, to their own prayer. This is a circumstance not to be lost sight of; and it accounts for the evidence in favour of the will being, in some parts of it, less stringent than it otherwise probably would have been. For instance, Mr. Livingstone's evidence to the instructions, No. 2, and that of other witnesses to many not unimportant parts of

the case, would probably have been had, if the widow and next of kin had made no objection to a requisition going out to China, as prayed by the executors, in the first instance.

I now proceed to the proofs furnished by the executors, under these circumstances, of the factum of this will, the only direct witness to which is the writer of it, Mr. Croft; being the "Mr. Croft, a law gentleman from Bengal," whom Mr. Livingstone had mentioned in his letter to the widow that the deceased proposed sending for, on suspecting that his illness might terminate fatally.

It seems that just about this period, or in the beginning of September, 1815, Mr. Croft, accompanied by his wife, had arrived at Macao from Calcutta, in the course of a voyage undertaken for the benefit of Mrs. Croft's health. He had become acquainted, at Calcutta, with Mr. James Pattle, the deceased's brother, and was the bearer of letters from him to the deceased, among which was a letter of introduction for himself and Mrs. Croft. The deceased was too ill to receive them into his own house, but he placed them in that of Sir Theophilus Metcalf, then at his dispo-**[63]**-sal, in consequence of its owner's absence from Macao, where they resided till the beginning of November.(*a*) During this interval Croft (the husband) often called upon the deceased, who admitted him or not according to circumstances; the length of his visits being regulated by the state of the deceased's health and spirits at the particular times when they happened to be paid.

The following is the history, as furnished by Mr. Croft in his deposition, of the making of this will:—On the evening before the will was executed he is sent for—he finds the deceased labouring under a great difficulty of breathing; apparently almost at the last gasp; but he soon recovers so far as to be able to converse—the deceased then tells him that he has sent for him in order to draw up his will—Croft answers that, not having his books with him, he will not undertake to draw it up technically and professionally; but will write it, as a friend, from his dictation—the deceased assents to this, and desires him to sit down and write accordingly. A paper is then written by Croft, from the deceased's dictation, which, having been read and approved by the deceased, is taken away by Croft, in order that he may copy it out fair for execution. In the course of the evening he receives two additional instructions,(*b*) which I shall presently notice; with which, and those taken as above, he proceeds to prepare the instrument in question. On the following day he carries it to the deceased, to and by whom it is read over—some corrections are made in it, at his own suggestion; and the **[64]** deceased finally executes the instrument, being at that time in a state of perfect capacity. When executed, the will is left in the deceased's custody, who saw Croft several times after; but made no further observations to him on the subject of it. He had quitted Macao, on his return to Calcutta, about a fortnight or three weeks, when the deceased died.

The above is a mere general outline of Croft's account; but it warrants an assertion that, in that account itself, if credible, the Court is furnished with direct proof of the factum of this instrument; or, in other words, it is furnished with direct proof that this instrument was drawn up from instructions given by the deceased, and that it was executed by him, being at the time of sound and disposing mind and memory. As to this last particular, indeed, it may be observed, once for all, that no doubt has even been suggested with respect to the deceased's perfect capacity at this period: he survived this transaction five weeks; and it is in evidence, from a host of witnesses, that he was fully capable to the last; and that his mind to the last was as much alive as it had ever been.

Such, then, is the direct positive evidence to the factum of this will. In confirmation of it we have,

1st. The finding of the instrument, as already described, immediately upon the death of the deceased in a sealed-up envelope; one of the seals used bearing, I observe, the deceased's crest and cypher. And this a fortnight or three weeks after Croft, the writer of the instrument, had quitted Macao.

2dly. There are five old and intimate friends of the deceased attesting the genuineness of the signature—persons well acquainted with his hand-writing, from

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(*a*) Croft himself was absent about a fortnight of this time, having gone to Canton. Canton is distant about 60 miles from Macao.

(*b*) See note (*a*), page 72, post.

[65] his correspondence, both private and official—forming that opinion and belief, not upon a hasty and casual inspection, but after doubts had been raised as to the genuineness of the signature—assigning, as their ground of opinion and belief, its perfect resemblance to the deceased's usual signature in that peculiarity of character which belongs to and distinguishes the hand-writing of most individuals. Evidence to hand-writing is, at best, inconclusive; but of that species of proof I will say that the witnesses here produced have furnished as strong and as satisfactory a sample as well could be furnished. These circumstances, in conjunction with others which will naturally disclose themselves in the progress of this inquiry, so corroborate the direct evidence in favor of this will, that unless that evidence be impugned and discredited in the strongest manner, the will itself is fully established.

The opposers of the will have endeavoured to subvert the force and effect of this evidence in several ways. But their counsel have principally argued and objected, in order to this—1st, The character of the witness, Croft, which they have represented to be such that the Court can place no reliance upon his evidence; especially none, in favor of such a will, which: 2dly, they have maintained that hardly any evidence could sustain, from the improbable mode in which it purports to dispose of the property of the deceased: 3rdly, and lastly, they have contended that, independant of all this, the pretended signature to this will is proved (as it was expressly alleged) to be a forgery, and not of the hand-writing of the deceased; which if it be proved, then of course there is an end, both of Croft's evidence, and of the whole [66] question. It is necessary therefore that the Court should examine, briefly, each of these several grounds of objection.

1. And here, in the first place, it is to be observed, in estimating the credit due to this witness, Mr. Croft, that his general character has not been put in issue: no plea has been given stating no witness has been produced to depose that he is a person not fit, from his general character, to be believed upon his oath. His moral character in a particular transaction has been attacked, through the medium of interrogatories addressed to him; and pretty successfully, as far as that transaction goes. It appears, by his answers, that he had married, in this country, a daughter of Sir Edward East, whom he accompanied to India on his being appointed Chief Justice at Bengal, in 1813. At Calcutta he entered into partnership with Mr. Cumberbach, an attorney, and continued in partnership with him till 1816. The will in question was made in 1815; up to which period, and until long after, Croft's moral character stood unimpeached; so that nothing at that time, apparently, pointed him out as a fit instrument to be selected for the commission of a gross fraud and forgery. In 1818, however, it appears that he, a married man, resident with his wife at Calcutta, seduced a young woman, only 19 or 20 years of age, the daughter of his former partner, Mr. Cumberbach—a case of seduction, it is true, attended with some circumstances of great aggravation. The father brought his action for this, and recovered heavy damages; and Mr. Croft left India and returned to Europe. Now what, or whether any, palliatives to this grossly immoral conduct on his part existed, as in the lures and temptations thrown out [67] by the young lady, or otherwise, I shall not stop to inquire: it can admit of little excuse, and of no justification. But that the Court should presume him, from this one transaction, capable of committing a gross act of fraud and forgery two years before, and of supporting it by as gross perjury two or three years after, is a proposition which I am bound to withhold my assent from both by law and reason. Mr. Wakefield's counsel have contended that the witness, Croft, is to be swept out of the case: that however is going a length to which the Court is quite unprepared to follow them, upon any such grounds as they have stated: at the same time he is certainly not a witness omni exceptione major; he is, to a certain degree, tainted. The Court therefore will resort to other criteria than his mere oath of the integrity of this whole transaction relative to the will in question; and will briefly consider what confirmation his statement respecting it derives, as well from admitted facts and probabilities in the case; as upon other considerations fairly applicable, as tests of the credit due to the account given of it by this witness in particular.

Among these other considerations a first, and not the least material, is that the deposition of this witness itself, which is long and special, carries with it strong internal marks of truth and fairness. So far as the Court is enabled to judge, it presents a candid, unreserved, undisguised relation of facts. He is called to speak

to this transaction nearly five years after it had taken place; it might well be that in that interval some of the particulars had escaped his recollection altogether, and that others, once forgotten, would revive as circumstances connected with them gradually sug-[68]-gested themselves to the witness. This alone would be sufficient to account for the statement of a transaction so remote being, to some extent, erroneous and confused. The memory of this witness may, not improbably, be a treacherous one. It is also to be remembered that means have been resorted to of betraying him into inconsistencies, or contradictions, to speak the most favorably of them, a little extraordinary. He had been questioned in a very unusual manner (not to say intentionally tampered with) by the opposers of this will at the outset of the cause. The Court alludes to a letter addressed to Croft in December, 1819, by Mr. Wakefield; and conveyed to him at Marseilles, where he then resided, not by the ordinary conveyance of the post, but by a special messenger, Mr. Humphries, an attorney (who afterwards travelled with the witness from Marseilles to Paris); a letter consisting not merely of general inquiries, but making up a set of special interrogatories containing a pretty strict cross-examination of Mr. Croft relative to all the circumstances of this long by-gone transaction. Now, first, as to this mode of proceeding, it is one in my judgment very objectionable. Croft was the alleged writer of the will; a witness whom the executors must have been expected, and indeed whom they were bound, to produce. General inquiries of him as to whether he, in truth, was the writer of the will, and as to whether the deceased gave him instructions for it, and subscribed it, and was in a state of testamentary capacity at the time, might not be improper, even in the projected opposers of it; in order to determine them as to whether, and to what extent, they would persist in their projected opposition. But to require written answers to a long [69] string of interrogatories as to such a transaction, of the nature of those addressed to this witness, and before he had seen the original papers in the cause, was a course of proceeding neither very usual, I repeat, nor very proper; although the court is willing, in candour, to acquit the writer of this letter of any improper intention at that time. What however has the result been? The witness not only, apparently in the most unreserved manner, returns a full general answer by letter to that so addressed to him; but he also answers distinctly, in writing, all the queries in the several interrogatories, as far as his recollection then served him. And this letter, and these answers, are now introduced into the cause, in order to discredit the witness, as by reason of variations between them, and the deposition. After all, however, to what do those variations amount? Upon my mind, candidly and impartially considered, they produce, for reasons presently to be stated, a quite contrary effect to that for which they have been invoked into the cause.

These answers of Croft confirm as fully, in substance, the factum of this will; or, in other words, that it was written from the instructions, and that it was subscribed by the hand, of a capable testator; as the deposition: the principal variations are these: in the answers it is said—1. That the instrument was completed and signed at one sitting: 2. That the daughter had a legacy of 50,000l. and was also the residuary legatee. It seems that this statement was erroneous in both particulars; accordingly a correct statement, and consequently one varying from the above, in both particulars, was given in the deposition, of which an abstract has already been furnished.

[70] Now as to this first variation, the witness does not suppress that his impression at the time of his answering Mr. Wakefield's queries was that the instrument was completed at one sitting. He candidly admits this upon his examination in chief, and says that "he could not have deposed merely from unaided recollection that the will was not then signed; and that what he then wrote" (namely, from the deceased's dictation, as above) "became the draught of his will; for the impression upon his mind was that such had been the fact, till in the month of March last (i.e. in the month of March, 1820, for this witness was examined in the July of that year) copies of the instructions (i.e. the two additional instructions sent to the deceased in the evening of the day when the instructions, as already stated, were taken) were shewn to him by Mr. Gatty, Wakefield's solicitor, at Paris; and they refreshed and corrected the deponent's memory, so as to enable him to depose, &c." that is in brief, as already stated in the abstract of his deposition. The witness speaks to the same effect, only with greater particularity, in answer to the third interrogatory, with every appearance of fairness and candour, and which the Court sees no reason to distrust, even after all that has been urged in objection to the credit of this witness.

An explanation equally satisfactory is given of the other variation. He says, in answer to the third interrogatory, "The respondent did, in his letter to Mr. Wakefield, state the impression upon his mind to be that the legacy to the daughter was 50,000l.; which he stated, as he did every thing else, from recollection; and, by referring to the will, as he has [71] now an opportunity of doing, he sees very plainly how the misconception arose, she having an absolute bequest of 30,000l. and a contingent bequest of 20,000l. She was therefore to have eventually what he, rather erroneously, stated her (as he then believed her) to be entitled to absolutely." He admits also having stated, according to the then impression of his mind, that the daughter was the residuary legatee. The account which this witness gives of his communications with Sir Theophilus Metcalf, in answer to this same fifth interrogatory, as to the erasure of Pearson's name and the substitution of Shank's—his not attempting to account for this, &c. (not to advert to it more particularly) has every mark, to my mind, of truth and fairness.

As to Croft's mistake, indeed, with respect to the disposition of the residue, so far from impeaching the credit of his general narrative, it goes far to confirm it in my judgment. Taking this transaction to have passed in mere ordinary course, as the witness relates, there is nothing unnatural or improbable in Croft having forgotten, after an interval of four years, to whom the residue was bequeathed by this will. It was a matter of no moment or interest to him; nor is it at all surprising that it should have made no deep impression upon his memory. But on the other hypothesis, on the supposition of this being a fraud on the part of Croft, in conspiracy with some other person or persons, its main object must have been to deprive the daughter, then Miss Pattle, of the residue. And that Croft could possibly have so far forgotten the main object of the fraud, as to hold out to Wakefield that his wife was the residuary legatee at any time, is a circumstance so improbable that this very mistake [72] is a strong confirmation of the transaction having actually passed as he describes it.

Thus far, then, the attack upon the credit of this witness fails in its object. Admitting him, however, to be so shaken in credit as to require even all that corroboration which an accomplice requires, examined upon a criminal prosecution, still, in my judgment, the testimony of this witness has that corroboration. Some of the numerous corroborations which it derives, as well from the res gesta as from the testimony of other witnesses, have already been adverted to. Again, that the deceased made a will at this time, through the agency of Croft, must be admitted from Livingstone's letter to the widow. It is in evidence too, not only that soon after the making of the will such was generally reported at Macao to be the fact, but that it was mentioned specifically to Mr. Ross at the time, as that gentleman deposes, by Croft, by Livingstone, and he, Mr. Ross, thinks, by the deceased himself. Again, as to the contents of the will, the pencil instructions, No. 1, are proved to be in the deceased's hand-writing; as the instructions, No. 2, are proved to be partly in the hand-writing of the deceased and partly in that of Mr. Livingstone.(*a*) Accordingly, [73] the bequests and directions furnished by these instructions are embodied in this will. Both these instructions, I should say, were carried by Croft to Bengal and preserved; nor are they produced by him, as to corroborate his own evidence, now that the will is questioned, but they were delivered by him to Sir Theophilus Metcalf in the following

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(*a*) These instructions Nos. 1 and 2 were as follows:—

No. 1.

"Please to add

"£1000 to A. Pearson.

"Ditto to J. Livingstone.

"All my goods and wines to be sold for the general purposes of my will, except a pipe of Madeira to each of my executors. "T. C. P."

No. 2.

"I hereby empower my present attornies George Templar and Hastings Nathaniel Middleton, esquires, to sell all my stock in the 3 per cent. consols, and East India Stock, for the general purposes of my will. "Thos. Chas. Pattle.

"19 Oct^{r}. 1815."

"My dear Sir,—Mr. Pattle wishes the above clause to be inserted in his will, because at present his attornies have no power to sell, only to receive and reinvest. —Your's truly, "John Livingstone."

year at Bengal; when inquiries were made about the substitution of Shank's name for that of Pearson; and he, Croft, should seem to have actually forgotten their existence, till copies of them were shewn to him, in 1820, by Mr. Gatty, at Paris. If there be any fraud then Livingstone must be a party to it: as also must Allen, for the name of "Shank" and the indorsement on the envelope are now proved to have been written by Allen. In short, so strongly does all this corroborate the evidence already stated, furnished by Croft, as to the immediate factum of this instrument, that the adverse parties have been constrained to meet it by setting up, in fact, a new case, almost at the hearing, which I shall advert to presently; equally unfounded, however, as that originally set up, either in proof or in probability.

2d. It has been attempted, however, to be maintained in argument, secondly, that the dispositive part **[74]** of this will is so highly improbable as to present a nearly insuperable obstacle to its being considered the deceased's own act. Let us see upon what foundation that argument rests, or, in other words, whether the dispositive part of this will has any thing of that "high improbability" sought to be ascribed to it.

The deceased had a wife and daughter—an only child. Towards his wife more has been said of his fondness than could be of his fidelity, for his conduct in that particular does not seem to have been quite pure. The truth and sincerity of his love for his daughter admit of no doubt: he was particularly attentive to her education; and constantly expressed himself, when speaking or writing of her, in the warmest and most affectionate terms. Now it is said that the amount of property left away from this only daughter is so improbable as to furnish, of itself, a serious obstacle to the alleged validity of this will: and, by way of heightening this improbability, the Court is reminded that the deceased had made a will, leaving to his wife and this daughter his whole property, in 1805.

Now here, in the first place, does it at all follow that, because the deceased left his wife and daughter his whole property, consisting of from 10 to 20,000l. in 1805, he should also leave them his whole property, consisting of from 140 to 150,000l. (after a ten years' separation from them) in 1815? I see little or no connexion between the two propositions, the one of which has been assumed as the so probable consequence of the other. The deceased might think in 1815, as many persons do who have acquired large fortunes abroad, that his collateral relations had, then, some **[75]** claim upon his bounty. He might think his daughter amply, and more safely, provided for by a part of his large property in 1815 than by a bequest of the whole. There could be no room for such considerations in 1805, when his whole property was at least ten times less in amount; and not more than sufficient to leave his wife and daughter decently and comfortably provided for; which I must presume to have always been his first object.

Again, the circumstance of there being no legacy in this will to his uncle Haselby is said by the opposers of the will to be nearly incompatible with its genuineness; the more especially as the deceased had mentioned in letters of January and February, 1815, that he had "put down" Haselby for 3 or 5000l. Now such "declarations," as they have been termed, are the slightest circumstances possible in a case like the present, either in favor of or against a will. The letters in question are dated in January and February, 1815; in the course of that year the deceased had earnestly and repeatedly pressed Haselby to come out to China, which he had declined. This might induce him to alter his mind and omit Mr. Haselby. But the very evidence produced by the opposers of the will, in order to shew the improbability of Haselby's omission, does incidentally, by a consequence of which probably they were not aware, render the general tenor of this will, as to the dispositive part of it, by no means incredible. It proves that even in 1814 the principle of the will of 1805 had been departed from; and that the deceased had given, or intended to give, considerable legacies away from his wife and daughter. Nor is it at all improbable **[76]** that a testator who bequeathes 3 or 5000l. to an uncle should endow his brothers, sisters, and their families, with even as liberal a portion of his testamentary bounty, as is purported to be conveyed to them by this obnoxious will.

Observations of a similar import apply to another similar argument, only with still stronger effect, inasmuch as the "declarations" upon which it is founded are of a much looser texture. The deceased, it seems, had promised Captain Langford to "do something for his son;" a promise which I admit, as insisted, that he never performed, provided this is to be taken as his will. But a circumstance of this nature is a mere

feather, if placed in the scale as a counterpoise to that weight of evidence by which this instrument is authenticated. The deceased, in making this promise, might have been insincere; or he might have altered his mind; or he might have forgotten it. It was likely that there should be such a legacy in his will: but is there not being so unlikely as to assist materially in proving this or any will said to be his, to be a fabrication and a forgery? I am of opinion that it is a circumstance too trivial and remote to have any such effect whatever.

But since the opposers of this will, in their zeal to impress on the Court the improbability of the dispositive part of it, have thought fit to refer it to some testamentary dispositions of the deceased in 1814; those who defend it are surely at liberty, by way of rebutting that inference, to refer it to other testamentary dispositions of the deceased, of nearly the same date, which are before the Court, if not in strict formal proof, still, in my judgment, sufficiently in proof **[77]** to justify this use of them on their part. At all events, they are sufficiently in evidence for the Court to avail itself of them, in order to ascertain whether the dispositive part of the will now propounded really is so utterly improbable as its opponents would represent it. I allude to the paper marked (A) annexed to the affidavit of scripts of Sir Theophilus Metcalf.

It appears that in June, 1814, the deceased shewed Sir Theophilus Metcalf a memorandum which he had written in the blank page of an Encyclopædia consisting of sums and initials; being, as he said, an abstract of the legacies contained in a will, which he, the deceased, had then lately made. This Encyclopædia was afterwards given by the deceased to his friend Captain Ross, and the paper in question was copied in 1817, by Sir Theophilus Metcalf, from that book.(*a*) Among others is Mr. Haselby's legacy of 3000l. Most of the legacies correspond in amount with those in the will now propounded. Some are enlarged—the legacy, **[78]** for instance, to the brother, Mr. James Pattle, is enlarged from 10 to 15,000l. Probably the deceased's property had increased between April, 1814, and October, 1815. The sum of 60,000l. is put down without any initials; but as neither the father, wife, nor daughter are noticed in this abstract, this sum of 60,000l. (made 70,000l. in the will) was clearly intended for them. The disposition of the residue is not mentioned; nor was the deceased himself probably aware, even nearly, of its exact amount. It is in evidence that, only very shortly before his death, he was under great uneasiness as to a considerable sum due to him from a person named Beale, who subsequently became a bankrupt; though not, I think it appears, until after the deceased had obtained payment of his debt. It might be very difficult, under these circumstances, for the deceased himself to calculate what the residue of his property at any given time would actually nett to those persons selected for his residuary legatees.

Now it should seem upon the general result that the legacies minuted in this abstract amount to about 114,000l., of which only 60,000l. seem to have been intended by the deceased for his father, wife, and daughter: being nearly in the same proportion to what then, probably, was his whole property, as the bequests to them under this will bear to his whole property at the time of his death. If then to conjectures upon loose probabilities as to the dispositive part of this will this abstract, made by the deceased himself, of the will of 1814, may be opposed with any sort of propriety, the whole inference, slight as it is, arising from the asserted improbability of the dispositive part of it, stands completely refuted. I term it a slight inference, and upon

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(*a*) The script, paper (A), was the copy so made by Sir Theophilus Metcalf of these sums and initials; over against which were placed the names of the persons to whom he conceived the initials to allude in the following manner:—

"10,000l. J. P.—His brother, James Pattle.
5,000l. S. R.—His sister, Mrs. Rocke.
5,000l. E. M.—His sister, Mrs. Mitford, &c."

Sir Theophilus Metcalf had sworn that, "Being well acquainted with the family and friends of the deceased, he was enabled, as well from a perusal of the said memoranda, as from the explanation which the deceased himself had given to him of the meaning of the same, to ascertain all the persons to whom the several initials applied." At the head of this paper was the sum of 60,000l. without any initials: opposite to which was written by Sir Theophilus Metcalf, "This sum, I conceive, was meant for his wife and daughter."

general principles, for this reason. All presump-[79]-tions, either for or against an alleged will, arising from the particular disposition which it purports to make of the deceased's property, are but vague and loose at the very best; inasmuch as the varieties of human opinion, as to what is or is not a fit disposition of property by will, are almost infinite.

3. I proceed, thirdly, to the evidence in proof of the direct charge of the signature to this instrument being a forgery.

This Court has often had occasion to observe that evidence to hand-writing is at best, in its own nature, very inconclusive; affirmative from the exactness with which hand-writing may be imitated; and negative from the dissimilarity which is often discoverable in the hand-writing of the same person, under different circumstances. Without knowing very precisely the state and condition of the writer at the time; and exercising a very discriminating judgment upon these; persons deposing, especially to a mere signature not being that of such or such a person, from its dissimilarity, howsoever ascertained or supposed to be, to his usual hand-writing, are so likely to err, that negative evidence to a mere subscription or signature can seldom, if ever, under ordinary circumstances, avail in proof against the final authenticity of the instrument to which that subscription or signature is attached. But such evidence is peculiarly fallacious where the dissimilarity relied upon is not that of general character, but merely particular letters; for the slightest peculiarities of circumstance or position —as, for instance, the writer sitting up or reclining, or the paper being placed upon a harder or softer substance, or on a plane more or less inclined—nay, the materials, [80] as pen, ink, &c. being different at different times—are amply sufficient to account for the same letters being made variously at the different times by the same individual. Independant, however, of any thing of this sort, few individuals, it is apprehended, write so uniformly that dissimilar formations of particular letters are grounds for concluding them not to have been made by the same person. Of the deceased, at least, the hand-writing was not so uniform as to render such dissimilarity a test (and it is the one principally relied on) safely applicable to the proof of this signature being a forgery. The Court has before it thirty letters written by the deceased, when in perfect health, and even finely written. The body in a small, fine, rapid hand; the signatures larger, but still in a masterly hand. Yet in the formations of the particular letters, especially those composing the signatures (nay, in the signatures themselves), nearly every sort of variety occurs. Sometimes the deceased signs "Tho^{s}. Cha^{s}." sometimes "T. C." only. And the particular letters, especially the initials "T. C. P.," are as various as can well be conceived in their particular formations. Subject to these preliminary observations, I address myself to the direct proof of this signature being a forgery—only further premising that if Courts, from their experience, have always been in the habit of expressing suspicions of the nature which I have described as to evidence upon hand-writing generally, there never was a case tending to justify and confirm those suspicions more strongly than the present.

The best, usually perhaps the only proper, evidence of hand-writing is that of persons who have acquired [81] a previous knowledge of the party's hand-writing from seeing him write, and who form their opinion from the general character and manner of this, and not from criticising particular letters. Of this class of witnesses only three are produced to prove this signature a forgery, namely, Lord Torrington, Mr. Drummond, and Mr. Baring.

The first of these, Lord Torrington, had not seen the deceased subsequent to 1810 or 1811; and what does he say? "He cannot depose that he believes the signature not to be of the hand-writing of the deceased." He admits, however, having been told by Major Robson that "very great doubts existed as to whether the signature were not a forgery;" and yet, deposing under the prejudice which these suggested doubts would naturally give rise to, "he will not venture to say that he believes the signature not to be that of the deceased in the cause:" there is such a "similarity of character," he cannot depose that "he believes the signature not to be his." It has been truly, I think, insisted that this is evidence rather favorable than adverse to the genuineness of this subscription.

Nor is the evidence of Mr. Drummond, the second witness, in its general effect, very dissimilar: for he cannot take upon himself to depose that he does not believe the signature to be the hand-writing of the deceased: "he can only depose," for reasons stated, "that he has doubts:" he admits that the signature, "at first view,

does appear in his judgment to have the character of the deceased's subscription." What then are the reasons upon which this deponent rests his doubts? I should first however premise that [82] Mr. Drummond had not seen the deceased write after 1807; and that he too had been told, like the first witness (namely by Mr. Wakefield), that the signature in question was believed to be a forgery.

According, then, to his recollection, the final "ss" of the Christian names "Thoˢ." and "Chaˢ." were usually made by the deceased without any curve inwards at the foot; and the capital P, in the surname Pattle, in one connected flourish, i.e. with a double loop at the bottom. The signature differing from the deceased's usual signature (according to his recollection) in the particulars is the ground upon which this witness's doubts are founded.

Now here, in the first place, as to the capital P, I have already observed, speaking of his letters, that the deceased made his capitals in a variety of different ways. But will it be believed that of his signatures to three exhibits annexed to the very allegation upon which the witness is deposing, the P in Pattle is made in no one instance in the mode suggested by this witness, as the usual mode; but that they are all in the same form as in the signature to the will? As to the final "ss," the deceased being manifestly a rapid writer, made his "ss" more frequently by a mere dash of his pen, without curving inwards at the foot, though there are many instances to the contrary in most of the exhibits. Nay, here again, in the very first of the three exhibits annexed to this allegation, the final "s" in the "Thoˢ." is written in the one of these modes; and in the "Chaˢ." it is written in the other. So extremely fallacious are the criteria sought to be relied upon. I will only further observe on this head, that of the two allegations given by the [83] opposers of this will, there being three exhibits annexed to the first and two to the second, the signatures to the three former are as dissimilar to those to the two latter exhibits as can well be imagined. The three former are signed "Thoˢ. Chaˢ. Pattle," in a beautiful hand—the two latter are signed T. C. Pattle only; and this hardly legibly. The deceased then was obviously not so uniform a writer that observations of this sort can be much depended upon.

The third witness, Mr. Baring, is more positive—he does venture an opinion to this signature being a forgery: he participates in the scepticism, and to some degree in the confidence, of those witnesses who, from their skill in hand-writing alone (as I shall presently observe), arrive unanimously at the same conclusion. Indeed, it may be well questioned whether Mr. Baring does not more properly belong to this latter class of witnesses than to the one in which I am considering him. He is evidently a witness who plumes himself as a judge of hand-writing generally—of the deceased's hand-writing in particular he has had little knowledge, nor had he seen the deceased write subsequent to 1801. At best, however, his knowledge of the deceased's particular hand-writing was slender and remote—his prejudices against the signature were recent and probably strong: for he admits that Mr. Wakefield had, previous to his examination, affirmed to him, "that the will would be found a forgery." Now what are the reasons by which Mr. Baring fortifies his belief as to this signature being what it was so asserted?

His first reason is that the signature is not in the same hand-writing as the address on the envelope. So [84] far he happens to be right: but who ever said that the address on the envelope was written by the deceased? Not the propounders of this will at any time; though the opposers at one time did, namely, just so long as suited their own purpose. The indorsement on the envelope is now admitted on all hands to have been written by Allen. Meantime, of the professional gentlemen, if I may so term them, deposing to hand-writing, of whom I shall say more presently, there are several who depose that the signature is in the same hand-writing as the address. So that we have this curious feature in the case. Mr. Baring who deposes to his belief of this signature being a forgery, under an impression that the address on the envelope was written by the deceased, assigns, as one of his reasons for that belief, the "signature" being in a different character from the "address." Other witnesses again, who depose to the same belief under a conviction that the address on the envelope was not written by the deceased, assign as one of their reasons for that belief the "signature" and "address" being written in one and the same character.

His second reason is that "the top of the T in Thomas is of a greater length than the deceased was accustomed to make, or ever made it in the days of his best writing." It might be sufficient to say that this "T" does not purport to have been made "in

the days of his best writing." The deceased was in bed, and sick and feeble; which might well of itself account for this "T" differing from those which he made "in the days of his best writing." Thus it should seem that the reason were frivolous though the fact were true. But there is some reason to believe that the witness is [85] mistaken in his premises, as well as erroneous in his conclusion. The objection is that the flourish at the top of the "T" in "Thomas" is too long: it extends however only to the first small "t" in the surname of Pattle. Now, in the signature to the very first exhibit annexed to the opposer's allegation, the flourish is longer, actually extending two letters beyond, that is, to the "l" in "Pattle," instead of merely to the first "t."

The next reason is that this same "flourish" is too firm to be consistent with the tremulous appearance of the remainder of the signature. This is surely too weak a reason for serious discussion; not to mention that, in his opinion of the "tremulous character," at least of the whole of the remainder of the signature, this witness is not outborne by those other witnesses, who speak as professors on this subject, and regard it in a scientific light. But independent of this, parts of a signature so made might well be more tremulous and others less so, according as the deceased, sitting up in bed, shifted from a more to a less convenient posture, or vice versa; or even according as, remaining in the same position, he bestowed more or less pains on the different component parts of it.

This witness's next reason is that some of the letters in "Thoˢ." are painted or touched up. This is the old objection of which, as a general objection, I shall say more presently. Meantime, if the fact were so, it proves nothing—for the deceased was not in that state of extreme bodily debility as to be incapable of retouching some of the letters if not sufficiently clear, as struck off in the first instance.

[86] Mr. Baring's last reason is that the signature bears a strong resemblance in point of hand-writing to the body of the instrument, particularly the letter "s" in "Thoˢ." Now admitting this similarity, it proves nothing; the deceased's hand-writing certainly has something, as already observed, of similarity to Mr. Croft's. But when this witness puts in the similitude of a single letter, the letter "s," this last reason really becomes unworthy of grave judicial remark.

Of the evidence to hand-writing, thus far, this then is the general account. Three witnesses are produced to prove this signature a forgery, no one of whom was intimately acquainted with the hand-writing of the deceased, or had seen him write for a number of years. Two of the three have doubts, but concur in the general similarity of this to the deceased's admitted signatures; the third disbelieves, but assigns reasons for that disbelief, in no degree valid in my judgment to justify and sustain it. On the other hand, there are five witnesses of as high respectability, deposing from an intimate, and much more recent, intercourse and acquaintance with the deceased and his subscriptions (and this, too, after doubts had been suggested of its genuineness) to this being his actual signature; and so deposing from similarity, not of particular letters, but of general character; ordinarily the only safe criterion upon which to form an opinion upon such a subject. It would surely be waste of time to attempt to sum up this evidence on both sides in order to strike a balance.

But the opposers of the will have obtruded on the notice of the Court evidence (if it should be so called) [87] to this part of the case of a somewhat different species. I mean the opinions of persons who, without any previous knowledge of a party's hand-writing, think they can judge, from their skill and experience in such matters, whether a signature, for instance, said to be his, be so or not, by comparing it with other, his admitted, signatures; and who also undertake by certain indications to determine, from the general appearance of hand-writing, whether it be written in a natural or an imitated character. This species of evidence has been constantly held, both subdivisions of it, the lowest and weakest that can possibly be offered. The first subdivision indeed, or evidence to hand-writing that rests upon mere comparison, is inadmissible at common law: if indeed the observation does not rather apply to this branch of evidence, in both its subdivisions, under the authority of the case of *Gurney* v. *Longlands* (5 B. & Ald. 130), the last case in which any question respecting it has occurred at common law that I am aware of. Inclining strongly to this view of the subject, the Court, so far as regards the present case, might say at once that the effect of this evidence, be it what it may, would fail to bring the scale as to proof of hand-writing even to an equal balance; much more would fail to turn it, and convict this instrument of fabrication and forgery.

But the evidence of this species actually adduced in the present cause suggests some considerations into which the Court may, not unusefully, enter, as applicable to this subject generally.

Here are seven witnesses of this class examined in the present case—five of the seven being persons in **[88]** official situations (three in the post-office and two in the bank): added to these are an engraver and a law stationer. Now to what, taken in its general result, does their evidence amount?

In sustaining the case which they are produced to, namely, that this signature is a forgery, these gentlemen all agree. At that end in common they all arrive. But, though they agree in their conclusions, they differ so widely in their premises—the reasons, comparatively few, which they assign in common, are so vague and unsatisfactory—in many not unimportant particulars they so flatly contradict each other—and in others, most, if not all of them, in turn, are so flatly contradicted by admitted facts in the cause—that their evidence, taken as a whole, fails to induce any suspicion even upon my mind of this instrument being, what they so confidently pronounce it, a forgery. For instance, as to the vague and inconclusive character of most of their common reasons, the circumstances, I observe, which they nearly all assign as their reasons for deeming this signature to be written in a feigned and not in a natural hand, may be amply accounted for by the deceased's state and condition at the time of this instrument being signed. One common reason is the old objection, as I again term it, of "painting:" (*a*)[1] **[89]** there can scarcely be a less certain criterion. Many persons have a trick, or knack, or habit, of retouching their letters; it was that, well known to his contemporaries, of a late eminent advocate in this Court; (*a*)[2] most of whose notes and opinions might be easily convicted of being forgeries, according to this criterion. It may happen to any person, not in the habit of it, to pass over his letters a second time, from a failure of ink in the pen that traced them in the first instance. In short, this circumstance of painting is, itself, extremely trivial. Again, as to contradicting each other, some of these witnesses are confident that certain letters, exhibited by the opposers of the will, are not of the hand-writing of the deceased—others are as confident that they are of his hand-writing. Lastly, as to the contradiction which certain of the witnesses experience from admitted facts in the cause, there are several of them pretty confident that the body of the will, the subscription to it, the pencil instructions, and the indorsement on the envelope, were all written by one and the same individual, namely, Croft. The weight of evidence so preponderates as to justify me in terming it an admitted fact in the cause that they are the hand-writing (to say nothing of the signature) of three different persons, viz. of the deceased, Croft, and Allen. Nay, the indorsement is now suggested by Wakefield himself to have been written by Allen; and affidavits, filed on his part, are actually before the Court, in which that fact is distinctly sworn to.(*b*) Witnesses so deposing, to say the least, are completely neutralized; and it may be sufficient, **[90]** so far as respects the present case, to dismiss their evidence with that single remark. But, as with reference to general practice, I earnestly recommend that no attempts should be made to obtrude such evidence on the Court in any future case. It occasions considerable certain expence; that any benefit should result from it is most unlikely; but that any considerable benefit should, may be safely pronounced nearly impossible. In aid of a good case it is wholly superfluous, as the Court deemed it, for instance, in the case of *Saph* v. *Atkinson* (see ante, vol. i. pp. 212, et seq.), where it is to be recollected that the Court had made up its mind to pronounce against the will before it adverted to the direct evidence adduced in proof of the signature to it being a forgery at all. That in support of a bad cause it is, at best, merely unavailing, this very case may serve to shew. Meantime these professors ordinarily, as in this instance, speak their opinions

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(*a*)[1] To assist the Court in detecting this, a glass of high powers, said to have been used by these gentlemen in order to its detection, was offered to the Court at the hearing. This offer the Court peremptorily declined—observing, in substance—that glasses of high powers, however fitly applied to the inspection of natural subjects, rather tended to distort and misrepresent, than to place such objects in their true light—especially when used (their ordinary application in the hands of prejudiced persons) to confirm some theory or preconceived opinion.

(*a*)[2] The editor believes Dr. Lawrence.

(*b*) See note (*a*), page 97, post.

with a confidence which renders the admission of their testimony in such cases even highly mischievous; from its probable tendency to mislead, not indeed the Court, but its suitors, to the almost unavoidable creation of expence, and delay, and inconvenience to both parties. If it should be asked, of what use, then, is the art which these gentlemen profess, if it can never be depended upon? In what cases may it be fairly invoked, and to what objects safely applied? I answer: its legitimate use I take to be this—it may be reasonably resorted to by parties whom a suspicious or suspected instrument purports to deprive of a legal benefit, for their own private information, in **[91]** the first instance; it may be safely relied on to the extent of suggesting the propriety, on their parts, of caution, doubt, and inquiry. But whether evidence to hand-writing of this species can ever be of much, if of any, avail, under circumstances not very extraordinary, when the authenticity of the instrument comes to be finally determined upon by the competent forum (a matter which must depend upon almost infinite, more stringent, considerations) is what, for reasons sufficiently apparent, I much incline to doubt. Still, with all this, this Court, which is subordinate to a higher tribunal, may not feel itself warranted in altogether rejecting such evidence, if tendered to, and pressed upon it, against the uniform course of, at least, its modern practice. But this Court would not regret having the sanction of the superior tribunal, the Court of Delegates, either to reject such evidence altogether, or at least to confine its admission to those (perhaps nearly unsupposable) cases of such high doubt and nicety that a mere feather weight would give a preponderancy to the evidence for or against the instrument; when it might be resorted to, after publication, by direction of the Court itself, for its own information; which I incline to think was actually the old mode of introducing such evidence into these causes.(*a*)

[92] It only remains to observe that the case set up by the opposers of this will, which I have thus gone through in detail, and which I think in no degree effectual to defeat the claim of this will to probate, had all along to contend with one nearly insuperable obstacle, à priori; for it ventured to charge a direct fabrication and forgery in the absence of that which could alone render them at all probable. An instrument is not forged without some inducement; nor can there be a conspiracy without conspirators. Now what, even as suggested, was the inducement, and who were the conspirators in this case are, up to this instant, to the Court at least, profound secrets. Not only no proof is offered, but it is not even suggested in plea, in concert with whom this asserted fraud and forgery on the part of Croft were perpetrated. As to the fabrication of this will by Croft, ex mero motu, and not **[93]** in concert with anybody —the very supposition of it is absurd—for it neither conveys, nor purports to convey, any benefit whatever to Mr. Croft, either directly or indirectly. The parties principally benefited under this will, the brothers and sisters of the deceased, and their families, were thousands of miles off, in this country. The brother James, to be sure, was at Calcutta; from which place Croft had then recently sailed to Macao. Was he the conspirator? Was it in concert with him that this gross fraud was schemed and executed by Croft? Impossible! How were opportunities for the practice of this

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(*a*) *Machin and Tyndall* v. *Grindon and Others.* Prerogative Court of Canterbury, Michaelmas Term, 4th Session, 3rd December, 1756.

A codicil bearing date in 1755 was propounded and pleaded to be all written by the deceased. The adverse party pleaded on the contrary that it was not his hand-writing, and pleaded, in supply of proof, several receipts dated in 1752, which were alleged to be the deceased's hand-writing, and to differ from the codicil both in the character and manner of spelling.

Dr. Simpson objected to these exhibits, as having been written three years before the codicil, in which time a man's hand-writing might greatly vary, and therefore as no evidence to prove the codicil not to be the deceased's hand-writing.

But I was of opinion that they are a species of evidence that might induce a probability for or against the codicil; and that such exhibits have always been received as evidence, and therefore I admitted them.

It should seem from the above case (which is copied from Sir George Lee's "manuscript book," by favor of Dr. Phillimore. See 1 Phill. p. 166) that the present practice is one of some standing. See further on this head, generally, the case of *Beaumont* v. *Perkins*, 1 Phill. 78, and the cases of *Reilly* v. *Rivett*, and *Heath* v. *Watts*, as stated in the notes on that case.

fraud to be anticipated when Croft left Calcutta? For instance, how could it be foreseen that Croft, on arriving at Macao, would find the deceased in a dying condition, and bent upon revoking a recent will, in order to make a new one, through his instrumentality? Croft was a perfect stranger to the deceased, nor indeed on terms, it should seem, of particular intimacy with his brother, James Pattle—not even, I observe, his attorney.

An hypothesis, set up by the counsel for Mr. Wakefield at the hearing, is equally unsubstantial with that which would represent this forgery as a concerted scheme between Croft and Mr. James Pattle. It is, that a will was actually made for the deceased by Croft in the manner which he has deposed—only—that this is not that will: in other words, that the will so made has been subducted; and that this is a supposititious will that has been substituted in its room. Now, here again, as to who were the privies to this fraud, and what were the inducements, the Court is left in the dark—nor is the suggestion (for it is merely such) to which I am adverting borne out by any one fact in **[94]** the case with which I am acquainted. On the contrary, facts are in evidence that, in conjunction with what appears on the face of the instrument itself, render this hypothesis hardly capable, as it is wholly unworthy, of a serious refutation.

For instance, this envelope was addressed to the executors (it is now admitted on all hands) by Allen, being the person who substituted the name of Shank for that of Pearson on the third side of the will. This last is proved by the opposer's own witness, Captain Langford (confirmed by Ross), who deposes not only to the address on the envelope, but to the name of "Shank," over the erased named of Pearson, being in Allen's hand-writing. Now, of what plausible explanation is this circumstance capable, on the hypothesis of this being a supposititious instrument, substituted for the genuine will? On the contrary, admit it to be the genuine one, as deposed by Croft, and the circumstance almost explains itself. Croft leaves the will, when executed, with the deceased—he hears and knows no more about it. The deceased, though in full possession of his mental faculties, is ill, and peevish, and fretful—he is worried about money concerns—Pearson has gone with the factory to Canton, and has never once, as he complains, come down to see him. Is it any thing unlikely that the deceased, in this mood, should strike out his name, and substitute another's, before directing this will to be sealed up? Now, if this resolution was adopted within the last fortnight or three weeks of his life, Croft could not be the agent; for he had left Macao and returned to Calcutta. The deceased, however, had still two persons about him, whom he occasionally employed, **[95]** as he himself told one of the witnesses, as "secretaries," Livingstone and Allen. Livingstone, of the two, was least constantly about him, except as a mere medical attendant—nor was it probable that he should be selected, by preference, to strike out a legacy to his friend and partner, Pearson. Allen was the very person of all others whom the deceased would naturally employ, not only to address his will when sealed up, but to alter this legacy: accordingly it is in the hand-writing of Allen that not merely the address on the envelope, but the name of Shank, substituted for that of Pearson, is proved to be. How strongly this corroborates the whole transaction, as well as how inconsistent it is with the hypothesis now set up, is too obvious for comment.

If the case rested here it would only remain that the Court should pronounce this instrument amply proved. But an application made to the Court just previous to the hearing, and still persisted in, is first to be disposed of; being an application "to rescind the conclusion of the cause, in order," it is said, "to let in fresh evidence." But that application, in substance, comes to this: the parties who oppose this will, finding or fearing that they have failed to sustain their original case, crave leave to abandon it, and to set up a new case altogether.

Now this sort of application is one that, obviously, the Court can seldom be expected to accede to—admitting it, as it does, to be not impossible for parties to suggest a new case, even in this stage of a cause, which the Court safely might, and for the sake of justice would, admit to proof. In the present instance it might be sufficient to say that the Court is too **[96]** satisfied of the claim of this will to probate, as the genuine and last will of the testator, for its conviction to be shaken by the case which is now attempted to be made on the part of Mr. Wakefield, the person in whose sole behalf this application is made—and that no evidence of which that case is capable would induce it to come to a different conclusion, or to pronounce against

the force and effect of the will which has been propounded, and, in my judgment, has been proved in this cause. In this view of the subject, it might be sufficient for the Court to proceed at once to its sentence—the more especially as Mr. Wakefield's counsel, with due delicacy towards the Court, as well as with great judgment towards their client, have kept this part of his case in the back ground as much as possible. But as mysteries are always best avoided, and as those decisions, correct in themselves, are always most satisfactory, of which the reasons are also given, I shall state very briefly what the suggestions are upon which this application is founded: in order to obviate any possible misconception of the grounds upon which I hold myself bound to reject it.

The suggestion then is, that the deceased made a will subsequent to this, namely, on the 28th of October, of a different tenor and effect—in which case, to be sure, there is an end of the will propounded in this cause, whether it be genuine or a forgery—and that on the same 28th of October he caused a letter to be written to Mr. Templar, one of his executors, which he signed—adding at the foot of that letter a memorandum, which he also signed, containing the substance of this will—which letter, however, was never forwarded to Mr. Templar. The bequests of this sug-[97]-gested will are as follows:—2000l. per annum to the widow, during widowhood; to be reduced to 1000l. per annum in case of her marrying again; and a specific legacy of 50,000l., together with the residue, to the daughter; after payment of certain other specific legacies to friends and relations, amounting probably, in the whole, to 16 or 18,000l. Hence it appears that under this will Mr. Wakefield, who sets it up, would be entitled at least to 100,000l.

Now the will itself is suggested to have been fraudulently destroyed; so as not to be producible in any event: but that is not all. The letter to Mr. Templar, with this memorandum at the foot of it, is also suggested to have been recently lost (*a*) by Mr. Wake-[98]-field, out of his pocket, just on the eve of its being deposited in the registry of this Court (though not till after it had been shewn to divers persons, and copies of it had been taken); so that this "letter" is forthcoming no more than the original will. The body of this letter, I should say, is suggested to be in the hand-writing of Allen, who died, some years back, at Manilla.

Now here, in the first place, it is not immaterial to consider how far the utmost proof of which this suggested case is capable would really advance Mr. Wakefield's object—only premising that of any particulars relative either to the making or the destruction of the will itself, nothing is suggested. Who wrote it? who attested it? who destroyed it? who substituted the forged will? what were their motives, or what their inducements? nothing as to all this is even suggested. The Court has a mere suggestion, upon hearsay, that such a will was made and was destroyed.

Of what proof then is this letter capable, even if recovered and produced before

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(*a*) Of the paper so suggested to have been lost by Mr. Wakefield, the following is a copy:—

". . . gives me hopes, though I am in a very weak state, and sometimes fear the worst. You will, I hope, receive a duplicate of my will soon after this—but, if not, pray take great care of this. God bless you, my dear friend, and believe me ever,—Your sincere and attached friend, "THO^{s}. CHA^{s}. PATTLE."

"Substance of my will.

"Thomas Pattle, my father, 500l. a-year for life. At his death the principal to become part of the residue of my property. James Pattle, William Pattle, Sarah Rocke, and Eliza Mitford, 1000l. each, &c. &c."

(At the foot.)

"Read and approved by me, and signed to make it valid, in case of any accident to my will at Macao, the 28th of October, 1815. "THO^{s}. CHA^{s}. PATTLE.

"J. W. Croft."

In support of the motion to rescind the conclusion of the cause a variety of affidavits were tendered from persons to whom the paper had been shewn, as to the body of this paper being in the hand-writing of Allen. There were also affidavits made by Mr. Joseph Hume, and one or two others, to their belief (speaking from a comparison of hand-writing), of the signatures "Tho^{s}. Cha^{s}. Pattle" and "J. W. Croft" being genuine. In several of the former affidavits the indorsement on the envelope of the will was also sworn to be in the hand-writing of Allen.

the Court? It can merely, as the case is laid, consist of evidence to the hand-writing of Allen, and to the deceased's subscription; the rule of this Court being that evidence to hand-writing only is incapable of substantiating any disputed instrument as a will. But the Court is promised no such evidence; for the paper is lost—or if [99] such evidence, it must be all ex parte; there can be no counter evidence. I am also to recollect that, in the event of a copy of this letter being propounded, the parties who propound it are subject, in no case, to an indictment for forgery; they are not acting, consequently, under that responsibility. It is true that the name of Croft, as a sort of attesting witness, is suggested to have appeared upon this paper. But were Croft himself produced to its genuineness, and in support of the case now set up, he would be discredited, in toto, by the evidence that he has already given in this cause. The obvious presumption would be, that he had been corrupted and bought over.

Now, under these circumstances, even if some plausible and unsuspicious account of the finding of this letter could be suggested—giving a probable history of where it was first discovered—in whose hands and keeping it had been for the last eight years, and so on—still the letter itself, à fortiori a copy of it, is capable of no proof which would justify the Court in pronouncing for it as containing, in substance, the deceased's will. But the suggested history of the "finding" of this letter is neither plausible nor unsuspicious: on the contrary, it is most extraordinary in itself; and pregnant with suspicion on the very face of it. It is this—

Eight years after the death of the testator, and four from the commencement of the present suit, some anonymous person writes to Major Robson, who had married the deceased's widow, relative to certain testamentary papers of the deceased, asserted to be under his control, or in his possession. Not receiving, in answer, a satisfactory communication from [100] Major Robson, he addresses Mr. Wakefield, through the two-penny post, in the month of June last (1823), on the same subject. He continues to write Mr. Wakefield anonymous letters, but will give no address; and will receive no answer, but through certain mysterious advertisements in a newspaper. He offers him, in these, 10,000l. not to bring this suit to an issue—an offer which he repeats at Paris, though why, at either time, is not suggested. The correspondence is thus carried on for some time—but this mysterious person will consent to no interview (or, as Mr. Wakefield expresses it in his affidavit, "will venture upon no disclosure of facts") in England—he will only consent to an interview at Paris. To Paris Mr. Wakefield goes, accompanied by his brother and a solicitor; where, at length, the parties meet; and where this paper, the "letter," is finally delivered to Mr. Wakefield by his late anonymous correspondent, after a solemn promise and written engagement entered into on his part "neither to disclose his name, nor to give any information which may lead to its disclosure, under any circumstances;" previous to, and without which, he had refused to consent to any interview, or to make any disclosure connected with the subject, even at Paris. And this is the suggested history of the "finding," if it may be so termed, of this instrument. I should add, indeed, that this mysterious person is suggested to have disclosed, at this interview, that a letter, similar to the one then delivered to Mr. Wakefield, was in the possession of one Smith, formerly a seaman on board the "Alpheus," but then (and still) absent in the West Indies, as quartermaster, on board of his majesty's ship the "Ganges:" [101] but how it came into Smith's possession, or why he has kept it back for the last eight years, &c. &c. is neither explained, nor attempted to be.

In my judgment a plea setting up such a case as this would have been inadmissible at the very commencement of the cause. But to open the cause, in this stage of it, after the publication of the evidence, upon such grounds, is really quite out of the question. The suggestions contained in these affidavits, taken in themselves (for the Court has not even seen the affidavits filed by Major Robson in reply), howsoever sustained, are incapable of leading to any other conclusion than that at which the Court has arrived upon the evidence: and the Court must, therefore, at once, pronounce in favor of the will propounded in this cause.

The only remaining consideration is that of costs. The parties calling in the probate were neither barred by any lapse of time, nor even by their having acted, and received their legacies, under the will: they had still a right to call for proof of it per testes, if they suspected it not to be genuine. Here, however, their right stops—and they are clearly subject to the costs occasioned by their having pleaded this instrument to be a fabrication and a forgery, having produced slight, if any,

grounds to justify such a proceeding. Upon this principle, and in further consideration that, although in possession of their own legacies, they have now for upwards of eight years intercepted the stream of the deceased's testamentary bounty to his other legatees, the Court is of opinion that it is bound, in justice, to give costs from the time when the parties who oppose this will gave an allegation.

[102] DEW *v.* CLARK AND CLARK. Prerogative Court, Hilary Term, Extra Day, 23rd Feb., 1824.—In a rejoinder to or upon a responsive allegation, the only facts strictly pleadable are those either contradictory to, or explanatory of, facts pleaded in the allegation to or upon which it rejoins; and those noviter preventa to the proponent's knowledge; though the court may, in its discretion, permit facts to be pleaded which came under none of those descriptions, under certain circumstances.

[See further, 3 Add. 79.]

(On the admission of an allegation.)

Judgment—Sir John Nicholl. The deceased in this cause, Ely Stot, died in the month of November, 1821. He left a will, which was propounded in a common condidit, in Trinity Term, 1822, by Mr. Thomas and Mr. Valentine Clark (two nephews of the deceased, as being the children of a deceased sister), his two residuary legatees; and a counter allegation on the part of Mrs. Dew, his only child, was given in, and was admitted on the same day.(*a*)[1] A second allegation on the part of the residuary legatees was filed in June, 1823; and the present question respects the admissibility of a plea, tendered on the part of the next of kin, responsive to this second allegation of the residuary legatees.

The case originally set up in opposition to the will, on the part of Mrs. Dew, was principally one of partial insanity. Her allegation charged that the deceased, from her earliest infancy, had taken an aversion to her, his only child, founded purely on mental illusion; and that the will in question sought to be impeached was the immediate and direct offspring of that insane and irrational antipathy, and not of a **[103]** sound and disposing mind and memory. At the same time, it distinctly charged upon the deceased something of general insanity, or insanity unconnected with such aversion towards his daughter, especially betraying itself upon religious matters and concerns.

The counter plea to this, on the part of the Mr. Clarks, was long and special, consisting of thirty-one articles, accompanied with several annexed exhibits. Its objects, briefly stated, were two: 1st, to establish the deceased's general capacity; and, 2dly, to shew that his treatment of his daughter in particular, if harsh or severe, was still not insane or irrational: for that it was justified or excused by misconduct on her part, into some circumstances of which it entered with, at least, no too great apparent feeling or delicacy, as at this time; though the ultimate propriety of this course of proceeding, or the contrary, must obviously much depend on the proofs to be made in the cause.

The allegation now tendered to the Court, in part, consists of facts contradictory or explanatory of those set up in that last mentioned, to which it responds. Such facts are, I think, entitled to be pleaded: so also are those facts material to the question at issue, if any, noviter preventa, to the proponent's knowledge: but so are not any other facts whatsoever, at least as of strict right. At the same time, if any facts are here pleaded which, though coming strictly under none of these descriptions, yet still are both important in themselves, and bear directly upon the will, the subject-matter of the suit, the Court will be disposed, in the exercise of its discretion, to admit them in the present instance for the two following **[104]** reasons:—In the first place, it will be extremely unwilling to exclude any facts really bearing upon the case of an only child, so nearly disinherited, and so attacked, in point of character, merely from their not having been pleaded at precisely the requisite time, according to strict form. 2dly. The Court will be justified to itself in conceding this indulgence by what has been stated to it as to the particular course of the prior proceedings; (*a*)[2] a statement

(*a*)[1] See ante, vol. i. pp. 279, 285.

(*a*)[2] It was said that the plaintiff's first allegation had been hastily constructed, and was brought in on the same day with the condidit, namely, on the by-day in Trinity Term, 1822, in order to found an application (acceded to by the Court) for leave to

of which it sees no reason to entertain any doubt or suspicion, confirmed as it is by what appears on the records of the Court, and which certainly distinguishes the present case from ordinary cases, in this particular. But, independent of these special considerations, as the whole matter had been put in issue by the prior pleas, the Court would, undoubtedly, have excluded all facts not either explanatory or contradictory, or newly come to the proponent's knowledge— facts of which three descriptions, I have already said, she is entitled, de jure, **[105]** to plead: and which, consequently, the Court is also, de jure, bound to admit. Upon these principles, it seems to the Court that parts of this allegation are admissible, and that other parts it is bound to reject.

The case set up in the first part of the plea to which this allegation responds is, that the deceased (though "of a violent and irritable temper," and of "great pride and conceit"—though "very precise in all his domestic and other arrangements," and one who entertained "high notions of parental authority"—though "of rigid Calvinistical principles," and deeply impressed with ideas "of the total and absolute depravity of human nature," of the necessity "of sensible conversion," and of the expediency of "confessing to others the most secret thoughts of the heart," yet still) "at all times before, and down to the end of the year 1820, conducted and managed the whole of his pecuniary and domestic affairs, as well as all professional and other matters of business, in a rational manner;" was "of sound and perfect mind, memory, and understanding;" and was fully competent to the performance of any act "requiring thought, judgment, and reflection."

Now, the 1st article of this allegation appears to me strictly contradictory of that part of the defendants' case to which I have just adverted. It pleads, in substance, that the deceased did not, to the time specified, "conduct himself and his concerns, pecuniary or domestic, in a sane and rational manner"—for "that he frequently gave ridiculous and contradictory orders to his servants and trades-people"—that he would frequently, when cattle were being driven by **[106]** his house, "rush into the street, abuse the drivers, and insist, with violent oaths, that no such cattle should pass his door"—that he would frequently ring up his servants in the middle of the night and insist "that it was morning, refusing to be persuaded to the contrary"—"that he would frequently be low and desponding, and cry for hours together without any apparent cause or motive"—and, finally, that in these and many other respects he so conducted himself, long prior to the year 1820, as to induce his neighbours, friends, and others to believe him of unsound mind and incapable of managing himself and his affairs.

The above is, in substance, the 1st article of the plaintiff's allegation before the Court; and it seems to me entitled to be admitted as strictly contradictory of the first case made in the plea given in by the defendants. The principal objection taken to it—namely, that it departs from the case originally set up by the plaintiff, which is said to have been one of partial insanity—appears to me to be sufficiently obviated by this consideration. Such partial insanity was, originally, and I presume still is, what the plaintiff means principally to rely upon. At the same time the deceased was distinctly represented, even in her first plea, as labouring under insanity upon points not connected with those delusions which he was charged to have felt with respect to the character and conduct of his daughter, the plaintiff, in particular. In this view of them the plaintiff's former allegation well consists with this part of her present plea—sufficiently well, at all events, to entitle it to go to proof; especially under the circumstances to which the Court **[107]** has already adverted, connected with the bringing in of her former plea.

But the succeeding articles, from the 3d to the 9th, both inclusive (for of the 2d

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take the depositions of certain material witnesses, far advanced in life, upon it, de bene esse, in the course of the then ensuing long vacation; that a supplement was originally intended to have been given in on the part of the plaintiff, in the shape of additional articles; and that such intention had only been abandoned on its becoming known to her professional advisers that the defendants' counter plea would be of a nature absolutely to require a rejoinder, in which rejoinder such supplemental matter might conveniently be embodied. And it was said to be under these special circumstances that supplemental matter to the original plea was introduced into the cause, in this late stage of it.

the Court will presently dispose), appear to me inadmissible in this stage of the cause for several reasons. They purport, each, to allege some specific fact in proof of the general charge conveyed in the 1st article.(*a*) But of these the whole, with the exception of the 9th, are very considerably remote in point of date, and are to some extent equivocal as proofs of actual insanity; whilst the most material may be examined to, either under the 1st article of the present, or under articles of the same proponent's former allegation. Upon these con-[108]-siderations I think them either inadmissible or not necessary to be admitted in this stage of the cause, and consequently shall reject them.

The 2d article is of a different description, and is, I think, proper to be admitted, notwithstanding the remoteness, in point of date, of the transaction to which it refers. It pleads that some time in the year 1800 the deceased insisted on his daughter, who was only eleven years of age, passing the night with one of his female patients, then resident in his house, labouring under insanity; and that he actually compelled her so to pass the night, as a punishment for some crime of which he alleged his said daughter to have been guilty. This I think a material fact. This irrational mode of punishing a child only eleven years old (for such I conceive it), even supposing her to have been guilty of some delinquency, has, I think, a strong tendency to shew that the deceased's general treatment of, and conduct towards, his daughter was, as set up on her part, irrational; and that it was not justly incurred by any misconduct of which she had been guilty; which is the case laid in the second, and perhaps most material, part of the adverse plea.

The 10th article is also, I think, clearly admissible. It had been pleaded in the 17th article of the allegation to which it responds that the said Charlotte Mary Dew (then Stot) frequently made to her said father and other persons voluntary promises, as well written as verbal, to strive to correct her "vile disposition," to "bend and subdue her stubborn will," &c. &c. which promises the article concluded by pleading that the person who gave them had con-[109]-stantly broken and disregarded. And in part supply of proof of the premises so pleaded five several exhibits, being original letters from his said daughter to the deceased, were annexed to the allegation; containing such admissions of misconduct accompanied with such promises of reformation and amendment.

It is now, in effect, pleaded on the part of the daughter, in this 10th article of the allegation under review, that she did occasionally make to her said father, and also to other persons, admissions and promises to the effect charged and pleaded in the adverse allegation, but that such promises were not voluntary: on the contrary, that they were extorted from her by the deceased; and were written under great mental anguish and anxiety, arising from previous harsh treatment and its threatened repetition, either under his immediate dictation or under that of persons to whom the deceased had made false representations of her character and conduct. And the article concludes with expressly averring that his said daughter faithfully regarded and performed her promises of endeavouring to conform her conduct to the rules laid down by the deceased, so far as the same were practicable; although all her efforts to please him, and secure his affections, were rendered hopeless and unavailing by the

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(*a*) For instance, the 3d article pleaded that the deceased gave orders (probably before 1808, though no precise date was assigned to this transaction in the plea) that the baker who supplied him with bread should ring the house-bell without putting his feet on the steps leading up to the house-door, which was impossible; and that he flew into violent rages, and threatened to dismiss him on this impossible condition not being complied with on his part. The 4th article, that on a servant having given him notice that he meant to quit his place, in the year 1808, the deceased rushed upon him, forced him into a corner of the room, and attempted to cut his nose off with a razor. The 5th, that in 1810 he stuck up a notice to the Bishop of Durham, who attended him as a patient for medical electricity, requiring him to clean his shoes before he came into the house. The 6th pleaded a certain transaction between the deceased and a Mr. Willatts, whom the deceased took a fancy to on seeing him at St. John's Chapel, Bedford Row, expressive at least of great eccentricity. The 7th, that the deceased frequently spoke, in the most inflated terms, of the cures which he performed with his electrical machine; and solemnly ascribed to himself supernatural powers, in effecting the same, &c. &c. &c.

general unsoundness of the deceased's intellects, and by the gross delusion under which he laboured in particular, as to his said daughter's conduct and character. This 10th article, so in part explanatory, and in part contradictory, of those material averments contained in the 17th article of the adverse allegation must, I think, clearly be admitted.

[110] The 11th, the 12th, and the 13th are also either directly contradictory or explanatory of facts or charges made in the plea to which it responds, and are consequently admissible on the same principle as the 10th.

The 14th article pleads that, in the month of February, 1821, a commission in the nature of a writ de lunatico inquirendo issued out of Chancery at the petition of Mary Stot, the wife of the deceased, to inquire of the lunacy of the deceased; who was stated in the petition to then be, and to have been for the last three weeks, so far deprived of his reason and understanding as to be incapable of governing himself, and managing his affairs—that in the return to that commission the deceased was certified to have been found of unsound mind from the 1st day of January preceding, under which return a commission of lunacy was afterwards applied for and obtained—and that the whole of the above proceedings took place in the absence, and without the knowledge of the said C. M. Dew, or her husband, who were entirely ignorant of the same till after their actual conclusion. All this appears to the Court very material, and proper to be pleaded, even in this stage of it, under the special circumstances of the cause. It is an important fact in the cause that the deceased was, at least in the latter part of his life, found to be insane; and the daughter's ignorance of these proceedings is material on this account; it may assist, at all events, in explaining why, when the deceased was so found to be insane, his insanity was found by the jury only to have commenced on the 1st of January preceding, and **[111]** was not carried back to an earlier date. At all events, the daughter, as not being a party to that proceeding, is in no sort bound by the finding of the jury, as to the particular date of the commencement of the deceased's incapacity.

The 15th article only pleads certain exhibits to be official copies of some of the legal instruments referred to in the preceding article; which being admitted, this, together with the exhibits themselves, must also of course be admitted.

16, 17. The 16th article is to this effect: it pleads that the husband of the said C. M. Dew, in her right as the daughter and sole heiress at law of the deceased, became entitled to certain freehold property of which the deceased died possessed, in the event of his legal intestacy—that with a view of putting at issue the legal validity of the said will considered as a devise of real property an action of assumpsit was brought in his majesty's Court of King's Bench by Mr. Dew against John Fletcher, a devisee in trust named in the said will, for the recovery of a certain sum of money received by the said John Fletcher, on account of rent which had become due on the said property subsequent to the death of the deceased, expressly grounded upon the deceased's incapacity to devise the said property as a person of unsound mind—that the said action was in substance defended, after pleading the general issue, by Mr. Thomas and Valentine Clark, the defendants in this cause—and that on the 20th December, 1822, a verdict was found for the plaintiff in the said action, with costs, which were assessed at the sum of 376l. 1s. 3d.; the original sum as for the recovery of which the said action was **[112]** brought, having been the sum of 3l. 18s. 9d. only. And the 17th article pleads the third annexed exhibit to be a true copy of the final judgment given in the said action.

The admission of these articles has been opposed with much warmth, but not, I think, with equal success. As facts and circumstances not unconnected with the matter at issue, I think that this action and verdict may fairly be pleaded: they are strictly noviter preventa to the proponent's knowledge: for they have occurred subsequent to the admission of her former plea. The case is one of a nature to require every illustration: nor is the Court disposed to shut its eyes to any fact or circumstance whatever which is capable of illustrating it by no too remote a probability. It will be for the Court to guard against the admission of this part of the plaintiff's case operating unduly to the prejudice of the defendants: their apprehension of which prejudice is obviously the real ground of their objecting to its admission.

It has been said that the plaintiff was naturally anxious to submit her case, in the first instance, to a jury, that with such a case she had a much better prospect of succeeding with a jury through the medium of their feelings than of obtaining the

sentence of a Court, constituted as this is, in the exercise of its judgment. The Court has no scruple in avowing that it participates to some extent in the feeling with which a British jury may be supposed to have looked at a case of this description: at the same time it is fully aware of the propriety of suffering its feelings in no case to be biassed to the prejudice of its judgment; nor will the Court shrink from the task of con-[113]-sidering this, like other cases, impartially, according to the known and recognized laws of evidence when, if ever, it presents itself to it for final adjudication: however painful to itself individually may be the conclusion at which, in its judicial capacity, it is forced by this process to arrive.

The Court has also been told or reminded of the original backwardness of Courts, like this, of ecclesiastical jurisdiction, in permitting the husband, who is suing for a divorce by reason of his wife's adultery, to plead the verdict recovered in an action for damages brought by him against the alleged adulterer at common law. The fact, however, of such verdicts being and having long been pleadable in such suits is beyond all question; and the very principal objection to their reception in such cases is one, according to the plea, wholly inapplicable in the present. It was constantly objected that the wife was no party to the action for damages; and this was always represented as constituting the hardship of suffering the verdict in such action to be pleaded to her prejudice. But that no similar objection applies in the present instance is quite obvious according to the plea—for the action is pleaded (however the fact may be) to have been in substance defended by the identical parties who are now defending the suit in this Court.

18, 19. The 18th article also seems to the Court admissible. It pleads that the defendants in this suit were for years well acquainted with the deceased's unnatural conduct to his daughter, and that Mr. Thomas Clark, one of the defendants, wrote and sent a letter to the deceased under an assumed or feigned name, in the month of February, 1807, reproaching him [114] with such conduct as well towards his said child as towards his own sister, a widow (mother of the defendants) by suffering her to languish in extreme poverty and wretchedness without any relief or assistance, although himself in affluent circumstances. And it also pleads that the deceased entertained no regard or affection for his nephews, the defendants: and that he had neither seen nor had any communication with them for nearly twenty-four years before and down to the time of his death.

Now this article appears to me directly responsive to the case set up in the plea upon which this allegation rejoins, it being that the plaintiff experienced from the deceased no other harshness or severity than was the just or natural result of her own misconduct. It can never be deemed immaterial to shew, nor is the plaintiff in my judgment precluded from shewing, that one, at least, of the defendants entertained or expressed very different opinions in 1807; and although many years have elapsed since those opinions were expressed, yet it is to be remembered that the plaintiff was at that time a woman grown (seventeen or eighteen years old), and that even then she had been guilty, according to the defendants' case, of much of that misconduct now imputed, as justifying the aversion with which the deceased is admitted to have regarded her. Neither is it immaterial (nor inadmissible, even in this stage of the cause, I think, under the peculiar circumstances of it) that the deceased was upon no terms of intimacy or communication with the defendants, in whose favor the plaintiff, his only child, is virtually disinherited by this very will, the validity of which is at issue between the parties in the cause. The 19th article, with its accompanying [115] exhibit, the original letter referred to in the 18th, is a necessary appendant to that article, and must consequently be admitted as of course.

20, 21. The 20th and 21st, the only two remaining articles of this allegation, seem also to the Court proper to be admitted. The defendants had averred in the 30th article of their plea that the plaintiff and her husband had acquiesced in the deceased's will by formally consenting in the month of January, 1822, that certain funds and effects of the deceased, then in Chancery, should be transferred to the defendants as administrators of the deceased's property with this will annexed. She now pleads in this 20th article of her allegation, as explanatory of that fact, that such partial acquiescence was in effect caused or occasioned by the liberal professions, both verbal and written, of esteem and affection made to her by the defendants shortly after the death of the deceased; and by promises held out that arrangements should be presently entered into for admitting her to a participation with themselves of the benefit derived

to them under the deceased's will. And certain exhibits are pleaded in the 21st article to be notes or letters written by the defendant, Thomas Clark, with the knowledge and privity of his co-defendant, to the plaintiff, in the months of November and December, 1821, expressive of such esteem and affection, and allusive to such proposed arrangements. What its final effect in the cause may be I will not undertake to anticipate; but I think that this is matter explanatory of a not immaterial adverse fact pleaded in the defendant's allegation; and consequently that the plaintiff who propounds is strictly at liberty to go into proof of it.

[116] Subject to these observations I admit this allegation, with the exception of those articles from the 3d to the 9th inclusive, which I reject for reasons already stated.

Allegation admitted as reformed.**

USTICKE *v.* BAWDEN. Prerogative Court, Hilary Term, By-Day, 1824.—An allegation setting up the revival of a will upon the cancellation of subsequent testamentary papers, under which only it had stood revoked—admitted to proof.—The legal presumption is adverse to an unfinished or imperfect will: but to the revival of a former uncancelled, upon the cancellation of a latter revocatory will, the legal presumption is neither favorable to nor adverse. The law, having furnished that principle, retires; and leaves the question one of intention merely, and open to a decision either way, according to extrinsic facts and circumstances.

(On the admission of an allegation.)

Stephen Usticke, late of Penwarne House, in the county of Cornwall, Esq., was the party deceased in this cause: he died possessed in his own right of **[117]** certain real estates estimated at the value of 400 or 500l. per annum; and of some personal property, though said to be not very considerable: he had also a life interest in the mansion house and an estate at Penwarne bequeathed to him by his late uncle, Sir Michael Nowell, under the circumstances and subject to the condition (presently to be stated) as pleaded in the second article of the allegation before the Court; the admissibility of which was the immediate point at issue in the cause.

The deceased left at his death the following testamentary papers:—

1. A regularly executed will bearing date on the 1st of July, 1807. By this instrument he gave and devised all his real property, of what nature or kind soever, to John Vigurs, in trust for Frances Elizabeth Bawden (party in the cause) for life, and after her death to two other persons for 500 years, in trust to raise, by sale or mortgage of such estates, the sum of 900l. to be paid in legacies of 300l. each to three of his nephews. Subject to this trust the testator devised all his said estates, after the death of Miss Bawden, to his nephew, Lewis Charles Peters, for life; with remainders, successively, to his heirs male and female; in default of such heirs to another nephew, with similar remainders; and in default of issue, male and female, of such other nephew, to his, the testator's, right heirs for ever. He also bequeathed by his said will a leasehold brewhouse and premises to Miss Bawden for life (remainder to his nephew, Day Perry le Grice), together with all his personal estate and effects, absolutely; and appointed Miss Bawden his sole executrix.

[118] The second testamentary paper was,

2. A will, bearing date the 5th of January, 1821, made and cancelled under the circumstances pleaded in the 9th and 10th articles of the allegation. By this will of the 5th of January, 1821, the testator bequeathed an annuity of 400l. to Miss Bawden for life; and the rest of his estate, both real and personal, after payment of certain legacies (of which the principal was an annuity of 80l. for life to his niece, Miss Lenny Peters) to his nephews, Michael Nowell Peters, and Charles Lewis Peters, absolutely.

3. The third testamentary paper was a will, bearing date the 8th day of January, 1821, made and cancelled under the circumstances pleaded in the 11th article of the

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** From which admission of the above allegation and exhibits, as reformed, an appeal was interposed in due course by Mr. Thomas and Mr. Valentine Clark to the High Court of Delegates. This appeal was heard in that Court on Friday, the 9th of July (1824): when their Lordships were pleased to affirm the sentence appealed from, and to condemn the appellants in the sum of 100l. "nomine expensarum."

The Judges who sat under the commission were Mr. Baron Hullock, Mr. Justice Park, Dr. Arnold, Dr. Coote, Dr. Burnaby, Dr. Daubeny, Dr. Gostling, and Dr. Lee.

allegation. Its principal object seems to have been to give Miss Bawden, in addition to her annuity of 400l., all such goods, chattels, and effects as the deceased should die possessed of, to and for her own use and benefit, absolutely. For the rest, it agreed in substance with the will of the 5th of January preceding; especially as to the disposal of the residue.

4. The fourth testamentary paper was a codicil to this will of the 8th of January, 1821, and bearing date on the 20th of the same month, pleaded in the 11th article of the allegation. It reduced Miss Bawden's annuity for life to 200l.; but otherwise ratified and confirmed the said will.

5. The fifth, and last, was an unfinished testamentary paper, without signature or date, but pleaded in the 12th article of the allegation to have been made and written by the deceased, considerably subsequent to January, 1821. In this unfinished paper Miss Bawden's annuity was also fixed at 200l. only.

[119] A proctor for Miss Bawden had propounded the whole of these testamentary papers: but the case, in substance, on her part, laid in the allegation before the Court was that the will of 1807 had revived in consequence of the cancellation of the several testamentary instruments as pleaded, by and under which only it had stood revoked.

The allegation pleaded—

1. That Stephen Usticke, the party deceased, died on the 26th of January, 1823, leaving a brother, the Reverend Robert Michael Nowell Usticke (party in the cause), and, together with three sisters, and several nephews and nieces, entitled in distribution to his personal estate and effects, if pronounced to have died intestate.

2. That the deceased, above five-and-twenty years before his death, became acquainted with, and attached to, Frances Elizabeth Bawden (party in the cause), a lady of respectable family and connexions, and that he engaged to marry, and subsequently would have married, the said F. E. Bawden, but for the disapproval of his uncle, Sir Michael Nowell, from whom he had great expectations; that Sir Michael Nowell died in 1802, having first by his will, bearing date the 25th of April, 1797, left the deceased his mansion-house, for life, and a freehold estate of 1500l. per annum; but upon express condition of his not marrying Miss Bawden; in which case he, the testator, revoked such devises, and limited over the devised premises to other uses.

3. The third article merely pleaded the paper-writing No. 1, exhibited in supply of proof, to be a true copy of that part of Sir Michael Nowell's will, **[120]** relative to the devises pleaded in the preceding article.

4. That the attachment of the deceased and Miss Bawden continued to subsist after the death of Sir M. Nowell; that no marriage took place between them by reason of the penalty annexed to that occurrence in Sir M. Nowell's will; but that, in 1802, Miss Bawden was induced to take up her residence with the deceased, and that she had lived and cohabited with him as his wife, from that time till his death—that she was visited by many of his family, both male and female, and that the deceased constantly felt and expressed the greatest regard and affection for her, throughout, and during the whole period of, their said cohabitation.

5. That in April, 1803, the deceased made and executed a deed of gift of various personal property (*a*) to Miss Bawden (described therein as his intended wife), her executors, administrators, and assigns for ever; on condition of her permitting him the use and enjoyment of the same during his life-time, and with a proviso that the deed should be void in case of his **[121]** survivorship; and that he delivered this deed to Miss Bawden, in whose custody it remained till the 8th of January, 1821,

(*a*) Viz. "All his household furniture, plate, linen, &c., horses, cattle, corn, hay, &c.; live and dead stock; and, finally, all his goods and chattels of whatsoever nature, lying or being at the house which he then occupied at Mawnan, in the county of Cornwall, and on the lands and tenements attached thereto; and also on the tenement of Boskenning, in the said parish of Mawnan." Very few of the goods and chaetels mentioned in this instrument were in the testator's possession at the time of his dath, or, if in his possession, capable of being distinguished from those at Penwarne, in which he had only a life interest—upon which and other (legal) grounds it was admitted to be very doubtful whether this deed of gift, though in existence, could have any operation.

when it was given up by her to Mr. Edwards, of Truro, the deceased's friend and solicitor.

6. The 6th article only pleaded the exhibit No. 2 to be the original deed of gift, pleaded in the next preceding article.

7. That the deceased, during the last twenty years of his life, expressed, at various times, and to divers persons, his intention of amply providing for Mrs. Usticke (as Miss Bawden was generally called); on which occasions he commonly added, when speaking to persons in whom he confided, that "she had sacrificed every thing for his sake."

8. The 8th article pleaded the factum of a will, bearing date the 1st of July, 1807, made and executed by the deceased, in duplicate,(*a*) in the presence of witnesses; and now propounded, on behalf of Miss Bawden, the sole executrix named in it.

9. That, in or about the beginning of January, 1821, the deceased, with his own hand, wrote and made a new will; and executed the same, also in the presence of witnesses, on or about the 5th day of January in that year, when the same bears date.

10. That about that time the deceased, having expressed, as with reference to his testamentary arrange-**[122]**-ments, his regret at Mr. Edwards, his attorney, not being at hand, the attendance of that gentleman was bespoke by Miss Bawden; that the deceased, on seeing him, shewed him the will of the 5th of January, 1821, and gave him instructions for divers alterations to be made in it; and that Mr. Edwards immediately converted the same, by alterations and interlineations, into a draft for a new will, which the deceased, on the 8th of January in the same year, duly executed in the presence of witnesses, having been prepared by Mr. Edwards, pursuant to such instructions, in manner aforesaid; that, upon the execution thereof, the deceased delivered the said will to Mr. Vigurs, his apothecary, who, after several months, returned it to the deceased, at his request; that the deceased, some time afterwards, but when the proponent is unable to propound, cancelled the same by tearing off his signature from the several sheets of the said will; and also wrote, with his own hand, as well several memoranda on the backs of the sheets, as various alterations in the body of the said will, either prior or subsequent to the said cancellation; that Mr. Edwards took possession of the will of the 5th of January, 1821, upon the execution of that of the 8th of January, and retained the same till after the deceased's death.

11. That soon after executing his said will the deceased, with his own hand, wrote a codicil to his said will; and executed the same in the presence of two subscribed witnesses, on the 20th of January, 1821.

12. That a considerable time subsequent to January, 1821 (but when particularly the proponent is unable to propound), the deceased began a new will to secure a **[123]** provision for Miss Bawden [a paper exhibited in the cause, in the deceased's handwriting, but] without date or signature.

13. That some short time before his death the deceased frequently expressed his desire to see Mr. Edwards, his solicitor, who lived at a great distance from him, in order finally to arrange his affairs, but did not send for him, or appoint any day for his attendance; that three days before his death Mr. Vigurs, his apothecary, said to the deceased, whom he perceived to be in great danger, speaking on the subject of his will, "I hope you have made no alterations to the injury of Mrs. Usticke," meaning Miss Bawden, so called; when the deceased replied, "No; die when I will she will find that she is left better than Sir Michael left Lady Nowell;" and that the property left by Sir Michael to Lady Nowell, so referred to by the deceased, nearly equalled in amount the property left by the deceased himself to Miss Bawden by the will of July, 1807.

14. That some time after the death of Sir Michael Nowell the Rev. Robert Usticke (party in the cause) sought, by means of an ejectment, to obtain possession of the mansion-house of Penwarne, in the county of Cornwall, being part of the estate devised to the deceased by Sir Michael Nowell as aforesaid, on the alleged ground that the deceased was actually married to Miss Bawden—a marriage forbidden, under pain of forfeiture, by the will of Sir M. Nowell; that the deceased deeply resented

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(*a*) The duplicate of this will was said still to be in the possession of Messrs. Shephard and Adlington, solicitors, in London, who had prepared it; in the same state, of course, as when executed by the deceased: it was not suggested that this duplicate had ever been in the deceased's possession.

this attempt to deprive him of his property, and from this and other causes became at variance with, and was never reconciled to, his said brother, to the day of his death.

[124] 15. The fifteenth article pleaded the finding of the above several testamentary papers [which were all exhibited in the cause] subsequent to the death of the deceased, viz. the will of 1807, in a drawer under lock at Penwarne, to which the deceased had always free access up to the time of his death; the paper bearing date the 5th of January, 1821, in the possession of Mr. Edwards; the cancelled will of the 8th of January, 1821, and the unfinished testamentary paper in a desk in the deceased's counting-house or office; (*a*) and the codicil of the 20th of January, 1821, in the possession of Mr. Beauchamp, a relation by marriage, to whom the deceased had delivered or sent it, sealed up, with a request that he would take care of it.

16. The 16th and last was the usual concluding article averring the truth of the premises.

Judgment—Sir John Nicholl. I think that this allegation is clearly entitled to go to proof. The point for the Court's ultimate decision will be whether the cancellation of a latter will by the testator did, or did not, amount to the revival of a former, only revoked by that will so itself subsequently cancelled. Upon that point it would be premature to express a decided opinion in the present stage of the cause. The case set up in this allegation is in affirmance of that revival; for the facts averred in it are supposed, and are pleaded in order, **[125]** to shew that a former will of this deceased did revive, upon the cancellation of a latter, expressly revocatory of that former will in its uncancelled state. I think it quite impossible to say that these facts, as pleaded, are incapable of justifying the Court in arriving at that conclusion, so that the allegation is clearly, I repeat, not inadmissible. Much of course indeed must depend, looking to its final effect, upon the nature and degree of proof by which the facts pleaded in it are substantiated. Much also must depend upon the strength of the adverse case; should an adverse case, that is, be set up for the next of kin, either by means of interrogatories, or by that of a substantive independent plea.

Where an allegation propounds an imperfect testamentary paper, it being a clear principle that the legal presumption is adverse to that paper, the allegation must contain facts of a sufficiently stringent nature to encounter and repel an adverse legal presumption, in order to insure its own admissibility. But an allegation pleading facts more equivocal is admissible, either way, in a case like the present: for in neither alternative, as I take it, is there any adverse legal presumption to encounter or repel. This Court is founded in holding, under the sanction of the superior Court, that the legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled, upon the cancellation of a latter, revocatory will. Having furnished this principle the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision either way, solely according to facts and circumstances. This, I conceive, is the true principle to be extracted **[126]** from the judgment of the Court of Delegates in the case of *Moore* v. *Moore and Metcalf* (see 1 Phillimore, pp. 375 and 466)—a case determined, after an able argument, upon the fullest consideration.

It is quite unnecessary to inquire what principle would be applicable to a case of this description totally nude of circumstances; as I think it next to impossible that such a case should ever occur. If ever such a case actually does occur, it will be for the Court to deal with it according to the best of its judgment, pro re natâ. But I can scarcely figure to myself a case either without concomitants, or with these so nicely balanced that neither side prevails. There must always, I think, be circumstances in both scales; and preponderating circumstances either in the one or the other, so as not to leave the case itself where the law seems to leave it, purely in equilibrio.

The present case, at all events, is not one of that description: on the contrary, taking the facts to be true, and to be encountered by no adverse case (the former of which I am bound to assume, and the latter I am not called upon to anticipate) its circumstances are numerous, and, I must say, strongly in favor of the revival. There are strong circumstances tending to shew the deceased's intention to leave a will of some sort in favor of Miss Bawden, and not to die wholly intestate. But the question

(*a*) This counting-house or office was described in the argument as a private room in the garden, detached from the house, of which room itself the deceased always kept the key, as well as that of the desk in it, in which the testamentary papers in question were found.

clearly lies between the will of 1807 and an intestacy, under which Miss Bawden is, of course, left without any provision. The cancellation of the will of the 8th of January clearly did not revoke that of the 5th—for the will **[127]** of the 5th of January itself was cancelled by its very conversion into a draft for this will of the 8th of January. The codicil of the 20th of January expressly refers to this will of the 8th of January; and was cancelled, ipso facto, by the cancellation of that will; with which it must be taken to stand or to have fallen. The mere incipient testamentary paper is of no effect or avail in law—it is without date or signature—non constat, precisely, even according to the plea, when it was written—and although it might as pleaded have been written "considerably subsequent to January, 1821," yet still, I observe, that it is written on paper which has the water-mark of 1808, being, however, in either event, equally unavailing in law. The question clearly then, I repeat, lies between this will of 1807 and an intestacy—which the circumstances pleaded are strong to shew that the deceased at no time ever contemplated. His intention to provide for Miss Bawden after his death is evidenced by a series of facts, independent of the general probabilities of the case: in particular, by the deed of gift of 1803 and by the will of 1807, to which he adhered stedfastly, for any thing that appears to the contrary, for fourteen consecutive years, namely, till the year 1821. And though, subsequent to 1821, his mind does seem to have fluctuated as to the provision to be made for this lady in point of amount (whether from diminished regard, or, as suggested, from the decreased and decreasing value of his property,(*a*) or from some or other cause), yet still this **[128]** whole series of scripts is strong evidence of his intention, at all times, to leave Miss Bawden provided for at his death in some sort—which must be defeated by an intestacy, under which she can take no benefit.

Again, the declarations pleaded to have been made by the deceased to his apothecary, Mr. Vigurs, three days before his death, are strongly confirmatory of the case set up in the allegation—as it is difficult, or rather impossible, to say to what they refer if not to the will of 1807. The Court is fully aware of the danger of relying too implicitly upon declarations: it is fully aware that they are open in all cases to suspicions of insincerity on the one part, and of misapprehension, at least, on the other: under this impression, it will examine these declarations, when they are before it in a final shape, and in conjunction with all the circumstances of the case, with the utmost caution. But if entitled to any credit, they must go some way to justify an inference that the deceased, at the time of making them, held this will of 1807 to be operative—and, consequently, that he must have considered it to revive upon the cancellation of the subsequent will of 1821.

The same conclusion is strongly fortified by another fact pleaded. The will of 1821 had been out of the deceased's possession: it had been delivered to his friend, Mr. Vigurs, I presume, for safe custody. But the deceased reclaims it—and, having so done, he **[129]** cancels it, carefully and deliberately, in a highly formal manner, namely, by tearing off his signature, at that time affixed to every one of the five several sheets of which this will consisted. But the will of 1807 is pleaded (at least sub modo) to have been always in his own possession, and in a place to which he had access. It is not for the Court at present to conjecture to what the proof of this fact so (I admit to some extent equivocally) pleaded may ultimately amount. But should the fact be proved to have been, at all, as pleaded—à fortiori, should it be proved that this will of 1807 was, or must be taken to have been, not unfrequently under the deceased's own notice and immediate inspection, his not having cancelled this in as careful a manner as he had cancelled the will of 1824—and, still more, his not having cancelled it at all—will certainly raise a strong presumption that he meant it to revive and become operative on the cancellation of that instrument by which only it had been revoked.

Upon these considerations—and without going more minutely at present into all the circumstances of the case, the Court is satisfied of the propriety of admitting this allegation.

Allegation admitted.

(*a*) It had been suggested, in the course of the argument, that a decrease in the value of the deceased's property had actually taken place about that time, to a considerable extent, as well from the general depreciation of landed property at that time, as from particular circumstances connected with the failure of a brewery, in which the deceased had been in some measure interested or concerned.

[130] THE OFFICE OF THE JUDGE PROMOTED BY DAWE AND NOCKOLDS *v.* WILLIAMS. Arches Court, Easter Term, 4th Session, 1824.—Articles against a parishioner for "brawling," &c. by reading a "notice of vestry," in church during divine service, without due authority, admitted to proof.—An objection to the jurisdiction of the Court to entertain a suit for "brawling" by "letters of request," over-ruled.

(By letters of request from the archdeaconry of Huntingdon.)

This was a cause or business of the office of the Judge, promoted by William Dawe and Martin Nockolds respectively, parishioners, inhabitants, and churchwardens of the parish of Tring, in the county of Hertford, archdeaconry of Huntingdon, diocese of Lincoln, and province of Canterbury, against Henry Williams, also a parishioner of the said parish, for his soul's health, &c. and especially for having "created a disturbance in the parish church of Tring aforesaid during the time of divine service therein," and for having "quarrelled, chode, and brawled, by words, in the said church, during such time." It was a proceeding in this Court, the Court of Arches, in the first instance, by virtue of "letters of request," under the hand and seal of the "Commissary of the Lord Bishop of London in and throughout the archdeaconry of Huntingdon."

The criminal charge as contained in the third of six articles, exhibited on the part of the promovents, was as follows:—That "on the morning of Sunday, the 24th of August, 1823, and during the time of divine service in **[131]** the parish church of the parish of Tring aforesaid, he, the said Henry Williams (the defendant), not being a churchwarden, overseer, or officer of the said parish, did enter into the porch of the said church and affix, and leave affixed, on the door of the said church, a written notice, in the words and figures, or to the effect following, to wit, 'Take notice, that a vestry will be held in this church on Friday next, the 29th day of August, at three o'clock, to choose new churchwardens in the place of the present ones.' Signed 'George Kingsley, Charles Belcher, overseers; Adam Morton, William Firth, Thomas Woodman'—that he, the said Henry Williams, then entered the said church, accompanied by Adam Morton, an inhabitant of the said parish, and having taken his seat with the said Adam Morton in his pew, did, during the time of divine service therein, and immediately after the Rev. Charles Lacy, the minister then officiating in the said church, had concluded reading the Nicene Creed, stand up in the said pew, and, not regarding the sacredness of the place in which he then was, and without any lawful authority whatever, did irreverently read aloud a notice in the words, or to the precise effect of the said written notice, so affixed, as aforesaid, on the door of the said church; and did, moreover, then and there irreverently and indecently chide and brawl, in the presence and hearing of the congregation then assembled in the said church; and did thereby, and by so reading aloud the said notice as aforesaid, interrupt the performance of divine service, create a great disturbance in the said church, and give great offence to the congregation assembled therein." The **[132]** articles concluded by praying that the defendant might be "duly corrected for such offence according to the exigency of the law;" might be "admonished to refrain from the like behaviour in future;" and might "be condemned in the costs of the suit."

In opposition to the admission of the "articles," it was submitted that the act charged upon the defendant had nothing of that malus animus, on the face of it, which it was contended was essential to the offence of "brawling." What, it was said, is the intrinsic character of the act? When any thing is to be proposed to the parishioners relative to the general management of the parish, the churchwardens are the proper persons to call a meeting of the parish. If the object of that meeting be personal against the churchwardens (as in this instance), it may be (as the fact was in this instance) that they refuse to call a vestry. What then are the parish to do? Are they not to meet in vestry at all? That can hardly be. But if parishioners are to meet, legally in vestry, a prior "notice" in church, similar to the one in question, is absolutely requisite under Mr. Sturges Bourne's act (58 Geo. III. c. 69, s. 1); which says not a word as to whom vestries shall be called by, or at all prescribes the course to be pursued when the churchwardens, the persons authorized to call them in the first instance, refuse or decline—an omission possibly fit to be supplied in the event of any revision of that act. Under these circumstances, it should seem, primâ facie, that such notice of vestry must be given in church without the authority of the churchwardens; and that the parish, in deputing one of their body to **[133]** that office, took the only step capable of being taken. The notice in question, even as pleaded,

was signed by the overseers and other (respectable) parishioners: so that the parishioner deputed to the office of reading it in church was, surely, sufficiently authorized to protect him from being dealt with, for having merely executed that office, as a "brawler." Other modes, indeed, may be suggested in which the parish possibly might have proceeded. It may be said, for instance, that they might have moved the Court of King's Bench for a mandamus to the churchwardens to call a vestry. But, not to mention the circuity and expensiveness of this (the only mode which readily suggests itself), such suggestions, it was said, are foreign to the argument—that confining itself, as it does, merely to shewing that the act charged evinces nothing of that malus animus, on the face of it, essential to the offence of brawling; and which, unless the Court infers, from the intrinsic character of the act itself, it is bound, it was argued, to reject the articles.

Should it be said that "this was a calling of a vestry for an illegal purpose," and that hence the Court will infer "malice," the answer is: 1st, non constat, that this was a calling of a vestry for an illegal purpose; but even granting it to have been, still, 2dly, it was not a calling of a vestry for any purpose so illegal, on the face of it, that the Court will infer any malus animus in the defendant on that account. The power of parishioners to remove their churchwardens, in case of their wasting the goods of the parish (or, it may be presumed, in case of their other misbehaviour), is pretty broadly laid down in many **[134]** books of authority. "Churchwardens," says Mr. Justice Blackstone, "may not waste the church goods, but may be removed by the parish, and called to account" (1 Bla. Com. 394). And it is said to have been ruled by the Court of King's Bench two centuries ago that parishioners may displace their churchwardens, though chosen for a time certain, before the expiration of that time (13 Co. 70). And indeed it should seem, as the law now stands, pretty essential that parishioners should have some such power. "In ordinary repairs," says Bishop Gibson (Cod. 1, 396), "the churchwardens need not take the sense of the parishioners; and, though indiscreet or over expensive, are entitled to be reimbursed by the parish for what they have expended, so it hath been truly expended, and without profit to themselves; because the parish have constituted them their trustees. Nor have the parishioners, he adds, any remedy but by complaint to the ordinary, in order to their removal." And Prideaux in his "Office of Churchwardens" (sections 32 and 33) is even still more pointed as to parishes being, in these respects, in the discretion (it might almost be said at the mercy) of their churchwardens. Gibson, it will be seen, has coupled this power of parishioners to remove their churchwardens with the necessity, or at least the propriety, of a complaint to the ordinary, in the first instance, in order to such their removal. But this, probably, might be the very course meant to be pursued in the present instance: it was not necessary in the published "notice of vestry" objected to, to enter into any particulars of the course meant to be pursued by the parish. "In order to choose new churchwardens," **[135]** might well stand for "in order to take the requisite legal steps for the choosing of new churchwardens"—leaving those steps to be ascertained by the vestry when actually met.

Under these circumstances, it was submitted that the mere reading of a notice of vestry, at the time and in the manner charged, was no brawling on the face of it, the churchwardens, the proper persons to call vestries on parish matters, refusing to convene a vestry (as they naturally would) for the purpose specified, and Mr. Sturges Bourne's act providing that no vestry shall be holden without a previous notice in church of the holding of such vestry, and of the purpose for which it is intended to be held.

Should the alleged offence be argued to consist in the violation of the rubric, the answer is—that the proceeding in this instance is not as for any (real or supposed) violation of the rubric, but for the offence of brawling. The citation is in that form—so are the articles, which are silent as to any violation of the rubric, and only object to the defendant the offence of brawling. Indeed, as to a violation of the rubric, any proclamation in church during the time of divine service, unless "by the minister himself," and "of something either prescribed in the Book of Common Prayer, or enjoined by the King, or the ordinary of the place," is a violation of the rubric; so that the rubric, in the particular question, is violated, without offence, in too many instances to render it probable that the Court would deem its violation, in the present instance, a fit subject for a criminal prosecution; detached from that other offence the offence of brawling, which the articles charge it to have involved.

[136] Lastly, it was submitted that some objections lay to the Court's entertaining a suit for brawling by "letters of request," on the following consideration:—

By the "bill of citations" (stat. 23 Hen. VIII. c. 9) none are to be cited out of their dioceses, except in certain excepted cases, the fifth being, "in case that any bishop or any inferior judge having under him jurisdiction in his own right and title or by commission, make request or instance to the archbishop, bishop, or other superior ordinary, to take, treat, examine, or determine the matter before him or his substitutes—and that to be done in cases only where the law, civil or canon, doth affirm execution of such request or instance of jurisdiction to be lawful and tolerable." Now it is to be collected from this correction [and that to be done in cases only, &c.] that execution of such request, or instance, of jurisdiction is lawful and tolerable but in certain cases: it were a vain correction (as laid down by the Court of King's Bench in the case of *Jones* v. *Jones*, reported by Ld. Ch. J. Hobart) (Hob. 186), if it were lawful and tolerable in all. "No doubt," said the Court of K. B., in the case in Hobart, "the statute in question was not made without advice and hearing of the canonists, and therefore cannot be supposed to be so ignorantly penned; and the case, concerning so much the ease of the subject, deserves much consideration." Now certainly neither the law, civil or canon, can affirm the execution of such instance or request of jurisdiction to be "lawful or tolerable" in the case in question. For **[137]** it is a proceeding in substance, under a statute (5 & 6 Edw. VI. c. 4), and consequently it cannot be supposed to be one of those cases ever in the contemplation of the law, civil or canon—it is a proceeding, too, under a statute, subsequent in date to the "bill of citations;" but that is not all; it is a proceeding under a statute which expressly limits the proceeding to be "before the ordinary of that place where the offence shall have been committed." Consequently this was denied to be one of those cases in which it was "lawful or tolerable" that the suit should be sent up, by letters of request, from the inferior to the superior ordinary. Nor is the position, it was said, so taken up upon principle, destitute of authority, for there is a "suggestion" in Winch [Entries, 570] for a prohibition to a proceeding before the archbishop in a cause for brawling, transmitted by letters of request (the identical case in point) on this very ground. The suggestion is express: "Quod cognitio offensæ (si qua offensa) per statutum prædictum (ibid.) ad ordinarium loci, et non ad alium quemcunque judicem spiritualem, pertinet ac spectat: ac prædicta offensa, in articulis, sive interrogatoriis prædictis, superius contentis (*c*) (si qua spiritualis offensa fuisset) ab ordinario loci ad aliquem alium judicem spiritualem per aliquas literas requisitionum punienda fore, mitti non debeat." It was admitted, however, at the same time, that suits for brawling, by letters of request, had been entertained by the Court of Arches in **[138]** some recent instances; (*a*) but then the objection does not seem to have been taken in either, or any, of those cases. Upon these considerations it was prayed that the Court would put an end to the suit by rejecting the articles.

The substance of the argument in support of the articles will be found expressed in the judgment.

Judgment—Sir John Nicholl. This is a proceeding as well under the general ecclesiastical law as under the statute of Edward the Sixth, against the defendant, Henry Williams, a parishioner of Tring, for "creating a disturbance in the parish church of Tring, during the time of divine service," and for "quarrelling, chiding, and brawling, by words, in the said church, during such time."

The admission of the "articles" in this case, the third of which expresses the particulars of the charge, is opposed: but they appear to the Court sufficiently to contain the ecclesiastical offence charged. A private parishioner has no right during the time of divine service, and of his own authority, to publish such a notice as is here stated, or any other notice, in the church. The rubric expressly states that "nothing shall be proclaimed or published in the church during the time of divine service, but by the minister, nor by him any thing but what is prescribed by the rules of this book, or enjoined by the King or the ordinary of the place." And the rubric, as a part of the Book of Common Prayer, is confirmed by **[139]** act of parliament, and constitutes a part of the statute law of the land.

Vestries, for church matters, regularly are to be called "by the churchwardens

(*c*) The "articles" being set out at length, in the "suggestion."

(*a*) As in *Newberry* v. *Goodwin*, 1 Phill. 282, and probably in some other cases.

with the consent of the minister." The late act of parliament (58 Geo. III. c. 69) neither altered the general authority under which, nor the persons by whom, vestries are to be called: it only added some further formalities in the mode of calling; such as directing the notice to be put up on the church-door, and that it shall be given a certain number of days before the vestry is to meet.

Suits have been entertained in this Court for offences of the description contained in the present articles; as in the case of *Thompson* v. *Tapp*, and other cases.

Here, then, being an offence sufficiently laid in the articles; and the articles sufficiently conforming to the citation, they must be admitted by the Court.

The proceeding is also under the statute of brawling. That statute was intended to repress all interruption and disturbance, even by words only, of the congregation met for public worship. It has been so construed. Here it is not necessary to express any opinion, whether simply reading a notice, wholly unconnected with any other circumstances of irregularity, would amount to such an offence as would form a fit subject for prosecution; since it is obvious that a private parishioner's proclaiming in the church a notice calling a vestry, in the middle of the year, for the purpose of choosing new churchwardens must be connected, primâ facie at least, with some contest and **[140]** dispute existing in the parish; and, consequently, must have tended to disturb the congregation, and to call off their attention from the solemn purpose for which they were assembled. The service was not over; for it is not ended till the grace or blessing is pronounced, dismissing the congregation.

The article pleads "that he did moreover irreverently there chide and brawl." If it be intended to prove any other words and expressions,(*a*)[1] they should be set forth in the article, so as to give the defendant an opportunity of cross-examining to, and contradicting them.

It has been suggested, upon the authority of some ancient dicta, that under the true construction of the statute of citations, a suit for brawling cannot be brought in the Court of Arches by letters of request: but it is not denied that suits so brought have constantly been entertained in this Court. Besides, the defendant did not appear under protest; but, after having appeared absolutely to the citation, he takes the objection to the jurisdiction at the admission of the articles. Upon the whole, the Court feels itself bound to allow the suit to proceed unless it should be stopt by a prohibition: should such a measure be held to lie against the jurisdiction of this Court, under the circumstances of the present case, the Court will readily, as it will be its duty, put an end to the proceeding.

[141] THE OFFICE OF THE JUDGE PROMOTED BY PALMER *v.* ROFFEY. Peculiars Court of Canterbury, Easter Term, 4th Session, 1824.—Articles against the defendant (a churchwarden) for brawling, &c. in church, pronounced to be proved; and the defendant suspended and condemned in full costs; the case being held to afford no ground for mitigated costs.—In all cases of brawling, &c. in church where two persons are implicated, which is most to blame is nearly immaterial; each is bound to abstain; and each, failing to abstain, incurs a like penalty.

[See *England* v. *Hurcomb*, p. 307, post.]

This was a cause or business of the office of the Judge, promoted by Samuel Palmer, a churchwarden of the parish of St. Mary, Newington, in the county of Surry and deanery of Croydon,(*a*)[2] against Richard Roffey, also a churchwarden of that parish, for "quarrelling, chiding, and brawling by words in the church of the said parish;" and also for "smiting and laying violent hands upon certain persons in the said church, and creating a riot and disturbance in the same."

The articles, twelve in number (after pleading as well the general ecclesiastical law with respect to the offence or offences charged, as the statute 5 & 6 Edw. VI. c. 4; 1st, against quarrelling, chiding and brawling by words; and, 2dly, against smiting

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(*a*)[1] This was disclaimed by the counsel for the promovent; and the word "moreover" was upon this struck out of the articles.

(*a*)[2] Newington is within the jurisdiction of the Court of "Peculiars," as one of the several parishes within the deanery of Croydon in Surry: which, together with the several parishes composing the deanery of Shoreham in Kent, and thirteen parishes within the city of London, are subject to the immediate jurisdiction of the Dean of the Arches, as Judge of the Peculiars.

or laying violent hands, in any church or church-yard; further), in substance pleaded; that at a meeting of the parishioners of the said parish in vestry, on Easter Tuesday, 1823, to choose parish officers for the year ensuing, Roffey, the defendant, the rector's warden, in the first instance "quarrelled, chode and brawled" with Joseph Hurcomb, a parishioner and inhabitant **[142]** of the said parish then and there present, in manner as set forth in the articles, and shortly after created a riot and disturbance in the north aisle of the parish church (whither the said meeting had adjourned, on a poll being demanded by the friends of Mr. Jones, one of two candidates for the office of parish-warden for the ensuing year, against whom the rector had declared the choice of the parishioners to have fallen on a shew of hands), in the course of which he, Roffey, both further "chode and quarrelled with," and also "assaulted and laid violent hands upon the said Joseph Hurcomb and others," in manner also specified in the articles. Lastly, the articles pleaded that Mr. Palmer, the promovent, the other candidate being the person finally elected to serve as parish-warden with Roffey, the rector's warden for the ensuing year, had been authorized or enjoined by an order of vestry, made on the 18th of April, 1823, to institute the present proceeding against Mr. Roffey [as also another similar proceeding against Mr. Tijou, his sidesman (*a*)[1]] for his conduct, before pleaded, in the said parish church, on the 1st of April then preceding the occasion articulate.

To this the defendant, Mr. Roffey, gave a responsive allegation, consisting also of twelve articles; its general purport and effect being to palliate the nature and circumstances of his altercation with Mr. Hurcomb, whom it expressly charged to have been the "quarreller, chider and brawler," in the first instance; as also that, in effect, he, Roffey, was the person assaulted in the north aisle, namely, by **[143]** Mr. Hurcomb and his friends, and was not the assailant; and that the only force used on his part (or that of his sidesman Mr. Tijou) was for the necessary protection of his person, alleged to be in peril, from and by reason of the violence of that assault. The allegation also pleaded that, of three witnesses whom it specified, examined upon the articles, the first, Mr. Hurcomb, was himself a party proceeded against in this Court, both for "quarrelling, chiding and brawling," and also for "smiting and laying violent hands" upon a certain person or certain persons, on the occasion articulate; and that the two others, a Mr. Richardson and a Mr. Williams, were also themselves, respectively, parties so proceeded against for "quarrelling, chiding and brawling" (though not for "smiting or laying violent hands") on the said occasion.(*a*)[2]

Fifteen witnesses were examined upon these articles and nine upon the responsive allegation; most, or the whole, of whom were interrogated at considerable length, so that their depositions constituted together a great mass of evidence. This evidence had been argued upon by counsel on both sides on a preceding Court-day, and the cause now stood for sentence.

Judgment—Sir John Nicholl. This is a suit for brawling brought by Samuel Palmer, one of the churchwardens of St. Mary, New-**[144]**-ington, against Richard Roffey, the other churchwarden; the very description of the parties shewing that in this parish there unfortunately exist differences among the inhabitants. The existence of such differences must be greatly lamented; and the Court would be happy to remove them and to restore harmony among these neighbours and fellow-parishioners: but if that cannot be effected, the Court will at least endeavour to avoid aggravating their animosities, and will therefore abstain from entering into a more minute detail of the subjects of dispute than the impartial administration of justice may render absolutely necessary.

The offence charged in these articles is punishable, as well by the general ecclesiastical law, as by the statute of Edw. the Sixth specially referred to in the articles, and it is an offence subject to the jurisdiction of the Ecclesiastical Court (as expressed in the case of *Wenmouth* v. *Collins* (Lord Raymond, 850)) ratione loci. The object, as well of that general law as of the statute, is evidently to protect the sanctity of

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(*a*)[1] Vide p. 196, post, under cases in the "Peculiars," in Trinity Term.

(*a*)[2] These suits were instituted severally against the parties named in Trinity Term, 1823, at the promotion of Mr. England, one of Mr. Roffey's sidesmen. Articles in all three are filed; and witnesses examined. Responsive allegations (brought in, in Easter Term [May] 1824) are also filed in all three; but no witness has, to this time [October, 1824], been produced upon any one of these.

those places and their appurtenances set apart for the worship of the Supreme Being and for the repose of the dead, in which nothing but religious awe and Christian good-will between men should prevail; and to prevent them from being converted with impunity into scenes of human passion and malice, of disturbance and violence.

The sacredness of the place being thus the object of this protecting law, it is no part of the inquiry, where more than one person is implicated in the transaction, which of the two persons so implicated is most to blame, or which of them began the quarrel. There **[145]** can hardly be a quarrel without two parties; and each who engages in it violates the law, whether he be the most or the least blameable: each is bound to abstain from quarrelling, chiding or brawling in that sacred place.

This, then, being the view and object of the law, the sole question at issue in this suit is, whether the defendant be or be not proved to have committed the offence charged; for if it be proved, the Court is bound to punish the offence, and to administer the law in order to repress the evil.

The history of the transaction out of which the matter arose is shortly as follows:—On Easter Tuesday, 1823, the parishioners of Newington met in vestry as usual, to choose parish officers. The rector nominated as his churchwarden the defendant Roffey, who had served in that capacity the preceding year. Two persons were put in nomination to serve on the part of the parishioners; Mr. Palmer (who had also served the former year) was proposed by one set of parishioners; and a Mr. Jones by another set. On a shew of hands the rector, who was in the chair, declared the choice to have fallen on Mr. Palmer. The friends of Mr. Jones demanded a poll. A poll was accordingly granted; and the meeting was removed into the church for the purpose of taking the poll. I will here, in passing, venture to express some doubt whether, of necessity and as a matter of absolute right, a poll, if demanded, must be granted and must be taken in the church, and must be kept open till midnight; all of which seems to have been assumed upon the occasion: but at all events, if such a proceeding must be had in the church, it must be con-**[146]**-ducted decently and in order, for the occasion will not justify the violation of that decorum and respect which belongs to the place. Yet the transaction has been treated in some part of the discussion as if it had happened in the street or on Kennington Common. Whereas its taking place in the church constitutes the very gît of the suit.

At this vestry at Newington the mode of proceeding by poll being demanded and allowed, much discussion took place, both before its commencement and during its progress. Mr. Hurcomb, one of the parishioners, addressed the chair upon some point. Mr. Roffey, the rector's churchwarden, standing at the rector's right hand, interrupted Mr. Hurcomb—an altercation took place between them; in the course of which one called the other a "coward," the other retorted by "common informer"—a quarrel arose; and those reproachful terms passed repeatedly between them.

If the view of the Court in respect of the law be correct, both these parties violated it: the offence of one is no justification of the other; both ought to have abstained, and both are offenders. Mr. Roffey, himself a churchwarden, was, by his very office, more especially bound, not only to observe order and decorum himself, but to enforce the due observance of it in others.

Upon Mr. Hurcomb's case the Court is not at present deciding—he is not a party in this suit, but is examined as a witness in it. Yet if there be a suit depending against him on account of the part he took in this transaction, he will act prudently in considering the shortest mode of putting an end to it, instead of persevering in a hopeless defence.

[147] But whichever of the two was most to blame—whichever was the aggressor—there can be no doubt upon the fact that Mr. Roffey has committed the offence, which is rendered penal by the statute, as well as under the general law. If it were material, it is stated by some of Mr. Roffey's own witnesses that he commenced the quarrel.

This part of the transaction alone might be sufficient to compel the Court to pronounce the sentence prayed. The matter however did not end here; nor was it the most offensive part of what took place; for, at a later hour in the evening, there was a disturbance in the north aisle of the church of a still more violent character. About nine o'clock Mr. Roffey quitted his station by the polling-table, and passed over into the north aisle, down which he was proceeding with his hat on—an act itself very indecorous, especially considering Mr. Roffey's official character. Offence was natur-

ally taken at this; and several persons cried out, "Hats off, in this place—Shame! shame!" Though thus reminded, Mr. Roffey does not appear to have taken off his hat. Mr. Hurcomb was at this time standing in the north aisle, and talking to some persons in an adjoining pew. Roffey passed him; but before he got to the bottom of the church, apprehending, as it should seem, that Hurcomb had said something to him, he returned, and addressing Hurcomb, said, "What is that you say, Joe?" at the same time snapping his fingers in his face. In doing this, Mr. Roffey put his hand up in such a manner as to induce several of the by-standers to suppose that he had struck Mr. Hurcomb; but Mr. Hurcomb himself admits, in his evidence, that Roffey did not actually touch his face. **[148]** Mr. Hurcomb stept back and lifted up his arm to guard himself, and as if to ward off an expected blow; in so doing he pushed Mr. Roffey; but Mr. Roffey's witnesses admit that this was not done with an intention of striking him. A general disturbance immediately ensues: nearly all the persons in the church flock to the place: the constable is called for: and Roffey, being supposed to have struck Hurcomb, is taken into custody by the constable: he struggles: and, partly by his own exertions, partly by the interposition of his friends, and partly by the acquiescence of the constable, at length gets released from custody. Now this undoubtedly constituted a disgraceful tumult in the church, in which the officer appointed to preserve order was himself a party. Possibly Mr. Roffey might have acted under some misapprehension of what Mr. Hurcomb had said as he passed; but whether he apprehended rightly or wrongly, he acted improperly in returning at all, for the purpose of renewing the quarrel in that place. It seems unnecessary therefore to examine very minutely which set of witnesses may have represented the circumstances in detail with most accuracy. Nor is it necessary to state minutely the subsequent circumstances: for even after this disturbance had subsided the parties do not let the matter drop: the rector is afterwards obliged to quit his place at the polling table, in order to go and insist upon Mr. Roffey's forbearing from all further altercation and disturbance.

This is a general outline of the case sufficient to compel the Court to decide that the offence of brawling, charged in the articles, has been proved against the defendant.

[149] The act of parliament directs as a punishment that the offender, if a layman, shall be suspended ab ingressu ecclesiæ, at the discretion of the ordinary. In these days this mode of punishment may not, in all cases, be very appropriate: but, in obedience to the statute, I shall suspend the party ab ingressu ecclesiæ, for the space of one month.

In respect to costs, which in suits of this nature constitute a material part of the consideration, they must, under the circumstances of the present proceeding, follow almost as matter of course. Under possible circumstances, costs may be mitigated; but the present case does not afford grounds for such a mitigation. Mr. Roffey, from his office, was specially called upon to abstain and forbear. The proceeding, on the part of the promoter, cannot be considered as malicious or vindictive. Mr. Palmer was not engaged in the brawling, nor even present upon the occasion. In bringing the suit against Mr. Roffey, he is doing no more than the duty of his office requires of him; and the manner was directed and approved by a considerable number of parishioners who had met in vestry. Perhaps if Mr. Palmer and the other parishioners had directed proceedings to be instituted against those persons generally, who should appear to have been the principal offenders, to whichever party in the parish they might happen to belong, they would have shewn more impartiality, more real regard to public order, and less of party feeling, than by a particular selection. But without in this respect examining too minutely the perfect correctness of their judgment, so far as regards the present suit I do not feel that any sufficient ground is afforded to excuse **[150]** the defendant, who is pronounced to have committed the offence charged, from being likewise condemned in the costs of the suit.

SUTER *v.* CHRISTIE AND OTHERS. Prerogative Court, Easter Term, 2nd Session, 1824.

—The Court, on cause shewn, will permit a married woman, party in a cause, to appoint a proctor, &c. in the absence of her husband; on giving reasonable security to the other party as to his costs.

(On motion.)

This was a cause or business of proving in solemn form of law the last will and testament of John Rayner, deceased, bearing date the 31st day of May, 1811, pro-

moted by Mary Suter, wife of Thomas Suter (formerly Rayner, widow), the relict of the said deceased, and sole executrix named in the said will, against James Christie, the administrator (with a former will annexed, dated the 23d day of September, 1809), of the effects of the said deceased; and also against the three children of the said deceased, the universal legatees named in the said former will.

The usual decree with intimation under seal of the Court had been duly executed and returned—and the Court was now moved, on behalf of the said Mary Suter, that it would permit the said Mary Suter to appoint a proctor in the absence of her husband, the said Thomas Suter, in order to her proceeding in the said cause or business.

This application was founded upon an affidavit of the said Mary Suter, in which it was stated and sworn "that her husband, the said Thomas Suter, **[151]** had left this country for the Cape of Good Hope eleven years before; since which time she, the said Mary Suter, had received no pecuniary assistance whatever from him—that the said Thomas Suter was believed to have taken up his permanent residence at the Cape of Good Hope, without there being any probability of his return to this country—and that he had refused to execute the necessary documents, which had been sent over to him in the year 1819, for enabling his said wife to proceed in the above cause."

Under these circumstances the Court was pleased to "give leave to the said Mary Suter to appoint a proctor in the absence of the said Thomas Suter, her husband; on giving such security as the other parties in the cause might deem satisfactory as to their costs." (*a*)

[152] WILKINSON (FORMERLY LAWES) *v.* GORDON. Prerogative Court, Easter Term, 4th Session, 1824.—Quære whether, if A. be convicted of bigamy, as by reason of his marriage with C., living B. his first wife, it is still not competent to A., on C.'s death, to propound his interest as the lawful husband of C. in a suit in the Ecclesiastical Court, touching the administration of her effects: and to succeed in such suit on proof shewn; notwithstanding his said conviction for bigamy pleaded and proved.

[Referred to, *In re Crippen's Estate*, [1911] P. 113.]

Judgment—Sir John Nicholl. The deceased in this cause, Frances Elizabeth Gordon, otherwise Lawes, died in the month of March, 1820. Soon after her death administration of her effects was committed and granted to Thomas Gordon (party in the cause), as the lawful husband of the deceased. The present suit is in consequence of a decree taken out, in the month of May, 1820, by Susanna Matilda Wilkinson (formerly Lawes), the other party, calling on Mr. Gordon to shew cause why such letters of administration should not be revoked; and why letters of administration of all and singular the goods and chattels of the deceased as dead intestate, without parent and a spinster, should not be committed and granted to her, Wilkinson, as the sister and only next of kin of the deceased.

It is necessary that the Court should state in substance the proceedings and pleadings in the cause, with their several dates.

Gordon's interest as the husband being formally denied, was propounded in an allegation brought in in Michaelmas Term, 1820. It pleaded merely his marriage as "Thomas Gordon, widower," with the deceased, in the parish church of St. Marylebone, on the 13th of September, 1818; and their subsequent cohabitation, as husband and wife, until the death of the deceased in March, 1820. These facts were ad-**[153]**-mitted in the "answers," and no witness has been examined upon this allegation.

An allegation was brought in on the part of the sister in the same Michaelmas Term. It pleaded the marriage of Thomas Gordon, then a bachelor, to Harriet Cole,

(*a*) Accordingly a proctor, on the 4th session, brought in a bond, under the hands and seals of two persons, in the penal sum of 200l.; conditioned for the payment of costs to the extent of 100l., in case the said Mary Suter, or Thomas Suter, her husband, should thereafter be condemned in the costs of the suit. Then appeared, personally, the said Mary Suter and appointed her proctor; who subsequently propounded the last will of the deceased, bearing date the 31st of May, 1811, in a common condidit, upon which witnesses were examined; and on the 4th Session of Trinity Term the Court revoked the administration (with the will annexed, bearing date the 23d of September, 1809), then before granted to Mr. Christie; pronounced for the validity of the latter will; and decreed probate of the same to the executrix.

spinster, in the parish church of Woolwich, in the county of Kent, on the 11th of May, 1809; and their subsequent cohabitation at Woolwich and "various other places." It then pleaded, in opposition to Gordon's allegation, that he, Gordon, was not a widower at the time of his marriage, de facto, with the party deceased in the cause; for that Harriet Gordon, formerly Cole, was then living, and was seen by "divers persons," subsequent to the said pretended marriage; particularly in the month of March, 1819, at Sheerness; and in the month of July, 1820, at Chatham. [This, I must observe, is the only mode in which the history of the first wife is traced out by the sister in her plea: she only pleads that she cohabited with Gordon at Woolwich and other places, not saying where; that she afterwards separated from him, not saying when; that she was seen, subsequent to his second marriage, by divers persons, not saying by whom—nor saying when and where more particularly than that she was so seen "at Sheerness in March, 1819, and at Chatham in July, 1820." It must be obvious that it was quite impossible for Gordon to negative these allegations; unless, by tracing out the history of his first wife, and by proving her death prior to his second marriage.] The allegation then pleaded that Gordon had, on several occasions subsequent to his pretended marriage with Lawes, admitted to "divers persons" that his first wife, to his **[154]** knowledge, was living at the time: and that he had offered considerable bribes to persons aware of that fact not to give evidence against him in the event of his trial for bigamy. Lastly, it pleaded that Gordon was actually indicted for bigamy at the Old Bailey Sessions in the month of October, 1820, by reason of his marriage with Lawes, living his first wife; and that he was convicted of that offence: it exhibited, in supply of proof, a copy of the record of that conviction; and it concluded by alleging the deceased to have died intestate and a spinster.

Of this allegation, upon which six witnesses have been examined, I will only at present say that it puts the facts of the first and second marriage directly in plea and at issue. It does not intimate, by any means, that the sister rested for proof of her case upon pleading and producing a copy of the record of Gordon's conviction (*a*) for bigamy; although it made a part of her case.

In reply to this allegation of the sister, it was pleaded by Gordon (in Michaelmas Term, 1821) that his first wife deserted him soon after the marriage, and became a common prostitute; that, some time in 1815, she was admitted into St. Thomas's Hospital as "Mary White;" under which assumed name she had passed for some years preceding, during Gordon's absence from England; and that she died, on the 8th of July, 1815, in that hospital, and was buried as "Mary White" in the burial ground belonging to it. It further pleaded that the indictment for bigamy, articulate, was preferred by Wilkinson; and that, **[155]** previous to the trial of that indictment (though subsequent, it is to be observed, to the commencement of this cause), she, Wilkinson, had caused hand-bills to be printed and circulated (one of which printed hand-bills it exhibited, in supply of proof) offering a reward of thirty guineas to any person who could prove that Harriet Gordon, formerly Cole, was living on the 14th of September, 1818, when Gordon was married to his late wife, the deceased in the cause. It further pleaded that Gordon, subsequent to his conviction for bigamy articulate, had received his majesty's free pardon, and it also exhibited a copy of the original warrant of pardon, in supply of proof of that fact. Lastly, it pleaded that the property of the deceased, in virtue of a settlement made before her marriage, was secured to Gordon in case of his surviving her; but that the deceased, having been taunted by her sister, then Lawes, but now Wilkinson (party in the cause), as not the lawful wife of Gordon; and being anxious to secure her property to him at all events and under any circumstances; had made and executed a will in duplicate, or rather two wills of precisely the same tenor and effect, in the months of June and July, 1820; the one part, or one of the two wills being signed Frances Elizabeth Gordon, and the other Frances Elizabeth Lawes, spinster, her maiden name; whereby she appointed Gordon her sole executor and universal legatee: and the allegation concluded by pleading and propounding this will, or these wills, in the usual form. Upon this allegation, and certain additional articles, pleading merely the death, character, and hand-writing of one of the two sub-**[156]**-scribed witnesses to the will, thirteen witnesses have been examined.

(*a*) Differing in this respect, it is to be observed, from the libel in the cause of *Bromley* v. *Bromley*, vide note (*c*), page 158, post.

To this, again, it was replied on the part of the sister, Mrs. Wilkinson, that the deceased, even prior to her marriage with Gordon in 1818, had been attacked by paralysis, in consequence of which she laboured under considerable mental debility; that, subsequent to her marriage, she became more and more deranged (of which fact the allegation purports to furnish many specific instances); that, from the latter part of 1818 till her death, she was in the custody of, and extremely ill used by, Gordon; and that, at the time of the pretended execution of the will propounded by Gordon, she was of unsound mind, memory, and understanding.

Ten witnesses have been examined on this allegation, which was brought in in Easter Term, 1822: and to this again it has been finally replied, on Gordon's part, to the effect that the deceased was a person, at all times, of unimpaired capacity; and that she was uniformly treated by Gordon with conjugal affection.

Such is the substance of the proceedings and pleadings; from which it appears that the case before the Court has a double aspect. So far as respects the question whether Gordon is entitled to the property of the deceased, as dead intestate in law, it is an interest cause; and Gordon, in the event of the deceased's intestacy, must prove himself to have been the lawful husband of the deceased, in order to sustain his claim. In the other event that fact is immaterial—for Gordon under the will is equally en-**[157]**-titled to her whole property, whether he has succeeded in proving himself to have been the lawful husband of the deceased or whether he has failed.

I must here observe, however, that the first of these questions being determined in favor of Gordon, he has clearly no need to resort to the will: for, as a feme covert, the deceased could only die intestate in law. And this, I think, sufficiently accounts for the late period at which the will is said to have been produced in the cause; and which has been much observed upon in the argument. It was not incumbent on Gordon to produce this will until after his conviction for bigamy had been pleaded, and the sister had alleged the deceased to have died intestate and a spinster—a circumstance which, I think, sufficiently removes any objection to its validity, as to be deduced from its alleged late production. Besides, the genuineness of this will is not questioned; it is admitted to have been actually executed by the deceased at the time when it bears date: it is only objected to on the ground of the deceased's incapacity at that time. Under these circumstances I am of opinion that the time at which this will was produced has no tendency to impeach the fairness of this part of the transaction.

The first, then, if not the principal question is, did the deceased Gordon or Lawes die a wife or a spinster?

A fact of marriage between the deceased and Gordon is admitted. Consequently, the legal presumption, according to a well known maxim, is in favor of its validity, which it rests with the sister, who calls it in question, to impeach. And this she is said to have done, not merely primâ facie, but conclusively, by **[158]** producing a copy of the record of Gordon's conviction for bigamy: this is said to have impeached the validity of the second marriage conclusively, so that the Court is estopped from further inquiry into this part of the case.

To sustain this position it has been argued, in the first place, that, according to the rule laid down in *Searle's case*, "felonies, whereof parties have been convicted, are not re-examinable in other Courts." Now that this is true, sub modo, not only of felonies, but also (at least of one species) of misdemeanors, may be admitted on the authority of *Searle's case* (Hob. 121, ib. 288); on that of *Boyle* (3 Mod. 164. Comb. 72); on the case of *Sir George Bromley:* (*c*) **[159]** and on the authority, probably, of some other

(*c*) Delegates, 1793. This, in the first instance, was a suit brought by Dame Esther Bromley against her husband, Sir George Bromley, Baronet, for a separation à mensâ et thoro, as by reason of unnatural practices committed by the husband, in the Consistory Court of the Lord Archbishop of York. The libel filed in that Court, after pleading the marriage and cohabitation, &c. of the parties in the usual form, merely pleaded that the defendant had actually been convicted of an assault upon one George Stiff, with intent to commit the offence in question, at the assizes for the county of Nottingham, held at Nottingham, in the year 1790, and sentenced to two years' imprisonment in Nottingham gaol—exhibiting, at the same time, in supply of proof, a certain paper writing, alleged to be, and contain, a true copy of the record of that conviction. Her ladyship appealed from the rejection of this libel and exhibit

cases. But the suit in which the verdict of conviction was deemed conclusive in each of those cases was this: it was a personal suit, founded immediately upon that offence of which the defendant (the party proceeded against) had so been convicted. Consequently, none of those cases are in point to the verdict being even admissible evidence, much more to its being conclusive evidence, in a civil cause upon a mere question of property between plaintiff and defendant: which is the character of the present suit.

[160] The maxim principally, however, relied upon in support of the position contended for on the part of the sister is that laid down by Mr. Justice Buller, in his Law of Nisi Prius, viz. "That a conviction in a Court of criminal jurisdiction (generally) is conclusive evidence of the fact if it afterwards come, collaterally, in controversy in a Court of civil jurisdiction" (Buller's Nisi Prius, 7th edit. 245). But, if this be the rule at all, it is subject to many limitations; nor does the case of *Boyle* v. *Boyle*, to which the Court has just referred, cited by Mr. Justice Buller in support of his maxim, by any means bear it out as a general position. On the contrary, the doubt seems rather to have been—it has often been gravely questioned (*b*)—whether verdicts which have been given in criminal proceedings can be admitted in evidence in civil causes of this description at all: because the parties are not the same in the civil suit as in the criminal cause, where the King is always, at least technically and nominally, the prosecutor; and because the party in the civil suit, on whose behalf the evidence is supposed to be offered, might have been a witness on the criminal prosecution. If, indeed, the conviction were really upon the evidence of a party interested in the civil action to admit the record of conviction to be given in evidence at all, would be in the teeth of that salutary maxim, which prohibits parties to suits from giving evidence for themselves. Non constat, but that the sister was a witness upon the trial of this indictment: she **[161]** is not proved not to have been. So again it might very reasonably be questioned whether the verdict should be admitted in evidence at all, where, as in this instance, the criminal proceeding had been pretty clearly instituted only to make use of that verdict, in case of the conviction of the party proceeded against in the civil suit.

Generally speaking, however, I apprehend the true rule to be that a record of conviction is evidence of the same fact in a civil cause, only that it is not conclusive evidence. This is the rule to be collected from the following case, as cited by Chief Baron Gilbert (Law of Evidence, 33, 34), and which appears to me in principle hardly

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by the Court at York to the High Court of Delegates, which reversed the sentence appealed from, and admitted the libel to proof—and subsequently pronounced for the divorce as prayed by her ladyship—who afterwards procured an act of parliament dissolving the marriage.

It is to be observed, however, that the rejection of this libel by the Court at York did not proceed upon any supposed impropriety in the structure of the libel; or upon any supposed necessity that the practices in question should be specifically pleaded in the libel, in order to their being proved in that Court, in addition to its pleading the conviction and exhibiting a copy of the record. It proceeded upon a misconception (as it now seems) with respect to the sufficiency of a mere attempt to commit, &c. to found a sentence to the effect of that prayed by Lady Bromley.

So in the case of *Ellenthorp* v. *Myers and Moss* (in the High Court of Delegates, 1773), cited in argument by the counsel for the sister in support of their position as to the verdict being conclusive evidence (but with little effect, this last being a criminal proceeding), the articles merely pleaded the defendant's conviction of an assault, with intent to commit, &c., and exhibited a copy of the record; as the libel pleaded and exhibited in the subsequent case of *Bromley* v. *Bromley*. This latter proceeding, that of *Ellenthorp* v. *Myers and Moss*, was also a cause depending, in the first instance, in the Consistory Court of York, and was described as—"The office of the Judge, promoted by Myers and Moss, churchwardens of Weston, in the county and diocese of York, against Ellenthorp the vicar, for correction of his manners, &c. especially in respect of his having been convicted of an assault upon, &c. with intent to commit, &c." in order to his, the said Ellenthorp's, "deprivation."

(*b*) As in *Hillyard* v. *Grantham*, cited by Lord Hardwicke in *Brownsword* v. *Edwards*, 2 Ves. 246; and in *Gibson* v. *M'Carty*, Rep. temp. Hardw. 311; and in *Hathaway* v. *Barrow*, 1 Campb. 151. See Phillips on Evidence, 256, 260.

distinguishable from the present. "If a man has two wives, and be thereof convicted, and dies, and the second wife claims dower, the verdict and conviction cannot be given (i.e. conclusively given) in evidence, but, in this case, the writ must go to the bishop: for whether the marriage be lawful or not is the point in controversy, and that is of ecclesiastical jurisdiction, and is not to be decided at common law. But the verdict may be made an exhibit in the cause before the bishop, to induce him to believe there was a former marriage."

Such, then, I apprehend to be the true rule, generally speaking. And if there ever was a case of this description, in which the record of conviction ought not to be deemed conclusive evidence to the commission of the fact by the party against whom it is pleaded, it seems to me to be the present for several reasons.

In the first place, it clearly appears that the case on the trial was sustained by the single testimony of Nelly **[162]** Baker (a witness who came forward in consequence of an advertisement offering thirty guineas for evidence to convict the party) as to identity, viz. as to whether a woman who had cohabited for several years with a person named Owens, a seaman, at one time on board his majesty's ship the "Cadmus," was, as she, Baker, deposed, the identical Harriet Gordon, formerly Cole, Gordon's first wife, on which the conviction proceeded. All that Johnson (another witness) deposed in corroboration of Baker was that the woman who had so cohabited with Owens was living in 1819 and 1820—he only knew her to be Harriet Gordon, formerly Cole, from Baker's information. And how was Gordon to defend himself against Baker's evidence? It could only be by proving his first wife, of whom it is clear that he knew nothing, as of his own knowledge, subsequent to the year 1812, to have been dead at the time of his second marriage in 1818. This he seems indeed to have attempted—he seems, at the time of his trial, to have had some clue to the fact (if it be) of her having assumed the names of Mary White, and having died in St. Thomas's Hospital in 1815: for a woman named Cowen deposed to that effect on the trial; it being also proved on the trial that Mary White, or a female passing by these names, actually died in St. Thomas's Hospital in July, 1815. But Cowen's evidence (which went to a single interview with Gordon, formerly Cole, then passing, as she deposed, by the names of Mary White in 1815, just prior to her alleged admission into St. Thomas's Hospital) obtained less credence with the jury than the more circumstantial evidence of Baker: the rather, it should seem, as a woman named **[163]** Millington, produced to the same fact with Cowen, was discredited from her bad character, and very probably was deposing falsely on the trial. Her very production indeed to that fact seems not only to have neutralized Cowen's evidence; but to have given an unfavorable colour, in the eyes of the jury, to Gordon's whole case. Still, however, Gordon in effect was convicted upon the testimony of a single witness brought forward in consequence of the advertisement to which I have alluded, put in circulation by the real prosecutrix, the party in this suit: who plainly indicted and procured the conviction of Gordon, in order to avail herself of the effect, be it what it might, of that conviction in this Court; where a cause solely dependent (or then supposed to be) on the same fact was actually in progress. This conduct on the sister's part the Court will observe upon presently—whether these circumstances, namely, Baker's coming forward in consequence of this hand-bill, &c. appeared on the trial at the Old Bailey, I am not aware.

In the next place, I am to remember that the party convict, in this instance, is pleaded and proved to have actually received his majesty's free pardon, a circumstance which materially lessens the effect of that conviction, whatever it might otherwise have been in the cause. For it is notorious that the prerogative of pardon reserved to the chief magistrate is never exercised indiscriminately or capriciously—that the Crown never interposes but upon just grounds after all due attention to the merits and circumstances of the case. It has been argued that the "frofeiture" enures notwithstanding the pardon. So it does; but the Crown **[164]** is obviously disposed to take no benefit of the forfeiture.

Nor does a circumstance, on the other hand, which has been strongly insisted upon, tend much to fortify the effect of the verdict, so weakened and derogated from, as I have just said, by the pardon. It is pleaded and, I think, proved that Gordon, prior to the trial, did attempt to bribe some of the proposed witnesses, or, as it is termed, to buy off evidence. This, however, though a highly improper act, does not, as contended, necessarily infer any consciousness of guilt on his part. The offence charged was one

of which, however intentionally innocent, he might, in fact, have been guilty. The first wife might have been living in 1818, though he had supposed her to be dead. Under these circumstances, that Gordon, a sea-faring man, naturally under great alarm at the charge, should act as imputed to him, is a circumstance which, blameable as it is, is quite consistent with the death of the first wife prior to the second marriage. As for his "admissions" (pleaded) "to divers persons" that he "knew of his first wife being alive at the time of his second marriage," not one of these "divers persons" has been produced who speaks to them; so that these allegations themselves at best are good for nothing.

In proof of one thing the verdict is clearly good, viz. that Baker was believed, and that Cowen was disbelieved, by the jury. But the case now stands upon other evidence; so that the Court's arriving at a different conclusion is no impeachment of the finding of the jury. Baker, indeed, as I shall presently shew, **[165]** is still in effect the single witness as to this part of the case, on the one side. But Cowen's testimony, which stood alone at the Old Bailey, is here fortified and confirmed by the testimony of two other witnesses: and which puts the case that she failed to sustain at the Old Bailey nearly, I think, above all suspicion as stands upon the evidence in this Court. And the Court, I am of opinion, is at full liberty to look into that evidence, notwithstanding the verdict.

The sister, of course, undertook to prove the case which she has set up in plea; nor will it be denied that she has had ample opportunities of redeeming her pledge, if it was capable of being redeemed. Up to this time, however, the sister's case in this part of it, as already hinted, still rests in effect upon the single testimony of this woman, Baker.

Now was the evidence of Baker difficult of corroboration, had the fact upon which this part of the case turns really been, that a female who cohabited for several years with this Owens, and who confessedly was living years subsequent to Gordon's second marriage, was the identical Harriet Gordon, formerly Cole, his first wife? It was the very contrary of this. What is the history of Cole, the first wife, as given by Baker herself? It is this—"That she became acquainted with Gordon and his wife in or about the years 1808 and 1809, at Sheerness; where she, Baker, was then lodging at the house of a person named Doding, who was cook on board his majesty's ship the 'Heroine' (thentofore called the 'Venus'), of which ship Gordon was the gunner; that Gordon was a married man and lived on board the said ship, but used to come on shore there very often, almost daily, with his wife; **[166]** and that deponent, by frequently seeing them at that time (the said ship at that time lying) at Sheerness, became well acquainted with the said Thomas and Harriet Gordon." Gordon, then, formerly Cole, the first wife, according to this evidence, must have been a person well known at Sheerness; as, indeed, also appears from other evidence in the cause. But so, it likewise appears, from the evidence of this same Baker, from that of Johnson, from the evidence of Davis, and that of other witnesses, must have been the female who long cohabited with Owens. And yet the identity of this female with Cole, and consequently the sister's whole case, is left to depend on the single evidence of Baker. Johnson here, as at the Old Bailey, only proves that this female was living in 1819 and 1820; of her identity with Cole he still, as before, knows nothing but from Baker's information. Had such been the fact, there could, I think, have been no dearth of witnesses to prove it. One of the sister's witnesses (a witness on her first allegation) is a woman named Shott. Shott and her husband were keeping a public-house at Woolwich in 1809, and there became acquainted with Gordon, who introduced Cole to this deponent, prior to his marriage with her; they were actually married from the house of this deponent, to which they returned after the ceremony, and at which they cohabited on the wedding night. The witness, Shott, then, could have clearly identified this female as Cole, had she really been Cole. Now it appears by her answers to an interrogatory that Shott actually accompanied the sister to Sheerness and Chatham at the time the hand-bills were distributed, at and about which very time, as deposed by Johnson, the female whom Baker as-**[167]**-serted to be Cole was seen by that witness at Chatham. Now Shott could have deposed to her identity with Cole upon her own knowledge; and so have fortified Baker's evidence, not as Johnson does, which is really no corroboration, but in truth and substance. And yet of any attempt to confront Shott with this female there is no vestige in the case.

But how again does this single witness, Baker stand before the Court in point of

credit? In the first place, she is a witness brought in by an advertisement intimating that whoever will depose to a certain fact shall entitle himself to a reward of thirty guineas. Had the sister attempted by these means to prove evidence in this cause immediately, and in the first instance; I am warranted by the case of *Pool* v. *Sacheverel*,(*a*) to which I have referred by counsel, **[168]** in saying that it would have been a proceeding on her part highly criminal, amounting, itself, to a contempt of the Court: and it may be safely left with every one for himself to determine whether the transaction in question is much alleviated, at least in point of moral guilt, by the circuitous course which has been adopted of producing her evidence to this Court upon the present occasion. But I am principally considering the circumstance as it affects the credit of Baker—and it is clearly a circumstance which in my judgment renders Baker, at least, no entire witness in **[169]** the cause, whatever might be its effect upon her testimony at the Old Bailey, on the trial for bigamy, which this Court does not presume to determine. Here, however, at least in my judgment, it renders her no entire witness; she is, at least, a witness open to suspicion; and requiring to be corroborated as upon this ground only.

But, further, an exceptive allegation has been given to Baker's evidence after publication, pleading that the female who cohabited with Owens, as deposed by Baker, was not the identical Harriet Gordon, formerly Cole, as she, Baker, had sworn, but divers, namely, a person occasionally passing by other names, but whose real denomination was Caroline Lindsel; and further, pleading that she, Baker, in May, 1821, subsequent to her examination, had been confronted with Lindsel, when she admitted Lindsel to be the party of whom she had deposed as cohabiting with Owens; at the same time admitting her not to be Harriet Gordon, formerly Cole, Gordon's first wife.

(*a*) The case of *Pool* v. *Sacheverel*, in substance, was this. It was the case of a motion for the commitment of a party who had put forth an advertisement in the public prints that whoever would discover and make legal proof against a marriage in question in a suit then depending in the Court (the Court of Chancery) should have 100l. reward. The motion being made before the Lord Chancellor (Parker), it was adjourned by him to the next seal, when he pronounced his opinion (in substance, as follows) with great solemnity.

This tends to the suborning of witnesses; is very dangerous; and not only greatly criminal, but is a contempt of the Court, being a means of preventing justice in a cause now depending—and as the Court may, so in justice it ought, to punish this proceeding.

It has been objected that nothing has been done in consequence of this advertisement: that no witness has come in.

Resp. It does not appear but that some person would come in were this not discouraged: however, the person moved against has done his part, and if not successful, is still not the less criminal.

Obj. This is not an offer to any particular person.

Resp. It is the more criminal, as it may corrupt more. This advertisement will come to all persons, to rogues as well as to honest men—and it is a strange way of arguing to say that offering a reward to one witness is criminal, but that offering it to more than one is not so.

Obj. A person coming in for such a reward is no witness, for his testimony must be rejected.

Resp. It is so of every witness suborned or bribed—he is no witness if you prove him bribed.

It is a reproach to the justice of the nation, and an insufferable thing, to make a public offer in print to procure evidence; and is tantamount to saying that such persons as will come in and swear, or procure others to swear, such a thing, shall have 100l. reward; and this in a cause now depending here. If 100l. is to be allowed, the same reason will hold as to allowing 500l. or 1000l. And though the intention of the person so advertising may be innocent (and I, knowing the man, Mr. Pool, believe it was so in this instance), yet the justice of the Court, nay, the justice of the nation, being concerned in so public a case, I cannot dismiss the party, though his counsel offer to pay costs to the other party; but in justice and for example's sake he must stand committed. 1 P. Wms. 675-8.

This allegation, it will be seen, is express to the diversity of the female who so cohabited with Owens, as well as exceptive to the testimony of Baker. The evidence to diversity taken upon this allegation is defective, as I shall presently shew; yet still it is not without great effect on the testimony of Baker. For Rawlins, a witness examined upon this exceptive allegation, deposes that Baker, on being confronted with Lindsel, admitted her to be the female of whom she had deposed as cohabiting with Owens; only insisting that Lindsel had passed herself to her as Harriet Gordon, formerly Cole, Gordon's first wife, whom Baker then admitted that otherwise "she had **[170]** never seen." If, then, Rawlins is to be relied on, there is an end of Baker's evidence. He goes on to depose that he prepared an affidavit to that effect to be sworn to by Baker, which afterwards she declined making, "for fear," as she expressed it, "of getting into trouble in consequence of what she had sworn at the trial."

The evidence to diversity upon this allegation is incomplete, as already hinted, for this reason. There is no direct evidence to this Lindsel, after all, not being Harriet Cole, Gordon's first wife. Of the three witnesses examined upon this allegation, Davis and Rawlins had never seen the first wife; and Brooks, the third witness, Cole's aunt (a witness expressly produced to the diversity) only deposes to being introduced to a woman "whom she is told is Caroline Lindsel," and whom she readily declares not to be Harriet Gordon, formerly Cole, her niece. But owing, I rather presume, to some oversight, there has no witness been examined to prove that the woman so introduced to Brooks was the identical Caroline Lindsel, Owen's paramour, deposed of as such by the other witnesses. Had this been done, the evidence to diversity, upon this allegation, had been complete. It is said in explanation that Lindsel herself was meant to be examined, but died in the interval; this, indeed, is explanatory of, but it does not directly supply, the defect; and the evidence to diversity upon this allegation is still, strictly speaking, incomplete. But as exceptive to the testimony of Baker it is nearly conclusive; and in further apology for its defectiveness in the other particular I am to recollect that, the identity not being pleaded, Gordon had no **[171]** opportunity of pleading the diversity of the parties in question before publication, and that any fact must not only be pleaded more restrictively in an exceptive allegation than prior to publication, but that it must also be more strictly examined to.

But I am, lastly, also to recollect that a fact was pleaded by Gordon, decisive in effect, as to the diversity of this female with Cole, and indeed of the whole case, prior to publication. For it was pleaded by Gordon, in the first instance, that Cole was admitted into St. Thomas's Hospital under the assumed names of Mary White on the 6th of July, 1815—and that she died there, and was interred in the burial ground belonging to that hospital in the course of that month. That a female so calling herself died and was buried at the time and place articulate is indisputably proved and is undisputed. Is the identity of that female with Cole established in evidence? If so, that fact is decisive.

An attempt was made to prove this identity on the trial at the Old Bailey, which failed, as I have already said. But two additional witnesses have been examined to that identity in this Court who positively depose to the fact—and who tell, I think, no improbable story. I allude to the witnesses Lister and Harrison. Lister deposes that she had known Cole both before and after her marriage with Gordon—that she knew her to have been passing by the names of Mary White in the years 1813 and 1814—that she knew of her intention to apply for admission into St. Thomas's Hospital prior to her being actually admitted—that she afterwards went to St. Thomas's Hospital, and inquired for her as Mary White, and there saw her—**[172]** this she says was in July, 1815, but she forgets the day—that she found her very ill and promised to take her some tea and sugar on the following day—but that on the following day, when she went with the tea and sugar, she was told that "Mary White," as they called her, had died on that morning—and she, Lister, then deposes that she was actually shewn the body, which she positively identifies as that of Cole, Gordon's first wife. Harrison's (her mother's) account is in precise unison with this—the discrepancies between these witnesses are such as rather confirm than impeach the truth of their story; with which the evidence of Cowen in substance concurs. Here then are three witnesses distinctly proving the death of the first wife in 1815; and what is there to discredit Lister and Harrison? A jury has not disbelieved them, though it refused its credence to Cowen—and neither the general character nor the particular testimony of either of these

witnesses has been excepted to; though the sister has given an exceptive allegation to the testimony of Phœbe Wood, a witness examined upon Gordon's third allegation, whose evidence comparatively was of no moment in the cause. Had Lister and Harrison been produced at the Old Bailey, the verdict might, not to say must, have been different—and this Court would be justified to itself in arriving at a different conclusion from that of the jury, upon the new proofs now adduced, were this at all necessary.

But the Court is not placed in the predicament of being forced to arrive at any such conclusion, in order to sustain (if not his interest, technically speaking, as the husband, still) Gordon's right to the deceased's whole property. For a will is set up, giving the **[173]** whole property to Gordon—and the factum of that will is, I think, sufficiently proved. It is pleaded, on the other hand, that the deceased was incapable at the time and was in Gordon's custody. It might be sufficient for the Court to state on this part of the case that the allegation of incapacity is one which even the sister's own witnesses wholly fail to sustain. They are so various, so inconsistent, so overthrown by admitted facts in the cause, that the deceased's capacity is in no degree materially affected, even by their evidence. But, as opposed to the adverse case, the Court has no doubt of the deceased's full capacity. Far again from thinking the disposition improbable, as argued, or as itself indicative of duress, I think it much the contrary. The deceased had, prior to her marriage with Gordon, been in a weak and nervous state—resulting principally, it should seem, from the suicide of a person who was paying his addresses to her at that time in 1815. But that she had sustained any attack of paralysis, prior to her marriage with Gordon, as pleaded, there is no proof. She resided with her mother in Foley Place till the death of the latter in 1818—leaving the greater part of her property to this daughter, away from her other daughter (party in this cause), who was living separate from her mother and sister (the deceased) in lodgings of her own. On the death of her mother the deceased became a boarder in the family of Mr. William Gordon, brother of Thomas Gordon, in Grafton Street, with whose wife she had been previously intimate—and here it was that she became acquainted with Thomas Gordon, to whom she was married in the following September. That this marriage was brought about by **[174]** any fraud practised upon an incapable person is fully disproved by the history of the marriage, and particularly by the marriage settlement—drawn up by a solicitor, as he deposes, from the deceased's own verbal instructions, and securing her property to herself in as ample a manner as the most cautious and wary person could require it to be secured. In short, it is quite preposterous to suggest upon the evidence before the Court that this was a marriage unduly obtained. Subsequent to her marriage the deceased is repeatedly taunted by this sister, with whom she had been previously on bad terms relative to pecuniary affairs, with not being the true wife of Gordon—for that he, Gordon, had a former wife living to her knowledge, and whom she "could produce in a fortnight," and more to the same effect, which is not worth repeating. That the deceased, a weak nervous woman, so taunted and reproached, was often in tears and distress after her marriage—is not to be wondered at—any more than it is that she withdrew on one occasion for a short period from cohabiting with Gordon. The first of these circumstances infers no incapacity; nor does the latter any ill-treatment of the deceased by Gordon, it being well to be accounted for by other considerations. In the spring of 1819 the parties went to reside at a house in Little Gower Place, where they continued to live for eight or nine months, during which it is I think proved that they lived on affectionate terms, and that the husband was kind and attentive to the wife: in particular, it is proved that the wife kept the purse, and that she was jealous in maintaining what she considered her rights in that respect. It is **[175]** here that the will propounded is made—and that the deceased, so situated, should take the precaution of making this will, in order to secure her property to Gordon at all events, is a circumstance that appears to me any thing but unlikely.

It is objected, however, that this will was not drawn up by her solicitor. Now the deceased, who is spoken of as an extremely penurious woman, might object to employ a solicitor on the score of expence. Her marriage settlement was drawn up by a solicitor, at probably no inconsiderable cost—and the deceased might object to encounter a similar expence by the employment of a regular solicitor to make her will. Of one of the two subscribed witnesses, a person named Stromach, an intimate friend of the Gordons, being also the person who prepared or drew up the will, the

Court has only evidence, but satisfactory evidence, to the death, character, and handwriting; but the other subscribed witness, a young man, the husband's nephew, then about sixteen years old, an articled clerk to a solicitor, has been examined, and speaks to the factum of this will in a manner which leaves no doubt upon the mind of the Court of this being a bonâ fide transaction, and having passed in substance as he represents it. The will so executed is delivered to Mr. William Gordon, brother of Thomas Gordon, and a trustee under the deceased's marriage settlement, for safe custody; and it is produced under the circumstances to which I have already adverted —as soon, in my judgment, as it was at all incumbent on the executor to produce it. Under these circumstances I have no difficulty in pronouncing for, and decreeing probate of, this will to Mr. Gordon, as executor, with-**[176]**-out positively deciding, it not being necessary to decide, that he has sustained his interest as the husband of deceased. And thinking the sister's charge of incapacity disproved; and at the same time quite concurring with Mr. Gordon's counsel in their observations on the gross impropriety of one of the means used by the sister to procure evidence in this cause, I condemn her in costs from the time of her allegation (pleading the incapacity of the deceased) given in in Easter Term, 1822.

[177] THE OFFICE OF THE JUDGE, PROMOTED BY GATES *v.* CHAMBERS. Arches Court, Trinity Term, 2nd Session, 1824.—An allegation—responsive to articles filed against the defendant, a clergyman, for a violation of the 48th canon by officiating out of his diocese; as also for obstructing a licenced curate in the performance of divine service—admitted to proof—from the probable tendency of the facts pleaded to render it at least a case for mitigated costs if not to amount to a complete legal defence as to both parts of the charge.

[Referred to, *Martin* v. *Mackonochie*, 1879, 4 Q. B. D. 769.]

(By letters of request from the Consistorial Court of Peterborough.)

This was a cause of office brought by letters of request from the Consistorial and Episcopal Court of Peterborough, and promoted by John Gates, Esq.,(*a*) against the Rev. James Chambers, clerk, curate of the parish of Willoughby, in the county of Warwick, and diocese of Litchfield and Coventry, touching and concerning his soul's health, &c., especially for having "read prayers, and preached in the parish church of Byfield, in the county of Northampton, and diocese of Peterborough, as the minister or curate of the said parish, on Sunday, the 14th of September, in the year 1823, without any licence or permission first had from the Right Rev. Father in God, Herbert, Lord Bishop of Peterborough, or any other competent authority"—and also —for having thereby "obstructed the Rev. Samuel Stanley Paris, clerk, the curate of the said parish of Byfield, duly licenced, in the performance of his clerical duties"—in violation of the 48th canon, and against the laws and constitutions ecclesiastical of this realm.

[178] The "articles," which were admitted without opposition (after pleading that "by the laws, canons, and constitutions ecclesiastical of this realm, no person in holy orders of the Church of England can lawfully perform the duties of a curate, or officiate as such, without the permission of the bishop of the diocese or the ordinary of the place, having episcopal jurisdiction, first had and obtained, and reciting the 48th of the Canons of 1603), went on to plead that, on or about the 15th of July, 1817, Mr. Chambers, the defendant, was duly licenced to the curacy of Willoughby, in the county of Warwick, and diocese of Litchfield and Coventry, by the lord bishop of that diocese, on the nomination of the Rev. Nathaniel Bridges, D.D., vicar of the said parish (of which parish it was afterwards pleaded that the said Rev. James Chambers continued to be, on the 14th of September, 1823, and still at the issue of the citation was, licenced curate)—and that on or about the 30th of November, 1822, the Rev. Samuel Stanley Paris, clerk, was licenced by the Lord Bishop of Peterborough to the curacy of Byfield, in the county of Northampton, and diocese of Peterborough, to which he was nominated by the Rev. Charles Wetherell, clerk, the rector of Byfield; and that on Sunday, the 14th of September, 1823, the said Rev. S. S. Paris, clerk, was, and continued to be, curate of Byfield, aforesaid, in virtue of the said licence. The articles then proceeded to object that on the said Sunday, the 14th of September, 1823, the said Rev. James Chambers, still being curate of Willoughby, as aforesaid, did,

(*a*) Secretary to the Lord Bishop of Peterborough.

without any licence or permission from the Right Rev. the Lord Bishop of Peterborough, or any other lawful **[179]** authority whatever, contrary to the ecclesiastical law and canon aforesaid, take possession of the reading desk attached to the pulpit, in the parish church of Byfield aforesaid, and declare his determination to perform divine service in the said church—that Richard Sheppard, one of the churchwardens of the parish, thereon requested him to leave the said reading desk, and to permit the aforesaid Rev. S. S. Paris, clerk, the licenced curate of Byfield, to perform the duty—that the said curate, the said Rev. S. S. Paris, himself also remonstrated with the said Rev. James Chambers, and requested him to leave the said reading desk, and not to obstruct him, the said Rev. S. S. Paris, in the performance of his duty—warning the said Rev. James Chambers that if he persevered in his attempt, his conduct would be brought to the notice of the bishop of the diocese—but that the said Rev. James Chambers, notwithstanding such remonstrance and warning, refused to quit the reading desk, and did officiate as the minister or curate of the said parish, by reading the service of the day, and preaching a sermon; and did thereby obstruct the said Rev. S. S. Paris in the performance of his duty as the licenced curate of the said parish. And the articles concluded by praying that the said Rev. James Chambers, the defendant, might be duly and canonically punished and corrected according to the exigency of the law, and might be condemned in the costs of the suit made and to be made on the part of the promovent.

To these articles it was pleaded, responsively, on the part of Mr. Chambers, the defendant, in substance,

That the Rev. Charles Wetherell, clerk, the rector **[180]** of the parish of Byfield articulate, was, in the years 1822 or 1823, and still is, resident in the rectory house, and performing his duties as rector of the said parish; that in or about September, 1822, the said Rev. Charles Wetherell engaged the Rev. Samuel Stanley Paris, clerk, to become his assistant curate in the said parish at an annual stipend of 100l.; such engagement to determine at the expiration of three months' notice to that effect given by either party; that the said Rev. S. S. Paris, accordingly, was nominated to the Lord Bishop of Peterborough to be licenced to the said curacy; and was actually so licenced on or about the 13th of November, 1822; that in such licence the said Lord Bishop of Peterborough, without any nomination to that effect from the said Rev. Charles Wetherell, appointed the stipend of the said Rev. S. S. Paris at 120l. instead of 100l.(*a*) per annum; but that the said Rev. S. S. Paris declared, previous to entering upon his duty, that it was not his intention to insist on such increased stipend, but to abide by his engagement to serve the said cure for 100l. per annum only; that the said Rev. Charles Wetherell, being dissatisfied with the conduct of the said Rev. S. S. Paris as such (assistant) curate, did on or about the 6th of January, 1823, express the same to the said Rev. S. S. Paris, upon which they mutually **[181]** agreed to part at the end of three months from that time or sooner, if agreeable to both parties; that subsequent to the said agreement the said Rev. S. S. Paris giving fresh offence, was on or about the 24th of January, 1823, required by the said Rev. Charles Wetherell to quit his said curacy immediately, in consequence of which notice he, the said Rev. S. S. Paris, absented himself on the following Sunday, the 26th of January aforesaid, from the said church of Byfield; that on the Monday following, the 27th of January, the said Rev. S. S. Paris admitted to the said Rev. Charles Wetherell that he had neglected his duty as well to the said parish as to a school for the education of the poor, established in the same, his services at which had been stipulated for on his taking his said curacy; and expressed his sorrow for having given cause of offence to the said Rev. Charles Wetherell, who assured him of his forgiveness, but still required him to quit the said curacy at the expiration of three months from the said 6th of January; that in the course of the same week the father of the said Rev. S. S. Paris interceded with the said Rev. Charles Wetherell for the continuance of his son in the said curacy; and that the said Rev. Charles Wetherell then consented to permit the

(*a*) It should seem that his Lordship had conceived it, in the first instance, imperative upon him to assign in the licence a stipend of 120l. (from the population of Byfield, exceeding 500 persons) under 57 G. III. c. 99, s. 55. On becoming aware that that section of the act only applied to the cases of non resident incumbents, he reduced the stipend so assigned in the licence to that assigned in the nomination, viz. 100l. per annum.

said Rev. S. S. Paris to take part in the duties of the said church and parish till the expiration of the three months aforesaid, though at the same time he positively refused to continue him as his assistant curate beyond that period, upon which understanding the said Rev. S. S. Paris was permitted to take his share of the duty on the following Sunday, the 2d of February; that the said Rev. S. S. Paris did not continue to be, **[182]** and was not, as articulate, the curate of the said parish of Byfield, in virtue of the licence articulate, on the Sunday, the 14th of September, 1823; for that from and after the expiration of three months from the said 6th day of the said month of January he, the said Rev. S. S. Paris, was not the curate of the said parish, but had been dismissed from the said curacy as aforesaid; that on or about the 25th day of February, 1823, the said Rev. Charles Wetherell gave information to the Lord Bishop of Peterborough that he had dismissed the said Rev. S. S. Paris from his said curacy, and requested that his licence might be withdrawn; and that he had several times tendered the said Rev. S. S. Paris his stipend, at the rate of 100l. per annum up to the expiration of three months from the said 6th of January; that the said S. S. Paris had not officiated in the said church or parish between the 2d of February and the 14th of September, 1823, and that the said Rev. Charles Wetherell had himself performed all the duty of the said parish during that period. [The above is the substance of the three first articles.] The allegation then pleaded in substance that the Rev. James Chambers, clerk (the defendant), did not commit the offence or offences articulate on Sunday the 14th of September, 1823, at the parish church of Byfield, as articulate; that on the said Sunday he, the said Rev. James Chambers, attended at the said parish church to perform the morning service, pursuant to the request of the said Rev. Charles Wetherell, then absent from Byfield in attendance upon a sick wife at Malvern; that previous to proceeding to the said church the said Rev. James Chambers pro-**[183]**-duced his licence from the Lord Bishop of Litchfield and Coventry to William Farebrother, one of the churchwardens of the said parish, who accompanied the said Rev. James Chambers to the said church and gave him possession of the reading desk; that before he had commenced the service the said Rev. S. S. Paris came up to the said reading desk, accompanied by Richard Sheppard, the other churchwarden articulate, and desired to officiate as curate of the said parish; declaring moreover that the said Rev. James Chambers, by persisting in doing the duty, would incur the displeasure of the bishop of the diocese; that the said Rev. James Chambers then declared that he came there to do the said duty at the express desire of the rector, who had informed him that the said Rev. S. S. Paris was no longer his curate; and further declared that, not being aware that he was offending against any law by merely assisting a friend in his absence, he should persist in doing the duty, though he disclaimed all idea of acting perversely, or in the spirit of defiance; that the said Rev. James Chambers then promised at the instance of the said Rev. S. S. Paris to admit at any time that the said Rev. S. S. Paris was then ready, and had claimed, to perform the service; on which they parted; and the said Rev. James Chambers proceeded to, and did, perform the said service, as requested by the said Rev. Charles Wetherell, the rector.

The admission of this allegation was opposed, on behalf of the promovent, as neither justifying nor even much extenuating the charge made in the articles. That charge was said to be two-fold—a violation of the **[184]** 48th canon, involving the obstruction of a licenced curate in his undoubted right to officiate in the absence of his rector. Upon the offence first charged, the violation of the canon, the allegation was argued to have no bearing; the provisions of the canon being peremptory that no minister shall "serve" in any place, but by allowance of the ordinary of the place; and such "serving" by the defendant, as charged in the articles, not being denied in the allegation. Consequently, the allegation was said to contain no justification of the alleged breach of the canon. As for that other offence charged, the obstruction of the curate, it was said—the allegation must be taken to admit that the bishop's licence was not actually withdrawn; until when, a curate once licenced continues to be curate by the general ecclesiastical law. Hence, so far from setting up any legal defence to this part of the charge, the allegation admits the actual, nay, even the wilful, obstruction of the curate—to be inferred, this last, from its being after notice so admitted. Herein was said to consist (as laid down by Lord Mansfield, in the case of *Hyde* v. *Martyn* (Cowper, 440)) the distinction between a licenced, and an unlicenced, curate: the one is removable at pleasure: the other is not removable

at the mere pleasure of the rector or vicar, but continues to be curate till the ordinary's licence is revoked. And this was argued to hold, as well of an assistant curate to a resident rector or vicar, as of a curate, properly so called; namely, one who has "curam animarum" committed to him, pro tempore, by the bishop, in the absence of an incum-**[185]**-bent. The ordinary, indeed, is bound to revoke his licence on reasonable cause shewn; one of such reasonable causes clearly being the rector or vicar's undertaking his own duty: and, failing to revoke his licence on reasonable cause shewn, this is matter of appeal and complaint to his ecclesiastical superior. True it is that Lord Mansfield has intimated (*a*) that curates, though licenced, are removable "by rectors or vicars undertaking their own duties." But by this it is not to be understood as if an incumbent, by undertaking his own duty, annuls his curate's licence, ipso facto. The incumbent is bound to certify this to the ordinary; who, being satisfied as to the duty being so undertaken by the rector or vicar, bonâ fide, is bound to withdraw his licence, as in the instance of any other reasonable cause shewn, on pain of appeal and complaint as above. This view of the subject was said to be the just result of the whole course of the ecclesiastical canons and constitutions, though it was admitted not to be fortified by the authority of any known decided case: and the opinion (said to be that of Mr. Serjeant Hill) expressed to the contrary; namely, "as though all but perpetual curates are removable at pleasure," in the notes on a late edition of Burn,(*b*) was denied to be law. Upon these grounds the Court was prayed to reject the allegation.

In support of the allegation, it was argued, on the contrary, that the facts alleged were material in answer to both parts of the charge. The canon was **[186]** said, on the face of it, especially as viewed in connection with other canons, to have no reference whatever to ministers performing casual acts of duty in any place, without allowance of the ordinary of the place: but to be only applicable to ministers "serving" [that is, (so contended) taking permanent cures] without such allowance. Now, the "serving" charged in the articles was here pleaded to have consisted in the performance of a (single) casual act of duty. Hence, it was said that the allegation was, at least, a good defence to that part of the charge which respected the supposed violation of the canon; to the penalties of which it was admitted that ministers taking permanent cures, without "allowance of the bishop of the diocese," might be liable. Nor had the allegation, it was maintained, a bearing less stringent upon that other part of the charge—the obstruction of a "licenced curate," so termed in the articles. The allegation upon that head went to shew that the curate's dismission was held (rightly or wrongly) to have been legally effected by the rector at that time—above all, that the rector had, himself, done the whole parochial duty, without the curate's having officiated in a single instance for the preceding seven or eight months. These facts constitute, it was said, a full defence, even as to this part of the case—being amply sufficient to justify the defendant from a criminal charge of having "obstructed the curate," for merely not consenting to compromise the (real or supposed) rights of the rector by surrendering the reading desk in this instance—although the curate (so styled) did, not improperly perhaps, put in his claim to officiate—evidently to keep open the question of right as between **[187]** him and the rector; a question with which the defendant properly declined to interfere. Even should the facts pleaded be held not to amount to a full justification of the defendant as to this part of the charge, still they are clearly relevant, it was said, to the extent of making this a case for mitigated costs, which was sufficient, of itself, to entitle the allegation to go to proof.

Judgment—Sir John Nicholl. The only question which the Court is at present called upon to decide is the admissibility of a defensive allegation, offered on behalf of Mr. Chambers, against whom a criminal proceeding has been instituted in this Court. The question for its ultimate decision will be, whether the defendant has committed an ecclesiastical offence for which he ought to be canonically punished, and also to be condemned in the costs of the prosecution.

[Here the Judge described the offence from the presertim of the citation, and recited the substance of the articles, and of the defensive plea.]

Such is the substance of the charge, and such are the facts, stated in this allegation

(*a*) In the case of *Hyde* v. *Martyn*, Cowp. 440.
(*b*) Burn's Eccl. Law, by Fraser, vol. ii. pp. 55, in notis.

(and which Mr. Chambers offers to prove in his defence), the admission of which is now opposed. Nothing can be more widely different in their character and effect than the representations made of this transaction; on the one hand in the articles; and on the other in this defensive allegation.

Is the allegation then admissible? for that, I repeat, is the only present question: in considering which I am bound, upon general principles, to assume the [188] whole contents of the allegation to be true. And I am also bound to remember that in this, as being a criminal proceeding, the defendant is entitled to a full latitude of defence; and to state all circumstances (in order to examine witnesses to prove them) which can in any degree bear upon the ultimate decision of the matter charged, and its consequences.

The three first articles of the allegation state, and enter into a detail of circumstances in order to shew, that there were differences at this time between the rector and his curate, upon a question whether the curate had been legally dismissed, or whether he continued to be legally the curate, and to be entitled to his salary as such. In the present suit the Court will not be drawn aside, even to express an opinion incidentally, or indirectly (for it cannot decide), upon the matter so in dispute between the rector and the curate; as to which of those parties is legally right in respect to the dismission from the curacy without the bishop's having withdrawn his licence; though that point has occupied much of the argument that has just been offered at the bar. Meantime the fact that there was such a dispute existing does not appear to be, by any means, irrelevant, so far as it is pleaded; since it is explanatory of the whole transaction, and at least may bear upon the question of costs, which is not an immaterial part of the proceeding. In that view, if in no other, the three first articles of this allegation, applicable, in particular, by way of defence to that part of the charge which respects the "obstruction of the curate," are admissible.

The remainder of the allegation is also admissible, [189] partly on the same ground; though possibly, again, the case laid in the allegation, taken as a whole, may furnish a complete defence, if not to both parts of the charge, still to that part of it which respects the supposed violation of the canon.

The 48th canon, the violation of which is principally objected so far as applies to the present question, is in these words—"No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure and the meetness of the party." And the canon is headed, "None to be curates but allowed by the bishop." (*a*)

Now the object of this canon seems at least to be that curates who are engaged to take charge of parishes, either altogether or in part for a continued time, shall be "examined and admitted" by the diocesan. What then is the history of the case charged in the articles as a violation of the canon which this allegation fur-[190]-nishes? The rector of Byfield, himself a resident rector, engages a curate, not to take the entire charge of his parish, but merely to assist him (the rector) in fulfilling his parochial duties—he becomes dissatisfied with that curate and dismisses him, legally as he conceives, after notice, pursuant to the terms of their original agreement. A question, however, arises between the rector and curate as to whether the latter has been legally dismissed—and is still subsisting at the period of this transaction. Meantime the rector, who as incumbent has the paramount right, does himself the whole duty for many successive months—he has then occasion to be absent one Sunday on account of his wife's ill health; and requests the defendant, a neighbouring clergyman, the licenced curate of another parish, but which parish happens also to be in another diocese, to

(*a*) This, in the Latin, is "Ministri, nisi ex episcopi vel ordinarii approbatione, pro curatis non admittendi." And the canon itself is "Nulli curato, aut ministro, permittetur, ullibi curæ animarum inservire, nisi prius per episcopum, &c. examinatus ac admissus fuerit."

The Canons of 1603, it should seem, were originally framed in Latin—and the English translation is in some parts not by any means accurate. The original text should be always consulted in any case of apparent ambiguity. See, for instance, an apparent ambiguity at the close of the 106th canon, in the English translation, which the editor remembers to have been the subject of much discussion in the Donegal cause. There is no such ambiguity in the Latin canon.

officiate for him at Byfield on that day. The defendant so requested attends and does officiate for the rector, notwithstanding the claim of a third person (Mr. Paris) to officiate as curate—he (Mr. Paris) being the curate who had been licenced to Byfield, and whose dismission, whether legal or not, was the point at issue between him and his rector. Mr. Paris's claim to officiate is admitted in the plea: the defendant, however, it is also pleaded, though he declines surrendering the desk to Mr. Paris, promises to admit his demand; and disclaims all notion of violating the law, or acting in contempt of lawful authority—circumstances from which, in my judgment, it is fairly to be inferred that his sole motives in persisting to officiate were a natural reluctance to prejudice any (real or supposed) right of the rector; and a wish to leave the **[191]** dispute between him and his curate unprejudiced by any thing that might take place at that time. Now, in this view of the case, I am by no means prepared to hold that the defendant has committed any violation of the canon by which he becomes liable to a criminal prosecution.

It may be very proper that curates within the meaning of the canon, as already explained—and in which light the Court, as at present advised, is disposed to regard it—should be "examined and admitted" by the diocesan, in order to prevent persons not duly qualified from being introduced into parishes in that character. But the defendant in the instance in question, it should now seem, did not attend at Byfield in that character; nor was he acting as curate within the meaning of the canon so understood—he only came to officiate for the rector on a particular occasion. That occasional assistance so given is punishable as an ecclesiastical offence merely because the minister, so assistant, has not been licenced as curate by the bishop of the diocese is more than, without further consideration and other authorities being adduced, I am prepared to lay down as the rule of law: such a rule would be highly inconvenient to the clergy; and might not unfrequently occasion parishioners to be deprived altogether of the church service.

This interpretation of the 48th canon is confirmed in my judgment by the 50th and 52nd canons, which are in pari materia. By the first of these, the 50th canon, "neither the minister, churchwardens, nor any other officer of the church shall suffer any man **[192]** to preach within their churches and chapels but such as, by shewing their 'licence to preach,' shall appear unto them to be sufficiently authorized thereunto." Now the 52d canon plainly implies that this "licence to preach," at least, was not required to be had of the local ordinary: for the entry directed to be made by that canon, for the purpose of conveying information to the local ordinary in the case of a stranger preaching in his diocese, is, among other things, to set forth the name of the bishop by whom his "licence to preach" was granted. It appears indeed from the 49th canon that the "licence to preach" referred to in these, the 50th and 52d, canons was quite a distinct thing from the "licence to a cure," which is the subject of the 48th canon—being (the first) a licence to "preach" specially; without which ministers were forbidden by the 49th canon "to expound," as it is termed (i.e. to preach), "in their own cures or elsewhere," or to do any more than "read plainly and aptly, without glossing or adding, the homilies (then) already set forth, or in future to be published by lawful authority, for the confirmation of the true faith and for the edification and instruction of the people." It is well known that such (separate) licences to preach were in use both before and for some time after the Reformation; but for the last century or two, in consequence of the clergy being better educated, or for some other reason, they have fallen into desuetude; and are now included either in "letters of orders" or in the "licences of ministers to particular cures." The defendant, it may be further observed by the way, is pleaded to have actually complied in effect **[193]** with the 52d canon in this instance, by shewing his "licence" to the churchwarden; by whose authority, as well as by that of the rector, it now seems that he took possession of the reading desk, though he is charged by the articles to have done this "without any competent authority whatever."

Upon the whole, this allegation appears to the Court to be strictly admissible. It gives the transaction a character quite different to that to be collected from the articles of charge. It may at any rate protect the defendant from costs. It may also amount to a complete defence in point of law; not only excusing the defendant from costs; but subjecting the promoter to payment of the whole costs. The point in dispute between the rector and his curate will remain untouched. Under this possible result of the proceeding, whether the promoter may think this a fit prosecution to be per-

severed in, as a criminal suit, against this third party, Mr. Chambers, is a matter which he (the promoter) must decide for himself.

Allegation admitted.**

*** On a subsequent Court day the proctor for Mr. Gates declared that "he proceeded no further:" upon which the cause was dismissed with costs, as a matter of course.

The following proceedings in another Court may be stated as, in part, connected with the subject of this report.

In consequence of the existing disputes between Mr. Wetherell and Mr. Paris as to his dismission from the curacy of Byfield (stated and referred to in the allegation admitted, as above, in the Arches Court), Mr. Wetherell was served, in the month of May, **[194]** 1823, with a monition for payment of Mr. Paris's salary, as curate, to the following effect:—

Monition.

(Seal) HERBERT PETERBOROUGH.

Herbert, by divine permission, Bishop of Peterborough, to the Rev. Charles Wetherell, rector of Byfield, in the county of Northampton and diocese of Peterborough, greeting:—Whereas the act of the 57th of Geo. III. c. 99, s. 53, has provided that in case any difference shall arise between a rector or vicar and his curate, touching the curate's stipend, or the arrears thereof, the bishop of the diocese shall summarily determine the same; and is empowered to proceed therein by monition and sequestration. And whereas the Rev. S. S. Paris, whom we have licensed, on your nomination to the curacy of Byfield, has represented to us that no stipend has been paid him since the 24th day of January last and that you refuse to pay what has become due to him since that time, or any part thereof; we hereby monish you, the Rev. Charles Wetherell, to pay within two-and-thirty days from the date of the service of this monition, to the said Rev. S. S. Paris, the whole amount of the arrears which shall be then due to him, or shew cause within the same period why payment should not be compelled by a sequestration of your said benefice. Such cause you will shew in writing, addressed to us and to be filed in our registry at Northampton within the time specified, agreeable to the provisions of the 26th and 76th sections of the said recited act. And agreeably to the 75th section **[195]** such cause may be shewn either in the form of an affidavit, or in any other form of writing as the case may require. We shall then summarily determine the matter at issue.

Given under our hand and seal this 8th day of May in the year of our Lord 1823; and of our translation the fifth.

Mr. Wetherell, upon this, applied to the Court of King's Bench for a writ of prohibition to the bishop from proceeding to a sequestration of his benefice under that monition; and a writ nisi was granted upon a suggestion, supported in the usual manner by affidavits, that the case, as between rector and curate, in which the monition issued, was not a case within the operation of the stat. 57 Geo. III. c. 99, s. 53.

That rule was made absolute by the Court of K. B. upon argument, in Trinity Term (3d July), 1824, the Court holding that this process by monition, &c. against a rector for payment of arrears of stipend to his curate was, as suggested, not well founded on 57 Geo. III. c. 99, s. 53, in the case in point of an assistant curate to a resident rector; being only to be had in cases where the curate's licence had been granted and his salary assigned under that act; which was held by the Court to apply solely, in these particulars, to the curates of non-resident incumbents.

It is to be noted, however, that this decision of the Court of King's Bench leaves the general question, as to licenced curates being removable at pleasure, or the contrary, precisely on the footing where it stood before; be that footing what it may. All which the Court of King's Bench has determined seems to be that the assistant curate of a resident incumbent is not entitled to the benefit of a summary process by monition, &c., for the recovery of his stipend in arrear. This process by monition, &c., it should **[196]** be observed, is clearly not according to the general course of the ecclesiastical law: consequently it is either well founded upon the statute, or it has no foundation at all.

THE OFFICE OF THE JUDGE, PROMOTED BY PALMER *v.* TIJOU. Peculiars Court of Canterbury, Trinity Term, By-Day, 1824.—Articles against the defendant (a sidesman) for brawling, &c., in church, pronounced to be proved; and the defendant suspended and condemned in the sum of 50l. nomine expensarum—this being held (in contradistinction to a former case arising out of the same general transaction) to be a case in which the prosecutor was not entitled to his full costs.

This was a cause or business of the office of the Judge, promoted by Samuel Palmer, a churchwarden of the parish of St. Mary, Newington, in the county of Surry and deanery of Croydon,(*a*)[1] against Henry Michael Tijou, a sidesman of the same parish, for "quarrelling, chiding, and brawling, by words," in the church of that parish; and also for "laying violent hands upon certain persons, and creating a riot and disturbance" in the said church.

The articles, nine in number, after pleading the general law (as in the case of *Palmer* v. *Roffey*, vide p. 141, ante), pleaded that, in the evening of Easter Tuesday, 1823, at the time of a poll taken in the church of St. Mary, Newington, for the election of a churchwarden for the year then next ensuing, Tijou, the defendant, perceiving that Richard Roffey, a churchwarden of the parish, was taken into custody by a constable, violently forced his way through the persons assembled, in order to release him, and in so **[197]** doing, smote, and laid violent hands on, divers persons; that on William Turner, a parishioner, gently laying his hand on his shoulder, and begging him, for God's sake to be quiet, he, Tijou, swore at, and then putting himself in a fighting attitude, aimed a violent blow at the head of the said William Turner, who only avoided the same by stepping back; that after, in conjunction with others, effecting, in a violent and outrageous manner, Mr. Roffey's rescue from the constable, he, Tijou, on being remonstrated with by a Mr. Elisha Turner, aimed another blow at the head of the said Elisha Turner, accompanied with oaths and divers quarrelsome, chiding, and brawling expressions; that he, the said defendant, then went into a pew adjoining that in which Mr. Hurcomb, a parishioner, was seated, whom he also violently abused and swore at; and at whom he clinched his fist in a menacing and insulting manner; lastly, that he laid violent hands on a Mr. Samuel Bishop, also a parishioner, who only interfered by requesting him to be calm, and pushed him down, whereby he was seriously hurt; when, in consequence of such violent and outrageous conduct, he was taken into custody by a constable. The articles likewise pleaded (as in the case of *Palmer* v. *Roffey*) that this prosecution was also instituted by vote or direction of the vestry.

A responsive allegation, consisting of eight articles, in substance pleaded, that Roffey the churchwarden was assaulted in the north aisle of the said church on the occasion articulate, and forced to the ground, and otherwise ill treated, by Mr. Hurcomb and his friends, to the actual peril of his life; that Tijou, the defendant, who was then in the church-yard, hearing **[198]** the tumult, and being apprized of the perilous situation of Mr. Roffey, proceeded into the church; and, with the assistance of other persons, succeeded in releasing him from the same; that, in so doing, he was obliged to press through the crowd assembled, but that he neither smote, nor laid violent hands upon, any person or persons whatever; nor conducted himself towards William and Elisha Turner and Joseph Hurcomb, articulate, in manner as objected to him in the articles; that soon after Roffey's release, and whilst he, Tijou, was standing on the seat of a pew in the said church, Samuel Bishop, articulate, pulled him down from such seat, and placed himself thereon in his stead; upon which he, Tijou, in like manner displaced Bishop, and regained possession of the said seat: shortly after which, he, Tijou, and Bishop, mutually apologized, and shook hands. And this allegation also pleaded (as Roffey's had, in the former case) that Hurcomb and Richardson, two witnesses examined upon the articles, were themselves under prosecution—the one for quarrelling, chiding, and brawling, and the other, Hurcomb, both for this offence, and for that of smiting and laying violent hands, in the parish church of St. Mary, Newington, upon the day, and on the occasion, articulate.(*a*)[2]

Thirteen witnesses were examined upon these articles, and six upon the responsive allegation. Of their evidence, which, though sufficiently bulky, was less so than that taken in the former case, the result on the mind of the Court, after hearing counsel on both sides, is stated in the judgment.

(*a*)[1] Vide note (*a*), page 141, ante.

(*a*)[2] Vide note (*a*), page 143, ante.

[199] *Judgment—Sir John Nicholl.* This case of *Palmer* v. *Tijou*, and the former case of *Palmer* v. *Roffey*, arising out of parts of the same transaction, in which former case the Court noticed the general state of facts and the law applying to it, the present occasion does not require a repetition of those preliminary considerations. It will be sufficient to state that in electing churchwardens for the parish of Newington in the year 1823, and while a poll was going on in the church, a quarrel arose between Mr. Roffey, one of the churchwardens, and Mr. Hurcomb, a parishioner; which quarrel continued at the polling-table a very considerable time; the terms "coward" and "informer" being repeatedly interchanged between them. Which of those two persons began the quarrel, or which was most to blame, appeared to be immaterial: both had grossly violated the laws existing for the protection of the sanctity of the place. This quarrel was followed by a still more violent disturbance between the same parties in the north aisle of the church; most of the persons present flocking there, being attracted by the noise and tumult. It is after the commencement of the disturbance in the north aisle that the offence of Mr. Tijou is charged to have been committed: he was not all engaged in the original quarrel which led to the disturbance in the north aisle, nor was he present at the commencement of the latter. During the confusion, some of the by-standers called out for constables; and a constable had actually taken Mr. Roffey into custody.

It would hardly be proper for the Court wholly to [200] pass over without notice a misapprehension which seems to have prevailed respecting the duties and authorities of the different parish officers. Most of the persons present seem to have considered that nothing special attached to the place in which they were assembled; that whether it was a church, or a tavern, or a polling-booth, made no difference. There was a disturbance; the constables are called for, the cry is raised of "turn him out," and the constable, Wright, seizes the churchwarden Roffey, and soon after, the constable Passey seizes the sidesman Tijou, pulling out his pocket staff in proof of his authority to do so.

Now the church itself, and the preservation of order in the church, is, in the first instance, under the protection of the ecclesiastical law and the ecclesiastical officers. The Court does not mean to say that, if an actual breach of the peace takes place in the church, and the ecclesiastical officers either neglect, or are unable to do their duty, or still more, if they call for assistance, the civil officer may not be warranted in interfering: but, in the first instance, it is the duty of the ecclesiastical officers to preserve order in the church: theirs is the primary authority. Who then are those officers? The churchwardens, and their assistants the sidesmen. It is their duty to attend the church for the very purpose of preserving order. It is implied in their oaths of office "faithfully to discharge their duties as churchwardens;" if they are dissenters from the Established Church, and from motives of conscience cannot attend its worship, they are allowed by law to serve the office by sufficient deputy. In the execution of this duty they are protected by law: for example, if they take off a man's hat in church, or if they turn an [201] obstinate disturber out of the church without unnecessary violence, they are not guilty of an assault. They therefore are primarily the officers whose duty it is to keep order in the church. How far these considerations may aggravate the offence of Mr. Tijou I am not at present inquiring: I notice them principally in order to say, that constables are called for upon this occasion, earlier than was necessary, in my judgment, or consequently than was justifiable. Nor is the alacrity with which these constables seem to have acted quite uncensurable. Passey, for instance, takes Mr. Tijou into custody, and without any requisition to that effect. But the authority of Mr. Tijou in that place was paramount to the authority of any constable: and it must be a very strong case indeed which will justify a constable in inverting this order of authority by taking a churchwarden or a sidesman into custody; although possible circumstances may justify and require such a proceeding. The Court has stated thus much, not as of any great importance in the present case, but that the rights and duties of these officers respectively may be properly understood and more generally known.

The first question in the case is, whether the articles charging the offence are proved: the matter of costs will be for after consideration. Upon carefully perusing the evidence I am of opinion that although the articles state some of the facts in rather an inflamed manner, and there are some discrepancies between the witnesses, yet, upon the whole, it is established that the law has, to a certain extent, been violated.

When the disturbance in the north aisle commenced [202] Tijou was not in the church: nor is it suggested that he had taken any part in the previous quarrel. The facts are these—Tijou while in the churchyard, hearing the noise, comes into the church: and perceiving the disturbance and the crowd, he forces his way through the crowd up to the churchwarden; and if he had done this merely as a sidesman, intending to preserve order, it would have been justifiable: for his oath of office is "to be assistant to the churchwardens of his parish," and the churchwarden at that time was actually engaged in a personal struggle, namely, with the constable. But it would be an excess of candour to suppose that Mr. Tijou was influenced, if by that motive at all, by that sole motive. Roffey himself at the time, far from being occupied in preserving order, was acting in gross violation of it: and the (principal, at least) object of Tijou's interference seems to have been, to take part with a friend (Roffey), and to maintain his quarrel; and not merely to discharge his own official duty. At all events, there is no sufficient justification of his language and conduct upon this occasion, whatever were his motives. The Court is therefore of opinion that the law has been so far violated, though the case is by no means of an aggravated character. The disturbance which was going on tends to extenuate the conduct of Tijou; he was excited to that conduct by the existing tumult and the situation of his friend. The original brawlers, Roffey and Hurcomb, had kept up their quarrel for hours: they were the great offenders, and the cause of the whole disturbance. Many of the by-standers, probably, took a warmer part in the business than was strictly justifiable in point of law; considering the respect that was due to the place [203] in which they then were assembled; but to have instituted suits against all who might have so offended upon the occasion would have been acting much too rigorously.

What afterwards passed with a person of the name of Bishop took place also in the heat of the moment. Even according to Bishop's own account, he first put his hand on Tijou's shoulder, and though he did this in order to appease matters, yet Tijou, being so heated, might easily have mistaken it as an act of aggression and an assault; but, according to Tijou's witness, Bishop first pulled him down by the coat from the seat of the pew; and Tijou, in the same manner, pulled Bishop down, in order to recover his place; though, unfortunately, on descending, Bishop's foot turned under him, by which he received some injury. The parties made up their private misunderstanding upon the spot, by shaking hands in token of forgiveness; and although that immediate reconciliation might not conclude any person against proceeding for the purpose of maintaining public order, yet it is not wholly immaterial to the present consideration; more especially in respect to costs.

Now, upon the point of costs, it is to be observed that generally, where an offence has been committed, the expence of correcting it is to be borne by the offender; but it does not necessarily follow that full costs are to be given: they may be mitigated according to the discretion of the Court. That discretion, however, is not to be arbitrarily exercised; but upon a just and impartial consideration of all circumstances. The conduct of both parties must be taken into consideration, in order to see how far the defendant [204] ought to pay, and how the promoter has a claim to receive full costs.

Two prosecutions have been instituted by Mr. Palmer. The prosecution against Mr. Roffey, the churchwarden, who had been guilty of brawling in the church for hours together, previous to this renewed quarrel in the north aisle, the Court held to be a case which called for full costs. But by that prosecution the sanctity of the place would be asserted; the law upon the subject would be ascertained and become known, and the example, to prevent the recurrence of the offence in the parish, would be made. If another person equally offended, or with scarcely a shade of difference, it might have been invidious to select only one of them: both might have been properly prosecuted; but upon a view of the whole transaction I cannot think that Tijou was the other person who ought to have been so selected.

As the public officer discharging his duty for the purpose of repressing such offences, Mr. Palmer was fully justified in the former proceeding; it was also advised and directed at a meeting of the parishioners. The churchwarden was not, however, bound to obey that direction—he was to judge of its propriety, for he becomes the party responsible to the Court and to the defendant: and although the Court is always disposed to protect public officers in the fair discharge of their duty, even if

some error of judgment should occur, yet it is also the duty of the Court to protect individuals against the abuse of official station, and against being harassed with expence by an officer who may be supported by the parish purse.

From the evidence laid before the Court in these **[205]** two causes, the two principal offenders were Mr. Roffey and Mr. Hurcomb. Even if the former were the greater of the two, yet the latter, if a second prosecution were deemed necessary, was the other proper person to have been selected as the object of such prosecution. It is with regret the Court differs in opinion from so respectable a body as the vestry of this parish; but I cannot help, most conscientiously, differing from them on the present occasion. They direct a prosecution against Mr. Tijou, who was only a subordinate offender; while they do not direct any prosecution against Mr. Hurcomb; but, on the contrary, he is brought forward, not only as a witness in these suits, but as an active partisan, applying to some of the other witnesses to attend in support of it. Looking at this course of conduct, it seems to me impossible to consider the present prosecution against Tijou as having been instituted solely for its proper and legitimate object, namely, to protect the sanctity of the place consecrated and set apart for the worship of the Supreme Being; nor impartially, to correct those who have offended against public order and decorum, without any regard to which party in parish politics the offender might belong. It therefore does not appear to be the case of a public officer acting without private motives in the discharge of his duty; which possesses a decided claim upon the justice and discretion of the Court, to indemnify him in his full costs, at the expence of the party proceeded against; but upon careful consideration, I cannot help thinking this to be a case for mitigated costs: and as Mr. Tijou will have his own expences to pay, which have been rendered pretty heavy, by the promoter's ex-**[206]**-amining a great number of witnesses; and as Mr. Palmer may possibly be indemnified by others of the parish, I shall content myself, in the first place, with suspending Mr. Tijou ab ingressu ecclesiæ for one week; and, secondly, by condemning him in 50l. nomine expensarum.

AYREY AND OTHERS *v.* HILL. Prerogative Court, Trinity Term, 1st Session, 1824. —A case of insanity alleged to defeat a will—testator proved to have been not properly a madman; but an habitual drunkard who, under the excitement of liquor, acted in all respects very like a madman—different considerations applicable to the two cases as with relation to the matter in question stated—testator held to have been not under the excitement of liquor, and, consequently, not insane at the time of making his will; and the will itself, consequently, established.

Judgment—Sir John Nicholl. The case before the Court is pretty voluminous, in point of evidence; but there is much of it to which the Court has little occasion to advert in stating the grounds of its judgment.

The deceased, Peter Hurman, otherwise Efford,(*a*)[1] died on the 5th of August, 1821, leaving a will bearing date 25th of June in that year, the validity of which is the point at issue. The following is a summary of the contents of that instrument. It benefits, considerably, the family of Mr. Pike, one of the executors; it devises and bequeathes a freehold estate for life, together with the residue of the testator's personalty for life, to Lucy Hill, his niece and sole next of kin; and a legacy of 500l. to William Hill, her husband, in the event of his surviving her; it also be-**[207]**-queathes 700l. (100l. each) to seven different charities; and 100l. each to the three executors, Mr. Ayrey, Mr. Pike, and Mr. Megginson; whom, lastly, it purports to appoint joint (substituted) residuary legatees. Such, in substance, are the contents of this will; (*a*)[2] it is written on five sheets of paper, each of which is signed (the fifth

(*a*)[1] The mother of the deceased had had two husbands—Hurman and Efford. The deceased was the son of the first husband; but chose to pass, and was usually known, by the name of the second.

(*a*)[2] The following is a correct abstract of the will, which it seems proper to state, for a reason that will appear in the sequel. Samuel Pike, 100l.—his four children—400l. 4 per cents.—Sidwell Pike, his daughter, two freeholds, Aldersgate Street; a leasehold, No. 8 Anderson's Buildings; ground rents of twenty houses, ditto; two copyholds at Plaistow—Orphan School; Boy's School, Bethnal Green; Brown's Charity School; Deaf and Dumb School; Hospital, Hyde Park Corner; ten, widows

being also sealed) by the testator; and it is likewise subscribed by three persons, as witnesses, the solicitor who drew it up, and two neighbouring tradesmen, merely called in to attest the formal act of execution. The personalty bequeathed by this will is stated to amount in value to about 500l. and the realty devised to between 5 and 10,000l.

This instrument, such as I have described it, is propounded by the executors, and is opposed by Lucy Hill, the testator's niece and only known relation; her alleged ground of opposition being, in a word, the asserted testator's incapacity. Her allegation, respon-[208]-sive to a condidit, pleads, generally, in the third article, that the deceased had long been subject to mental derangement, more particularly from about the middle of the year 1817; of which it furnishes a variety of (supposed) instances in the fifteen succeeding articles; summing up the whole by pleading in the nineteenth article that the deceased was not of testamentary capacity on the 25th of June, 1821, but that he was in the custody, and under the controul, of the executors (one or all) at that time, upon whose sole suggestion the will in question was, de facto, made and signed by the deceased. To this it is answered, on the part of the executors, that the deceased was never insane; for that he conducted himself rationally at all times, when not under the excitement produced by spirituous liquors, to the immoderate use of which, it may be stated, once for all, as an admitted fact in the cause, that the deceased had been addicted for a number of years.

Now this being, in substance, the case on both sides, it appears to me that the testimony of Mrs. Hill's own witnesses fails to make out a case of (proper) insanity or mental derangement. They speak to the deceased's extravagant conduct indeed, in a variety of instances; but they admit him, in at least by far the greater part of these, to have been intoxicated at the time; when it does seem that he not only talked wildly and incoherently, but that he acted, and conducted himself, in all respects, very like a madman. Even Fagg, the witness who deposes most strongly in this particular, concludes by stating the deceased, in her apprehension, "a mad drunken fool;" obviously connecting, as appears by this phrase, in her [209] view of the case, his supposed insanity with his admitted habits of gross intoxication. On the contrary, however, it is pleaded and proved that the deceased at no time was under any control as to the management of his person or property; that he received rents; made payments; transferred stock; drew drafts; settled accounts; bought and sold property; in a word, that he was perfectly sui juris to the last, with respect to the conduct both of himself and his affairs, in all particulars.

The testator's case then appears to the Court to be that of a person not (properly) insane or deranged; but to be that of a person addicted to a species of ebriety, which, during its subsistence, frequently produces, and is proved, in the present instance, to have actually produced, upon the subject of it, effects very similar to those which insanity, or mental derangement (properly so called) would or might have occasioned. In other words, the deceased appears to the Court, not in the light of a madman, but in that of a person habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted, in most respects, very like a madman.

Now, viewed as with reference to the point at issue, the cases in question, notwithstanding their apparent similarity, are subject, in my judgment, to very different considerations. Where actual (proper) insanity is proved to have once shewn itself, either perfect recovery, or, at least, a lucid interval at the time of the making, must be clearly proved to entitle any alleged testamentary instrument to be pronounced for as a valid will. Either of these, however, the last especially, is highly difficult of proof, for the following [210] reason. Insanity will often be, though latent: so that a person may, in effect, be completely mad or insane, however, on some subjects, and in some parts of his conduct apparently rational. But the effects of drunkenness or ebriety only subsist, whilst the cause, the excitement, visibly lasts: there can scarcely

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at Orsett; ditto at Plaistow, 100l. each—Lucy Hill (the deceased's niece) a real estate called "Squirrel's Heath Farm," and other real estates for life; at her death to be sold, and out of the proceeds, 500l. to William Hill, her husband—Lucy Hill residue, for life—Samuel Pike, John Ayrey, and J. M. Megginson, substituted residuary legatees and executors, with legacies (the two latter) of 100l. each. The residue (real and personal) was estimated, in the argument, at 7 or 8000l.

be such a thing as latent ebriety: so that the case of a person in a state of incapacity from mere drunkenness or ebriety, and yet capable, to all outward appearance, can hardly be supposed. Consequently, in the last, which, in my judgment, is this description of case, all which requires to be shewn is the absence of the excitement at the time of the act done; at least, the absence of the excitement in any such degree as would vitiate the act done; for I suppose it will readily be conceded that, under a mere slight degree of that excitement the memory and understanding may be, in substance, as correct as in the total absence of any exciting cause. Whether, where the excitement in some degree is proved to have actually subsisted at the time of the act done, it did or did not subsist in the requisite degree to vitiate the act done, must depend, in each case, upon a due consideration of all the circumstances of that case itself in particular; it belonging to a description of cases that admits of no more definite rule, applicable to the determination of them, than the one now suggested, that I am aware of.

In this view of the question before the Court, it must be obvious that the result will depend upon the deceased's state and condition at the time (to be collected, principally, from what passed at the time) of his giving instructions for, and signing, the instrument now propounded as and for his last will. But **[211]** previous to considering this it may not be improper that the Court should briefly notice one or two outlying circumstances.

And here, in the first place, I am bound to observe that the dispositive part of this will has, to my judgment, nothing very alarming in point of probability. The deceased, in early life, had been for many years in the service of a Mr. Holker (the uncle of Mr. Megginson), an attorney, who left him an annuity by will, which the deceased constantly received at Mr. Megginson's office. Hence he appears to have considered himself connected, in a manner, with Mr. Megginson; and it is in proof that he frequently spoke of his regard for him, and his intention to benefit him at his death. The bequest, then, to Mr. Megginson is one by no means improbable. Again, as to Pike and his family, the wife of the deceased died in February, 1820. During her life the deceased had resided at Bethnal Green—he was much affected by her death, and took, upon that event in particular, to a course of excessive drinking, which led to the commission of many of those acts of extravagance deposed to by the witnesses upon the niece's allegation. Soon after his wife's death (in the Spring of 1820) he went to lodge with Pike (whom he had previously known) at Anderson's Buildings, in the City Road, and became from that time much attached to, and fond of, his children. It is charged that the deceased, while at Pike's, drank spirits to excess, and that Pike and his children, the latter especially, encouraged him in that pernicious habit; but this, admitting it to have been true, was a circumstance not likely to abate his fondness for them; though itself, most undoubtedly, very **[212]** highly reprehensible. In March, 1821, the deceased bought a house, and went to reside, at Dalby Terrace (also in the City Road); and was accompanied by Pike and his family; who remained, however, at Dalby Terrace about three weeks only, or till about the middle of April. But the deceased himself soon became dissatisfied with his purchase; and removed back to Pike's, in Anderson's Buildings, in the following June; a few days prior to the date of the present will. Under the circumstances the disposition, so far as it benefits Pike and his family, is not by any means very unlikely. Even Mr. John Ayrey, the third executor, had been well known to the deceased from the year 1817—and I think that there are sufficient vestiges in the evidence of mutual kindnesses between the parties to relieve the testamentary benefit derived even to this executor, though, of the three, the one least connected with the deceased, from any charge of high improbability. The deceased had intrusted him with some charitable donations—and it appears that Mr. John Ayrey was also executor of a former will, executed by the deceased, about six months before his death.

But how, again, was the deceased situated with regard to his family? for this is a circumstance by no means immaterial in estimating the probability, or the improbability, of this will, in the dispositive part of it. The deceased left one niece, the posthumous child of a brother by the half-blood, his sole next of kin, and only known relation. She at that time, was forty years of age; and, though twice married, had never had a child. Now, the will in question is scarcely inofficious with regard to this niece: it bequeathes her a very considerable portion of the property for life; she

[213] is the general residuary legatee for life: her husband, too, though pleaded and proved to have been no favourite of the deceased, has a legacy of 500l. in the event of his surviving her. The probability of the niece ever having any child or children was too remote a one to be much contemplated: so that the will's containing no provision for that event, but substituting other residuary legatees, strangers to the testator in blood, after her decease, is a circumstance, again, not at all extraordinary.

Lastly, of two at least of the three executors and substituted residuary legatees, the will now propounded is not the deceased's first testamentary disposition in favor. Annexed to Mr. Megginson's affidavit of scripts is the draft of a will prepared by a person named Durant, and executed by the deceased on the 21st of March, 1821: but the original of which does not appear. Now from the contents of this draft it appears that the will of March, 1821, was a will equally if not more in favour of Pike's family than that now propounded; and Mr. John Ayrey is an executor of this will, with a legacy of 100l. Between that time and the 25th of June it is deposed by Combes (an adverse witness) that he, at the deceased's request, drew up a third (intermediate) will from his dictation, which the deceased afterwards indeed refused to execute; although it was probably upon the occasion of his dictating this will that he destroyed the former will made by Durant. Of the contents of the will so prepared by Combes there is no account—but the testimony of Combes (an adverse witness) on this part of the case is express to the capacity of the deceased at that time and to his intention to die testate; in which respects it is not immaterial.

[214] The only direct evidence as to the factum of the will now propounded (independent of that of the two other subscribed witnesses, who merely speak to the formal act of execution) is to be found the deposition of Mr. Singleton, a subscribed witness, being also the solicitor who prepared or drew it up. The following is a brief abstract of the course of the transaction as represented in the evidence of this witness.

On the morning of the 25th of June (1821) the witness attends the deceased, of whom he had previously no knowledge, in order to make his will, at the instance of, and in company with, Mr. John Ayrey, party in the cause, whom he had known well for the last four years. Ayrey says the deceased had told him to "bring his own attorney." On arriving at Anderson's Buildings they are shewn up to the deceased, who is ill in bed. The witness, after certain preliminaries which need not be stated, is accommodated with a chair close to his bed side, near the pillow; and Mr. John Ayrey continuing in the room all the time, gives the deceased to understand upon this, that he is ready to take instructions for his will. The deceased says, "I, Peter Efford, being of sound and disposing mind," but, stopping himself, adds, "You know what to say as well as I do." The witness proceeds accordingly, without farther dictation, to write the introductory part of the will; intimating to the deceased when it is that he arrives at the dispositive part or the first bequest. The deceased then furnishes instructions, agreeably to which the witness reduces into writing the paper now propounded. The witness in some instances is obliged to make the deceased repeat his words from his inarticulate manner of speaking—in some instances names are spelt **[215]** by the deceased, the witness not knowing how to write them—and the Christian name of one of Pike's children is ascertained and communicated to the witness by Ayrey, the deceased himself not recollecting it. When the witness arrives at the residuary clause, the deceased desires that the residue shall be given to certain charities to which he had bequeathed specific legacies in the former part of the will—but on the witness telling him that real estate, part of the residue, is incapable of passing by will to charities, he says, after pausing for about a minute, as if reflecting how he shall dispose of it, "Give the residue (meaning, as the witness deposes, the residue of his property generally) to the executors." The witness then proceeds with and finishes the paper, which being done, it is audibly and distinctly read over to the deceased by the witness, who explains to him the purport and effect of certain parts of it, and the deceased says that it is "all right." It is then executed and published with the usual formalities in the presence of the witness and of two neighbouring tradesmen, who are called in to attest, and who, together with the witness, Mr. Singleton, actually do attest, the execution—Ayrey being also present, but of course not a subscribing witness. The witness then tells the deceased that "he shall get the will done in a more formal and regular manner and be with him again in a day or two;" but he deposes that he "can't recollect what the deceased answers, he, the deceased, being a good deal exhausted." The witness upon this retires, keeping possession of the will. I shall have occasion to

notice in the sequel all which occurs subsequently between the deceased and this [216] witness that has any bearing, real or supposed, upon the validity of this will—as also to observe upon one or two other facts disclosed and opinions expressed by him in the course of his examination.

This in substance is the testimony of the only direct material witness to the immediate factum of this instrument. It is obviously, I think, satisfactory—provided it be such as, in connection with the res gesta and the face and appearance of the instrument itself, ought to satisfy the Court as to the deceased's free agency and capacity (the contested points) at and during the particular period of time to which it relates.

And first, as to free agency, the res gesta as disclosed upon the face of this evidence suggests nothing to my mind even of undue influence, much less of actual control. There is no appearance of conspiracy. One of the executors, Mr. Megginson, is in no degree implicated in, nor was even privy to, the transaction: and even Pike, the second executor, and with his family, principally benefited under it, and at whose house it was executed (being also, however, it is to be observed, the deceased's own then residence), takes no part whatever in the actual making of the will. Ayrey, the third executor, is present indeed, but does not actively interfere—and although the witness, Mr. Singleton, was his solicitor and not that of the deceased, there is little to excite suspicion in the circumstance of the deceased choosing to employ his friend's solicitor upon this occasion in preference to his own; especially it being considered that in the instance of neither of the two former wills prepared, the one by Durant and the other by Combes, Mr. [217] Megginson's assistance had been or apparently was intended to be invoked. Lastly, the solicitor is not introduced to the deceased with a will ready prepared merely in order to obtain a formal execution—he is introduced to receive, and actually does receive, instructions for a testamentary disposition of his property from the deceased himself—and when, added to all this, it is considered that the benefit at first intended to the executors was but slight and compensatory for the trouble imposed upon them, and that instructions for making them the substituted residuary legatees were only furnished upon the deceased's being apprized that real estate, part, and the very principal part, of the residue would not pass to charities, I do think that the res gesta disclosed upon this evidence is such as to negative the charge that has been set up of fraud and conspiracy—and to evince the testator's free agency in the proper legal sense of that term (if of sufficient capacity) at the time of the transaction.

And here, with respect, secondly, to the deceased's testamentary capacity at that time (his general state and condition being, in my judgment, that which I have already described), it is surely not immaterial that the Court should advert to the time of day at which this transaction takes place. This transaction does not take place in the evening when the deceased's habits were likely to be in operation (a circumstance this, again, which tends to negative the charge of fraud and conspiracy in the parties to the transaction), but at eleven or twelve o'clock at noon; when, if ever, it is to be presumed that the deceased was, and it was probable à priori that he would be, free almost or altogether from the [218] effects of intoxication. Now this being so in the first place, does the instrument itself, upon the face of it, tally with, and by consequence sustain, the account given by the witness of the manner and mode in which it was drawn up and prepared? and, 2dly, how does it bear upon the stringent question, that of the deceased's testamentary capacity at the time?

The will is written, as I have already said, on five sheets of paper; it has no appearance of a paper taken as instructions merely and subsequently converted into a will by a provisional or precautionary execution. Does this, then, falsify Mr. Singleton's account of the transaction? By no means. He had said that he was ready to "take instructions," &c.—but the deceased immediately commences with, "I, Peter Efford, being of sound and disposing mind," &c.—clearly indicating his intention not merely to furnish instructions, but to dictate a final will. Consequently the formal shape of the paper is perfectly consistent with the witness's account of the manner in which it was prepared; and although, upon the face of it, it exhibits a fairer appearance (I mean, is written with fewer alterations and erasures, for some there are) than an instrument of this length, written at once without any previous draft, would ordinarily exhibit; yet still I can easily conceive that an experienced solicitor, verging upon forty years of age, might well draw up such an instrument at once, if the instruc-

tions were clearly conveyed; which it is likely that they were, in this instance, from that knowledge of testamentary forms for which the deceased was indebted to his employment for several years in an attorney's office; and from the circumstance of two prior wills then lately prepared: so that the disposition, **[219]** in point of general outline, may be presumed to have been fresh in his mind. In the instance of the will prepared by Combes, he speaks of it as a will drawn up precisely as the instrument now propounded is deposed to have been, namely, from the deceased's "dictation." It must be admitted, however, that this appearance of the instrument does at first seem a little incongruous with the mode deposed to by the witness of its actual preparation; and it was a circumstance, this, to which the Court directed the attention of the counsel for the next of kin, in order to have the benefit of their observations upon it in the course of the argument. The difficulty is, however, I think, sufficiently removed by those considerations suggested, in the first instance, by the counsel for the executors, and now upon deliberation adopted by the Court, which have just been applied to it.

How, then, lastly—assuming (partly at least) for the present the credibility of Singleton's narrative of the mode in which it was prepared—how does the face and appearance of the testamentary paper propounded bear upon the question of the testator's alleged testamentary capacity? Upon that head it is, I think, nearly conclusive. It is as complete a testamentary disposition of property as can well be conceived: it disposes of various properties—it bequeathes various legacies, and to various legatees—all these are minutely and circumstantially set forth—no error is suggested even as to any one of these particulars.(*a*) It is quite impossible for the Court to pronounce that the person dictating such an instrument as this, in the **[220]** manner in which it was dictated by this testator (if the witness, Mr. Singleton, is to be believed), was, as it has been contended, non compos mentis or destitute, in any sense of the phrase, of testamentary capacity.

The sole remaining question then (one already indeed partly disposed of) is, ought the Court in this case to withhold its credence from Mr. Singleton's testimony? Now this witness is not only a person of unimpeached character, and sustained in his account of this transaction in substance, as I have already said, by the appearance of the paper itself, and by the testimony, so far as it goes, of the other subscribed witnesses; but he deposes in one, and that one the most material, particular with an apparent openness and candour which renders it imperative on the Court, in my judgment, to answer that question in the affirmative. He says, upon his examination, not only that the deceased spoke so inarticulately as to make a repetition of his questions necessary, but that in a few instances Mr. John Ayrey does interfere to suggest what it is that the deceased said; that Mr. John Ayrey did, on one occasion of the deceased's speaking inarticulately in the course of giving his instructions, say, "I think he is tipsy," or "I think he is drunk." And that he, the witness, "thought that the deceased was then, to a certain extent, affected by drinking spirituous liquors;" that while the witness so took the instructions, the deceased calling for drink, a tumbler of rum and water was brought, which he sipt occasionally, though the witness adds, "he observed no alteration in him in consequence of what he so drank." Lastly, this witness, though he speaks to his belief of the deceased's testamentary capacity at the time, disclaims the ability of **[221]** forming any absolute opinion "how far he was at that time fully capable of giving instructions for, and making and executing, his last will and testament; or of doing any other act of that or the like nature requiring thought, judgment, and reflection." The Court has already arrived at its own conclusion, that he was so capable at the time, to the extent at least of entitling this instrument to probate—a conclusion not to be shaken or disturbed by this witness's qualified opinion as to his possible incapacity at that time, though a startling feature in the case, and fairly open as such to those observations which have been made upon it by the counsel for the next of kin. Meantime this, with the rest appearing, too, as it does in the examination in chief, and not merely drawn out by interrogatories, is clearly indicative of the witness's fairness and candour, and justifies the confidence reposed by the Court in his representation of facts—facts themselves again which, being credited, seem, in connection with the rest of the case, fully to warrant that conclusion at which the Court thinks that it is bound to arrive.

(*a*) Vide note (*a*), page 207, ante.

Having pursued the inquiry thus far, the Court is not compelled to travel in detail through the evidence as to what subsequently took place. The following is an outline of this. Singleton tells the deceased that "he shall get the will done in a more formal and regular manner, and be with him again in a day or two." What the deceased then said he cannot recollect; but he is neither proved to have given, nor is it probable that he did give, directions for any further instrument. The deceased was, he says, and might well be much exhausted; this transaction having occupied from eleven or twelve o'clock **[222]** till three in the afternoon. The witness, however, on the same day (the 25th of June) proceeds with the will to a conveyancer's, who returns it, together with a draft will, on the 28th; with which draft will Singleton waits upon the deceased on the same day. The deceased suggests alterations in this draft will on that day and further alterations on the following day, the 29th of June, which, being inserted, a will is engrossed for execution, and is produced to the deceased in that state, on Sunday the 1st of July. The deceased kept that engrossed copy but postponed the execution, and died without any further act done on the 5th of August. But these subsequent unfinished acts, in my judgment, are of no avail to defeat the regularly executed will. The execution of the will of the 25th of June was not a provisional execution, so far as the deceased was concerned, but a final execution—this was Singleton's notion, obviously not that of the deceased. Again, what passed subsequently seems to have all arisen from Singleton's distrust of the correctness of that will, as having been reduced into writing at once, without any previous draft; and does not appear to have been sanctioned by, or to have proceeded from, any instructions or directions of, the deceased himself.

Nor will the disposal of the residue having proceeded, in part at least, under a possible mistake materially bear upon the question. Being told by Singleton that his real property would not pass to charities, he says, "Give the residue (real as well as personal) to the executors." Why, it is said, was not the personalty given to charities? This bequest over of the residue to the executors, so far as personalty is **[223]** concerned, might (it has been argued must) have been founded on mistake or misconception. But such possible mistake is surely of no avail to defeat the will; nor is the Court either disposed or authorized to apply so subtle a test to the trial of its validity. The mistake, at all events admitting it to be, is not of a nature to affect the niece. Her interest, at least in the residue, either real or personal, the deceased never meant to extend beyond her own life. Meantime the residuary clause having been drawn up in exact conformity with the deceased's own directions, and the will when finished having been read over to the deceased, and then executed and attested in the mode that I have described, the Court, in my judgment, can go no further. It appears to me to be the will of a free and capable testator; and, as such, I pronounce for it.

DAVIS *v.* DAVIS AND DAVIS. Prerogative Court, Trinity Term, 1st Session, 1824.—Substance of a codicil pronounced for, in the absence of the instrument itself, upon satisfactory proof, 1st, that it was duly made; and, 2dly, that (even if cancelled) it was not revoked by the testator.

[Referred to, *Colvin* v. *Fraser*, 1829, 2 Hagg. Ecc. 292.]

This was a business of propounding and proving by witnesses, in solemn form of law, a second codicil to the last will and testament of Edmund Thorp Luff, late of Berkley Place, in the parish of Clifton, in the county of Gloucester, Esq., the party in the cause, deceased, which second codicil was alleged to have been] lost, or unintentionally destroyed, but the substance of which was contained, as alleged, in a certain affidavit as to scripts sworn to by Henry Davis and Maria Davis (the wife of the said Henry Davis); promoted by Richard Hart Davis, Esq., one of the executors named in the said will (praying probate of **[224]** the will and first codicil thereto), against the said Henry Davis, the other executor named in the will; and also against Maria Davis (wife of the said Henry Davis), the residuary legatee named in the said alleged second codicil.

His majesty's proctor had intervened in the cause on behalf of the Crown; as, in the event of the codicil propounded not being pronounced for, the deceased was dead intestate, as to the residue of his property, and he was expressly alleged to have died without any known relation.

The circumstances of this case (which will be found detailed in the judgment) were

pleaded in an allegation given in by the parties who propounded the codicil: and all the principal facts in the allegation, so far as the respondent's knowledge went, were admitted in the answers of the other party.

Judgment—Sir John Nicholl. There can be no doubt that the contents or substance of a testamentary instrument may be established, though the instrument itself cannot be produced upon satisfactory proof being given that the instrument was duly made by the testator, and was not revoked by him: for example, either by shewing that the instrument existed after the testator's death; or that it was destroyed in his lifetime without his privity or consent. Many cases of the sort have been decided.

In the present case the party deceased, Mr. Luff, died in May, 1823, a widower, without any known relation, at the very advanced age of eighty-five, leaving behind him property to the amount of about 4000l. He duly executed a will in May, 1818, thereby **[225]** leaving several legacies to charities, amounting together to about 2000l. He left also 50l. to each of his executors, Mr. Henry Davis, and Mr. Richard Hart Davis: but the will declared that the residue was to be disposed of "by any paper signed by him which was to be a codicil thereto." In December, 1822, the deceased made a codicil, giving two legacies of 50l. each to Burton and his wife (the persons at whose house he lodged) and 10l. to each of the children of those persons, but still not disposing of the residue.

It is pleaded that the deceased had a very great affection for Mr. Henry Davis and his wife; and that in the beginning of April, 1823, he gave Mr. Henry Davis instructions for a codicil, bequeathing the residue of his property, undisposed of by his will, to Mrs. Henry Davis; that a codicil was to that effect prepared and duly executed, the substance of which is set forth in Mr. H. Davis's affidavit of scripts; (*a*) that, after the execution, the deceased declared he should "never alter it;" and that the codicil was then folded up and put in a small box which stood in the deceased's room, in which he kept some papers and various other articles.

Now the evidence, especially that of Fisher and Harris, the alleged subscribed witnesses, fully establishes that the deceased executed a codicil on this evening in April, as pleaded; and I see no reason to doubt that the contents of this codicil were as set forth in the affidavit. The deceased had no known relations whatever: his wife and his only son were **[226]** dead: he had no intimate acquaintances or connections except Mr. and Mrs. Davis; they were constantly treating the deceased with the utmost attention and kindness, and the deceased was as constantly expressing his gratitude towards them. There was no other person, therefore, in whose favor it was at all likely he should now bequeath the residue of his property, the disposal of which, by codicil, he had expressly reserved to himself in his will: he had already bequeathed about 2000l. in charities, to the several objects of his benevolence, at Bristol; and he had already, in the preceding December, made a separate codicil in favor of the persons in whose house he lodged. All his declarations to the Burtons and others are fully confirmatory of his alleged intention to give the residue of his property to Mrs. Davis; and the daughter, Mary Ann Burton, indulging a little of that curiosity which is commonly attributed to her sex, actually perused a codicil to that effect, upon one day finding the deceased's "trunk" open; and she deposes to the substance of its contents.(*a*) The tenor therefore of the codicil is proved by the probability of the disposition, by the declaration of the testator, and by a witness who actually read it.

But the instrument is not found upon the death of the testator; and as it was left in his own possession, the legal presumption is that he himself destroyed it, animo revocandi. This presumption, however, may be repelled by evidence; nor does it require evidence amounting to positive certainty, but only such as reasonably produces moral conviction.

[227] The whole conduct of the deceased, and his declarations down to the very evening of his death, render it most highly improbable that he should have revoked this codicil. Those declarations, having been detailed from the evidence by the counsel, need not be again stated by the Court. The codicil is proved by Mary Ann Burton to have been in the trunk already mentioned. It is also proved that the deceased was a great smoker, and frequently took papers out of this trunk for the purpose of lighting his pipe: he was a very old man: and it is in no degree improbable

(*a*) Vide note subjoined to the case.

that he may have taken the codicil out by mistake, and used it for that purpose. This is infinitely less improbable than that he should have destroyed the codicil with the intention of revoking it.

It also appears that the trunk was sometimes left open: that it was the receptacle of all sorts of things; and was accessible to other persons in the house. The codicil therefore might have been taken out, accidentally, or otherwise, neither by, nor with the privity of, the deceased. Upon the whole I feel morally convinced by the evidence produced, first, that the deceased duly executed a codicil to the effect alleged: and, secondly, that it was not revoked by himself; and therefore it is the duty of the Court to pronounce for its validity, as propounded. The probate must pass in the usual form, namely, "till the original, or a more authentic copy, be brought in," for it is still not physically impossible that the original may be in existence.*_*

_ The alleged codicil, as stated in the affidavit of scripts, was as follows:—

"I, Edmund Thorp Luff, do hereby make this a codicil to my last will and testament: and do give and bequeath to Maria [228] Davis, wife of Henry Davis, of Berkley Square, in the city of Bristol, solicitor, all the rest, residue, and remainder of my monies, chattels, and estate, to and for her own use and benefit, for her very great kindness and attention to me during my long illness. And I do hereby ratify and confirm my will in all respects, save as the same is hereby altered.

"Witness my hand, this day of April, 1823. "E. T. Luff.

"Signed, published, and declared, by the said E. T. Luff, as and for a codicil to his last will and testament in the presence of us Jane Harris, James Fisher."

Mary Ann Burton, daughter of Mr. and Mrs. Burton, in whose house the deceased lodged, deposed, on the seventh article of the allegation propounding the codicil, in part, as follows:—

"The deceased had a little box in his room, covered with leather, and very old, in which he used to keep a variety of things, but principally letters, scraps of poetry of his own making, and notes of sermons by different ministers; both which last he was in the habit of taking occasionally out of the said box, the key of which he kept in his waistcoat pocket, and reading to the deponent: once or twice the deponent has known the box to be left open, when the deceased had been reading, and had gone to lay down on the bed; and, on one occasion of this sort, happening about ten days or a fortnight before his death, she, the deponent, whilst lingering in the room, took up some of the papers so kept in the said box, and read them: the first was a piece of poetry that she had seen and read before—the second was folded up as a letter, but with no writing or direction on the outside, and not sealed, and so she opened and read it—it was, she verily believes, the codicil to the deceased's will. It was, as near as she can recollect, for she read it but once, in the following words:—'I, Edmund Thorp Luff, give and bequeath to Maria Davis, wife of Henry Davis, my whole and sole estate and effects, for her kind attentions to me during my illness.' This she knows was the substance, though she will not undertake to swear that she has given the words correctly. It was signed by the deceased and witnessed by Mr. Fisher and Mrs. Harris. When deponent had read it, she was sensible she had done wrong, and thought that the deceased might have seen her, and she immediately replaced the [229] said paper, and the others, in the box as she had found them; and came down stairs, without the deceased being conscious of what had happened."

The Court observed in conclusion—"It has been usual, on similar occasions with the present, for the Court to pronounce for the instrument as contained in the deposition or depositions of some witness or witnesses." But since in the present case there can be no question that the contents of the instrument are set forth at once more correctly and less to the benefit of the parties who propound it, in the affidavit of scripts made by those very parties, than in the deposition of the witness Burton, I have no difficulty on the present occasion in acceding to the prayer of the parties, though out of the usual course, by pronouncing as above for this codicil "as contained in the affidavit of scripts."

His majesty's proctor prayed that the costs of his appearance as such might be paid out of the estate. In objection it was said that the "Crown neither took nor paid costs," but

Per Curiam. That rule is not, I think, applicable to an appearance given by the Court under the present circumstances, and I direct the costs of that appearance to be paid out of the estate.

MEDLYCOTT *v.* ASSHETON. Prerogative Court, Trinity Term, 7th July, 1824.—The ordinary presumption that a codicil to a will is revoked by the revocation of that will, held not to be sufficiently rebutted by circumstances shewing a different intention, and the testatrix consequently pronounced to be dead intestate.

[Referred to, *Black* v. *Jobling*, 1869, L. R. 1 P. & D. 687.]

This was a question as to the validity of a codicil found uncancelled among the papers of the deceased. Her will had been cancelled in her lifetime; unquestionably by order of the deceased.

Judgment—Sir John Nicholl. The testatrix in this cause, Miss Catherine Cockayne, died in March, 1824, at the house of her relation Mr. Maunsell, where she had been previously resident two or three months. The deceased was possessed of personal property to the amount of above 2000l. and was entitled to a ninth share of some real [230] property. She left behind her the honorable Barbara Cockayne Medlycott, widow, her mother, and eight sisters, the parties entitled in distribution in case she is dead intestate.

In April, 1820, the deceased executed a will, which she deposited for safe custody in the hands of a Mr. Smith, described as the steward of the family. In December, 1820, she wrote a codicil, giving 100l. each to the two "trustees" named in her will, and dividing some trinkets among her family. In the month of January last (1824) she looked over the papers in her writing-desk, several of which she burnt (it is to be presumed) as useless; and a few days afterwards wrote to Mr. Smith desiring him to destroy her will. This is admitted not to have been done with the intention of making a new will; for she neither expressed, nor is there reason to suppose she entertained, any such intention. Mr. Smith, upon receiving the letter, shewed the envelope containing the will, with the seal unbroken, to a third person; and immediately in his presence put the will into the fire unopened, where it was burnt, and wrote to inform the deceased that he had obeyed her directions. Upon the death of the deceased, Mr. Smith's letter is found in her writing-desk, the uppermost paper; and lower down, in the same desk, among other papers, the codicil of December, 1820, is also found uncancelled. These are the facts of the case: and the Court is to decide whether this codicil is valid or whether it is revoked.

A codicil is primâ facie dependant on the will; and the cancellation of the will is an implied revocation of the codicil. But there have been cases where the codicil has appeared so independant of and uncon-[231]-nected with the will that, under circumstances, the codicil has been established, though the will has been held invalid. It is a question altogether of intention. Consequently the legal presumption in this case may be repelled, namely, by shewing that the testatrix intended the codicil to operate, notwithstanding the revocation of the will. In my judgment, however, the circumstances of this case are not sufficient to establish such an intention in order to repel the legal presumption. The codicil in this case appears connected with the will; for the principal legatees in the codicil are "her two trustees" being such under the will; and the will being revoked, they no longer retain that character. Even the distribution of the trinkets made by the codicil might be influenced by the disposition contained in the will.

It seems probable that the deceased last saw the codicil when she put her desk in order and burnt some of her papers: but that was done before she sent directions to have her will destroyed. And even if she had then determined to cancel it, she might not choose actually to destroy the codicil till she knew her directions to Mr. Smith had been carried into effect. Afterwards, when she received Mr. Smith's letter, which she deposited at the top of her desk, she either might not think of the codicil or might not deem it necessary to destroy it; under the more common idea that a codicil is dependant on a will. Under these considerations I am of opinion that, the legal presumption of the codicil being revoked by the cancellation of the will, is not sufficiently repelled by circumstances shewing a different intention in the testatrix, and consequently that she must be pronounced to be dead intestate.

[232] IN THE GOODS OF MARY RADNALL, Spinster, Deceased. Prerogative Court, Trinity Term, 4th Session, 1824.—When a sole next of kin refuses to take administration, the Court, on cause shewn, will decree letters ad colligendum bona defuncti, limited according to the special circumstances of the case.

(On motion.)

Mary Radnall, of Bewdley, in the county of Worcester, the party deceased in this

cause or business, died in September, 1823, a spinster, without parent and intestate, leaving behind her Francis Radnall, her natural and lawful brother and only next of kin and the sole person entitled to her personal estate and effects. The deceased's property, consisting principally of money due to her on mortgage and by bond, leasehold estates, cash at her bankers, &c. amounted to about 3700*l*. The deceased was also entitled to an undivided moiety of certain leasehold property in Bewdley, as also of some freehold property, of which she, the deceased, and her brother, Francis Radnall, were tenants in common. She died without leaving any other than a few trifling debts, which were immediately discharged by her brother, Francis Radnall, out of his own property.

Subsequent to the deceased's death, various applications had been made to Francis Radnall by Robert Pardoe, who had been agent for the said deceased during her life, and still was agent to the said Francis Radnall, relative to his taking out administration of the deceased's effects; but the said Francis Radnall (on being informed that in case of an administration an oath must be taken faithfully to administer the effects, and as to the value thereof) positively declined, either himself to take the said letters of administration, or to take any step whatever for enabling any **[233]** other person so to do, on the score of all oath-taking being contrary and repugnant to his religious opinions.

Mr. Pardoe and his partner Mr. Nicholas were also agents and solicitors to the executrix of Henry Lancellot Lee, Esq., deceased, whilst living indebted to the deceased, on bond, in the sum of 500*l*.; Mr. Pardoe being also a trustee under his will for the sale of his estates for payment of his debts. Those estates had been sold accordingly: the money was now ready for payment of the said sum of 500*l*. so due on bond to the deceased's estate; and inconvenience and loss were accruing to the estate of the said Henry Lancellot Lee, in consequence of there being no person legally authorized to receive, and give a discharge for, the same: nor could he, Mr. Pardoe, for the same reason, though willing and desirous so to do, settle his accounts with the estate of the deceased, and obtain a proper discharge for the balance thereof.

The above facts being duly verified by the affidavit of Mr. Pardoe, the Court, on motion of counsel, was pleased to direct a citation to issue, calling on the said Francis Radnall to accept or refuse the letters of administration of all and singular the goods, chattels and credits of the said deceased: otherwise, to shew cause why the same should not be committed and granted to the said Robert Pardoe, limited to "the collection of all the personal property of the said deceased; and giving discharges for all the debts which might have been due to her estate on payment of the same; and doing what further might be necessary for the preservation of the property aforesaid:" and to "the safe keeping of the same, to abide the directions of the Court."

[234] GALE *v.* LUTTRELL AND OTHERS. Prerogative Court, Trinity Term, 4th Session, 1824.—The executors of a deceased executor, though not the personal representatives of the original testator (there being an executor of the original testator still surviving), are compellable to bring in an inventory of the effects of the original testator.—The Court will compel an executor to bring in an inventory &c. at the suit of a creditor by bond of the testator, notwithstanding its alleged invalidity, and a suit as to this actually commenced, and then depending, at common law.

(On petition.)

John Fownes Luttrell, late of Dunster Castle in the county of Somerset, and of Northway, in the county of Devon, was the party deceased. He made his will and appointed four executors, two of whom only, John Fownes Luttrell and Francis Fownes Luttrell, took probate of the will, namely, in May, 1816; of these Francis Fownes Luttrell was since dead, having made his will, and thereof appointed Henry Fownes Luttrell and Frederick Moysey, Esquires, executors, who took probate of the said will of Francis Fownes Luttrell in May, 1823.

In Michaelmas Term, 1823, a decree issued, citing John Fownes Luttrell, Henry Fownes Luttrell, and Frederick Moysey, Esquires, to exhibit an inventory of the effects of John Fownes Luttrell (the original testator, and an account of their administration thereof) at the suit of Mary Gale, administratrix (with the will annexed) of William Hawkes, whilst living, a creditor of the said original testator.

An appearance was given to this citation under protest as to Henry Fownes

Luttrell, and Frederick Moysey; and the Court was prayed to pronounce for that protest, on the ground that, there being still living an executor of the original testator who had proved his will, they, the said Henry Fownes Luttrell and Frederick Moysey, though the executors of a deceased executor, were not the personal representatives of the said original testator, and consequently, were unduly cited to **[235]** render an inventory and account of his effects. As to the surviving executor, Mr. John Fownes Luttrell, it was prayed that, under the circumstances stated in an act of Court into which the protest was extended, the Court would further, in its discretion, decline, assigning him to bring in the inventory and account called for; until a question stated to be then depending in the Court of King's Bench as to the validity of a bond, under which the party at whose suit the citation had issued, claimed to be a creditor of the deceased, should have been determined in the affirmative, by that Court.

This act of Court, or extended protest, was replied to on the part of Gale, the creditor, to the effect stated in the judgment, and the cause after argument by counsel now stood for sentence.

Judgment—Sir John Nicholl. Gale, as a creditor of John Luttrell, deceased, has cited his son John Luttrell, his surviving executor, and Henry Luttrell and Frederick Moysey, the executors of Francis Luttrell, another of his executors since deceased, to exhibit an inventory: an appearance for the parties cited has been given under protest: and in the act on petition extending the protest it is stated that the validity of the bond, under which Gale claims to be a creditor, is controverted in an action brought in a Court of common law; and, further, that the executors of the deceased executor are not bound to exhibit an inventory, there being a surviving executor.

To this it is replied that Francis, the deceased executor, received a considerable portion of the testator's effects; that both executors had recognized the bond **[236]** after the death of the testator: and that in the action brought against John, the surviving executor, he had pleaded "plene administravit." The Court is now to decide whether the parties cited are bound to exhibit an inventory.

An inventory is due from an executor or administrator almost as matter of course, at the prayer of any person having the appearance of an interest: though, in modern practice, inventories are not required to be exhibited without being so called for.

In respect to the party calling for the inventory in this case, here is an asserted creditor by bond: this Court will not enter into the validity of the bond: it is sufficient that such a claim is put in suit against the executor. And as the executor has pleaded "plene administravit," it furnishes the strongest reason to entitle the creditor, before he proceeds farther in trying the validity of the bond, to ascertain by the production of an inventory whether the deceased left assets to answer his demand. The surviving executor is therefore cited by a party having an apparent interest sufficient to entitle him to call for an inventory.

In respect to the executors of the deceased executor, Francis Luttrell, though they are not the representatives of the first testator, there being a surviving executor, yet, being called upon as representing another executor who took probate, and who is stated to have got possession of a considerable part of the deceased's effects, the creditor has an interest sufficient to entitle him to call upon them also for an inventory: since, without a disclosure from them of such parts of the first testator's property as came to the possession of the deceased executor, Francis, the creditor, is still without **[237]** means of finally ascertaining what assets his debtor has left; as those assets may be unknown to the surviving executor.

Protest over-ruled—John Fownes Luttrell assigned to bring in an inventory, and Henry Fownes Luttrell and Frederick Moysey assigned to appear absolutely—and question as to costs reserved.

PAUL *v.* NETTLEFOLD. Prerogative Court, Trinity Term, By-day, 1824.—An executor (at least one who has a special interest) may call upon his co-executor for an inventory.

Judgment—Sir John Nicholl. In this case an inventory is called for, from an executor, by a co-executor, but who is also sole residuary legatee.

It is objected to, on the ground that "an executor cannot sue his co-executor"—but the rule does not apply. The party calling for an inventory in this case does not call for it as co-executor, but in the character of residuary legatee. Those characters are quite distinct: so much so, that a person who possesses both, and

wishes to decline being the representative of the testator, must renounce, as well the probate, in the character of executor, as the administration, with the will annexed, in the character of residuary legatee. As residuary legatee the party has the greatest interest in ascertaining what effects the testator left behind him; the whole of which effects may have got into the hands of the co-executor, without the knowledge or privity of the residuary legatee. I therefore see no ground in principle, nor has any [238] authority (indeed quite the contrary) (*a*) been produced, by which a residuary legatee, though also [239] possessing the character of executor, is deprived of the right of calling upon the other executor for an inventory, and consequently I over-rule this objection.

Objection over-ruled, and an inventory ordered.

GREENOUGH *v.* MARTIN. Prerogative Court, Trinity Term, By-Day, 1824.—A will and codicil pronounced for; and three intermediate codicils, propounded on behalf of legatees in the same, held to be invalid. In a Court of Probate, what instruments the testator meant to operate as, and compose, his will, is to be collected from all the circumstances of the case.

Jane Greenough, late of St. John's Wood, Mary-le-bone, in the county of Middlesex, the party deceased, died on the 14th of February, 1824.

The deceased, by her last will and testament, bearing date on the 30th of March, 1821, gave to her butler, Henry Martin, 300l., if he should be living in her service, or in the joint service of herself and her nephew, Mr. George Bellas Greenough (with whom the deceased then was and continued to be, resident till she died), at the time of her decease—and to her servant, formerly Elizabeth Fletcher, but then Martin, wife of Henry Martin, a like legacy of 300l., upon the same condition, subject also to which she farther gave to Elizabeth Martin an annuity for life of 50l.; [240] and to Henry and Elizabeth Martin, 15l. each for mourning.

(*a*) The following case, cited in the argument from a manuscript note of Dr. Bettesworth, would go to shew that an executor, as such merely, or without any special interest, might call upon his co-executor for an inventory:—

Huggins v. *Alexander*. In the Prerogative Court of Canterbury, Hilary Term, 2nd Session, 1735-6.

Mr. Alexander died, leaving children, minors; and made his will, whereof he appointed his wife, Mr. Huggins, and another person executors. The wife possessed herself of all the effects, and refused to give Mr. Huggins any account. Huggins thereupon cited her to give an inventory; and the question now was, whether, where two executors have taken probate jointly, one can call the other to bring in an inventory.

Dr. Strahan, for Mrs. Alexander, said—the deceased appointed his wife guardian to his children; and allowed her to dispose of 6000l. among the children, in such proportions as she should think fit. Executors and trustees by the will are not responsible for any involuntary acts or losses, but only for their own acts. One executor cannot sue another [Swinburn, part iv. s. 20] unless he has a special interest in the estate. Mr. Huggins hath nothing in the will, nor any interest.

Dr. Paul for Mr. Huggins. There are three executors and two trustees named in the will; and, by the will, the executors and trustees, or one of them, are to consent to the marriage of the minors. Huggins had an interest, as executor; and in Chancery one executor can sue another. In the Prerogative, February 6, 1726, Thomas Duck made an executor and an "overseer"—the "overseer" prayed a "commission of appraisement," and the Court decreed an inventory. Hugh Nash died at Paris, and left two sons, Hugh and Gyles, co-executors. Gyles prayed an inventory from the other; and it was granted in the Prerogative. Hugh appealed to the Delegates; but afterwards deserted his appeal, on September 8th, 1727.

Court [*Dr. Bettesworth*]. Where minors are concerned, the Court doth often, ex officio, order an inventory. There is no provision in the will, in case of the wife's second marriage. Huggins has taken probate; and, if she should die, he, as surviving executor, will be accountable. It is said that a co-executor, before probate, may call for an inventory; and he is then as much an executor as afterwards. The question is, whether Huggins has not an interest, merely as executor, sufficient to entitle him to a discovery of the estate. I am of opinion that he has; and therefore decree Mrs. Alexander to give in an inventory.

The deceased, in the interval between the 30th of March, 1821, and the 30th of December, 1823, made four codicils to her will, in favor of this same Martin and his wife. These codicils were wholly written by the deceased, although she was quite blind; owing to which they were nearly illegible, and not to be decyphered without great difficulty, viz.—

A codicil, dated May, 1821, by which she gave them 200l. each—over what she had left them by her will.

A codicil, dated January, 1822—by which she gave them 400l. each—over what she had left them by her will.

A codicil, dated 4th September (without any year, but probably 4th September, 1822), by which she gave to Elizabeth Martin, the wife, her "round silver salt spoons"—and

A codicil, dated "December, 1822," by which she gave to Henry Martin 500l.—likewise to Elizabeth Martin 500l.—without any mention of her will.

On the 30th of December, 1823, the deceased made and executed a codicil to her will, under the circumstances (pleaded and proved on the part of her executor, Mr. Greenough) which are stated in the judgment. By this codicil she expressly says, "I revoke the several legacies given by my will to the servants in my service, or in the joint service of myself and George Bellas Greenough, at my decease—excepting those to Henry Martin and Elizabeth Martin, his wife. The legacies of 300l. and 300l. which I have, by my will, given to Henry Martin **[241]** and Elizabeth Martin, his wife, I hereby increase to 1000l. sterling each—the said legacy of 1000l. to the said Elizabeth Martin, to be in addition to the life annuity of 50l. provided for her by my will. And I further, and additionally, give to the said Henry Martin and Elizabeth Martin 15l. each for mourning—such annuity and legacies to the said Henry Martin and Elizabeth Martin to be payable only in case they shall be in my service, or the joint service of myself and Mr. Greenough, at the time of my decease." And the following clause is then added:—"My said will, having been this day read over to me, I hereby confirm the same, excepting as to any legacy that may have lapsed by reason of the death of any legatee or legatees."

On the part of Mr. Greenough, her executor, it was contended that, under the circumstances so pleaded and proved, the codicils previously made by the deceased in favour of Mr. and Mrs. Martin, and now propounded in their behalf, were revoked by this codicil of the 30th of December, 1823. The allegation propounding the codicils opposed by the executor only pleaded (in addition to hand-writing and capacity) the period (as stated in the judgment) during which Martin and his wife had been in the service of the deceased—that the deceased reposed an entire confidence in them, and constantly entertained and expressed for them a great regard and affection—and that she frequently declared her intention to be, that "the longer Elizabeth Martin lived in her service, the better it should be for her"—lastly, that the codicils propounded shortly after the same were written respectively were lodged by the deceased with a **[242]** duplicate part of her will, in the hands of her bankers, Messrs. Drummond's, where they remained till the time of her death—and that the deceased never declared it to be her intention to revoke them or any of them, nor mentioned them either directly or indirectly, at the time of executing the codicil, dated the 30th of December, 1823.

Judgment—Sir John Nicholl. Mrs. James Greenough, the testatrix in this cause, died on the 14th of February last, 1824—she was a very old lady, and had been quite blind for several years—she lived with her nephew—they kept house together. She had been attended for several years by Henry Martin and Elizabeth his wife: the husband had been her butler twenty-two years; the wife her own personal attendant twenty-eight years.

In March, 1821, she made her will: it was prepared in a full and formal manner by her solicitor, and executed in duplicate; one part of which was deposited with her solicitor, the other part with Messrs. Drummond's, her bankers. By this will she left Martin and his wife each a legacy of 300l., and she further bequeathed to Mrs. Martin an annuity of 50l. for life. In the month of May following, the deceased with her own hand, wrote (or rather scrawled, for it is scarcely legible on account of the deceased's blindness) a codicil giving to Martin and his wife each 200l. "over what left by my will." In January, 1822, she wrote a similar paper giving them 400l. each "over what left by my will." In December, 1822, she wrote another

similar paper, giving each of them 500l.: but in this last paper there is no mention of her will. **[243]** These three papers she sent to her bankers. In December, 1823, she sent for her solicitor, desiring him to bring her will with him, as she wished to make a new one—he accordingly attended her, and took down her instructions in respect to the alterations which she wished to make by her new will. Among other instructions, she directed legacies of 1000l. each to Mr. and Mrs. Martin, and 15l. to each of them for mourning.

The solicitor, finding the alterations to be but few, suggested that they might conveniently be made by a codicil; to which she assented. The next day the solicitor brought the codicil for execution.

The will and the codicil were then read over to, and the latter executed by, the deceased. In the conclusion of the codicil she confirms the will except so far as altered by the codicil. Now, the question is, whether the will and this last codicil are alone to be proved; or whether the three intermediate codicils also composed a part of the deceased's testamentary dispositions.

In a Court of Construction, where the factum of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the Court of Probate the inquiry is not so limited: for the intentions of the deceased as to what instruments shall operate as, and compose, his or her will, are to be there collected from all the circumstances of the case taken together.

In the present case it seems admitted that the second of these codicils, giving 400l. to each of the **[244]** Martins, "over what was left by the will," would, even in a Court of Construction, be held as a substitution for and not as an addition to, the bequest by the former codicil of 200l. each. But when the Court looks at the regular progress of these instruments, it can have very little doubt as to what were the real intentions of the testatrix in respect of all these codicils. After a very long service, when she makes her will she estimates the proper recompence to each of them at 300l.: she soon after adds 200l., making this 500l.; she then, after sometime, substitutes 400l. for the 200l., making the whole 700l.: near a twelvemonth afterwards she writes a paper, giving each of them 500l. This again was probably a substitution for the preceding codicil, as it would make the whole benefit to each 800l., and the deceased, under her infirmity of blindness, and sending each of these papers as they were written, severally, to her bankers, might, very probably, not be exact in the formality of her proceedings, or aware of the legal construction which these several instruments might be exposed to. But when she sent to her solicitor to bring the duplicate of her will, which was in his possession, to her; and gave him instructions as for an entire new will; and in and by that new will intended to make the benefit to Martin and his wife 1000l. each; I cannot bring my mind to doubt that upon this intended new will being, at the suggestion of her solicitor, converted into a codicil, the former will and this codicil were clearly intended to convey the whole benefit which she meant to give to Mr. and Mrs. Martin; and that she had no intention whatever that these intermediate papers, written by herself and **[245]** deposited at her bankers, should have any operation—the more especially as, by this codicil, now regularly executed, she confirms her will, except as thereby altered, but takes no notice of the three codicils now propounded. I am therefore of opinion that they do not compose a part of the deceased's will, and I must pronounce against their validity.

LANDON *v.* NETTLESHIP AND ARMITAGE. Prerogative Court, Trinity Term, By-Day, 1824.—A probate called in at the suit of the widow; and the executors put on proof, per testes of the will, alleged by the widow to be invalid on account of the testator's incapacity. The will pronounced for; with costs against the widow, from the time of giving in her allegation; though against the evidence of two of the three attesting witnesses.

Judgment—Sir John Nicholl. Henry Landon, a liquor merchant, died on the 31st of July, 1821, leaving a widow and five children. The will which is in contest in this cause bears date the preceding day; by this will he gives all his property to his wife and children, equally: except his real property, which he gives to his eldest son; and he appoints Mr. Nettleship and Mr. Armitage his executors, but without any benefit. He had no real property in possession: his personal estate is insolvent.

Probate of this will was taken by the executors soon after the testator's death;

and they administered the effects for about eleven months: the probate is then called in by the widow; and the executors are put upon proof of the will. What just motive could exist for taking such a step in respect to this insolvent estate it is difficult to assign. The executors, however, have propounded the will; and in support of the factum they have examined the drawer of it, the three attesting witnesses, and the apothecary who attended the deceased.

[246] The drawer of the will mentions a circumstance, at the outset, rather of a startling kind; namely, that he was not allowed to go up stairs to the testator to receive the instructions, but that the instructions were brought down to him through the intervention of Armitage, one of the executors. The witness explains, however, the reason, namely, that he entertained certain religious opinions and occasionally preached; and that the deceased, being fearful that he, the witness, might think it right to urge his own opinions, declined a personal interview, as unwilling at that time to be disturbed upon such a subject. Another witness, Brown, was present and heard the deceased give the instructions. Besides, the executor who conveyed the instructions to the drawer of the will has no benefit whatever under the will—nay, he was not even intended to be an executor: for the deceased, having finished the dispositive part of the instructions, proposed to Brown to be one of the executors with Nettleship; and it is only upon Brown's declining that he requests Armitage to be an executor, to which Armitage assents and is thereupon appointed. Nettleship was not present at any part of the transaction. But, further—the widow, who perfectly well knew the condition of the testator, was actually a party to the whole transaction, though the will was to her prejudice, she not taking her distributive share, nor being even an executrix.

Brown is one of the attesting witnesses—and although he states that his memory is defective from ill-health, yet he appears to give a fair and cautious account of what passed—and if he is credited he fully proves capacity and volition. But the two **[247]** women who have attested the instrument describe the deceased as in a state of total insensibility. They are deposing, however, against their own act and against their own conduct at the time; and what is more, against the whole conduct of the very party who produces them as witnesses, the widow herself. The deceased's cellar-man also, who came into the room just after the execution, joins the two women in representing the deceased to have been then in a state of incapacity—but on an interrogatory he says that he "always represented the deceased to two persons, Nettleship and Page, to have been in an insensible state when he saw him." Now, these two persons, Nettleship (not the executor) and Page, who, on the next day and for four months afterwards, were in constant communication with this cellar-man, being generally employed in the same warehouse, positively depose that he never to them represented the deceased as being in a state of insensibility or intimated any thing of the kind—his credit is therefore materially shaken.

The medical attendant, Mr. Warner, left the deceased soon after twelve o'clock in the day on which the will was made; and he deposes that although he thought his recovery hopeless, yet his capacity was good at that time.

Mr. Warner's conduct at the time was consistent with the opinion he has now given—for on going away he recommended that, if the deceased had not settled his affairs already, he had better make his will. This circumstance connects itself with what is stated by the witness, Joseph Armitage, who says "that the widow told him the doctor had recom-**[248]**-mended the deceased's making his will, but that she did not think him so bad as the doctor did." Here then is the widow's own declaration at the time, confirming, indeed, her entire conduct that the testator was in a sufficient state of testamentary capacity.

The whole subsequent conduct of the widow and of all other parties tends to confirm the validity of the will. Immediately on the death the executors act in that character. Nettleship, who was not present at the making of the will, as well as Armitage, who was present, join in all acts. They conduct the funeral. They buy mourning for the family. They take probate of the will. They carry on the business. They renew the licence. They pay the rent. They meet the creditors.

At the meeting of the creditors it was ascertained that the estate was greatly insolvent: it was agreed to allow the widow three guineas and a-half a week for two months and to give her the preference of taking the stock in trade in case she could find friends to assist her. Three meetings of the creditors are held; when at length,

some dispute arising, either between the creditors, or on account of the widow's weekly allowance being discontinued, the widow is put upon calling in question the validity of the will and compelling the executors to the proof of it by the present suit. I am of opinion that they have proved it and that they have been vexatiously harassed to their own injury and to the injury of the other creditors of this insolvent estate. The widow in this suit has set up the incapacity of the testator against the whole tenor of her own conduct, by which conduct she was, in effect, an attesting witness to this will. **[249]** It is therefore the duty of the Court not only to pronounce for the validity of the will, but to condemn the widow in costs from the time of giving in her allegation.

MOLONY *v.* MOLONY. Consistory Court of London, Trinity Term, By-Day, 1824.—An allegation responsive to the libel in a suit for restitution of conjugal rights admitted to proof—although the facts pleaded amounted to a charge of neither cruelty nor adultery against the party by whom a sentence of restitution was prayed.

(On the admission of an allegation.)

This was a cause of restitution of conjugal rights promoted by "Edmund Molony, Esq., of Woodlands, in the county of Dublin, in Ireland, but now at Downing Street, in the county of Middlesex" (so described in the citation), against Jane Molony, of the parish of St. Mary-le-bone, in the county of Middlesex, his lawful wife.

The libel pleaded the marriage of the said Edmund Molony to Jane Molony, then Jane Jackson, widow, at Dunmore, in the county of Galway, in Ireland, on the 18th of March, 1817, and their cohabitation at Woodlands, till July, 1819; and, subsequently, in London, until the month of November, 1820; when it was pleaded that "the said Edmund Molony was obliged by important and necessary business to return to Ireland; but that the said Jane Molony declined to accompany him: upon which he proceeded thither alone, and left her residing in his house, No. 17, in Crawford Street, Portman Square"—that the said Edmund Molony "was detained by his said business for a considerable time in Ireland;" and that "some-**[250]**-time in or about the months of May or June, 1821, the said Jane Molony quitted his said house in Crawford Street; and, from that time, concealed the place of her residence from the said Edmund Molony"—that in the spring of 1823 the said Edmund Molony, by means of his friends, "discovered the residence of the said Jane Molony," and came to London in the month of May in that year; and that, since discovering the residence of his said wife, the said Edmund Molony had many times by himself and his friends required and intreated the said Jane Molony to live and cohabit with him; with which request and intreaty she, the said Jane Molony, had refused, and still refused, to comply without any just cause. And the libel concluded by praying that "the said Jane Molony might be compelled by the sentence of the Court to live and cohabit with the said Edmund Molony, to treat him with matrimonial affection; and to render him conjugal rights."

To this it was pleaded, responsively, on the part of the wife, in substance, as follows (*a*):—

1. That at the time of the marriage of the parties as pleaded in the libel Jane Molony, then Jane Jackson, widow, was entitled, under the will of her late husband, to an annuity of 800l. for life; and was possessed of jewels and other articles of personal property, valued at between 4000 and 5000l.: and that, **[251]** in virtue of her marriage settlement, this annuity of 800l. was secured to the wife for her own sole and separate use; and the husband became entitled to her other property of what nature soever.

2, 3. That from and after the marriage of the parties they cohabited at Woodlands for upwards of two years, and until the month of June, 1819; when Mrs. Molony, having become nearly blind in consequence of cataracts that had formed in her eyes, came to London, accompanied by her husband, to consult Mr. Alexander. That on

(*a*) This, it should be stated, however, is the substance of the allegation as reformed under the direction of the Court—a reform effected by striking out some parts of the allegation, in its original state objected to as irrelevant, and so deemed by the Court; and by introducing the substantive averment in the 6th article, as to the plaintiff's usual place of abode and fixed permanent domicil being in Ireland only.

Mr. and Mrs. Molony's arrival in London they took up their residence at a furnished house in Crawford Street; where they also cohabited until Mr. Molony's departure for Ireland in November, 1821. That Mrs. Molony did not on that occasion decline or refuse to accompany her said husband, as pleaded in the libel: but that Mr. Molony, without apprizing his wife either then or previously of any such intention, left his house in Crawford Street on the evening of the 19th of November in that year, and immediately proceeded to Ireland; where he continued till May or June, 1820.

4. That Mrs. Molony neither quitted the house in Crawford Street voluntarily; nor concealed from Mr. Molony her subsequent places of abode, as pleaded in the libel—on the contrary, that she continued in Crawford Street till the month of June, 1821, when she was compelled to quit it in consequence of an execution put into the house by the landlord for rent in arrear; under which execution her whole property, except her wearing apparel, was seized and removed—that payment of the wife's separate income had been stopt in this interval in consequence of proceedings **[252]** [a bill filed and injunctions had] instituted by the husband in Chancery against the wife and her trustees, towards the close of the year 1820—that, on so quitting Crawford Street, Mrs. Molony removed to lodgings, first in George Street, and afterwards, viz. in August, 1822, in Charles Street, Manchester Square—and that Mr. Molony was acquainted from the first with such his wife's changes and places of residence.

5. That from November, 1820, Mr. Molony neither saw nor communicated with (nor in any manner contributed to the maintenance and support of) his said wife till the month of June, 1823; when, being compelled to come to this country in order to give evidence in a suit then depending in the House of Lords, he did, upon arriving in London, call upon his said wife in Charles Street.

6. That the usual place of abode of the said Edmund Molony was, and had long been, at Woodlands in Ireland: and that he, the said Edmund Molony, had not any fixed place of residence in this country.

7. That the said Jane Molony, from 1819 down to the present time, had been in very delicate health; and had been confined to her house, and to her room principally, from August, 1822—and that the said Jane Molony was, in the opinion of her medical attendants, incapable of removing to Ireland, or undertaking any considerable journey, without imminent danger to her health.

The admission of this allegation was opposed by counsel, as not setting up any case which, however proved, would justify the Court in declining to pronounce the sentence prayed by the husband on proof, in substance, of his libel. They relied, of course, on the **[253]** commonly received maxim, departed from, as they maintained, in no single instance; that "facts pleadable in bar to a suit for restitution are such only as, upon proof, will entitle the party who pleads them to a sentence of separation, such sentence being prayed." (*a*) Nor could it be inferred, as they contended, either from the description of the husband in the citation, as from his now alleged sole domicil in Ireland, that it was the object of this suit to compel his wife to return to, and cohabit with him in, that country. But,

The Court overruled these objections—as not choosing at present to decide that the facts pleaded were wholly irrelevant—especially the wife's state of health; and the husband's sole domicil in Ireland, as pleaded. Consequently, it admitted the wife's allegation to proof—but without pledging itself to the effect of the facts pleaded as a bar, either wholly or in part, to the sentence prayed on behalf of the husband in the libel at the final hearing of the cause.

BAIN *v.* BAIN. Consistory Court of London, Trinity Term, By-Day, 1824.—Alimony pendente lite is to be computed from the return only, and not from the issue, of the citation, even though considerably prior to the return—unless, possibly, under special circumstances.

In this, which was a suit instituted by the husband against the wife for a separation à mensâ et thoro, by reason of adultery, the Court upon this day allotted alimony to the wife, pendente lite, at the rate of 300l. per annum. It was then prayed on behalf of the wife that the Court would direct it to be computed from the issue, and not from the return, of the cita-**[254]**-tion, an interval of between three and four

(*a*) Vide the case of *Barlee* v. *Barlee*, 1 Add. 305.

months: (*a*)[1] otherwise it was said the alimony, pendente lite, for the first year is in effect allotted at the rate of 200l. and not that of 300l. per annum, the proportional allotment, as with reference to the husband's faculties. But,

The Court saw nothing special in the case to induce it to depart from its usual practice of allotting alimony from the return only of the citation; and decreed accordingly.

SMYTH *v.* SMYTH. Consistory Court of London, Trinity Term, 1824.—It is incompetent to the Court under any circumstances to make a formal allotment to the wife of any sum, in the nature even, or as an account, of alimony; until a fact of marriage, at least, is either proved against or admitted by the husband.

This also was a cause similar to that of *Bain* v. *Bain;* instituted, however, by the wife against the husband.

The libel on this day was admitted as reformed; and the proctor for the wife now prayed that the Court would allot a sum to the wife, as on account, or in the nature, of alimony—this being the Court day immediately preceding a long vacation. But,

The Court said that it was incompetent to it, in point of form, to make any allotment to the wife of the nature prayed—there not only being no constat of the husband's faculties; but a marriage de facto, even though pleaded against, being neither proved nor confessed by **[255]** the husband. It recommended, however, that, in effect, the wife should be alimented proportionably to the husband's means—during the long vacation, intimating that it should take this into the account when, in the progress of the suit alimony pendente lite came to be regularly allotted, if its recommendation were not complied with.

STEEVEN AND HOLLAH *v.* THE RECTOR, PARISHIONERS, AND INHABITANTS OF THE PARISH OF ST. MARTIN ORGARS, IN SPECIAL, AND ALL OTHERS IN GENERAL. Consistory Court of London, Trinity Term, By-day, 1284.—An application for a faculty to take down a church (so styled), in effect, acceded to by the Court; under the peculiar circumstances, verified on behalf of the applicants, of the building being in a state of dilapidation; and there being no person, or persons, compellable by law to restore and uphold it.

(On motion.)

The parish church of St. Martin Orgars,(*a*)[2] together with that of the adjoining parish, St. Clement, Eastcheap, was destroyed by the fire of London in 1666. By the act of 22 Car. II. c. 11, for rebuilding the several churches, and the union of the respective parishes therein mentioned, it was enacted (s. 63) that the parishes of St. Clement, Eastcheap, and St. Martin Orgars should be united into one parish; and that the church thentofore belonging to St. Clement, Eastcheap, should be the parish church of the said parishes so united. And by sect. 66 of the same act it was provided that the scite of the church of **[256]** St. Martin Orgars, and the church-yard belonging to the same, should be inclosed with brick or stone walls for a burial place for the said united parishes, and should not be used or employed for any other purpose whatever—a general provision of the act extending to the several other demolished churches and their church-yards, similarly circumstanced under the act, with those of St. Martin Orgars.

It appears, however, that the rector and churchwardens of the said parish, by lease, bearing date the 3d of February, 1699, demised or granted the piece of ground whereon the church of St. Martin Orgars had formerly stood, to certain persons (as trustees for certain French refugees of the Protestant religion who had previously assembled, first, at a house in Jewin Street, and afterwards, at a house on College Hill, in virtue of the letters patent under the great seal of England,(*a*)[3] bearing date

(*a*)[1] The citation was served on the 26th of July [1823], but, owing to there being no intermediate Court day, it would not be returned till after the long vacation in November.

(*a*)[2] This epithet "Orgars" is derived by Newcourt from Odgarus, or Ordgarus, the probable founder of the church; who gave it to the dean and chapter of St. Paul's, still its patrons, about the year 1185. See Rep. Eccl. vol. i. p. 416.

(*a*)[3] "Granted originally to Peter Alix, clerk, and such other French refugees of the Protestant religion" (very numerous, and becoming daily more so at that time, in consequence of the then recent revocation of the edict of Nantz) "as should join themselves with him."

the 16th of June, in the second year of King James the Second), in order to erect a church for the performance of divine service, and the celebration of the holy sacraments, or other rites of the church, in the French language, but according to the liturgy of the Church of England—saving to the rector and churchwardens of the said parish their right of burial therein, and all fees in respect thereof. This lease, which was for fifty years, with powers of renewal as covenanted in the same, and **[257]** at a reserved rent of 35l. per annum, was confirmed by a private act, 11 & 12 Will. III. No. 54.

A church was accordingly built, partly, it should seem, upon the old foundation: and continued from that time in the occupation of French Protestants, descendants, probably, of those for whose use it was originally erected, at first by renewal of their lease, and, latterly, as yearly tenants, till Christmas, 1823, when possession of the same was delivered up to the churchwardens of St. Martin Orgars; who, in consequence of the dilapidated state of the building, were authorized by order of vestry to take down the same, preserving the vaults beneath so as still to form part of the burial place of the inhabitants of the said parish.

Under these circumstances a decree had issued, at the promotion of the said churchwardens, calling upon the rector, parishioners, and inhabitants of the parish of St. Martin Orgars, in special, and all others in general, having or pretending to have any right, title, or interest in the premises, to appear and shew cause why a licence or faculty should not be granted to the churchwardens for the purpose aforesaid with the usual intimation: which citation having been duly published in the church of St. Clement, Eastcheap, and returned without any appearance given, the Judge was now moved to decree a faculty pursuant to the said intimation.

Court [*Sir Christopher Robinson*]. The Court is disposed on the whole to accede to the present application, unwilling as it is, upon general considerations, to sanction the utter demolition of any building which has something, at least, of the cha-**[258]**-racter of a national church.(*a*) At the same time it could wish this matter to stand over in order to afford the parish time to consider whether this building, which is a spacious building, and not, as the Court has ascertained by its own inspection, in a state of visible decadency, might not be repaired and made subservient in some way (for instance, as a national school) to the church establishment: its appropriation in this sort the Court might feel itself justified in sanctioning under, at least, the implied authority of the private act of King William the Third. In the event of the building itself being wholly demolished the scite can only be used for a burial place; and can be devoted to no other use whatever under the express provisions of the act of Car. II. sect. 66.

Let this matter stand over till next term; in which interval an accurate survey may be made of the state of the building; and the parish may have time to consider, or to reconsider, the propriety of applying it, and the capacity of the building to be applied in some such manner as that which I have suggested. But if they think it ultimately expedient, as there are great dilapidations, though principally, it seems to me, in the **[259]** roof, and which nobody is compellable to repair, I think that they are entitled to have the scite of the old church restored to the state contemplated by the fire act; under which impression I shall be disposed to accede to their renewed application for a faculty to take this building down, unconditionally. I understand that the dean and chapter of St. Paul's, the patrons of the living, have been consulted; and have intimated that it is not their intention to offer any objection.

BRISCO *v.* BRISCO. High Court of Delegates, Trinity Term, 1st June 1824.—Adultery committed by either party (husband or wife) at any time before sentence will bar a sentence of separation at the suit of the other party; or will compel the Court to dismiss both parties, adultery being mutually, or reciprocally,

(*a*) The Court observed that the act of King William had scarcely impressed that character permanently upon it, although, in confirming the lease, &c., it provided "that, before the building to be erected should be made use of for purposes of divine worship, it should be decently fitted and accommodated; and so furnished and adorned as the Archbishop of Canterbury and the Bishop of London for the time being, or one of them, should direct and appoint." Quære, however, such being the character of the building, the necessity for any faculty to justify the parishioners in taking it down?

charged in the cause: and Courts must permit either of such parties to plead adultery against the other in any stage of such a cause, whether before or after publication, and how long soever this may have passed, or the cause may have been depending, it being certified to have been pleaded within a reasonable time after coming to the proponent's knowledge.

The Judges who sat upon this question were Mr. Justice Burrough, Mr. Baron Garrow,(*a*) Dr. Daubeny, Dr. Gostling, Dr. J. Addams.

This cause commenced in the Consistory Court of London; and was brought by Dame Sarah Brisco against her husband Sir Wastel Brisco, Baronet, for a divorce by reason of cruelty and adultery.

[260] The following is an abstract of such of the proceedings in the cause as require to be stated with reference to the question before the Court.

The citation was returned on the first session of Hilary Term, 1814; and a libel brought in in the same term was admitted to proof, without opposition, on the fourth session of Easter Term in that year.

In the month of April, 1815, an allegation, responsive to the libel, was brought in on the part of Sir Wastel Brisco; and was admitted, as reformed, having been opposed in its original state on the first session of the following Trinity Term.

In the month of May, 1816, a rejoinder or second plea was filed on behalf of Lady Brisco, and was admitted to proof, without opposition, as the libel had been, on the first session of Trinity Term in that year.

Publication of the evidence taken upon these several pleas passed in the Consistory Court of London on the 20th of May, 1817. And on the first session of Hilary Term, 1818, both proctors asserted allegations, exceptive to the testimony of the witnesses.

Such exceptive allegation on the part of Sir Wastel Brisco was argued on the third session, and was admitted on the fourth session of that same Hilary Term. The admissibility of an exceptive allegation offered on behalf of Lady Brisco was debated on the second session of the following (Easter) term; when the Judge of the Consistory Court, directing certain articles of that allegation to be reformed and, especially refusing to admit to proof, or wholly rejecting the 5th, the 8th, the 9th, and the 12th articles of **[261]** the allegation, the proctor for Lady Brisco appealed to the Court of Arches.

In the Court of Arches the Judge was pleased, on the fourth session of Easter Term, 1819, to allot the same sum to Lady Brisco for alimony pendente lite, being the sum of 200l. per annum, as had been allotted to her by the Judge of the Court below. But having, at the same time, ordered or decreed that such alimony should be computed from the date of the sentence appealed from, and not merely from the return of the inhibition, as prayed by Sir Wastel Brisco, an appeal on the part of Sir Wastel Brisco was lodged from that order or decree to the High Court of Delegates.

On the 15th of February, 1820, the cause on the appeal as to this grievance came before the High Court of Delegates (the whole commission); when the judges pronounced against the appeal, and affirmed the order appealed from: but (at the prayer of both proctors) they retained the principal cause (3 Phil. 106); and therein decreed a monition against Sir Wastel Brisco for the payment of certain costs, and the alimony then due. And on the second session of Easter Term, 1820, Sir Wastel Brisco was pronounced in contempt, and directed to be signified, by the Court of Condelegates, for not having obeyed that monition, duly and personally served upon him.

On the third session of Michaelmas Term, 1822,(*b*) Sir Wastel Brisco was absolved from his contumacy by the Court of Condelegates, on payment of the **[262]** costs and alimony, for non-payment of which he had been pronounced in contempt, and taking the usual oath: upon which the cause, as to the appeal from the rejection, &c., of certain parts of Lady Brisco's exceptive allegation by the Consistory Court of London, was proceeded in, and the same came on for hearing, before the whole commission, on the 19th of June, 1823; when the judges admitted the 8th, 9th, and 12th articles of

(*a*) Mr. Justice Best, who was also named in the commission, had taken his seat as Lord Chief Justice of the Court of Common Pleas in the interval between this and the last sitting of the Court; and was not present.

(*b*) Sir Wastel Brisco was understood to have been abroad during the greater part of this interval, to avoid an attachment under the significavit.

that allegation, which had been rejected by the Judge of the Consistory Court, as also the 5th article, with a slight reformation.

On the by-day after Michaelmas Term, 1823, the Court of Condelegates decreed publication of the evidence upon these exceptive allegations; when, on the same day, the proctor for Lady Brisco asserted, and prayed leave to bring in a further allegation, on the part of her ladyship, in the principal cause. The Court of Condelegates declining, as upon its own responsibility, to receive that further allegation in this late stage of the proceedings, the proctor then prayed to be heard, as to this, upon his petition,(*a*)[1] before the whole commission; and that prayer was referred by the Court of Condelegates to, and now came before, the whole commission, as at the final hearing of the cause; when the proctors of the several parties concurred in praying a sentence of separation—the proctor for Lady Brisco, by reason of the cruelty and adultery of Sir Wastel Brisco—the proctor for Sir Wastel Brisco by reason of adultery committed by Lady Brisco—the proctor for Lady Brisco, however, also praying that the judges would first rescind **[263]** the conclusion of the cause in order to receive the allegation aforesaid, and admit the same to proof, before proceeding to the hearing of the principal cause; in the event only of which prayer being rejected he prayed it to pronounce to the effect before stated.

The allegation so brought in, in the principal cause on the part of Lady Brisco, in substance pleaded the commission of adultery by Sir Wastel Brisco with a person named Sarah Stow, a servant in his family, with whom it pleaded that he went to reside in furnished lodgings at a house situate in Upper Norton Street, in the parish of Mary-le-bone, in the month of February, 1821: that they continued to live and reside there, passing as husband and wife, till the latter end of March, in the same year: and that, after leaving the said lodgings, they, the said Sir Wastel Brisco and Sarah Stow, went to Crofton Hall, the seat of Sir Wastel Brisco in Cumberland, where an adulterous intercourse (alleged still to subsist) was kept up, and carried on, between the said parties; in consequence of which she, the said Sarah Stow, had been delivered of two children, the one in September, 1822, and the other in September, 1823, begotten upon her body by the said Sir Wastel Brisco. This allegation was accompanied with an affidavit, made by Lady Brisco, to the effect that the several facts and circumstances pleaded in the allegation did not come to her ladyship's knowledge till the month of August, 1823, long after the 20th of May, 1817, when publication of the evidence taken in the cause passed in the Consistory Court of London.

In opposition to the reception of this further allegation in the principal cause, on the part of Lady Brisco (the preliminary question), it was not attempted to be **[264]** maintained, by the counsel for Sir Wastel Brisco, that the allegation ought not to be received upon general considerations, and viewed as with reference to general principles: but they contended that this being a suit unique, and sui generis, as it were, with respect to the length of time consumed and the number of witnesses examined in it, the Court, in its discretion, ought not to rescind the conclusion of the cause in this last stage of it, and by so doing permit her ladyship, in effect, to set up a new case, nearly seven years after publication of the principal evidence taken in the cause, and founded upon delinquency of the husband, admitting it to be, even laid in the allegation to have occurred, more than seven years after the return of the citation.

On the part of Lady Brisco it was contended, on the other hand, that these circumstances were not of a nature at all to affect the general principle (*a*)[2] upon which

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(*a*)[1] No petition in fact was entered into, the question being determined, as upon a mere motion, at the (intended) hearing of the cause. See post, pp. 263-266.

(*a*)[2] "Quando ante divortii sententiam contingit innocentis lapsus, constat inter omnes doctores teneri hunc ad conjugem dimissam—immo post sententiam;" he afterwards says "satis probabiliter docent multi" [lib. x. disp. x. No. 24.] And so, as to this last particular (for the first appears to admit of no question) Ayliffe asserts [Parer. 226] that "if the husband himself shall, after such divorce (namely, for the wife's adultery), commit fornication, the marriage shall be restored, on the score of his lewdness, and the husband, for a punishment, shall be obliged to receive his wife again." By this, however, it is not to be understood that the "lapsus innocentis post divortium" places the other party in a condition to charge, or object, that delinquency, in the first instance, in order to make it the foundation of a prayer

the allegation was confessedly receivable, or to prevent its application to the individual case; that the [265] husband's delinquency, at any time prior to sentence, would bar his claim to a legal separation on account [266] of his wife's adultery; as also would entitle the wife (adultery, as in this instance, being mutually or reciprocally charged) to a sentence of separation on account of the husband's adultery, in the event of the charge against her not being proved. Consequently, they insisted that facts of the nature of those now pleaded were strictly pleadable in such a cause at any time prior to a sentence; being also, as sworn in this instance, noviter perventa, or facts that had recently come to the proponent's knowledge: so that the allegation before the Court, at however late a period of the cause offered, ought to be received.

The Court on deliberation inclining to this view of the subject; and that this was not a case in which it was at liberty to exercise any such discretion with respect to rescinding the conclusion of the cause, &c., as that with which Sir Wastel Brisco's counsel had sought to invest it, finally pronounced for receiving the allegation; and it was afterwards, on the same day, without further opposition from Sir Wastel Brisco's counsel, admitted to proof.

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for "restitution of conjugal rights." This is to be inferred from the terms made use of by Ayliffe, "for a punishment," &c., and from the following passage in Sanchez, upon whom Ayliffe probably found himself in this dictum; although neither that of Sanchez nor any other authority is expressly vouched for it.

The fourth opinion upon this subject, says Sanchez—"Quarta sententia (cui adhæreo tanquam probabiliori) asserit nullam actionem acquiri conjugi adultero ut repetat innocentem, qui, post divortii sententiam adulteratus est; atque ita ea delicta minimè compensari: integrum tamen esse judici ut eos conciliet, ex officio suo illos cogens, quo fornicationis periculo consulatur. Prob. prior pars, nimirum non dari actionem: 1mo, quia, semel bene diffinitum minimè retractandum est: secundò, quia servitus, semel amissa, non renascitur: Servitus autem innocentis conjugis amittitur, lata sententia divortii: Tertiò, quia licet adulterii exceptio per simile adulterium extinguatur; at exceptio rei judicatæ, quæ obstat priori conjugi repetenti, minimè aboletur per crimen post sententiam admissum: Quartò, quia divortii sententia absolvit innocentem a debito conjugalis societatis; dissolviturque contractum matrimonii quoad jus thori, et habitationis, manente vinculo: quare innocens, postea fornicans, reus erit adulterii in ordine ad Deum ob vinculum matrimonii perseverans; non tamen peccabit adversus conjugem dimissum, nec illi injuriam inferet, utpote qui jure in illius corpus destiturus erat per sententiam, &c." This, he says, however, is only to be understood "quando sententia illa divortii transiit in rem judicatam, eo quod decennium appellationi concessum sit transactum; vel si fuerint tres sententiæ latæ. Nam si id non ita se habeat, perinde reputandum est ac si sententia non præcessisset adulterium posterius: quia virtus sentiæ est suspensa."

"Debet autem," he goes on to observe, "judex ex officio, licet alter conjux minime petat, hos conjuges reconciliare. Quia Prælatus, ut pastor animarum, tenetur periculis incontinentiæ occurrere. Hoc autem intelligendum non est regulariter: sed solum quando manifestum est, periculum conjugum, et aliorum scandalum. Sic Sotus. Bart à Ledesma, et alii. Imo Sotus et Bart. à Ledesma recte dicunt minimè teneri judicem uti medio tam rigido, nisi conjux ille prius innocens perditissime viveret, magnum suis adulteriis scandalum generans. At posse compellere, in pœnam, ob ejus conjugis scandalum." See Sanchez, lib. x. disp. x. No. 30, 31, per tot.

This note has been extended, in consequence of a doubt expressed in a late work (suggested in part by something reported to have recently fallen from a learned judge) whether the doctrine of "compensation" might not possibly apply to the extent of entitling either party, a wife or a husband, divorced for adultery from the other party, to be restored to his or her conjugal rights on proof of similar delinquency in that other party, even though itself not occurring till after such sentence of divorce. See Mr. Poynter's "Law of Marriage and Divorce" (p. 225, 2d ed. 1824); where the various points connected with those subjects are neatly arranged, and are stated, in the main, with great accuracy.

[267] DURANT *v.* DURANT. Arches Court, Michaelmas Term, 1st Session, 1824.—When the Court is prayed to rescind the conclusion of a cause, in order to fresh matter being pleaded, it always requires to be satisfied both that the party praying it is in no laches and that the measure prayed is one essential to the ends of justice. It always further requires that some special ground be laid (as that of such fresh matter having newly come to the party's knowledge, or as the case may be) to found the prayer.

[See further, 1 Hagg. Ecc. 528, 733.]

(On petition.)

This was a cause of divorce by reason of adultery, brought by the wife against the husband.(*a*) The present question respected an application made to the Court on the part of the husband, by act on petition, to rescind the conclusion of the cause: in order to receive an allegation not filed in due time, that is, before the cause was concluded, exceptive to the testimony of certain witnesses examined upon the wife's libel.

Judgment—Sir John Nicholl. In deciding upon this petition I must be understood to confine myself to the matter of the petition—for I have not thought it my duty, in order to this, to peruse and consider all the evidence (the depositions of forty-four witnesses) (*b*) and all the pleadings in the principal cause. The petition must stand upon its own statements—together, indeed, with what of the principal cause has been brought officially to the notice of the Court in former stages of it.

[268] The proceedings have throughout, I must say, the same general complexion. The cause throughout has an appearance of great and studied delay in one of the parties. It is a charge brought by the wife against the husband of adultery—which, whether well or ill founded, ought at once to have been fairly met. The suit, however, has existed nearly five years; during the last four at least of which it has been adversely contested, without any decision either as to the principal point or even as to the matter of alimony: so that the wife has merely obtained from time to time, and with difficulty, small pittances on account of alimony, instead of being in possession of stated alimony during this long interval, to which she was justly entitled. On the second session of Hilary Term, 1823, nearly two years ago, the Court concluded the principal cause and assigned it for informations and sentence on the next Court day; rejecting an application made by the husband's proctor to allow further time to bring in an exceptive allegation to certain witnesses examined on the wife's libel—an application founded merely upon verbal statements made by the proctor and unsupported by any affidavit. From this an appeal was lodged at once to the Court of Delegates; who in Trinity Term, 1823, affirmed the order of this Court and remitted the cause—in which, however, when the Court was about to proceed "according to the tenor of former acts," namely, to a hearing, it was again stopped by the present petition, praying that it would rescind the conclusion of the cause and allow time for giving in an exceptive allegation—a prayer which, as I have just said, it had once already rejected when moved to grant it (at that time, to be sure, on verbal statements merely) by the defendant's proctor.

[269] Applications of this nature, for obvious reasons, are seldom acceded to by the Court; though undoubtedly it is competent to the Court to accede to them. But in order to this it ought at least, I think, independent of any special ground laid, first to be satisfied both that the measure prayed is one essential to the ends of justice; and that the necessity for praying it has resulted from no laches on his part in whose behalf it is prayed. In the absence of either, à fortiori of both, those requisites, the Court is bound to reject such a prayer, if for that reason or for those reasons only—especially in a case the proceedings in which justify a suspicion that the measure itself may be one of several contrivances to protract and impede the decision of the principal cause.

The special ground laid, in addition to those general ones already suggested, for an application to rescind the conclusion of a cause in order to permit fresh matter to be pleaded, ordinarily is that certain material facts are "noviter perventa,' newly come to the knowledge of the applicant. No such ground is laid in support of this prayer—on the contrary, the special ground is one of such a nature as to suggest serious doubts whether, under any circumstances, the Court would be justified in

(*a*) See 1 Add. 114.

(*b*) Twenty-three on the libel, and twenty-one on the allegation of faculties.

attaching any weight to it in support of such a prayer. No "new facts" are even alleged to have come to the knowledge of the defendant in this cause. He has endeavoured, however, both to relieve himself from any charge of laches and to satisfy the Court that the measure prayed is one really essential to a due decision upon the merits of the cause—with what success I proceed to consider; in doing which, that special ground laid for sustaining the prayer of this petition, to **[270]** which I have just adverted, will incidentally disclose itself.

Of the evidence taken in this cause, publication actually passed on the fourth session of Michaelmas Term, 1822, the proctor for the husband declaring (all facts being then to be propounded) that he should give no allegation unless exceptive to the testimony of witnesses; upon which the cause stood "on admission of such exceptive allegation, if any, on the by-day; if not admitted, the cause to be concluded, and assigned for informations and sentence the next Court." From the by-day that assignation was continued till the first session of the ensuing term (a period of nearly seven weeks), the husband's proctor being at the same time assigned to deliver a copy of his exceptive allegation to the adverse proctor fourteen days before that first session; with a strong intimation from the Court that, not complying precisely with the assignation, he must, at all events, be prepared satisfactorily to account for this, by an affidavit or affidavits, to save the cause from being concluded. Under these assignations, neither an allegation being tendered nor a single affidavit to account for its not being, even upon the first session of Hilary Term itself, the Court concluded the cause—the appeal from which decree and the proceedings under that appeal and subsequently have already been stated; and the effect of which has already been to delay the hearing of this cause nearly two years. Are, then, the facts stated in this petition such and so sustained as to induce the Court to occasion still further delay, by rescinding the conclusion of the cause at this late period in order to admit an exceptive plea?

The principal, I might almost say the only, matter **[271]** set up, both to justify the husband on the score of laches and also to lay any special foundation for the present application, is that he was prevented from filing his allegation at the time assigned him by the Court through the illness of his attorney. The petition states in substance that immediately upon copies of the evidence being taken, the same were forwarded to Thomas Wood, the attorney of the husband, and who had attended the execution of the commission issued by this Court for the examination of witnesses on the libel and allegation of faculties at Penkridge in Staffordshire, as the proctor's substitute, with an earnest request that instructions should forthwith be furnished for an exceptive plea, if any such was intended to be offered—this in the beginning of December—but that early in that month Mr. Wood was taken ill and was confined to his house from that time for the space of three months (only once going out upon urgent business), by reason of which he was prevented from seeing the husband on the subject of this exceptive plea—however, that he forwarded the evidence to the husband, with written advice on the subject, who returned the same with directions that the necessary steps should be taken to except to the testimony of five witnesses examined on the libel—that the husband was then apprized by Wood of the nature of the evidence which would be required in support of such exceptive plea; who thereupon instituted enquiries as to the persons whom he supposed competent to give evidence in support of it—in the course of which, from the difficulty in discovering the abode of such persons and the distance thereof from the husband's residence, so considerable an interval elapsed that only on the **[272]** 17th of January (three days before the first session of Hilary Term) the proctor received final instructions for an exceptive plea—and being then only for the first time informed of the illness of the said Thomas Wood, &c.; he was unable on the first session of Hilary Term either to comply with the assignation of the Court as to giving in the exceptive allegation or to procure an affidavit accounting for the delay.

Now here, in the first place, not to insist that this Court knows nothing of attornies; that the proctor is "dominus litis," and that he and his principal are alone responsible both to the Court and the other party, I must observe that the fact of Mr. Wood's illness to any such extent as to account for the delay alleged to have been occasioned by that illness, is denied, and is, I think, substantially disproved on the part of the complainant. But supposing the fact to have been true—supposing that his assistance as an agent was, if not so necessary, so convenient, as hardly to be

dispensed with; that he, Wood, was incapacitated by illness from affording that assistance, and that the services of no other agent could be substituted for or accepted in lieu of his, what is there to account for all this not being verified to the Court at the proper time by affidavit? The statement in the act on petition may excuse the proctor in respect of laches, especially as it states him to have written as early as the 6th of December, earnestly desiring instructions forthwith in the premises; notwithstanding which he hears nothing of the parties till the 17th of January. But this, which acquits the proctor of laches, fixes that imputation the more forcibly, either on the party or on his sub-agent, for whose acts he is answerable, or on both—it **[273]** being incumbent, as I have said, for the party to have absolutely cleared himself from any such imputation, to justify the Court in acceding to him the indulgence now prayed. Hence I think that the excuse offered is neither true in fact nor sufficient in kind if it were true. And I must further observe that even supposing the case now set up, the main ground for the indulgence now prayed had been made in due time, and urged in a proper shape, that of a petition, sustained by affidavits, to the Court itself, to rescind the conclusion of the cause in lieu of and prior to the appeal; it might have been a grave question how far the Court would have been justified, no disability in either the proctor or the party being alleged in permitting the disability of a third party, of a solicitor of whom the Court knows nothing, to operate the desired effect; or at all to weigh with it in favour of that one party to the prejudice of the other.

The Court might stop here without any impropriety: for at least the party who prays it, being in laches, has made out no title to the indulgence prayed, on that ground only. But let us see how far the measure prayed, upon this shewing, is one likely to be essential to the ends of justice in the cause: a consideration in which it will also further incidentally appear, whether the husband has a fair claim to any special indulgence of this description.

Now so far is the measure prayed from being one apparently essential to the ends of justice, on the face of this petition, that I think it extremely doubtful how far any allegation in exception to the testimony of the five witnesses proposed to be excepted to would have been admissible, even prior to the conclusion of **[274]** the cause. I am not saying that it might not have so been, if tendered in the proper stage of the cause. But I do say that its claims to admission even then would have been so strictly investigated by the Court, and would have been required to be made out in so unexceptionable a manner, as to render this extremely questionable. Who are the five persons proposed to be excepted to? They are persons living in the defendant's own neighbourhood, and deposing to his own conduct; so that he must have known, generally at least, if not very specifically, the effect of their evidence, from the contents of the libel in proof of which they were examined. Add to this, it is not suggested that they have introduced any extra-articulate matter into their depositions; or that the husband had not full time and opportunity to cross-examine them. Now it is difficult to conceive that an exceptive allegation to the testimony of such witnesses, under such circumstances, could have made good its claim to be admitted at any time. From the moment of their production he must have known their general character—and from the contents of the libel, as I have said, the substance, at least, of their testimony. Yet neither is their general character excepted to—nor is the libel in such or any particulars contradicted by plea; for the husband gave no plea whatever before publication. As then no rule is better known or ought more strictly to be adhered to than this; that a witness shall not be excepted to, as to facts spoken to in his deposition, provided the party against whom that witness appears might have contradicted those facts by plea prior to publication—it is difficult, I say, to conceive, for it is unnecessary to decide that point absolutely, that the husband could **[275]** have framed any allegation, in exception to the testimony of these witnesses, that the court would have admitted to proof in any stage of this cause. Be that, however, as it may, there is nothing on the face of this petition, which is all that I can look to, to satisfy me that the indulgence now prayed is one at all likely to conduce essentially to the ends of justice in this cause; from which, as well as from thinking that other circumstance alleged in order to induce the Court to grant this indulgence, viz. the illness of the party's attorney, neither such in itself, nor so sustained that it ought to have any weight with the Court, and from the laches of the party on whose behalf it is made, I hold myself bound to reject the prayer of the petition.

If, however, at the hearing it shall appear that the cause entirely, or even mainly depends upon the testimony of the five (out of twenty-three) witnesses on the libel proposed to be excepted to, so that every thing, or even much, depends upon giving them full credit (their credit being shaken, as by interrogatories or otherwise), the Court in its discretion, and in order to arrive at the real and substantial justice of the case, may even then rescind the conclusion of the cause and permit evidence to be taken upon a plea of the description of that now proposed to be offered. But on the statements made in this petition, the Court cannot hesitate in rejecting the prayer of it, and in proceeding to hear the cause. And as it is the duty of both parties to be ready to proceed to the hearing, for so stands the assignation, I shall proceed to the hearing next Court day, at least at the prayer of the **[276]** wife, the complainant, whether this be convenient or otherwise to the defendant in the cause.(*a*)

Petition rejected.

GREG *v.* GREG. Arches Court, Michaelmas Term, 2nd Session, 1824.—If an appearance under protest be given to an inhibition which discloses an appealable grievance, on the face of it, without at the same time so disclosing any peremption of the appellant's right to appeal therefrom, the court will at least overrule such protest and direct an absolute appearance.—Note 1. That praying a judge to rescind any order perempts an after appeal from that order. 2. That his refusing to accede to such prayer is not itself an appealable grievance, any more than is—3. His refusing to permit witnesses to be examined "on the day assigned to propound all facts;" even though such witnesses are actually in court, and are sworn to be necessary witnesses.

(On protest.)

This was a suit by the husband for restitution of conjugal rights, appealed by the wife to this Court from that in which it originally depended (the Consistory Court of London) on a grievance. The husband appeared to the usual inhibition of the Court, not absolutely, but under protest; and the validity of that protest was the point immediately at issue.

Judgment—Sir John Nicholl. This is a suit for restitution of conjugal rights, brought by the husband against the wife, originally depending in the Consistory Court of London, and is appealed to this Court by the wife. It is necessary that I should briefly advert to the proceedings in the **[277]** Court below, in order to arrive at the merits of the present question; which arises out of an appearance given by the husband under protest to the inhibition issued by this Court.

The citation was returned on the first session of Easter Term, 1819, but no appearance was given for the wife till the second session of Hilary Term, 1820. On the second session of Easter Term, 1820, a libel was given in by the husband in common form. This produced a responsive allegation on the part of the wife; but not again till the third session of Trinity Term, 1821: nor was that allegation admitted, as finally reformed, till the first session of Easter Term, 1822. The husband's answers were brought in, in the October of that year; but no witnesses have been produced upon this allegation. A second plea on the part of the husband was brought in on the by-day after Hilary Term, and was admitted on the 12th of May, 1823. Upon this, as also upon the libel, witnesses have been examined; and on the third session of the following Michaelmas Term the husband prayed "publication, and all facts to be propounded next Court." Such have been the proceedings, as appears by the several assignations in the Court below, in the principal cause; exclusive of that from which this appeal is prosecuted, of which presently—and I must say that they carry with them every appearance of studied delay in the wife, the party proceeded against in the original cause, and the appellant in this Court.

Collaterally with these proceedings in the principal cause there were some other proceedings, also depending between the same parties in the Court below, upon a matter incidental to, though partly independent **[278]** of, the first, which require to

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(*a*) The principal cause, however, was not finally disposed of till the second session of Easter Term, 1825; when the judge held the libel to be proved, and pronounced the sentence of separation prayed by Mrs. Durant. From that sentence Mr. Durant has since appealed to the High Court of Delegates.

be stated. On the first session of Easter Term, 1821, the wife's proctor prayed to be heard, "on taxation of costs." The proctor for the husband prayed to be heard, on his petition, in objection to this; and, on the first session of Trinity Term following, alleged that he had delivered his "act" to the wife's proctor, who was assigned to return the same the next Court. Instead, however, of complying with that assignation precisely, or in any sense of the word, the "act" in question is not returned by the wife's proctor even upon the third session of Michaelmas Term, 1823, when the husband's proctor, as I have said, prayed "publication, and to propound all facts next Court." The proctor for the wife objects to this assignation; and on the by-day after that Michaelmas Term (then, for the first time alleging that he has (just) returned the act to the husband's proctor) prays that the Court will rescind the assignation decreeing "publication, and to propound all facts;" and that it will extend the term probatory till the wife's costs are paid—whilst the proctor for the husband prays the Court to conclude the cause, and assign it "for informations and sentence." No order should seem to have been made upon this; the judge merely directing the whole matter to stand over generally. It is pretty obvious, I think, from the course of the above proceedings, that the wife had means of defending herself independent of the husband; for she takes no step to enforce payment of her costs by the husband for above two years.

On the first session of Easter Term, 1824, the act of Court (that, I mean, as to the question of costs) is at length concluded, and affidavits on both sides are **[279]** brought in in support of it. On the second session the petition is heard, and the judge takes time to deliberate. On the third session the wife's proctor tenders a further affidavit in support of his petition, which, however, the Court rejects, together with the petition (the wife's petition for her costs) itself; and at the same time, at the husband's petition, concludes the cause, and assigns it for informations and sentence.

I do not make out very clearly how the assignation stood upon this Court day, no process being before the Court. I rather apprehend it to have been a sort of compound assignation; "to propound all facts, and on petition of both proctors." But however the assignation stood on that Court day, on the following Court day, viz. the fourth session of Easter Term, the cause is alleged to be, in due time and place, appealed on the part of the wife—and the wife's proctor, at the petition of the proctor for the husband (not alleging the supposed grievance not to be an appealable matter, or that, if an appealable matter, the appeal had been perempted as by acquiescence, or otherwise, so that it is competent to the Court below to proceed to a sentence, notwithstanding the appeal, or any thing of that sort) at the petition, I say, of the proctor for the husband, is assigned to prosecute his appeal by the first session of the next term. In spite of which, however, that proctor for the husband now appears under protest to the inhibition issued by this Court—submitting the incompetence of the wife to allege the appeal from which he prays the husband's dismissal: at the same time praying the Court "to retain the principal cause"—prayers of which I will only say that the latter appears to me not very well to **[280]** consist with the former. Such, in substance, as far as I have been able to collect them, have been the several proceedings in this cause.

Now the Court, without any process before it, and consequently without any assurance even that the proceedings, such as I have described them, have been accurately stated (for it can place no great reliance in this particular, either on the written statement of those proceedings in the act of Court, into which the protest has been extended or (indeed still less) upon any supplementary or explanatory statement of them, addressed to it verbally in argument by counsel), must look principally, if not solely, in order to determine the merits of the protest to what appears on the face of the inhibition. Does that, on the face of it, or does it not, disclose an appealable grievance or appealable grievances? By this, almost sole, consideration it is that the protest must stand or fall; for whether the Court below was right or wrong in making the orders or decrees appealed from, or, in other words, the merits of the appeal itself, are matters of which it is incompetent to it to form any notion even under the present proceeding.

This appeal is generally, as appears by the inhibition, from "certain grievances, nullities, iniquities, injustices, and injuries (words, these, of common form) done to and inflicted upon the appellant by the judge of the Court à quo:" but it is more especially "from the said judge having, on the third session of Easter Term (to wit,

Saturday, the 22nd day of May), in the year 1824, by his order or decree, refused to admit and hear read a certain affidavit then tendered on behalf of Sabina Mary-Ann Greg (the appellant): and also from the said judge having, by the said order [281] or decree, rejected the prayer of the proctor of the said appellant 'to rescind the order or decree made by him, the said judge, on the third session of Michaelmas Term, 1823, whereby he decreed publication in the cause, and assigned all facts to be propounded:' and from his having refused to direct the registrar to tax the costs made, and to be made, on behalf of the appellant, and to enlarge the term probatory until the said costs should have been paid; and, further, to allow a reasonable time after payment of the said costs for the examination of witnesses upon the allegation given in on behalf of the appellant: and from his having concluded the said cause, and assigned the same for informations and sentence"—to the "manifest injury of justice, and to the very great detriment and prejudice (words of common form again) of the said Sabina Mary-Ann Greg, the said appellant."

Such, then, on the face of the inhibition itself, to which an appearance under protest has been given in this proceeding, are the orders or decrees of the judge of the Consistory Court specially appealed from. It appears to me that they are orders or decrees of a very different complexion, and that they are subject, in this respect, to very different considerations.

The first alleged grievance is the judge's "refusing to rescind an order." Now, the very praying of the judge to rescind that order is, pro tanto, an acquiescence in the order; it is an act of the party, subsequent to and in respect of it, which, in my judgment, is sufficient to perempt any after appeal; that is, from the order itself.(*a*) As to the mere "refusal to rescind an [282] order," that is a matter not appealable, but one solely in the judge's own discretion, in my view of it.

The order or decree next specially appealed from is one her right to appeal from which the party appellant had perempted by no act of her own that I am aware of. But is that order or decree itself an appealable grievance? I strongly incline to hold that it is not an appealable grievance; being, like the refusal to rescind an order or decree, as already said, a matter purely discretionary. It is expressly so laid down in books of practice—in Oughton, for instance—"Si in die assignato," says Oughton [tit. 116], "ad proponendum omnia pars actrix, sive rea, habuerit testes necessarios presentes in judicio, et juraverit eos esse testes necessarios, judex eosdem admittere, jurare, et examinare potest: tamen relinquitur judicis arbitrio, an voluerit hujusmodi testes admittere vel rejicere, et neutri partium datur justa causa appellandi." If, then, the judge's refusing to permit witnesses to be examined, who are actually present in Court, on the day assigned to propound all facts, and who are sworn to be necessary witnesses, be no appealable grievance, surely his declining to assign, at large, a new term probatory on that day (especially, too, at the prayer of a party who had suffered the original term probatory to stand open a twelve month without producing a single witness) no single witness being present in Court, and no single affidavit being tendered as to any proposed witness or witnesses being a necessary witness, or [283] necessary witnesses (nothing of all which is even alleged to have occurred in this instance)—surely this, I say, a fortiori, is no appealable grievance, and the Court is quite disposed, upon this authority, to view it in that light.

So far, then, this appearance under protest to the inhibition (a proceeding by the way of rather a novel nature) might seem to stand upon reasonable grounds. But what subsequently appears on the face of the inhibition goes to deprive it of this credit, both almost and altogether. For what are the other acts appealed from, as appears by this? Why they are appealable grievances beyond all question, and such as the appellant has perempted her right to appeal from by no circumstance whatever, even as alleged in the cause. Her petition as to costs is rejected—the cause is concluded and assigned for informations and sentence, without time afforded her even to see the depositions; so that, clearly, she has had no opportunity of objecting to the

(*a*) And this, it should seem, notwithstanding a protocol of appeal entered; for it was distinctly stated in the act of Court by the proctor for the wife that "within 15 days from the third session of Michaelmas Term, 1823, to wit, on the 1st day of December, 1824, he, the said proctor, had duly interposed his protocol, protesting of a grievance and of appealing." And such protocol of appeal was brought in in part proof of the act.

testimony of the husband's witnesses, how objectionable soever on inspection that testimony may turn out to be. I do not mean to say that all this may not have been (I am rather indeed bound to presume that it was) very right—there has apparently been great and studied delay on her part—it may even have been so great, and so vexatious, as justly to debar her from those privileges to which she would ordinarily have been entitled; for instance, that of having her costs taxed, and that of having time afforded her to bring in an exceptive plea, if so advised after inspecting the depositions; from both of which these orders of the judge now complained of went actually to debar her. But the Court, without any process before it, with merely this inhibition and act of Court, or ex-**[284]**-tended protest, cannot undertake to decide all this, or any part of it. Meantime these orders and decrees being clearly of an appealable nature, without any circumstance even alleged to perempt this appellant's right in special, to consider and treat them as such, I am clearly of opinion that this appearance under protest is wrong, and that I am bound to overrule it, and entertain the appeal. By so entertaining the appeal I am not to be understood, as in the slightest degree, prejudging the merits of it—the merits of the appeal constitute a totally different question, and one of which it is incompetent to the Court to form any notion without seeing the process. It is one thing to say that such or such an order is of an appealable nature, that is, generally, may be appealed from; it is quite another to say that it is duly and fitly appealed from, under all the circumstances in any particular instance.

I would only add that no blame whatever attaches to the appellant for including all the several acts done (as well those of an appealable nature as the other) which she has included in the presertim of her appeal. For being all the act of one Court day, they all make up but one decree—at least, so as to warrant the inhibition's going as to the whole. It will be for the Court to distinguish between these at the hearing; applying, possibly, its remedy as to those of the one class, leaving the appellant, as it must, without remedy as to those of the other; those I mean of a nature not appealable. Meantime I overrule this protest, and with costs; both as the proceeding itself has somewhat the appearance of an experiment, and as the parties to it are husband and wife. Upon these grounds, and without at present entering into the question of **[285]** whether the wife is or is not entitled to her costs in that character generally, I think her, at least, entitled to the costs of the present proceeding.

Protest overruled, with costs.(*a*)

BARKER *v.* BARKER. Arches Court, Michaelmas Term, 2nd Session, 1824.—If a deed of separation be so worded as rightly to found a presumption that it might (so intended) go to sanction even adultery committed by the wife, living apart from the husband under that deed, that presumption must be rebutted by evidence to entitle the husband to a sentence of divorce, as by reason of such adultery committed by the wife.

[Discussed, *Ross* v. *Ross*, 1869, L. R. 1 P. & D. 736.]

(On appeal from the Consistory Court of London.)

This was a cause of divorce for adultery brought by Samuel Barker, against his wife Amelia Penelope Barker. It was appealed by the husband to this Court from the Consistory Court of London, the judge of which had dismissed the wife.

(*a*) On an extra Court day (25th of February) after Hilary Term, 1825, the Court pronounced for the appeal, so far as respected the cause having been concluded as stated in the judgment; but in all other particulars affirmed the decree of the Court below. At the same time, it gave leave to the wife to proceed to the examination of witnesses on her allegation; provided this were done immediately, and at her own expence. It appeared in the cause that the wife had a considerable income; and that the husband was in distress and in gaol. Under these circumstances the Court approved of the Court below having rejected the wife's petition for her costs: on the principle (often recognized) of the ordinary rule as to the wife's costs in cases of this nature not applying.

The principal cause was heard on the merits, and finally disposed of in Trinity Term, 1825, the Court, in the absence of any evidence on the part of the wife, upon whose allegation, after all, no witness was examined, pronouncing the sentence of restitution prayed by the husband.

[286] *Judgment—Sir John Nicholl.* This is an appeal from the Consistory Court of London, where the cause was a cause of separation, a mensâ et thoro, promoted by the husband against the wife for adultery. A libel was given in, in the Court below, pleading the adultery: and, upon the evidence of nine witnesses examined upon that libel the cause went to a hearing. In the course of the hearing the judge directed certain articles of separation into which the parties had entered, previous to the adultery charged, to be brought in—as with reference to which, in connection with the facts (the only facts then) proved, he, after some deliberation, pronounced the husband to have failed in proof, and dismissed the wife; which has given occasion to the present appeal.

It appears that these parties were married in 1815, the wife being at that time a minor: and that they cohabited as husband and wife from that time, principally at Clifton, till March, 1820; when in consequence, as pleaded in the libel, of "certain differences having arisen between them," they agreed to separate. The deed of separation just adverted to was accordingly drawn up, and was executed by both parties, on the 18th of that month. The wife then removed to Teignmouth in Devonshire, where she lived with her mother, Mrs. Burden; the husband continuing at Clifton; nor did they ever from that time cohabit as husband and wife, save for a few days; when they met at Bath, and so cohabited at the latter end of December 1820. Mrs. Barker returned from Bath to Teignmouth; but, in the month of February, 1821, about five weeks after, she eloped from that place with [287] a person named Thomas Bailey Potts, whom she had become acquainted with at Teignmouth, in the course of the preceding year. The husband, on being informed by the mother of his wife's elopement, immediately comes to London and institutes inquiries, which terminate in a discovery, by certain friends of the husband, of the wife in the society of her paramour, under circumstances quite unequivocal, at an inn at Hampton Court. The wife is, with some difficulty, prevailed upon to accompany the husband's friends to London, where she is placed under the protection of an uncle, her mother's brother; but, in about three weeks, she again elopes with the same companion, and goes to France, where they are said to have since cohabited. Of this subsequent elopement and cohabitation there is no proof; but of the first from Teignmouth, and of the adulterous connexion of these parties at Hampton Court, the proofs are clear and ample.

The Court neither supposes, nor has been given to understand, that the judge of the Court below entertained any doubt that the adultery was proved, as charged in the libel. His reason for declining to apply the usual remedy in that case seems to have been this. He appears to have considered the deed of separation so ample in its stipulations for the wife's perfect free agency, for the future, in all respects, as to found a presumption that it might (so intended) do this among the rest; namely, license that very conduct in the wife of which the husband complained.(*a*) And that presump-[288]-tion, if rightly founded, not being rebutted by any facts in evidence in the cause, as it then stood, would justify the sentence appealed from, in its fullest extent, in my judgment. Volenti non fit injuria—and though the mere separation of husband and wife is no bar to relief at the suit of one, for adultery committed by the other—yet where a separation subsisted at the time of the adultery charged it is peculiarly incumbent on the party charging it (especially that party being the husband) to make out most satisfactorily to the Court that the injury complained of is not one to which he or she, the complainant, is in any sort accessary.

(*a*) The parts of this deed principally relied on to found that presumption were the following:—"Now this indenture witnesseth, and the said Samuel Barker and Amelia Penelope Barker, his wife, do hereby mutually declare and agree that they shall and will continue to live separately and apart from each other, henceforth, for and during the time of their mutual lives. And the said Samuel Barker for himself, &c. doth hereby covenant and agree with the said Amelia Penelope Barker, &c. that it shall and may be lawful to and for the said Amelia Penelope Barker from time to time and at all times during the present coverture, to live separately and apart from him, the said Samuel Barker, in such manner and at such place and places and with such person and persons as she, the said Amelia Penelope Barker, shall, from time to time, think proper to choose (notwithstanding her present coverture), and as if she were sole and unmarried. And that he, the said Samuel Barker, shall not nor will

Now I think I am bound to take it that the presumption on which the judge of the Consistory Court [289] acted as above was rightly founded, and consequently that his sentence was correct. But whether, in true legal construction, the deed in question were or were not, in itself, what he appears to have considered it—whether it did in itself amount to license, even the commission of adultery by the wife; or whether the clauses relied on to sustain that construction were not rather technical clauses, ordinarily inserted, whether rightly or wrongly, in instruments of this description, to prevent, so far as may be, suits for restitution, and not to bar suits for divorce in the event of adultery committed, are questions which, as merging in the present case, the Court may be excused from exercising any definitive judgment upon. For even although the Court should put the same construction upon this deed as it received in the Court below, it may arrive at a different conclusion upon the evidence, without any impeachment of the former sentence. The presumption which this would raise against the husband would then, it is true, be the same in both Courts: but whereas that presumption in the Court below was not, as I have said, rebutted by any evidence; it is in this the Appellate Court, I think, amply so rebutted. For the husband in this Court, as he was fully entitled to do, has brought in a further allegation, pleading the circumstances under which the original separation was had, and a correspondence by letter which took place between him and the wife subsequent to the separation—several letters from the wife being exhibited, in supply of proof; as also the letter from the mother, in which she communicated to her son in law the first information that he received of his wife's elopement. From the evidence taken upon this allegation, and from [290] the face of these exhibits, I collect, both that the husband was not to blame in the matter of the separation—and that the deed of separation was understood neither by husband, nor wife, as dispensing to either with the obligation of fulfilling the marriage vow in the article of fidelity, so far as the consent of the other party was concerned; however, the contrary might seem upon the mere wording of the deed. The separation it appears took place at the wife's instance, upon no, imputed even, misconduct on the husband's part; but in consequence solely of differences that arose between them as to a change of trustees for certain property, to which the wife was entitled under her father's will. Her letters exhibit the wife as a strange, flighty, romantic character at all times. In these (after the separation), so far from imputing blame to the husband, she addresses him uniformly, in terms of ardent affection. She visits and, as already observed, cohabits with him for some days at Bath, in December, 1821. No blame again is imputed to the husband on that occasion; a letter is exhibited of a date subsequent to this even, as affectionate in its language, at least, as any of the preceding; in which, in particular, she hopes that they "shall soon be united again, never again to part." That the vast fondness expressed for the husband, especially in this last letter, was rather feigned than real may readily be conceded; as it appears that she was previously on pretty intimate terms with her paramour, and actually eloped with him, within a few weeks from the date of that letter. But, real or dissembled, the sentiments expressed are equally good in proof that no just foundation for any complaint was laid in the conduct of the husband [291] to the wife—if they were partly meant, which is very probable, as a blind to the husband, this at least shews the wife not to have suspected that she had the husband's licence to commit adultery. Again, the mother's letter, a letter expressive of great anger, and at the same time of great distress, conveys no reflection whatever on the husband, in apprizing him of the wife's elopement; and the promptitude with which that information is acted upon by the husband, to vindicate

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molest or disturb her, the said Amelia Penelope Barker, in her person or manner of living; nor at any time or times hereafter, either by ecclesiastical censures or otherwise, require or endeavour to compel her, the said Amelia Penelope Barker, to cohabit, &c. with him, the said Samuel Barker; and shall not nor will, for that purpose or otherwise, use any force, violence, or restraint to the person of the said Amelia Penelope Barker; or sue, or cause to be sued, any person or persons whomsoever for or on account of receiving, harbouring, lodging, protecting, or entertaining her, the said Amelia Penelope Barker; but that she shall and may in all things live and act as if she were sole and unmarried: without the restraint or coercion of the said Samuel Barker, or of any person or persons, by or through his means, assent, consent, privity, or procurement."

his own honour, fully rebuts any presumption which might grow out of the deed of separation, taken per se, that he was at all a party consentient, à priori, to his own disgrace. The case here then has a different aspect to that which it had when before the judge of the Consistory Court; and without definitively pronouncing whether, in my judgment, the deed of separation, taken per se, did or did not of itself raise, as against the husband, that presumption upon which he appears to have acted, but taking it so to have done, I am of opinion that under the explanations to which I have adverted, and upon the matter thus cleared up by the additional allegation in this Court, there is, even upon that supposition, nothing any longer to debar the husband of his remedy; but that he is now at least intitled to the sentence of separation, which he prays.

[292] MOGG *v.* MOGG. Arches Court, Michaelmas Term, 4th Session, 1824.—The wife's libel in a divorce cause, charging cruelty and unnatural practices on the husband, admitted to proof—the case charged (at least taken as a whole) being held to be one "per quod consortium amittitur."

(By letters of request from the vicar-general of the diocese of Bath and Wells.)

(On the admission of the libel.)

This was a cause of divorce or separation a mensâ et thoro brought by the wife against the husband for cruelty and unnatural practices.

The libel, after pleading the marriage and cohabitation, &c. of the parties, in the usual form, pleaded (somewhat generally indeed) that, from the beginning of the year 1820 till the month of June in that year, when she, the wife, quitted him and went to reside with her mother, the husband treated the wife with great unkindness, indignity, and cruelty; refusing to cohabit with her during all that time, either at bed or board—in consequence of which treatment (so pleaded) she, the wife, in the month of May in that year (1820), suffered a convulsive labour, at which her life was considered to be in great danger. It then pleaded that the said R. M. (the husband) had, at the assizes, held in and for the county of Somerset, at the city of Wells, in January, 1823, been convicted of assaulting one E. K. his apprentice lad—and of lewdly, wantonly, and wickedly pressing, &c. the said E. K., and of endeavouring to persuade the said E. K., to permit and suffer him the said R. M. to take indecent liberties with his person—to the corruption of the morals of the said E. K., to the great scandal and subversion of **[293]** decency, &c. and against the peace.(*a*)[1] Lastly, it pleaded a certain paper writing annexed to be, and contain, a true copy of the record of that conviction.

In objection to the admission of this libel it was submitted that the cruelty, per se, as charged, was too vague and unspecific. With respect to the other charge, it was said—in the case of *Bromley* v. *Bromley*, the sole precedent (Delegates, 1793. See page 158, ante, in notis), the conviction was of an assault with actual intent to commit, &c. Not so here—here the conviction was of a minor offence, though one of the same kind. And it might be doubtful whether the conviction of a husband for such minor offence would entitle the wife to a sentence of separation, a mensâ et thoro, merely upon that ground.

Court—Sir John Nicholl. The case laid, as a whole, does amount in my judgment to that per quod consortium amittitur. Could the Court send the wife home to such a husband? He refuses her access to his person—he resorts to abominable practices, cruelty itself, independent of that other charged. But the Court may be compelled to send the wife home if it should be of opinion that her case is not such as to entitle her to a sentence of separation. **[294]** On the contrary, I think that the wife, on proof of her case, as laid, will entitle herself to a sentence: under which impression of course I admit the libel.(*a*)[2]

(*a*)[1] The bill found consisted of four counts; the first charging an assault on E. K., to the effect stated in the text—the second and third assaults on the said E. K. of a similar, but still more aggravated, species; and the fourth an assault on the same subject generally. But the verdict found the defendant guilty of the offences charged in the first and fourth counts only—whereon he was sentenced to the payment of a fine of one shilling, and to imprisonment in the common gaol for six calendar months.

(*a*)[2] This cause was finally heard in Trinity Term, 1825; when the libel being proved in all particulars the Court pronounced for the divorce as prayed by the wife.

NORTHEY *v.* COCK. Arches Court, Michaelmas Term, By-Day, 1824.—In interest causes, where the suitor whose interest has been denied, succeeds in establishing it, costs follow, almost of course, without some special ground of exception to the rule.—Note that the certificate of registry is not essential to the proof of a marriage; especially not to the proof of a marriage had, if at all, anterior to the marriage act.

This was a cause of interest—in which the Court, in pronouncing for the interest of one asserted next of kin, condemned the other in full costs; as having questioned that interest, under the circumstances stated in the judgment, on frivolous and unfounded pretences.

Judgment—Sir John Nicholl. This is a cause technically described as a cause of interest (originally depending in the Consistory Court of Exeter); (*a*)[1] and it is limited to the single object of ascertaining the next of kin of Mary Row, late of Broadwoodwiger, in the county of Devon, the party deceased in the cause. The suitors, respectively, are Mr. Emanuel Northey and Mr. Richard Cock. Northey claims as cousin-german once removed by the whole blood—as that is descended from the same common ancestors with the deceased, William Drown and Joan his wife, the grandfather and grandmother of the deceased, and his, the claimant's, great-grandfather and great-grandmother, respectively. The claim **[295]** of the other suitor is founded upon his descent from the same grandmother with the deceased only, Joan Drown—who, after the death of William Drown, her first husband, is pleaded to have intermarried with one Diggory Cock, by whom she became the mother of Diggory Cock, father of Richard Cock, the party claiming.

Thus it appears that the asserted relationship between Richard Cock and the deceased is by the half-blood only. But as the law makes no distinction between the whole and the half-blood, in respect to administrations and rights of succession to personal property, it follows that if Cock's relationship to the deceased is proved, as pleaded, there is an end at once to Northey's claims, either to be administrator of the deceased or upon her personal property. For, as to the administration, Mr. Cock is of kin to the deceased, upon this shewing, in the nearer degree: nor is Mr. Northey entitled to any share of the personal estate, even by representation, no representatives being admitted among collaterals after brother's and sister's children.

The claim of Mr. Richard Cock appears to be questioned only in a single particular. His being the grandson of Joan Drown, also the grandmother of Mary Row, the deceased in the cause, is admitted: but Mr. Northey has denied that this Joan Drown was ever married to Diggory Cock, her alleged second husband; asserting that, although she lived and cohabited with him as such, till his death, it was in a state of concubinage merely, and that she never became his lawful wife.

Now here I must first observe that the burthen of proof principally rests with Mr. Northey. Where parties **[296]** have cohabited, especially where, for a long period, and till the death of one of them, as in this instance, the law presumes them to have been married; for it will not presume a criminal and illicit connexion between parties, at all events not to the prejudice of their issue. As then Mr. Northey (rather ungraciously) has raised this charge against his great-grandmother, he should have been prepared with evidence to sustain it; in which point, as I shall presently observe, he has wholly failed. On the contrary, to say nothing of the legal presumption in its favour, the actual marriage of this Joan Drown and Diggory Cock is established by their grandson, Mr. Northey's opponent in the cause, upon what appears to me the most satisfactory evidence.

The marriage in question is one of more than a century back; consequently, it was a marriage anterior to the marriage act; when marriages were neither solemnized nor registered with the regularity that they have since been, in virtue of that act. To hold the certificate of registry indispensable to the proof of such a marriage would be absurd: reputation, cohabitation, and mutual acknowledgments sufficiently prove, at least, such a marriage (*a*)[2] in such a cause if not strongly impeached. **[297]** But

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(*a*)[1] It was appealed to this Court on a grievance—when the Court pronounced for the appeal, and retained the principal cause.

(*a*)[2] Or probably any marriage, the marriage act having been repeatedly held not to take away the ancient mode of proving a marriage by presumptive evidence. See judgments to this effect of Lord Mansfield in the case of *St. Devereux* v. *Much Dew*

though no entry can be found in any register of the marriage of Joan Drown and Diggory Cock, there is documentary as well as oral evidence in the cause (though the latter alone might possibly be sufficient), which places the fact beyond any question. For instance, the parties had three children; these children were christened in the parish where they always resided as the children (two sons and a daughter) of "Diggory Cock and Joan his wife." Again, one of the sons (a first Diggory) died: he is buried in the same parish as Diggory, son of "Diggory Cock and Joan his wife." Extracts in proof of all this from parish registers are exhibited and duly verified in the cause. Lastly, on the death of Diggory Cock, administration is granted to Joan as his lawful widow and relict, of course upon her oath to that effect; and, on real property being sold which had belonged to Diggory Cock, subsequent to that grant, she, Joan, is a party to the conveyance, as his "widow and administratrix." These facts are also proved by duly verified exhibits in the cause. Of witnesses examined, the testimony is all one way, namely, in favour of the marriage, for Mr. Northey has produced no evidence upon his allegation that "the Cocks were generally known and reputed as base born." Nor has he succeeded in extracting any such evidence by cross-examining his adversary's witnesses, except in a single instance of much too trifling a nature to be dwelt upon. I allude to the evidence of one old blind man of 83, who does say, in answer to an interrogatory administered to him on the part of Mr. Northey, that a person named Parkinson told him some years ago that these "Cocks" were all "base born."

In proof of this some stress appears to have been **[298]** laid upon the circumstance that Mr. Cock himself, upon the death of the deceased, confessed or admitted that "her property," generally, belonged to "the Northeys." But this circumstance is sufficiently explained. Being of the half-blood, and not aware of the legal distinction in this particular between the descent of real and that of personal property, he did, at first, erroneously conceive that Northey was entitled to the personal as he is to the real property of the deceased; under which impression, and not, as asserted, from any consciousness of his father's illegitimacy, he made the admission relied upon. But he retracted this almost instantly upon receiving better information; and from that time to the present has asserted his interest, an interest which, in my judgment, he has amply proved.

The single question, under these circumstances, is that of costs; to which I think that Mr. Cock, whose interest has been denied upon such frivolous pretences, is justly entitled. Indeed, costs generally follow where the person whose interest has been denied succeeds in establishing it, almost, of course, without special grounds of exception, of which I can discover none in the case in point. On the contrary, Mr. Northey, not content with the real estate, having called in the administration duly obtained by his opponent and put him on proof of his interest by setting up a case that he has failed to sustain by any evidence, he is, I think, especially liable to reimburse that opponent for his expences in both Courts.

[299] SULLIVAN *v.* SULLIVAN. Arches Court, Michaelmas Term, By-Day, 1824.—The mere desertion of a wife by the husband, though a malicious desertion, will not bar a sentence of divorce at the suit of the husband on proof of adultery committed by the wife.—The long absence of the husband from, held not to be a desertion of the wife in the particular case; and the sentence held not to be barred, as insisted, by any part of the husband's conduct towards the wife, her adultery being proved.

[Referred to, *Fearon* v. *Earl of Aylesford*, 1884, 14 Q. B. D. 792.]

(By letters of request from the archdeacon of Buckingham.)

This was a cause of separation a mensâ et thoro by reason of adultery, promoted by John Augustus Sullivan against his wife, Maria Sullivan.

Judgment—Sir John Nicholl. This is a suit of divorce, brought by the husband

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Church [1 Bl. Rep. 367], and that of *Birt* v. *Barton* [Doug. 171]. And Lord Kenyon has declared in a case at nisi prius [Espin. 1, 214] that, though the marriage act had introduced a register of marriages, registration made no part of the validity of a marriage, but only went in proof of it; and that since, as well as before the passing of that act, cohabitation, reputation, mutual acknowledgments, &c. were good and available evidence of a marriage though no register whatever was produced.

against the wife by reason of adultery. It is admitted that the proofs of adultery are complete if the identity of a female, whose history is given in the depositions, and of Maria Sullivan, wife of the party promoting, and the party proceeded against in this suit, be established in a manner satisfactory to the Court. But of this identity I entertain no doubt, either legal or moral, on the proofs—any more than I do of the diversity of the husband, and of a person whose intercourse with the wife is proved to have been such as fixes upon the wife (that diversity being also proved) the charge of adultery.

The marriage of the parties took place in July, 1816; from and after which they cohabited for a short time, and mutually acknowledged each other as husband and wife. A suit was then instituted by the father of the husband (a minor at that time of the age of 17 or 18) to annul the marriage, as celebrated by banns not published in the true names of one of the parties—unquestionably a sufficient ground of nullity had the fact so been. But at the hearing of the cause, in the **[300]** month of June, 1818, the judge of the Court in which that suit was instituted pronounced for the validity of the marriage—and the sentence so had on appeal to this Court was affirmed also in the month of June in the following year. It was then appealed, namely, from the sentence of this Court to the High Court of Delegates; nor was that appeal actually dismissed till the month of February in the present year [1824]; although it had not been prosecuted by the appellant beyond to the mere bringing in of a libel of appeal; to which the respondent had at once given a negative issue.

Upon the institution of the suit of nullity in 1816 the husband was sent abroad by his father to await its issue. He was soon joined on the Continent by his father and mother; and continued abroad till February, 1822; at which time the appeal in the Court of Delegates, as just said, was still depending—having, during the greater part of that time, been attached to the British Embassy at Paris. The circumstances to which the Court has referred, as connected with the marriage, account, I think, satisfactorily for this part of the history. But I should say that on the husband's coming of age a deed of separation is executed by and between the parties; covenanting for their living, in future, separate and apart: an annuity for life of 500l., and the sum of 1000l. by way of outfit being settled on the wife in and by that deed.

The wife during all this time continued in this country, resident at various places —at first at a place called Gold Hill, near Chalfont in Buckinghamshire; and then at lodgings in Mary-le-bone, until the spring of the year 1821—at the former of which places it is that she is proved to have become intimate with **[301]** a Mr. Henry Gouldney, her alleged paramour. At what precise time that intimacy assumed the character which now attaches to it neither is, nor requires to be, stated in evidence. Suffice it to observe that in April, 1821, the wife, Mrs. Sullivan, went to reside at Mottingham, near Eltham, in Kent, where she continued till the month of April in the following year—and that, during nearly the whole of that period, she, Mrs. Sullivan, and Gouldney cohabited as husband and wife: passing, however, under assumed names, and using every precaution (as by suffering no trades people to enter, or even to come within the outer gates of the house, which is described as situated in a spot considerably secluded, &c.) clearly, as it should seem, in order to avoid any detection of this intercourse by or on behalf of the husband. The same, at Nelson Square, in the neighbourhood of Newington, to which they removed after leaving Mottingham; and then at Loosely Row, in the parish of Princes Risborough, in the county of Bucks; where Mrs. Sullivan was resident at the issue of the citation in the cause. And it is in proof that the fruit of this intercourse has been two children, to whom the wife has actually given birth; without any pretended connection with her husband, the complainant in the cause.

So far, then, as respects the adultery charged on the wife, the case is fully proved. Now being so proved, and actual connivance, at least, on the part of the husband not being suggested; what is there, let me ask, to justify the wife's violation of her marriage vow; and so to deprive the husband, in this particular instance, of that remedy to which the wife's infidelity plainly intitles a husband under ordinary circumstances? **[302]** It has been argued that the husband's going, and his long sojourn, abroad amounts to a malicious desertion of the wife; and that this should operate as a bar. Now here, in the first place, I am still to learn that even a malicious desertion of the wife by the husband is any bar to a sentence of divorce prayed by

the husband for adultery committed by the wife. By the law, indeed, of some countries, malicious desertion is a substantive ground of divorce, at the prayer of the wife against the husband; but not even there, that I am aware of, it licences adultery on the part of the wife by precluding the husband from a sentence of divorce on proof of its commission. Certainly, however, that neither is, nor ever has been, a doctrine of the law of this country; which also, as it is well known, has not recognized even malicious desertion as a substantive ground of divorce. But though, secondly, principally I am clearly of opinion that in true legal construction the husband's absence from was any thing but a malicious desertion of the wife, under the circumstances of the case. At the time of the husband's going abroad a suit (then just instituted) was depending to try the validity of the marriage: nor was that question finally disposed of till long after the adulterous connexion formed by the wife, on which, being proved, the husband now relies for a sentence. But during the pendency of that suit cohabitation was not only not incumbent by law on the parties, or on either of them; it would even have been legally censurable, at least in the husband. Nor could the wife at any period, till after that when she had forfeited her conjugal rights by the actual commission of adultery, have sued the husband for restitution, had he been resident in this country. **[303]** Of one feature, at least, of malicious desertion there is a total absence of any appearance in the cause—I mean that feature (often a very principal one in the character of malicious desertion) which discloses itself in the circumstance of the wife being left unprovided for. She was amply provided for out of the husband's funds, on his becoming of age, as already said by the Court, under the deed; and, up to that time, she had been alimented at the rate of 300l. per annum by the Courts in which the suit of nullity successively depended.

But the deed of separation has also been urged in bar of the husband's prayer. Now these Courts have so repeatedly said that such "deeds of separation" are no bars either, on the one hand, to suits for restitution, or, on the other, as here suggested, to charges of adultery, that it would be quite superfluous to combat this argument, looking at the deed of separation between these parties, quâ deed of separation merely. But it has been said that this particular deed of separation, by the very wording of it, amounts to a letter of license to the wife, to conduct herself howsoever, and to connect herself with whomsoever she pleases. But I see nothing in the deed, even taken per se, which necessarily implies this. I see no more in the deed than the ordinary class of provisions (*a*) for enforcing, so far as **[304]** may be, the continuance, and preventing the determination, of the separate state in which the parties covenant to live, by means of a suit for restitution brought by either, which, nearly in all cases, find their way into deeds of this nature; though nugatory as to any binding effect on the parties, in this particular, as already hinted. But what again, as appears in evidence, has been the conduct of the parties to the deed? Does that countenance the interpretation sought to be put upon it by the wife's counsel?

(*a*) "Now this indenture witnesseth that in pursuance of the said agreement, &c., he, the said John Augustus Sullivan, doth covenant, &c. that the said Maria Sullivan may, at all times hereafter, live separate and apart from him, the said John Augustus Sullivan, her husband, as if she was sole and unmarried; and that she shall be free from the power and command, restraint, control, and authority of him, the said John Augustus Sullivan; and shall and may live, and reside, in such place or places, and in such manner, as to her from time to time shall seem meet: and that he, the said John Augustus Sullivan, shall not, nor will, molest or disturb the said Maria Sullivan in her person or in her manner of living, &c., nor, at any time or times hereafter, by suit or process in the ecclesiastical Court, &c., or by any other means whatsoever, seek or endeavour to compel the said Maria Sullivan to cohabit or live with him, the said John Augustus Sullivan, or to enforce any restitution of conjugal rights; and shall not or will for that purpose or otherwise, use any force, constraint, or violence to the person of the said Maria Sullivan; or sue, or cause to be sued, any person or persons whatsoever, for receiving, harbouring, lodging, protecting, or entertaining her—but that she, the said Maria Sullivan, may in all things live as if she was sole and unmarried, without the restraint or correction of the said John Augustus Sullivan, or of any other person or persons, by or through his means, consent, or procurement." It will be seen that these provisions are precisely similar to those in the deed of separation in the cause of *Barker* v. *Barker*. Vide page 287, ante, in notis.

Does that give it to be supposed that either the one gave or the other took it as a letter of licence to the effect contended? Quite the contrary. Did the wife consider it a letter of licence to connect herself with Mr. Gouldney? The clandestinity of that connexion, to which I have already alluded, shews it not to have been so regarded on her part. And as to the husband, it is not denied that immediately on receiving intimation of what the wife's **[305]** conduct had been he takes steps to bring the matter to its present legal issue; without any suspicion, as it should seem, that he had licensed the wife to form any such connection as that which is the foundation of this suit—although the mere production of the deed, if a letter of license to the wife to form such a connexion, would at once defeat the sole object of the suit, as he himself must have known.

The Court has been urged over and over to consider the ill effect which it has been partly argued, and partly assumed, that a sentence of divorce in this cause will have on public morals. This, of course, as with reference to the supposed countenance that immorality will derive from a husband so circumstanced as the plaintiff taking advantage, as it has been phrased, of his wife's infidelity. But is the Court, by withholding its sentence, to leave it to be inferred, as it must do, that a wife, even one so circumstanced as the defendant, has its sanction to commit adultery? I hardly think that of the two alternatives this is the one least likely to countenance immorality. What should have been the wife's conduct in the peculiar circumstances under which I admit her to have been placed? Its object should have been to qualify herself during his absence, by mental and moral improvement, for the husband's future society; which might then, notwithstanding the state of actual separation in which they were living, have been ultimately afforded her. Instead of so doing, by abandoning herself to her vicious inclinations, she has clearly founded the sentence of legal separation now prayed by the husband—which, as thinking him justly entitled to it, under all the cir-**[306]**-cumstances of the case, in spite of what has been urged to the contrary, I accordingly pronounce.(*a*)

ENGLAND *v.* HURCOMB. ENGLAND *v.* WILLIAMS. ENGLAND *v.* RICHARDSON. Peculiars Court of Canterbury, Michaelmas Term, By-Day, 1824.—Articles against three defendants for brawling, &c. in a church, pronounced to be proved, and the defendants suspended and condemned in full costs—the case of no one of the three, either looking to his own conduct, or that of the promovent, being held to be a case for mitigated costs.

England v. *Hurcomb.*

Judgment—Sir John Nicholl. The case before the Court is one already in part disposed of by its judgment in the cause of *Palmer* v. *Roffey* (see page 141, ante), which was heard in Easter Term. It arises **[307]** out of the same general transaction, and the same general principles are applicable to it; though in their circumstances each is a distinct case, independent of the other, and standing upon its own grounds.

The offence charged upon Mr. Hurcomb in the present suit is the identical offence charged in the former suit against Mr. Roffey. Roffey's offence was that of quarrelling, chiding, and brawling with Hurcomb—Hurcomb's is that of quarrelling, chiding, and brawling with Roffey. Roffey's offence was held to be proved by the Court—but, in so holding it, the Court intimated its opinion that Hurcomb, upon his own shewing (for Hurcomb was a witness in that cause), was in pari delicto—so that his shortest way out of such a suit as the present, should any such be instituted, would probably be that most conducive to his own interest. The defendant, however, has persisted, notwithstanding this intimation, in bringing his cause to a hearing, and in defending

(*a*) Mr. Sullivan has since obtained an act of parliament by which the marriage was dissolved: although he and his wife were living separate, as above (in effect had never cohabited), when the adultery in proof was committed by the wife. To compensate for this ordinary requisite (namely, the cohabitation at that time of the parties) to the passing of such an act it seems that the two houses examined witnesses to the wife's ante-nuptial incontinence. The editor conceives this to be the single instance of their having so done. Such evidence, it may be added, has in no instance been received to assist in making out the husband's claim to a sentence of separation by reason of his wife's adultery in the spiritual Court. See *Perrin* v. *Perrin*, vol. 1, p. 1.

it by counsel; though he has profited to some extent, by the advice of the court, in not examining witnesses upon his defensive allegation; which, of course, renders the evidence, and consequently the expenses, on both sides less considerable in this than in the former cause; in which witnesses were actually examined to a defensive allegation, although their evidence failed to sustain the defence set up.

In support of the articles exhibited in this cause depositions have been taken, the result of which, in my judgment, leaves the case satisfactorily proved. It is proved that Hurcomb quarrelled and chode with Roffey, whom he repeatedly called a "common informer," for hours together at the polling table—and that, subsequently, he renewed the quarrel in the north aisle, **[308]** down which Roffey was proceeding in his way out of the church—a renewal which led to that disgraceful scene of uproar and confusion, stated and reprobated by the Court in its former judgment. It is proved, too, that Roffey upon that occasion was certainly treated with great violence, even that his clothes were torn from his back—but there is no satisfactory proof of any actual "smiting" of Roffey by Hurcomb, as charged in the articles. The "lifting up of his arm," spoken to by the witnesses, seems to have been for the purpose of warding off an expected blow; and not for that of actual aggression. The brawling, however, at the polling table, and its renewal in the north aisle, I repeat, are most satisfactorily proved; and the result is that which the Court anticipated at the hearing of the former cause.

England v. *Williams.* *England* v. *Richardson.*

Neither of the other defendants, Mr. Williams or Mr. Richardson, is defended by counsel. They are both proceeded against for quarrelling, chiding, and brawling, upon the same day (and on the same occasion) as the first defendant. The case against Williams has no direct connexion with the quarrel between Roffey and the first defendant; nor is the case of Mr. Richardson again immediately connected, either with that or with the case of Mr. Williams. But the offence of brawling, and an aggravated offence of that description is proved against both these defendants; against Richardson in particular, whose case in fact is the most offensive of the three. Against this defendant is **[309]** proved, not only the use of the most opprobrious language, but that of the menaces (delivered, too, in the attitude) of a prize fighter; it is even proved that he went so far as to demand the "card" of a person who merely interfered to repress his gross incivility to the rector; a species of implied challenge, tending to positive bloodshed; and all this in a church; where Christian benevolence, and forgiveness of injuries, if any have been sustained, ought especially to prevail. In short, the articles of charge are fully proved against both these defendants.

The only real question in either of the three cases is that of costs.

Now the Court has looked in vain for grounds to render either of these cases, like that of *Palmer* v. *Tijou* (see page 196, ante) (a still other cause arising out of the same general transaction, disposed of here in the last term), a case for mitigated costs. The cause of *Palmer* v. *Tijou* is dissimilar from either of the three, both as respects the promoters, severally, and the parties proceeded against. As respects the promoters, true it is that Mr. Palmer was a parish officer, acting ostensibly in the discharge of his official duty; but the Court is still disposed to adhere to its opinion, entertained at first for reasons already expressed, that the prosecution of Tijou was one that originated, to some extent at least, in party feeling, although directed or advised by so respectable a body as the vestry of this parish; with which the Court had the **[310]** misfortune to differ in opinion as to the propriety of selecting Mr. Tijou for a party to be proceeded against, rather than one of the present defendants. Here, as in *Tijou's case*, the promoter is a parish officer, acting in discharge of his official duty (for upon Mr. England as sidesman this prosecution, if proper to be had, clearly devolved; Roffey, the churchwarden, being himself under prosecution for, and afterwards convicted of, a similar offence), without any such circumstance as, I am still of opinion, existed in that other case, to derogate from his claim upon the Court for full protection and indemnity. Palmer, too, might possibly look to the parish purse to reimburse him for his expences; this promoter has, obviously, no prospect of being indemnified for the costs of the present prosecutions by any contributions from that quarter. Again, as to the parties proceeded against, Tijou's transgression was one by no means of an aggravated nature; Tijou was, confessedly, no party to the original broil—he interfered to protect his churchwarden, Roffey, who was being treated at the time with great actual violence—

and his interference, if it had been confined to that object, would have entitled him to praise rather than to censure. But his language and conduct upon that occasion were extremely reprehensible, whatever his motives might be; and though capable of much excuse; they admitted (the former) of no justification. These on the contrary are all aggravated cases; and I think that I am bound to accompany the sentence of suspension, ab ingressu ecclesiæ for one month, in each of the three, as in the case of *Palmer* v. *Roffey*, with full costs.

It would have been matter of some gratification to **[311]** the Court to have found any just ground for mitigating the costs in any or all of these cases. For this, probably, as giving a triumph to neither party, would have best conduced to allay animosities, and to conciliate that harmony in this parish which has been too long interrupted—an object which, undoubtedly, has not been out of the view of the Court. Still, however, to do justice is a paramount consideration; and I really do not see how, both for the purpose of repressing such offences generally, and for that of affording due protection to the parish officer officially proceeding in these particular suits (and whose claim to full protection is derogated from by no circumstance whatever that I am aware of) I can refuse to condemn all three defendants, Mr. Hurcomb, Mr. Williams, and Mr. Richardson, in costs generally.

HUNTER *v.* BYRN. Prerogative Court, Michaelmas Term, 1st Session, 1824.—Where objections to an inventory, given in on the oath of an executor, are taken by one only of various parties (her interest, too, only derivative) equally interested in the effects of the testator, the rest apparently acquiescing; and where the disclosure of assets sought refers back to transactions pretty remote in point of date, &c.—under such (and by parity of reason under similar) circumstances the court will presume the inventory to be correct, and, consequently, will dismiss the executor, without strong grounds laid to induce a contrary suspicion.

(On petition.)

Henry Frederic Arbouin, late of Mincing Lane, London, died some time since, having duly made and executed his last will and testament, whereof he **[312]** appointed his wife, Elizabeth Arbouin; James Byrn (party in the cause); and John Sabatier, executors; who took probate, as such, of his will in the month of May, 1803.

The testator by his said will directed that the residue of his estate and effects should be converted into money, and invested in the names of the said James Byrn and John Sabatier, upon trust to pay the interest, annual dividends, or profits thereof to his said wife, Elizabeth Arbouin, for her life; and from and after her decease (in the event of the deaths of their common issue, under age and unmarried, a contingency which actually befel in the year 1817), upon trust for the benefit of such person or persons as she, the said Elizabeth Arbouin, should by will or otherwise lawfully appoint.

Elizabeth Arbouin died, having first duly made and executed her last will and testament, whereof she also appointed James Byrn aforesaid, and the Rev. Daniel Veysie, clerk, executors, who duly proved the same in the month of February, 1806; having, in and by such will, directed and appointed that both her own property and that subjected to her appointment by the will of her husband, in the event aforesaid, should, in that event, go to and be divided among certain persons in certain proportions—one eighth being limited and bequeathed in the same to Susannah Hunter (formerly Arbouin), the other party in the cause.

Under these circumstances a citation had issued, at the instance of the said Susannah Hunter, calling upon the said James Byrn, as surviving executor of the will of Elizabeth Arbouin deceased, for an inventory and account of her effects. And the present question re-**[313]**-spected the validity of an objection taken, on the part of Mrs. Hunter, to the declaration in lieu of an inventory exhibited by the said James Byrn under and in virtue of that citation.

In support of the objection it was contended that the inventory was unsatisfactory, as not duly setting forth the husband's effects, subjected as above to the disposal of the wife; to a constat of which Mrs. Hunter, as appointee to an eighth of these, was clearly entitled, and from Byrn, the party cited—he, Byrn, being the surviving executor, both of husband and wife.

On the other hand, it was argued that the objection was unfounded; the inventory itself being satisfactory in the view taken of it by counsel (in effect, that stated in the

judgment). It was also submitted that the objection was one which, whether founded or not, it might be incompetent to the Court to entertain on the authority of certain cases determined at common law; and, in particular, on that of a late case, *Henderson* v. *French*, in Maule and Selwyn's Reports.(*a*)

Judgment—Sir John Nicholl. This inventory or declaration is objected to in a single item. The party who objects states in her act on petition that "she has been informed, and believes, that the sum of £1140l., over which the said Elizabeth Arbouin is, in the said declaration, by the said James Byrn, admitted to have had a disposing power by the will of her late husband, does not constitute, and is not in the said declaration stated to constitute, the whole of her late husband's effects, subjected to the disposal of **[314]** the said Elizabeth Arbouin as aforesaid," that is, as already stated in the former part of the act. And she prays that "the said James Byrn may be assigned to amend his declaration, either by inserting therein, or by exhibiting separately a full, true, and particular inventory of all and singular such the goods, chattels, and credits of the husband, that at any time since his death have come to his, the said James Byrn's, hands, possession, or knowledge, as by the husband's will were directed to be invested upon trust for the benefit, in a certain contingency, of the appointees of the wife"—of which Mrs. Hunter, I may say, is fully admitted to be one.

Now the property of the husband, so subjected to the wife's disposal, being the "residue of his effects," the exhibitant has stated, in substance, both the amount of that residue and how derived. For he says that till the death of his co-executor, Mr. Veysie, in the year 1817, he, the exhibitant, scarcely intermeddled in the deceased's effects; save only that early in that year, "at the time of his, the exhibitant's, bankruptcy, he proved, as executor of the deceased, a debt against his own estate, for the share of property due to her, the deceased, on account of a partnership concern in which he, the exhibitant, and the deceased's late husband, had been formerly engaged;" with the dividends upon which he purchased the sum of 1500l. three per cent. consolidated bank annuities in the joint names of himself and Mr. Sabatier, his co-executor in the estate of the husband. He admits the deceased to have had a disposing power over this by the will of her husband; and this it is of which Mrs. Hunter speaks in her act as 1140l., being the sum for which that stock was actually sold out in August, **[315]** 1821; and which constitutes the supposed objectionable item in the declaration now excepted to.

The question then is, whether the exhibitant is compellable upon this statement of facts to substitute for this sum of 1140l., stated in his declaration, an inventory in full of the husband's effects as now prayed? I am of opinion that he is not compellable at this time, in virtue, at least, of the present citation, and under the circumstances. The disclosure sought is very remote in point of time—it is sought by one whose interest in the effects of the husband is merely derivative; and the citation is for an inventory of the wife's effects only, not those of the husband—although this last, as being a technical objection merely, inasmuch as Byrn, the party cited, is the husband's executor, as well as that of the wife, might have been overlooked by the Court, had the party citing him made a strong case upon the merits. Both testators have been dead these almost 20 years. Byrn too had co-executors in the management of the estates of both; each of whom is since also dead—and of various legatees, the whole, it should seem, with the exception of Mrs. Hunter, have acquiesced in this sum of 1140l., being, as he states it, that residue of the husband's effects subjected, by his will, to the wife's appointment. Now I think, under these circumstances, that I am bound to presume the inventory correct in this particular, without strong grounds laid to induce a contrary suspicion. But I have looked in vain for such in the present proceeding. Nothing in the shape of any omission, or suppression, is specified—all which her act states (unsupported too by any affidavit) is, that she, Mrs. Hunter, has been informed, and believes, that this sum of 1140l. is not the whole of her late husband's **[316]** effects, subjected to the wife's disposal by his will. On the contrary, it is sworn by Byrn generally, at the end of his declaration, that no further or other goods, chattels, or credits of the deceased (the wife) have at any time come to his, the declarant's, hands, possession, or knowledge, than those inserted in the declaration; which would be plainly false, if this sum of 1140l. did not constitute the whole of the

(*a*) Vide case of *Telford* v. *Morison, formerly Thomas*, post, page 319.

effects, subject to her disposal, under the first testator's will as above. It is in effect then both stated and sworn in this declaration to constitute that whole, though Mrs. Hunter says otherwise in her act—and I think that I am bound to presume that statement, so made and sworn to be correct, at least for any thing that appears to the contrary on the face of these proceedings; and, consequently, that I am bound to dismiss the party cited from the further effect of the citation.

(IN THE GOODS OF SAMUEL ROLLS, Deceased.) Prerogative Court, Michaelmas Term, 1st Session, 1824.—The Court will not decree probate, even in common form, of alterations in a will, so made as, in themselves, and on the face of them, to be only cursory and deliberative upon affidavits; where it is doubtful whether any proof of what appears of their history, as stated in the affidavits, would justify the Court in pronouncing for those alterations, if regularly propounded, as parts of the testator's will.

(On motion.)

Samuel Rolls of Tottenham, in the county of Middlesex, Esq. (the party deceased), died suddenly, on the 25th of July last [1824]; possessed of personal property to the amount, in value, of about 25,000l.

In April, 1815, the deceased duly made and executed his will, in the presence of three witnesses, and thereof appointed his wife and three other persons executors.

[317] By this will he bequeathed to his wife the sum of 1000l., and all his furniture, &c., absolutely; and a life interest in the sum of 8000l.: to his nephew, John Rolls, 500l.: to a person named Francis Sard, 50l.: and the residue (with the exception of certain other legacies, amounting in the whole to about 2000l.) to his nephews and nieces, children of his brothers and sisters, twenty-three in number; eight of which residuary legatees were still minors.

In the month of April, 1822, the deceased, in a conversation with Mr. John Sard, mentioned to him that it was his intention to leave Francis Sard 100l.

In December, 1823, or January, 1824, he produced his will to Mrs. Rolls, intimating his intention to make certain alterations in the same. He then read over the will to Mrs. Rolls; and, on reading the legacy of 500l. given to his nephew John Rolls, made some alteration therein with a pencil. On reading the bequest of 50l. to Francis Sard, he made a similar alteration; observing that he had promised Mr. John Sard to leave Francis Sard 100l.; the propriety of keeping which promise she, Mrs. Rolls, assented to. On reading the bequest of 8000l. for life to Mrs. Rolls he observed that "he had not done sufficient for her," and that "he would leave her something more, increasing her income to 500l. per annum;" upon which, still with a pencil, he made a further alteration in the said will.

The will remained in the testator's own possession; and it was found after his death, in his iron chest, by a Mrs. Holt, with the following pencil marks and alterations. The legacies to Mr. John Rolls, and Mr. Francis Sard, increased, the one from 500l. to 1000l.; and the other, from 50l. to 100l., respectively, by **[318]** figures—and the bequest for life to Mrs. Rolls increased from 8000l. to 9000l., by the word "nine" (substituted for eight in the will), all in pencil—such figures and word respectively being in the deceased's hand-writing.

An affidavit of these facts was now exhibited, made by Mrs. Rolls, Mrs. Holt, Mr. John Sard, and a Mr. Saddington (the latter to the hand-writing only), and a decree was prayed, on the part of the executors, calling upon the residuary legatees to shew cause why probate of the said will with the said pencil alterations should not be granted to the executors in common form; with the usual intimation.

Court—Sir John Nicholl. These alterations are slightly made, and are clearly, in themselves, and upon the face of them, only cursory and deliberative. And it is by no means certain that any proof even of what appears of their history in these affidavits would justify the Court in pronouncing for them, if regularly propounded, as parts of the deceased's will. With this impression of the case I think that probate of the will, as altered, ought not to pass to the executors in common form; and, consequently, that the citation now prayed is one that ought not to issue. A probate in common form would of course not be binding upon the parties entitled to the residue; especially not upon such of them as are minors. At the same time, in permitting it to pass, the Court might well mislead all the parties as to what its probable judgment would be in the event of these alterations being propounded; and the facts and

circumstances now stated, merely upon affidavits, for the purpose of [319] sustaining them being pleaded, and proved—a possible mis-conception against which, I think, I am bound to guard by rejecting the present prayer. In the event of these alterations not being propounded by those who are interested to sustain them, and proved per testes; probate must be taken of the will as originally executed.(*a*)

Motion refused.

TELFORD *v.* MORISON, FORMERLY THOMAS. Prerogative Court, Michaelmas Term, 2nd Session, 1824.—A creditor (or legatee) may object to an inventory given in by an executor or administrator; and may file an allegation pleading omissa, in order to take the answers of the executor or administrator, though he may not go on to examine witnesses to falsify the inventory.—The court is plainly not merely ministerial in the matter of inventories, under the statute of Hen. VIII., although there are two cases in prohibition in the Court of King's Bench, seemingly to the effect (one, at least, of them) as reported, that it is so, merely ministerial. Accordingly it will go on to entertain objections to inventories as above, until it is more fully assured that the advised judgment of the Court of King's Bench is, to the effect of those cases, as reported.

(On motion.)

This was a question of objection to an act on petition, which the proctor for the party objecting had declined writing to; simply moving the Court by counsel that his party might be dismissed under the following circumstances:—

Amy Thomas, widow and executrix of John Thomas, the party deceased in the cause, had been cited by John Telford, a creditor of the said deceased, to exhibit an inventory of his effects, and to render a true and [320] just account of her administration of the same. A proctor appeared for the party cited; and, after exhibiting a declaration (instead of an inventory), together with an account, as required, prayed that his party might be dismissed. The proctor for the creditor prayed to be heard on his petition, in objection to this; and brought in an act on petition; alleging in objection that she, the executrix, in her declaration, had not "set forth the particulars of the sundry spirituous liquors, of which she admitted the deceased" (a publican by trade) "to have died possessed;" nor had she "set forth and specified the several articles of household goods, furniture, plate, linen, and china belonging to the deceased; nor when, where, and by whom the same were appraised;" but had merely stated generally that "they were appraised at the sum of 120l. 10s." And the same in respect to the lease and good-will of the testator's house and business, which were only said generally again to have been "appraised at the sum of 100l.;" though they were objected to be of much greater value. The Act therefore prayed that the executrix might be compelled to amend her declaration in these particulars; and might, further, be condemned in the costs of the proceeding. Instead of writing to this act, the proctor for the executrix, as already said, moved the Court by counsel, that his party might be dismissed—submitting that the Court had no jurisdiction to entertain objections of this or any nature to an inventory, on the authority of two cases determined in prohibition by the Court of King's Bench; the case of *Catchside* v. *Ovington*, reported in 3 Burrows, and that of *Henderson* v. *French*, [321] reported in 5 Maule and Selwyn (3 Burr. 1922, 5 M. & S. 406), and, consequently, that his party, the executrix, was entitled to her dismissal.

Court—Sir John Nicholl. This is a question of jurisdiction; and it is one which should have been raised by the proctor for the executrix writing to the act, to the effect of what is now submitted to the Court by counsel on a mere motion. At the same time, as both the Court and the adverse counsel were previously apprized of the grounds of the motion, so that neither the one nor the other are taken by surprize in consequence of the course actually pursued, I shall proceed to dispose of the question at once, notwithstanding the general irregularity of the proceeding: although, as I repeat, this is not the mode in which a question of jurisdiction at all, especially one of this magnitude, ought to have been raised.

(*a*) These alterations were propounded in the following Hilary Term, in an allegation, pleading in substance, as stated in the above affidavits: but the Court on debate rejected the allegation, and decreed a probate of the will to the executors in its original state.

The jurisdiction of the Court in the case in point is denied, not so much avowedly upon any reason or with reference to any principle, as it is upon the authority of two cases determined in prohibition, that of *Catchside* v. *Ovington* and that of *Henderson* v. *French*, the latter itself, by the way, founded partly no doubt on the former, which must be taken to have had at least some weight with the Court in its character of precedent, as and for which it was cited in the latter case. In a third case, indeed, that of *Hinton and Parker* (8 Mod. 168), there is a dictum to a similar effect with the judgments in the other two, so far as that dictum itself goes. But the principle upon which that dictum pro-**[322]**-ceeded, be it what it might (for it is not said nor is very easy to be conjectured), at least gives no countenance whatever to the avowed principle upon which the other two cases were decided. For in that case of *Hinton and Parker* the power of the Ecclesiastical Court to entertain objections to an inventory, in one of the only two cases in which it has any pretence to exercise such a power, namely, at the suit of a legatee, is admitted: a prohibition is actually denied on the ground of its having such power. The dictum, a mere dictum, is only to this effect—that the Ecclesiastical Court has no such power at the suit of a creditor. But the principle upon which the prohibition seems to have gone in the case of *Catchside and Ovington* and the other (*a*)—namely, that under the statute of Hen. VIII. the Ecclesiastical Court is merely ministerial in this matter of inventories—goes to deprive the Ecclesiastical Court of the power of entertaining objections to an inventory altogether; whether at the suit of a creditor or at that of a legatee, as will presently appear.

It is much to be regretted that the Ecclesiastical Court should be prohibited in any matter wherein jurisdiction has long been conceded to it, until (without offence be it spoken) the Court applied to for the prohibition has been attended by civilians, in order to its **[323]** being fully instructed as to all the points raised by the application. The very circumstance of jurisdiction having been long conceded to it, in any case, implies that its jurisdiction in that case is well founded and of public convenience—and before the further exercise at least of such a jurisdiction is prohibited to the Spiritual Court, it should perhaps be heard by its own counsel in its defence; as better apprized of those matters more immediately appertaining to the peculiar law and ancient practice of the Spiritual Court, which the application to the Temporal Court for a prohibition in that case almost necessarily involves, than counsel who practise in the Temporal Courts only can well be supposed to be. Now in the cases relied on in the present instance against the jurisdiction of the Ecclesiastical Court, the prohibition seems to have gone without much discussion of any sort; and it certainly went, without the Court of King's Bench at the hearing of either, having been attended by civilians, that I am able to discover. But the Ecclesiastical Court in those cases was prohibited in a matter wherein, as will presently be shewn, jurisdiction had long been conceded to it: and that the exercise of its jurisdiction in that matter was of public convenience can hardly be questioned. It is of great convenience to creditors and legatees (for the same considerations apply to both) to obtain a constat of assets before they engage here or elsewhere in perhaps expensive litigations for the recovery of debts or legacies. A disclosure of assets, the executor or administrator is bound to also by his very oath of office. But all this is merely nugatory, if an executor or administrator can evade a disclosure of assets by **[324]** any paper exhibited here, which he chuses to call an inventory—which must, however, be, if this Court is merely ministerial in this matter of inventories and can entertain no objections of any sort to an inventory as now contended. Of whom, but persons studious of concealment, are inventories usually sought through the intervention of these Courts? But if these Courts are functi officio the instant that any thing in the name of an inventory is exhibited, as to any benefit that in nine cases out of ten can

(*a*) In the case of *Catchside and Ovington*, however, that the prohibition went upon the construction of the statute of Hen. VIII. [21 Hen. VIII. c. 5, § 4] as making the Ecclesiastical Court merely ministerial is a statement which rests not on the authority of the report itself, but on that of the editor of the edition in 1790, who so says in a note on the report. All which the report itself says is this—"By Lord Mansfield and the Court: It appears on the face of the proceedings that the Spiritual Court hath no jurisdiction." But what the proceedings had been does not appear from the report.

be reasonably expected to result from them, this matter of exhibiting inventories might well be abolished altogether.

The Court of King's Bench, in issuing its prohibition in the cases referred to, seems to have taken up this matter as if both the obligation of exhibiting an inventory and the jurisdiction of these Courts over inventories originated with, and rested solely upon, the statute of Henry VIII. This at least is to be inferred from the printed reports, both of the arguments and especially of the judgments in those cases. In that of *Henderson* v. *French*, which is reported most at length of the two, it appears indeed that the present Mr. Justice Littledale, who was then counsel, did state, in shewing cause against the rule nisi for a prohibition that it had been the practice of the Court sought to be prohibited (the Consistory Court of Carlisle), to permit exceptions to be taken to inventories time out of mind: and entries of such proceedings in that court, from the year 1636 to 1812, were produced in support of that statement—the earliest, however, of these, that in 1636, it is observable, being long subsequent to the statute of Hen. VIII. But the counsel who argued in support of the rule, Mr. Scarlett, with-[325]-out any apparent reference to all this, as wholly beside the question, was content, by way of answer, with a mere reference to and argument upon the statute of Hen. VIII. In the words of the report, "Scarlett contrà cited 21 Hen. VIII. c. 5, § 4, which he contended only requires an executor to make an inventory and to deliver it into the keeping of the bishop or ordinary." And the Court seems to have taken the same limited view of the case in its judgment: for "the Court were of opinion (the words of the report again) that as the statute directed the executor, for the security of the creditors and legatees, to make an inventory to the bishop or ordinary; and that no bishop or ordinary should, under pain of 10l., refuse to take such inventory, his office was merely ministerial"—adding, "If the statute had intended more it would have so said."

But whoever is acquainted with the old law and practice of these Courts must be aware that neither inventories themselves, nor the jurisdiction of these Courts over inventories, is at all to be traced up or ascribed to the statute of Hen. VIII. Lyndewood, for instance, who wrote long before the statute, may be cited in proof of this; who in the 13th title of his third book De Testamentis enters pretty fully into the matter of inventories, and shews them to have been at that time generally under the cognizance of the Spiritual Court. Nor does it seem to have been long suspected even that the jurisdiction of these Courts in this particular was abridged by the statute of Hen. VIII. This may be collected from Swinburn, in whose book it appears that inventories and accounts were still required by these Courts of executors and administrators, at the suits of those interested in the effects of testators or [326] parties dead intestate; and might be questioned in these Courts—notwithstanding this, and long subsequent to the statute of Hen. VIII., when Swinburn wrote. There are several sections in the sixth part of his book, setting out when the inventory is to be made, what is to be put in it, and the effect and benefit of it—and it is there expressly also said that "if any creditor or legatory do affirm that the testator had any more goods than be comprised in the inventory, he must prove the same: otherwise the judge (the ecclesiastical judge) is to give credit to the inventory"—clearly not making him merely ministerial in this matter, and so unable to entertain objections of any sort to an inventory.

The object of the statute which is supposed to have this effect (I mean that of making these Courts merely ministerial) is so declared in its title, and runs so much through its enactments as hardly to be mistaken. The title is, "What fees ought to be taken for probate of testaments." And the preamble as clearly shews the true, I might almost say the sole, object of the statute to have been the restriction of fees. The order respecting inventories occurs (incidentally, as it were) in the middle of a section (the 4th § of the act) which, after stating how much the ordinary shall take in particular cases of wills or intestacies, goes on to enact, "That the executor or, in case of an intestacy, the administrator, calling or taking to him such person or persons, two at the least to whom the deceased was indebted or had made any legacy, and upon their refusal or absence, two other honest persons, being next of kin to the deceased, and in their default or absence, two other honest persons, shall in their presence, and by their directions, make or cause to be made a true and [327] perfect inventory of all the goods, chattels, wares, merchandises, as well moveable as not moveable whatsoever, that were of the said deceased; and the same shall cause to be

indented; whereof the one part shall be by the said executor or administrator, upon his oath to be taken before the ordinary, &c., on the holy Evangelists (averred) to be good and true; and the same one part indented shall deliver into the keeping of the said ordinary, &c., the other part thereof to remain with the said executor or administrator; and that no ordinary, &c., upon the pain in this estatute hereafter contained, refuse to take any such inventory to him presented or tendered to be delivered as is aforesaid."

Now it is pretty evident that this part of the act neither does nor was intended to confer any jurisdiction on the Ecclesiastical Court with respect to inventories. As little can it be construed to have taken any away. What it does is this: it regulates the mode of making inventories; as, especially, that the inventory shall be made in duplicate, one part to be kept by the ordinary: and in effect (as taken in conjunction with the whole act, and the inception of this fourth section) prescribes that the ordinary shall receive that one part so committed to his keeping, without exacting additional fees—which last I take to be what the legislature had principally in view, in that part of the order respecting the receiving of inventories by the Ecclesiastical Court itself. Nor is there in this fourth section, as might be inferred from the printed report of the case of *Henderson* v. *French*, in Maule and Selwyn, any special penalty of 10l., imposed on the ordinary for a contravention of the statute in the matter of inventories; from **[328]** which penalty imposed the Court of King's Bench seems partly to have inferred that the ordinary's office was so merely ministerial in that matter. That penalty, a general penalty, is imposed by a subsequent general section (the 7th), which enacts that "every ordinary, &c., that shall do or attempt or cause any thing to be done, or attempted, against this act or ordinance (the whole statute, that is) in any thing, shall forfeit and lose for every time so offending to the party grieved in that behalf, so much money as he shall take contrary to the present act" (still with reference this to the main object of the act as explained above, and a further proof of such being the main object); "and over that, shall lose and forfeit 10l. sterling—a moiety to the King, and the other moiety to the party grieved in that behalf that will sue, &c., for recovery of the same." And as to any jurisdiction which the Ecclesiastical Court thentofore had over inventories not being taken away by this fourth section, this is put beyond all manner of doubt by another general (the 8th) section, which is in these words: "Provided always, that this present act shall not be prejudicial to any ordinary, or any other person which now have or hereafter shall have authority for probate of testaments; but that every of them shall, and may, convent before them, all and every person or persons, made and named executor or executors of any testament, to the intent to refuse or prove the testament or testaments of that testator or testators; and to bring in inventories, and to do every other thing concerning the same as they might do before the making of the act."

Here, then, the jurisdiction is not only not taken away from, it is expressly reserved to, the ordinary. **[329]** The restraining of fees is the great object of the act; the limiting the jurisdiction of these Courts is not its object at all. The act neither originated the obligation of exhibiting inventories; nor did it, in my humble judgment, render the Spiritual Court merely ministerial, concerning inventories—confine it, that is, to the mere receiving of inventories, when exhibited. On the contrary, it reserved to it all the powers in this matter which it had before the act; of which powers that of examining alleged omissions in inventories indisputably was one.

If, however, the Court of King's Bench had put a different construction upon the statute, having all these matters fully before it, it would have been the duty of this Court to have acquiesced in that construction, to say the least, in its public capacity. The Court, therefore, in that case would undoubtedly prohibit itself, by admitting the validity of the present objection. But I am not disposed to do this as the matter now stands—and the rather, as I find that my predecessor did not conceive that his hands were tied up in a case like the present, by the decision of the Court of King's Bench, in the case of *Catchside and Ovington;* the principal case, that is, on the authority of which it is contended that it is incompetent to the Court to proceed in the present case. This may be collected, for instance, from the case of *Shackleton* v. *Lord Barrymore*, which occurred here in Hilary Term, 1798; and which, in substance, was as follows:—

It was a suit by Shackleton, a creditor, against Lord Barrymore, as administrator of his brother, the late lord, for an inventory. Lord Barrymore exhibited an inventory. The creditor then gave in an allegation, **[330]** pleading omissa; to which allegation

not only his lordship's answers were taken, but the creditor, being dissatisfied with those answers, produced witnesses on the allegation who were examined to falsify the inventory. At the hearing of the cause Lord Barrymore's counsel, of whom I was one, took an objection, at least to the depositions being read; citing, among other arguments in support of the objection, this case of *Catchside and Ovington*. The judge, Sir William Wynne, upon mature deliberation, sustained the objection, so far as it went to the reading of the depositions; at the same time that, notwithstanding the case of *Catchside and Ovington*, he ordered a fuller inventory as with reference to assets, the omission of which was deducible from the answers. From a note which I took of his judgment at the time I find that learned person to have expressed himself to the following effect:—

"It has been argued, that a creditor not being allowed to object to an account, it is not open to him on the same principle to object to an inventory. Upon principle, perhaps, there is no very solid distinction between the two cases; but a distinction has always prevailed in practice; allegations in objection to inventories have constantly been admitted. Two cases have been cited, indeed, to the effect that the common law will not allow inventories to be objected to in these Courts; but the reports of those cases are so short that it is not easy to see upon what principle they proceeded. In the one of these, the case of *Hinton and Parker*, it is merely said that the Spiritual Court shall not falsify an inventory at the suit of a creditor, though it may at the suit of a legatee. This is strictly all; for it is neither **[331]** said how the Spiritual Court shall not proceed to falsify an inventory at the suit of a creditor; nor is any ground for the distinction between the case of a creditor and that of a legatee, in this matter, for which there seems to be no good foundation in reason or principle attempted to be laid." In *Catchside and Ovington* the Court said, "On the face of the proceedings the Ecclesiastical Court had no jurisdiction;" but what the proceedings had been in that cause does not appear from the printed report.

What has been principally contended, however, is that though the Court may allow an allegation to be given in objection to an inventory, and answers to be taken upon that allegation; yet that it should go no further: that it should not permit witnesses to be examined upon the allegation in order to falsify the inventory. This distinction I take to be well founded (and therefore I incline to sustain the objection so far) for the following reason:—If the answers confess more assets than were inserted in the inventory, the Court may order the inventory to be amended by the insertion of these. But what is it to do if further assets are established by witnesses, in opposition to the answers? It cannot order them to be inserted in the inventory, without the party's oath; for the inventory is required by the statute to be upon oath. Nor can it compel the executor or administrator to swear to assets the possession of which he has twice already upon oath denied. Hence I sustain the objection taken to the depositions being read in this case. Nor in the cases cited (or in any other that I am aware of) of depositions taken on allegations of this **[332]** sort,(*a*) does any one occur in which the Court has ordered articles to be added to an inventory on depositions against answers: so that the taking of such depositions at all should appear merely superfluous.

Here, then, in this case of *Shackleton* v. *Lord Barrymore* there is a direct precedent for the Courts proceeding in this matter, notwithstanding the case of *Catchside and Ovington:* and I think that on the authority of that case the Court may proceed in the present; notwithstanding the countenance which that case of *Catchside and Ovington* derives from the more recent case of *French and Henderson;* and notwithstanding that more recent case itself, taken substantively. Further, in the present case the party, an executrix, whose authority is derived from the ordinary, objecting a statute in bar of proceedings by the ordinary, is at least, it should seem, first bound herself to a compliance with that statute. Has she complied with the statute? Is this such an inventory as is required by the statute? It is certainly not, in my view of it. The executrix does not even style it an inventory but a declaration in lieu of an inventory. She classes the effects in masses, and does not detail them specifically—nor does she set forth by whom they were appraised—both seemingly required by the statute.

(*a*) *Armstrong* v. *Caley*, 1763. *Venables* v. *Watkins*, 1766. *Deane* v. *Crevis*, 1767. *Griffiths* v. *Craven*, 1771.

Upon all these considerations I think that the executrix must either write to this act or bring in a further inventory as prayed by the creditor.

Motion refused.

[333] IN THE GOODS OF ROBERT NICHOLSON, ESQ., Deceased. Prerogative Court, Michaelmas Term, 3rd Session, 1824.—An original codicil of which probate had been granted, containing an assignment of 10,000l. (part of 15,000l. secured by a heritable bond on lands in Scotland) delivered out in order to its being registered in Scotland, and there finally deposited, this being necessary to give the same effect; and the codicil itself (termed in Scotland a deed of disposition or assignation) not relating to any property of the testator in this country.

(On motion.)

In the month of October, 1821, probate of four paper writings, as containing the will and three codicils of Robert Nicholson, the party deceased in the cause, was granted to his three executors. The testator died possessed of large personal and heritable property both in this country and in Scotland; and amongst other property in Scotland of a certain heritable bond, dated the 2nd of January, 1812, granted to him by Patrick Crawford Bruce, Esq., upon the lands and barony of Glenelg in North Britain, for securing the sum of 15,000l. with lawful interest thereon.

The paper writing, of which probate was granted as a third codicil to the testator's will, contained an assignment of 10,000l., part of the 15,000l. so secured by the said bond, in favour of Robert Nicholson Bruce (son of the aforesaid Patrick Crawford Bruce), his heirs and assigns; and in no way related to or affected any property of the testator in this country; and it was absolutely necessary, in order to carry the same into effect, that the said original third codicil itself (termed in Scotland a deed of disposition or assignation) should be recorded in the register books of the council and sessions at Edinburgh.

An affidavit verifying the above facts and circumstances was now exhibited; and the Court was moved by counsel (with reference especially to a case in [334] 1796, *Re Macpherson, Deceased*, where a similar application was acceded to) to decree that the said original third codicil to the will of the said testator should be delivered out of the registry of the court (an authentic copy of the same being first taken and deposited in its room) for the purpose of being inserted in the register books of council and sessions kept at Edinburgh by the Lord Chief Registrar of Scotland or his deputies; and there finally deposited.

The Court granted the prayer as made; but directed that means should be taken to ensure a certificate of the due delivery of the said original codicil to the said Lord Chief Registrar or his deputies, and of its having actually been inserted, recorded, and deposited as aforesaid (a precaution which should seem not to have been taken in the former case of *Macpherson*, so that no proof was ever exhibited in that case that the instrument had actually been duly received and registered). And the said codicil was subsequently delivered out, accordingly, to the executors on their entering with two sureties into a bond in the penal sum of 1000l. conditioned to their exhibiting a certificate as above, by the first session of the ensuing (Hilary) term; or at least an affidavit to the same effect, duly sworn in the event of the said Lord Chief Registrar or his deputies refusing or declining to grant such certificate.

Motion granted.

[335] IN THE GOODS OF THE REV. WILLIAM PHILLIPS, Deceased. Prerogative Court, Michaelmas Term, 3rd Session, 1824.—A defect in the legal representation of a party occasioned by the lunacy of one of his several administrators, how permitted by the Court to be supplied.

(On motion.)

In the month of October, 1817, letters of administration with the will and two codicils annexed, de bonis non, &c. of the Rev. William Phillips, deceased, had been granted by the authority of this Court to three of his younger children; being, as such, three of the substituted residuary legatees named in the said will. They had been granted, in the first instance, to his widow (since also deceased) as residuary legatee for life.

In the month of March, 1824, a commission in the nature of a writ de lunatico inquirendo was duly awarded by, and issued from, the Court of Chancery, under

which one of the said three administrators was found to be a lunatic; and two persons were subsequently appointed by the Lord Chancellor committees, severally, of his person and estate.

There were still standing, in the name of the deceased, in the books of the governor and company of the bank of England, certain sums the property of the said deceased; but of which neither the interest could be received nor the principal stock transferred as directed by the will, in consequence of such lunacy of one of the said three administrators; whereby the letters of administration granted as aforesaid had become inoperative in law.(*a*)[1]

[336] Under these circumstances, duly verified by affidavit,

The Court was pleased, on motion of counsel, to direct that upon the letters of administration so granted as aforesaid being brought in by the two (the sane) administrators and the committees of the third, letters of administration de bonis non, &c., should, with the leave and by consent of the said committees, issue de novo to the two former only; with the omission of the latter, the third administrator, who had so become a lunatic as aforesaid.(*b*)

Motion granted.

BROGDEN *v.* BROWN. Prerogative Court, Michaelmas Term, 3rd Session, 1824.—An allegation in objection to an inventory brought in on oath, by a party in the cause, admitted; and "answer" decreed. Quære, whether the Court might not assign a "term probatory," and permit witnesses to be examined on such an allegation, in the event of the answers being unsatisfactory.

(On the admission of an allegation.)

Mary Jones died on the 13th of June, 1823, a widow and without a child—leaving John Brown, **[337]** party in the cause, her natural and lawful father, and the only person entitled to her personal estate and effects, if dead intestate. Mr. Brogden, the other party, was sole executor in a will of the deceased, purporting to bear date on the 12th of June, 1823: he had propounded this will, and it was opposed by the father.

Both parties pleaded and examined witnesses—and on the second session of Trinity Term [1824] publication was decreed at the petition of the proctor for Brown, and "for sentence on the first assignation next Court:" when the proctor for Brogden asserted an allegation on admission of which the judge assigned to hear on the fourth session.

On the second session, however, of the term preceding [Easter Term], the proctor for Brogden had brought in an inventory of the effects of the deceased, on the oath of his party,(*a*)[2] in compliance with an assignation to that effect. And the proctor for Brown, on the second session of Trinity Term before mentioned, objected to that inventory, and the judge assigned to hear "on his petition," in objection to it, next Court.

The above assignation was continued from the third to the fourth session, when

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(*a*)[1] The act of 36 George III. c. 90, entitled "an act for the relief of persons equitably and beneficially entitled in the several stocks and annuities, transferable at the bank of England," so far as it relates to lunatics, was considered to apply only to stock standing in the name of a lunatic, either in his own right or as a trustee—and not to stock standing in the name of a deceased person whose legal representative had become lunatic.

(*b*) Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the Court to make a limited grant to his committee for his use and benefit during his lunacy. But until the present no case of an application to the Court to supply a defect in the legal representation of a party deceased, occasioned by the lunacy of his several administrators, is believed to have occurred.

(*a*)[2] It should be said that Mr. Brogden had been sworn executor of the will which he was now propounding ten days after the death of the deceased—and that, as executor in that interval, he had intermeddled with the deceased's effects, by converting property, &c.—though a probate of the will had been prevented from issuing by a caveat entered in the name of the father, after he had been so sworn; and the subsequent institution of the present suit. See case of *Brogden* v. *Brown*, among the cases heard in Hilary Term, post.

both proctors declared that they should give no further allegation, unless exceptive to the testimony of witnesses: on admission thereof, if **[338]** any, on the by-day—to which by-day the rest of the assignation was also continued; and so regularly on till Michaelmas Term; on the first session of which the proctor for Brown waived his petition, and brought in an allegation in objection to the inventory; which allegation was opposed, and now stood on admission.

1, 2. This allegation, after pleading (articles one and two) in substance that Brogden took possession of the effects of the deceased—that he was assigned to exhibit an inventory and that he had omitted various articles in the inventory actually exhibited, pleaded in substance, more specifically.

3. That the business of the deceased, that of a bread and biscuit baker, was carried on for some time after her death, and until the same could be disposed of—that during such time there were goods sold to the amount or value of 59l. or thereabouts, which sum had been paid into the hands of Brogden, the exhibitant—but that he, Brogden, in the inventory exhibited, had charged himself with the sum of 21l. 14s. 6d. only, in respect of goods so sold.

4. That the deceased at the time of her death had book debts owing to her, amounting altogether to the sum of 300l.: and was also possessed of two bills of exchange (value unknown)—that Brogden had received the said book debts, wholly or in part, and the said bills of exchange—but had charged himself with neither in the said inventory exhibited.

5. That the said deceased was possessed at the time of her death of a policy of assurance effected on her own life for 500l., or some other considerable sum—that Brogden since her death had received the amount of such policy under assignment thereof, or otherwise; **[339]** but had not charged himself with the same, nor made any mention thereof whatever in the said inventory. Lastly—

6, 7. That the deceased was possessed of various articles of plate, furniture and wearing apparel (in part specified) also taken possession of by Brogden (over and above what he had mentioned and set forth in his inventory): with which, or with any sum or sums of money in respect of which he, Brogden, had likewise omitted to charge himself, as bound by law.

The admission of this allegation was opposed on the behalf of the executor—partly as with reference to the late period at which it was tendered; and to the delay in the hearing of the principal cause, now ripe for the hearing, which the assigning of a new term probatory inferred to be consequent on the admission of the allegation would, of course, give rise to. It was also again submitted as a circumstance,(*a*)[1] on the authority of *Henderson* v. *French*, and other cases, that the Ecclesiastical Court had been held by the Court of King's Bench, merely ministerial in this matter of inventories—and so not authorized to proceed by allegations, admitted or otherwise, to falsify inventories once given in on the oaths of executors.

Judgment—Sir John Nicholl. Mr. Brogden, as sole executor of a will, which in that character he is propounding before the Court, was assigned to exhibit a full, true and perfect inven-**[340]**-tory of all and singular the goods, chattels and credits of the deceased which had come to his hands, possession or knowledge, at any time since her death. It is evident that he has not complied with this assignation if the averments of the allegation are true. The Court has been told that he is a nude executor—(*a*)[2] that, however, is a circumstance in the case quite immaterial. He is equally compellable to make a full disclosure of the effects to the other party. Brown, the other party, is therefore equally entitled to specify omissions and suppressions so, at least, as to have his answers in detail, as if the executor was benefited to the whole extent of the property by the asserted will. It may be material too that this full disclosure should be had in the course of the cause. The effects in the mean time may be made

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(*a*)[1] See this objection fully disposed of in the case of *Telford* v. *Morison, formerly Thomas*, ante, page 319. The executor was here also party in the cause—[See note (*b*) p. 40, post] and the objection was not taken by a creditor or legatee, but by the other party.

(*a*)[2] The will propounded bequeathed the whole of the deceased's property except a few trifling legacies to Mr. Brogden; but in trust for the benefit of her father, John Brown, for life; and of her brother and sister, Edward Brown and Ann M'Greggor, in equal proportions at his death.

away with—an administration, pendente lite, may even be necessary to secure these—it may turn out to be highly proper, and for many reasons, that the Court should postpone its judgment in the principal cause, till the disclosure sought is first fully had.

I admit the allegation and decree answers. Whether the Court shall proceed to the ulterior step of assigning a term probatory, in order to let in witnesses upon the allegation, is another consideration.(*b*) So it also is **[341]** (for I would be understood by no means to have finally decided), whether this collateral matter should, or should not, delay the hearing of the principal cause. I have strong doubts whether it should; in the event of its not being made to appear that it has a material bearing on the principal cause; so that it requires to be definitively settled, in order to enable the Court to pronounce safely in this. But should Brogden delay giving his answers in order to bring the principal cause to a hearing, before these are brought in—this of itself would induce the Court to pause; and possibly to insist on the answers being brought in, before the cause is set down for hearing,

On the matter of costs, if the averments of the allegation should turn out to be unfounded, Mr. Brogden will be entitled to the costs of this collateral proceeding, **[342]** whatever becomes of the principal cause. And so, on the other hand, will Brown be, whatever becomes of the principal cause, if the charges of omission or suppression made in the allegation are fully sustained. Should the allegation again be only partly sustained—should the omissions proved turn out to be either immaterial or accidental merely, or, in a word, not to be wilful and corrupt, the costs of the present proceeding, in this state of facts, will be purely discretionary; and the Court will allot or apportion them, in that event, to the best of its judgment, and not without reference to all the circumstances of the case.

Allegation admitted and answers decreed.

CRESSWELL AND OTHERS *v.* CRESSWELL AND OTHERS. Prerogative Court, Michaelmas Term, 4th Session, 1824.—In no case will the Court decree administration to substituted trustees, as such, without the consent of all parties beneficially interested in the trust properties, until the trust properties are actually vested in such substituted trustees.

[Referred to, *Woodfall* v. *Arbuthnot*, 1873, L. R. 3 P. & D. 109.]

(On motion.)

Estcourt Cresswell, Esq., late of Pinkney Park, in the county of Wilts, died on the 5th of July, 1823, possessed of real and personal estate of a very considerable amount in value—having first made and executed his last will and testament, bearing date the 21st day of February, 1821, whereof he appointed Joseph Pitt, Esq., and the Rev. Charles Dewell, clerk, executors and residuary legatees in trust, and six of his, the testator's, sons residuary legatees—with direction that in case his said trustees, or either of them, should die, or refuse, or decline to act, or become incapable of acting, in the trusts of his said will, his said sons, or the major part of them, might appoint others in their **[343]** stead, in the usual manner in which trustees are appointed in similar cases.

(*b*) It may be inferred from the case of *Telford* v. *Thomas* [ante] that the Court would not permit depositions to be taken on an allegation given in by a creditor or legatee in objection to an inventory exhibited by an executor, cited to exhibit an inventory that character merely. [See for what reasons in page 331, ante.] But Mr. Brogden had not only been sworn executor, and would so finally be, in the event of the will being pronounced for; he was also the party before the Court propounding the will; and the allegation in objection to the inventory was not given in by a creditor or legatee, but by the other party, the party opposing the will. This, obviously, subjects the case to very different considerations; so that the Court might well have permitted depositions to have been taken on this allegation, had the answers proved unsatisfactory, without at all departing from the principle laid down in that other case of *Telford* v. *Thomas*. No such step, indeed, was actually taken in the present case for the following reason. The answers had were most satisfactory—and at the hearing of the principal cause which followed the conduct throughout of the executor, which had been grievously aspersed throughout, in the name of the other litigant, was not merely vindicated from those aspersions; but was proved to have been exemplary, and generous in no ordinary degree. [See cases in Hilary Term, post.]

Shortly after the death of the said testator the said trustees signified their refusal to act, and declined acting altogether in the trusts of the said will—and subsequently renounced, by a special proxy under their hands and seals exhibited in this Court, as well the probate and execution of the said will, as their right and title to letters of administration of all and singular the effects of the deceased with the said will annexed.

In the month of August, 1823, one of the sons of the deceased filed a bill in the high Court of Chancery, in behalf of himself and the several creditors, legatees, and next of kin of the deceased, generally, against all the other parties before mentioned, for the purpose of having the trusts of the said will carried into execution, under the authority of the said Court; praying that it might be referred to one of the masters of the said Court to appoint a trustee or trustees in the room and stead of the said Joseph Pitt and Charles Dewell; as also for the appointment of a receiver; and for an injunction to restrain the defendants (or either of them) in the interim, from receiving, or possessing themselves of, any part of the testator's real or personal estate.

On the 13th of the same month of August the Lord Chancellor was pleased to grant the injunction; as also to appoint a receiver till further order (an order and appointment still in force); and was also further pleased on the 13th of December, 1823, to order or direct that it should be referred to a master (Mr. Dowdeswell) to appoint proper persons to be trustees under the will of the said testator, instead of the defendants Pitt and Dewell: and that they, the said [344] last-mentioned defendants, should convey and assign all the several trust premises to the trustees, so to be appointed, to, for, and upon the several trusts contained in the will of the testator concerning the same, or such of them as were still subsisting, and capable of taking effect, by a deed or deeds of conveyance and assignment to be settled and approved of by the said master.

In pursuance of the said order the master, to wit, on the 7th of April, 1824, reported that he had approved of the appointment of Richard Hopkins Harrison and Francis Henry Thomas, Esqrs., as trustees of the real and personal estate and effects of the testator; as also that he had settled, or approved of, deeds of conveyance and assignment, to vest in them the several trust premises. But the said report was still unconfirmed by the Lord Chancellor; nor had the conveyance and assignment therein referred to been executed, so as to vest the several trust premises in the trustees, so approved of by the master, by reason, as alleged, of one of the executors and trustees in this will, namely, Mr. Pitt, refusing to execute the same.

Under these circumstances it was prayed on behalf of the said Richard Hopkins Harrison and Francis Henry Thomas, by and with the special consent and approval of three of the six residuary legatees, that administration (with the will annexed) of the goods of the deceased might be granted to them, the said Richard Hopkins Harrison and Francis Henry Thomas, under the usual security—as the trustees, especially so appointed by the High Court of Chancery, of the estate and effects of the deceased in the place and stead of Joseph Pitt and the Rev. Charles Dewell, the execu-[345]-tors, and residuary legatees in trust, named in his will.

In order to found the application, it was principally alleged in the act of Court, duly verified by affidavits, on the part of the applicants, that a considerable part of the testator's property consisted of a leasehold estate of great value, held of the see of Gloucester, in want of immediate renewal, as depending on a single life; by reason of which, and other special circumstances also stated in the act, great loss and detriment to the estate were daily accruing; and still greater, probably, would accrue, in failure of the speedy appointment of a personal representative of the deceased.

In reply to this it was alleged, on behalf of the opposing parties, namely, the three other residuary legatees, that it was incompetent to the Court, by law and the practice of the Court, to grant the administration, at this time, as prayed, against their sense and consent. And it was further alleged that a consent on their part to a grant of administration to Messrs. Harrison and Thomas, jointly, was only withheld, in consideration that neither the master's report had been confirmed by the Lord Chancellor, nor had the conveyance therein specified been actually executed, so as to vest in those gentlemen the trust premises.

The single topic urged by counsel in support of the prayer of the petition was the loss and detriment, actual and probable, accruing and to accrue to the estate, for

want of an immediate personal representative of the deceased. The counsel for the objectors submitted that these must be, at least in great part, obviated by the circumstance of there being an existing receiver to the estate—and brought to its view the difficulties which might probably arise from the Courts **[346]** decreeing the grant to pass to the proposed administrators, before the trust estates should have become actually vested in them, by virtue of the assignment directed by the Lord Chancellor. Suppose, it was said, that circumstances (of which there are some disclosed in the act on petition itself, that render this no very improbable supposition) should occasion any variation in the order of reference to the master, or any pause, even, as to the propriety of confirming the master's report. The Court might be placed in a situation of great difficulty by acting precipitately on the master's report, in either of those events.

Court. With every possible disposition to afford the parties all the assistance in its power with respect to the management of this large estate, it is still, I think, incompetent to the Court to accede to the present application. Two gentlemen unobjected to, and therefore, I presume, very proper in themselves to take the administration, are nominated trustees by the master, under an order of reference made by the Lord Chancellor, which also directs that the trust premises shall be conveyed and assigned to them by the original trustees, so named in the will. But the deeds to that effect, as approved by the master, are still unexecuted—consequently, the trusts are still not vested in the new trustees—a previous step which I take to be absolutely necessary to entitle them as of right to the administration. It is alleged that Mr. Pitt, one of the original trustees, refuses, or declines, to execute the deeds of assignment, upon the ground of the testator's insanity at the time of executing this latter will; and of there being a former will in existence, of a different import. **[347]** This may, as suggested (appearing, as it does, in his answers in Chancery, given in subsequent to the order), occasion a variation in the order of reference to the master. But without entering into this consideration (or into that other, whether this be, or be not, such a "report" as requires to be confirmed by the Lord Chancellor,(*a*) in order to its full validity) I am of opinion, for the reasons already assigned, that this application is premature, and that I am bound to reject it. In no case of such substituted trustees would the Court be justified in decreeing administration to them, without the consent of all parties beneficially entitled to the trust property, until the trusts are actually vested.

Motion refused.(*b*)

[348] HOWELL *v.* METCALFE AND SANDERS. Prerogative Court, Michaelmas Term, 4th Session, 1824.—Where securities are required to justify in ordinary course, the Court will not dispense with this, even partially, but under very special circumstances.—If the Court decrees a general grant, but, under special circumstances, requires the securities to justify only as to a part of the property, it will not allow separate bonds; so that other securities than those who justify in the requisite amount shall enter into the common administration bond, in the double amount of the whole property.

Sir Theophilus John Metcalfe (the party deceased) died in the month of August, 1822, having, a short time before his decease, stated that "he had left his will in China," but without saying who were his executors, or to whom he had bequeathed his property. The deceased had been resident many years in China, and came to this country in 1820, for the benefit of his health, meaning to return to China.

(*a*) It had been said, in argument, that it was not the practice of the Court of Chancery to confirm such reports—and that the master's "report," in this case, was one that required no confirmation.

(*b*) But on the caveat day following, administration was decreed jointly to Mr. Harrison and Mr. Thomas; the deeds of conveyance and assignment being then certified to have been executed by Mr. Pitt and Mr. Dewell, the original trustees.

On this caveat day the deeds so executed by the old trustees were stated to have been executed by one only, Mr. Harrison, of the new trustees; there being two parties to these deeds, the old and the new trustees, as settled by the master. The Court directed the grant not to pass till the actual execution of the deeds by Mr. Thomas, the other trustee; who was said, as accounting for the delay, to be resident at Hereford, but to be perfectly willing and ready to execute them.

Under these circumstances administration, limited to certain purposes, of the goods of the deceased, until his will, or an authentic copy thereof, should be transmitted to this country (or his intestacy be ascertained) was decreed to two persons, Edmund Larken and William Monson, Esqrs., by this (the Prerogative) Court, in the month of December, 1822 (see 1 Add. 343, 345), which administration had ceased and determined some time back; a copy of the said will having actually been forwarded to this country.

The deceased by his said will appointed his brother (now Sir Charles Theophilus Metcalfe) of Hydrabad, Charles Magniac, and George Sanders, Esqrs., both of Canton, and the said Edmund Larken, Esq., his executors—and his daughter Eliza Metcalfe, a minor, aged about sixteen years at the time of his death, residuary legatee.

In March, 1823, a bill was filed in the high Court of Chancery, wherein the said minor, by David Howell **[349]** (party in the cause), was plaintiff, and the said Edmund Larken and William Monson were defendants—and by an order made in the said cause Mr. Howell was appointed guardian of the person and property of the minor until she attained her age of twenty-one years.

In the month of March, 1824, letters of administration (with the said copy of the will annexed) of the goods of the deceased were granted, by authority of this Court, to the said David Howell, limited to the purpose only of transferring all sums of money due and payable to the deceased, from the governor and company of the bank of England, from the London dock company, from the company of merchants trading to the East Indies, and from the Globe insurance company respectively (see 1 Add. 343), into the name of the accountant general of the Court of Chancery. But,

This last administration had also since ceased and determined, viz. on the arrival of Mr. Magniac, one of the executors, in this country. Mr. Magniac, however, subsequently died here; but without having taken upon himself the probate, or having in any manner interfered in the trusts of the said will: and of the other executors, two were still in India, and the third, Mr. Larken, had renounced the probate and execution of the will.

Under these circumstances a decree had been extracted at the instance of the said David Howell, Esq., calling upon the executors in India to accept or refuse probate of the copy of the said will aforesaid—otherwise to shew cause why letters of administration (with **[350]** such copy annexed) of the goods of the deceased should not be committed and granted to the said David Howell, Esq., as the guardian of the said Eliza Metcalfe, and for her use and benefit—limited until she should attain her age of twenty-one; or until the original will and codicil should be transmitted to this country; or until the arrival here of the said executors, both or either of them.

That decree was now returned into Court, duly executed by a service on one of the pillars of the Royal Exchange, &c.—and no appearance being given, and the facts as above stated being duly verified by exhibits and affidavits, the Court was moved—in the first instance, to decree administration according to the tenor of the said decree—but in the event either of its declining so to do, or of its requiring, in that case, that the securities should justify—then, to decree letters of administration to the said David Howell, Esq., limited for the purpose only of "receiving and collecting the outstanding personal estate and effects of the deceased; and from time to time, when so received, of investing the same in the name of the accountant general of the Court of Chancery; and further, for the purpose of duly administering the estate and effects of the deceased, according to the trusts of his said will, by and under the directions of the said high Court of Chancery."

The Court, as not thinking itself authorised to dispense with the securities, justifying, in the event of its decreeing administration according to the tenor of the decree, was pleased to decree letters of administration, &c., to **[351]** Mr. Howell, limited, as prayed in the other alternative, on his exhibiting an inventory, and giving the usual security.(*a*)

Motion granted.

(*a*) The administration so decreed was not, however, extracted in consequence of a caveat entered on behalf of certain parties interested under the will of a third party (Mr. Pattle, see p. 53, ante) of whom the deceased, whilst living, was one of the acting executors; to compel Mr. Howell to take a general grant, to which he was entitled, instead of the limited one so decreed, on the principle of the inconvenience which

[352] TUCKER *v.* WESTGARTH AND OTHERS. Prerogative Court, Michaelmas Term, 4th Session, 1824.—Where it is discretionary in the Court to grant administration to either of two claimants, it always decrees it, cæteris paribus, to that claimant who has the greater interest in the effects to be administered.

(On petition.)

This was a question between two claimants as to a grant of administration not within the statute 21 Henry VIII. c. 5. It was determined by the Court, as such questions usually will be, in favour of that claimant whose interest in the estate to be administered proved to be greatest.

Judgment—Sir John Nicholl. Thomas Atkinson, the party deceased, died in the year 1804, having made his will, of which he appointed his then wife, Mary Atkinson, executrix, during widowhood. By this will he bequeathed the principal part of his property to his widow for her life; and, after her death, to his daughter Isabella—and upon the death of this last, without children, he bequeathed it over to his nephews and nieces, the children of his three sisters. The residue of the testator's property was undisposed of by his will.

The widow took probate of the will, but married again, leaving goods unadministered; and died. Her (second) husband is since also dead—and Thomas [353] Tucker, party in the cause, is an executor in, and has taken probate of, both their wills. He, Tucker, then, is the representative of the widow's interest, indeed, in the effects of Thomas Atkinson, the first testator; but not of Thomas Atkinson, the first testator himself; of whose unadministered effects he now claims administration, with his will annexed.

The other claimants, and other parties in the cause, are five persons, nephews and nieces of the testator, children of his three sisters, and whose interest, as substituted legatees in his will, has actually accrued by the death of the daughter Isabella subsequent to that of the mother, without issue. They are also the daughter's first cousins, and next of kin.

None of the claimants were next of kin to the deceased at the time of his death. Consequently this administration, not being within the statute, is one upon which the Court must exercise its own discretion. In the exercise of which discretion it generally looks to which of the claimants has the greater interest, and decrees the administration accordingly—though other considerations may undoubtedly concur.

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would accrue to them from such limited grant, in prosecuting any claims which they might have against the estate of the deceased, as executor of Mr. Pattle. Mr. Howell on this abandoned the limited grant, and agreed to take a general grant, provided the Court would dispense with the securities justifying, save as to the property (said to amount to about 10,000l.) not in the hands of the accountant general of the Court of Chancery. And on the first session of Hilary Term, 1825, a motion to the Court to that effect was granted. A still further difficulty, however, afterwards occurred, in consequence of the sureties produced by Mr. Howell, who were willing to justify to the amount of the property out of the Court of Chancery (the 10,000l.), refusing to subject themselves to the usual penalty, under the common bond, in the requisite amount, viz. in the amount of 140,000l., the deceased's whole personal estate being valued at between 60 and 70,000l.: and the Court, on the by-day after Hilary Term, was thereupon further prayed, either to dispense with sureties altogether, as to the property in the name of the accountant general; or, that separate bonds might be allowed, so that other sureties than those justifying might enter into the common bond. The Court, however, declined acceding to either of these prayers as in direct violation, either, of its ordinary practice—observing "that it had gone as far as it could for the accommodation of the parties." Upon this the grant seems to have been altogether abandoned.

Mr. Howell, however, as prochein amy of the minor, Miss Metcalfe, had filed a bill in Chancery against two of the surviving executors of the will of the deceased: and proceedings in that suit were stayed by there being no legal representative of the deceased to be made a party to the suit. Accordingly, on the first session of Easter Term, 1825, the Court, on this statement, duly verified, was moved (and was pleased) to decree letters of administration of the goods, &c., of the deceased, to a nominee of Mr. Howell, "limited to the purpose only of answering to the said suit, in the Court of Chancery:" which limited administration was afterwards extracted.

In the present case, upon every consideration, the next of kin of the daughter, and not the representative of the wife, have the superior title to the administration. They have a greater interest in the undisposed-of residue—they are substituted legatees in the will—add to which, that the original testator never intended his wife to continue his personal representative after a re-marriage; a circumstance which throws some little additional weight into the scale.

I decree administration as prayed to the next of kin of the daughter; but as their affidavits contain some **[354]** imputations on the other party, not founded upon any thing which appears in their "act," I think that, upon this consideration only, they are not entitled to full costs. Hence I shall condemn Mr. Tucker in 10l. nomine expensarum; and not in full costs, as I should otherwise have done; thinking his opposition to the present grant utterly unfounded.

MONTEFIORE *v.* MONTEFIORE AND OTHERS. Prerogative Court, Michaelmas Term, 4th Session, 1824.—An allegation, propounding an imperfect paper, rejected; as insufficient, if true, to sustain the paper propounded.—In what sense, and to what extent, the Court assumes an allegation to be true, in considering whether it be admissible.—The difference, what, between a mere unexecuted testamentary paper and a testamentary paper which is also imperfect in other respects. The legal presumption is against the validity of either: but it is infinitely stronger, and more difficult to be repelled, against the validity of an imperfect paper of the latter, than it is against that of an imperfect paper of the former description. What it is which the Court requires to repel the legal presumption against a paper of either description.

[Followed, *Migneault* v. *Malo*, 1872, L. R. 4 P. C. 141.]

(On the admission of an allegation.)

This was a cause or business of proving, in solemn form of law, the last will and testament of Abraham Montefiore, deceased—promoted by Henrietta Montefiore, the relict, and the sole residuary legatee named in the said last will of the deceased, against the three executors of a former will. The admissibility of the allegation propounding this last will had been debated on a preceding Court day; and was the question that now stood for sentence.

Judgment—Sir John Nicholl. This suit is brought in a spirit of perfect amity between the parties, for the purpose of taking the opinion of the Court upon the validity of a testamen-**[355]**-tary paper, propounded as the will of Abraham Montefiore, deceased. I have taken time enough to consider the matter maturely; both as the property at stake is very large; and as the Court has received an intimation that the parties are disposed in this instance to abide by its decision, be that decision what it may. I have therefore, again, in the interval between this and the last Court day carefully considered all the circumstances of the case: but my opinion with respect to it has never wavered; or been different from that which I originally entertained.

The cause at present stands merely upon the admission of the allegation propounding the paper: but should the Court reject that allegation, there is an end of the cause itself. For the principle upon which the Court rejects any allegation is its inadequacy (assuming its truth) to make out the case laid in it. If the Court, then, rejects this allegation, it must be that it thinks it insufficient, assuming it to be true, to sustain the paper which it propounds as a will: so that in that event, as already said, there is, of course, an end of the cause. The cause must proceed, indeed, should the Court admit the allegation, in order to this being proved: as it only assumes an allegation to be true for the purpose of determining whether it be admissible—its final avail and efficacy in the cause obviously depending upon whether, and to what extent, the allegation is proved, after being so admitted.

In assuming, however, an allegation to be true for the purpose of determining its admissibility, the Court only assumes to be true those facts pleaded in it capable of satisfactory proof; and not, by any means, all the several averments which may stand in the allega-**[356]**-tion; which, in effect, are mere inferences deduced somehow or other from those facts. The averments in a plea are to be taken for true, so far only as the facts pleaded justify inferences to the effect of those averments; which, whether they do at all, and if so, to what extent, it is for the Court to determine. For instance, in this sort of allegation, "intention," on the testator's part, to do so and so is always averred—but such averment goes for nothing, unless the Court can infer

that the testator's intention was, as averred, from the facts pleaded. So when again, in a plea of this same description, the testator's capacity at the time of doing the testamentary act is averred, as it always is; the truth of that averment is only assumed by the Court, even in deciding upon the admissibility of the plea, to what extent it thinks that the facts and circumstances of the transaction, as pleaded, warrant an inference that he was of capacity at such time; and so, in other matters.

Having premised these observations, it becomes proper to consider the paper propounded itself—both with respect to its form, and with respect to its effect or substance. Upon the result of these considerations the legal presumptions in, and the whole view to be taken of, the case very much depend.

Upon the face of the paper it is, in point of form, a very imperfect paper. It is neither written by the deceased himself, nor signed, nor dated; no executor is appointed in it: it has no formal or other words of conclusion: two letters appear written as beginning a new sentence; and with these it abruptly terminates. A paper more imperfect, in point of form, can hardly be imagined.

[357] The term "imperfect" as applied to an instrument of this description is carefully to be distinguished from the word "unexecuted." Not every "imperfect" paper is "unexecuted:" nor is every "unexecuted" paper "imperfect," except only in a certain sense of that term. For instance, a testamentary paper may be finished and complete, looking to the body of the instrument, as purporting to dispose of the testator's whole property, and so on—still, however, if unexecuted, as, for instance, by wanting the deceased's signature, it is, in a certain sense of the word, though in a certain sense of the word only, an imperfect paper. But in applying the term imperfect to the present paper, the Court means that it is imperfect in every sense of the word: it is one that on the face of it was manifestly in progress only; it is unfinished and incomplete, as to the body of the instrument, as well as "unexecuted;" all which the paper itself propounded, which is in these words, clearly implies.

"I leave my son, Joseph Montefiore, Worth Park Farm—And my son, Nathaniel, Brighton Farm—And all my other property I leave and bequeath to my dear wife Henrietta Montefiore—This is my last will and testament. I w———"

The legal principles as to imperfect testamentary papers of every description vary much according to the stage of maturity at which those papers have arrived. The presumption of law, indeed, is against every testamentary paper not actually executed by the testator; and so executed, as it is to be inferred, on the face of **[358]** the paper that the testator meant to execute it. But if the paper be complete in all other respects that presumption is slight and feeble, and one comparatively easily repelled. For intentions, sub modo at least, need not be proved in the case: that is, the Court will presume the testator's intentions to be as expressed in such a paper, on its being satisfactorily shewn that its not being executed may be justly ascribed to some other cause; and not to any abandonment of those intentions so expressed, on his, the testator's part. But where a paper is unfinished as well as unexecuted (especially where it is just begun, and contains only a few clauses or bequests), not only must its being unfinished and unexecuted be accounted for as above; but it must also be proved (for the Court will not presume it) to express the testator's intentions in order to repel the legal presumption against its validity. It must be clearly made to appear, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes: so that by establishing it, even in such its imperfect state, the Court will give effect to, and not thwart or defeat, the testator's real wishes and intentions, in respect to the property which it purports to bequeath, in order to entitle such a paper to probate, in any case, in my judgment.

Upon these principles it follows that against the instrument set up in the present case, from its very form, the presumption of law to be repelled is a strong presumption. The task of repelling it—the onus probandi—in the case of this, as of every imperfect paper, rests, it need scarcely be observed, upon the party setting it up.

[359] In its effect this instrument has peculiar features which render the task so imposed on the party who propounds it a pretty difficult one. It not only sets out with devising real property in a different course from that in which it would descend by law (and so far, it is clear that it can have no operation); but it disposes at once of the whole personal property; giving it all (above four hundred thousand pounds) to the widow; and excluding all the testator's children (who in legal succession would

be entitled to two-thirds) from any part of it. Legal presumption, as well as rational probability, are strong against the testator having finally conceived any such intention.

There are two modes, nearly opposite, in each of which, however, testamentary instruments are not uncommonly drawn up: the one (perhaps the most common of the two) is to give, at the outset, the several legacies; and, at the conclusion, to dispose of the residue: the other is, in the first instance, to bequeath the whole property; and subsequently to except out of it the several legacies, &c., which the testator may chuse to bequeath as deductions from that whole. Now in the present instance, all the personalty being given to the wife, at the outset, in exclusion of the children, unless the Court can be satisfied that, so far as relates to the disposition of the personalty, this paper is complete, and that it was the testator's full and final intention to subject that personalty to no deductions whatever, either in favour of his children, or other, it would be impossible, I think, consistently with the ordinary principles acted upon by this Court, or with common sense and common justice, to establish this paper as the deceased's will. If the instrument is (as it clearly **[360]** is) in legal construction one in progress merely, and unfinished as to the body of the instrument, the legal presumption surely is, that had the deceased not been prevented from finishing it, he would have gone on to provide for his children in a subsequent part of the instrument. I cannot assent to the proposition contended for by one of the counsel, that if a testator dies while the instrument is in progress, that instrument, "so far as it goes," be its contents and effect what they may, must be valid. I know of no principle to that broad extent ever laid down; nor was any authority cited in support of it. The rule which I take to operate in the case of every unfinished paper is this: can the Court infer that, by pronouncing for it, it will carry into effect what it collects, from all the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it—but surely not if it sees reason to believe that by so doing it will defeat or counteract, instead of giving effect to, that wish.

Hitherto the Court has been considering this paper taken singly, and not in connection with any other testamentary papers left by the testator. Such, however, there are—papers before the Court. There is a former executed will; of which this unfinished paper, if established, will be, in effect, not a partial but a total revocation: for the two are not such that the Court can pronounce for them, as it sometimes can pronounce for papers in parallel cases, as "together containing" the will of the testator. It has been said that at all events the deceased intended to die testate; and that he intended to revoke his former will; and the Court has been urged from this to pronounce for the unfinished **[361]** paper. Testate the deceased must die—for if the paper propounded be invalid the executed will must operate. And, as to the revocation of the former will; the question is not so much whether the deceased can be taken to have intended to revoke his former will, simply, as it is, whether he can be taken to have intended that this unfinished paper should be substituted for, and should operate in lieu of, and in preference to, that former will. The question is not a question between the former will and an intestacy—it is between the two instruments; between the former will and this paper in its obviously incomplete, imperfect state. The former will being an executed instrument the "præsumptio juris, et de jure," is that he intended it to operate, unless he actually cancelled or destroyed it, or made another valid instrument which will have the effect of revoking it.

Before proceeding to a consideration of the facts pleaded in this allegation, I will make one other general observation, applicable to questions of this nature (not unimportant, too, in its bearing upon the particular case), which is this. In considering whether a plea of this description be admissible, the Court is bound to keep in view the extent and effect of the paper which it propounds—and to couple these, all along, with its history, as given in the plea. Now what this part of its duty suggests to the Court as with reference to the present immediate question is this. The paper propounded going, in effect, to revoke an executed will, and to put an immense property in a course of distribution which is very far from being an "officious" one; the allegation, to be admissible, must make out a case of full and entire "capacity" in the testator, at the **[362]** time when the paper was framed. Nor will it be sufficient, in order to this, for the plea to make out that he was of capacity to answer a few (common) questions, or to make a few (casual) remarks, or even to conceive and

express some (loose) wishes and ideas, as to altering his will, and so on—it must satisfy the Court that he was equal, and alive to, and comprehended, the full import of what he was doing at the time; seriously important as what he actually did must be admitted to be: in short, as Lord Coke expresses it, that he was "capable, at the time of the transaction, of making disposition of his 'estate,' with judgment and understanding." And in determining whether the allegation should, or should not, satisfy the Court in this particular it must look, not to mere averments, but to the facts pleaded—such averments, as already said, being good only so far as they are warranted by the facts pleaded; which last are all of the allegation that the Court assumes to be true.

I now then proceed, subject to these general considerations, to consider the facts of this case as they are stated in the present plea: and they appear to me to raise a question of so little doubt and difficulty that it is principally for the satisfaction of the parties that I am induced to enter into a detailed statement of them.

The allegation in the two first articles furnishes, in substance, a history of the testator and of his executed will. It pleads that Abraham Montefiore died on the 25th of August last [1824], at Lyons, in France, on his way home to this country, leaving a widow, one daughter by a first wife, and two sons and two daughters by a second wife (his now widow and relict), **[363]** all minors, and the youngest daughter born after May, 1820, the date of the executed will. This will, with two codicils, is all in the deceased's hand writing; and it is to the following effect. It is a complete will as to personalty—it is a will that, obviously, was not intended to act upon real property; as it makes no mention of such and is attested by a single witness: the necessary inference from which is that the testator meant that his real estate should descend to his eldest son. Of his personalty it disposes as follows—25,000l. to each of his children, except to the daughter by his first wife, whom it bequeaths only 15,000l., as the testator had settled about 10,000l. on her previous to his second marriage. The residue, with the exception of certain legacies of no very large amount, it bequeaths to the widow; whom it appoints (jointly with four other persons) executrix. What the residue might amount to at that time does not appear.

This will as I have described it remains uncancelled and unrevoked unless it be revoked by the paper now in question. It does appear, however, that the deceased at an intermediate time (pleaded in the latter end of 1822 or at the beginning of 1823), intending (so pleaded) to make a new will, wrote certain papers which are before the Court, marked D, E, and F. They contain a mere outline or rough sketch of a new will; they are loosely written and with various erasures; trustees were apparently intended to be, but none are appointed, and the residue is undisposed of in either of them. Previous to writing these papers, however, I should observe, namely, in August, 1822, the deceased is pleaded to have invested stock of the value of about 10,000l. sterling in the names of each of his four **[364]** younger children—placing them, therefore, upon an equality in this respect with the eldest, the daughter by the first wife. It is also pleaded that he had a child born in February, 1823, which died shortly afterwards. These papers, D, E, and F, themselves were laid aside and abandoned, so far as appears: and they are not suggested even to be of any legal validity.

It may not, however, be improper to consider whether the disposition contemplated by the deceased at that time, as appears from those papers, raises any thing of a probability in favour of the present disposition. In my opinion it does quite the reverse. It appears from these that the testator's intention then at least was not to give every thing to his wife absolutely and to consider his children provided for by what he had secured to them in his life time, but to limit his wife to a certain income for life; and to leave at her death a certain sum only (100,000l., three per cents.) at her disposal. And as the testator had not proceeded in the draft will, contained in papers D, E, and F, so far as to a disposition of the residue, it is almost necessarily to be inferred that the residue of his property was intended by the testator to be given among his children.

These different instruments, then, and the previous history, though rendering it highly probable that the deceased would alter his will of 1820 generally, yet lay no foundation of probability in favour of the particular disposition (purported to be carried into effect by means of the paper now propounded) of the whole personalty to the widow.

It is further to be observed that no previous testamentary declarations are suggested

to have been made by [365] the deceased, tending to support the probability of any intended alteration of his will. He is pleaded to have been long in a declining state: yet no dissatisfaction with his existing will appears to have been expressed by him at any time in confidence to his friends, or otherwise; still less is any thing of an intention, in the event of his making a new will, to bequeath the whole of his vast personal property to his wife absolutely. Nothing, indeed, of a testamentary character, so far as appears, was either said or done by the deceased, from the time of his writing those loose papers in the beginning of 1823, which have already been spoken of, until within a very few hours of his death.

This brings me, then, to a consideration of the circumstances pleaded in the fifth article of this allegation, upon which alone the validity of the instrument propounded, if to be supported, must rest. It seems proper that the Court should read this fifth article in order to render the observations that it may have to make on the history contained in it fully intelligible.

[Here the judge read the fifth article of the allegation; (*a*) and partly in the course, and partly at the conclusion of the reading, observed to the following effect:—]

(*a*) The fifth article of the allegation was in the following words:—"That the said deceased being on his return to this country, as in the first article of this allegation is pleaded, and having been for many months previous in a declining state of health, became, on the night of the twenty-fourth day of August last, considerably worse, and about eight o'clock in the evening of the said day, about five hours preceding his death, fully sensible of his danger, he addressed himself to Louis Mazzara, a person who accompanied the said deceased on his journey, and said 'Mazzara, you must promise me that my body shall be transported to London after my death:' that thereupon the said Louis Mazzara promised the said deceased that his directions should be complied with; that the said deceased then said, 'I wish something to be given to poor William: this young man is very clever, and it may assist him,' meaning and intending thereby, William Woodley, his, the deceased's, servant; and he, the said deceased, spoke of giving the said William Woodley one thousand pounds, but gave no further directions as to the same, but enquired of the said Henrietta Montefiore, his wife, what the said William Woodley received per annum: that shortly after the premises just before pleaded a physician who was to pass the night with the said deceased arrived and almost immediately after ——— Martins, another physician, also visited the said deceased: that the said deceased thereupon called to him the said ——— Martins the physician and the aforesaid Louis Mazzara, and taking them both by the hands, addressed them in the French language, to the following purport and effect. 'My friends, I take you for witnesses that I made about four years ago'—that the said deceased then stopped and asked the said Louis Mazzara what the word 'will' was in French: that the said Louis Mazzara informed him that it was expressed by the word 'testament;' that the said deceased then said, 'yes, yes,' 'testament,' 'four years ago I made a will,' and addressing himself to the said ——— Martin, said 'yes, I made a will, but I do not wish it any longer, I do away with it, and I wish to make another.' And the party proponent doth further allege and propound that by the aforesaid expressions, he, the said deceased, meant and referred to the paper writing being the will, bearing date the third day of May, 1820, more particularly pleaded and referred to in the second article of this allegation, and that by the expressions he then used he, the deceased, meant to declare his intention to revoke the said will: that the said deceased then continued. 'I leave to my son Joseph, the farm at Worth Park; and to my son Nathaniel, the farm at Brighton:' that the said deceased was proceeding further to express his intentions with respect to the disposition of his property, when he was interrupted by the said ——— Martins, who observed, that it would be better to write down all that the said deceased dictated: that the said deceased thereupon replied, Mr. Martin is right; Mazzara, take paper and write down that. That the said Louis Mazzara having accordingly procured paper and set himself to write, in the presence and hearing of the said two physicians and William Woodley, desired the said deceased to repeat what he had before said respecting his two sons: that the said bequests were written down by the said Louis Mazzara in French, in the very words and being the very paper marked B; that the same was then read over by the said deceased himself, who, after having considered it for a short time, directed the said William Woodley to write it in English. That the said deceased

[366] The deceased is here then pleaded (as already said) to have been for many months previous in a declining state of health: and to have become "considerably worse" on the night of the 24th of August—and then [367] it is at eight o'clock in the evening, within five hours of his dissolution, that this transaction commences. Now it is highly probable, I think, a priori, on the face of this statement, that his capacity was impaired, and that [368] his mind was wandering even at the commencement of this transaction; a considerable time was occupied in its progress; and the deceased is admitted to have been in extremis before its actual termination. He begins with, not any expressed wish concerning the disposition of his property, but with a desire that his body after his death should be conveyed to England. Nor even after this does he advert to any intention of altering his will—but merely to "doing something" for a servant who was in attendance on him and whom he talks of [369] leaving 1000l. A physician who is to pass the night with him arrives, and soon after a second physician—when the deceased, then for the first time (taking one of these, and his friend Mr. Mazzara, by the hand) alludes to his former will, and says, "that he does not wish it to stand, &c." Now, that some wandering notion to that effect came across his mind at this time must be conceded; but that the deceased can be taken, from this part of the history, to have proceeded like a person in the full possession of his understanding, setting about making a new will, I am not at all disposed to admit. The deceased then begins expressing his wishes, "I leave my son Joseph, Worth Park farm, &c.;" but it is not the deceased who proposes that such, his wishes, shall be committed to writing—that is suggested by Martins, one of the physicians. The

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then dictated to the said William Woodley, and pursuant to such dictation the said William Woodley wrote in English the very words contained in the testamentary paper marked C, brought into and left in the registry of this Court for safe custody, on the part and behalf of the said Moses Montefiore, and now annexed to the affidavit of the said Moses Montefiore, and pleaded and propounded on the part and behalf of the said Henrietta Montefiore, except the words, 'This is my last will and testament;' which were added by the said William Woodley, of his own accord, under the circumstances hereinafter mentioned: that after the said William Woodley had written the said paper, save and except the words, 'This is my last will and testament:' the said deceased had prayers read, and after the prayers were over the said William Woodley, under the impression that the said deceased had nothing more to add to the last mentioned paper, wrote the words, 'This is my last will and testament.' That the said William Woodley then read over the whole of what he had so written audibly and distinctly to the said deceased, who approved thereof, and then desired to be raised up in bed: that the said deceased was accordingly raised up in bed, and on the said paper writing being placed before him he made an attempt to take a pen and to write something on the said paper himself; but from his great bodily weakness and a convulsive seizure he was incapable of so doing; that the said deceased then requested to have some wine, which having taken, he desired that the paper so written by William Woodley should be again read over to him, which being accordingly done, he again asked for the pen, but the said deceased becoming more and more exhausted, and being, from continued convulsions, quite incapable of writing, he appeared to wish to say something, and uttered in English the word 'and' or 'I wish;' but at that very moment he was seized with a violent spasm, which affected the organ of speech, that he uttered several French and English words, the whole purport of which could not be comprehended by the persons who surrounded his death bed, but which evidently had reference to the paper written as hereinbefore pleaded by the said William Woodley, and which, together with the pen he repeatedly (after he had become speechless) made signs to have brought near to him: that the attention of the said deceased was entirely fixed to the said paper, and to the last moment of his life he shewed signs of wishing to do something to it. And the party proponent doth allege and propound that the said Abraham Montefiore the deceased was at and during all and singular the premises, of perfect, sound, and disposing mind, memory and understanding, and talked and discoursed rationally and sensibly, well knew and understood what he said and did, and what was said and done in his presence, and was fully capable of giving instructions for his last will and testament; although from bodily weakness he was incapable of fully executing the same. And this was and is true, &c."

deceased, however, assents; and directing Mazzara to procure a pen and ink, and take them down in writing, repeats his wishes as to the Worth Park and Brighton farms to Mazzara in the French language, which he understood so imperfectly as even to be at a loss for the French word for a testament or will. Mazzara takes down in French these purported devises of the Worth Park and Brighton farms; which the deceased, after reading over, directs his servant, Woodley, to write down in English.(*a*) The French paper is abandoned upon this—and Woodley writes the paper in question, from the deceased's **[370]** dictation—purporting to devise the real estates as above; and giving the personal property to his wife. Prayers are then read to the deceased, at whose suggestion does not very clearly appear from the plea—at the conclusion of which he, Woodley, thinking the deceased had nothing more to add, writes the words "This is my last will and testament," now appearing at the foot of the paper. The instrument itself is then read over to the deceased, who attempts to get up and sign it; but is prevented from so doing by a convulsive seizure—attempts to sign, that is, this imperfect paper; which it is hardly possible to suppose that the deceased, if he had had any degree of capacity at the time, could have thought that he had arrived at the conclusion of—being, as it is, without any provision for his children; without any legacy whatever, even to Woodley, although his intention to "do something" for Woodley seems to have first drawn his attention to the subject of his will; and without any appointment of either executors or trustees. And as to the writer of the paper, so far was he from thinking it concluded (although he had thought so, and under that impression had written the words "This is my last will") that he begins a new clause; he writes the letter "I," and a "w," the initial letter of the word "wish"—but he can make out nothing as to the wish of the deceased—who becomes, in effect, speechless at that time, though he still attempts to articulate, and soon after actually expires.

Now, looking at all the circumstances here stated, I am, in the first place, by no means satisfied that the deceased was of full capacity during any part of this transaction—or that the whole is not rather to be ascribed to the vague wanderings of a mind that had **[371]** survived its disposing powers, than to one in the full exercise of thought, judgment, and reflection. In the second place, I am by no means satisfied that, assuming for argument's sake, the deceased's full mental capacity at the inception, and even during the whole progress of this testamentary act, it had arrived at maturity as far as it goes: I am by no means satisfied that it was not (I much more incline to think that it was) his intention, having bequeathed the whole of the personalty to his wife, in the first instance, to make out of it provisions for his children, and probably other deductions; in manner as, I have said, is not uncommon with testators. But if such were his intention, to pronounce for this paper would be to defeat, and not to carry it into effect—the paper itself purporting to bequeath the whole property (the personalty) to his wife absolutely. What the deceased's precise testamentary views may have been I can only conjecture—he might probably have meant some distinction in favour of his second son: he might probably have meant to place his youngest daughter, who was born after the date of the executed will (which will must operate in the event of the Court pronouncing in effect against the paper now propounded by rejecting this allegation), upon an equal footing with her elder sisters. The Court indeed has no power of carrying these testamentary intentions of the deceased, if such they were, into full effect—the widow, however, may, if so disposed, as she is the residuary legatee under the executed will—and that the residue is so large in amount as to put this amply within her power, admits of no question.

The Court being of opinion that all the circumstances **[372]** pleaded in the allegation will not be sufficient, if proved to sustain the paper propounded, rejects the allegation.

(*a*) The paper so written by Mr. Mazzara was before the Court; and was in these words:

"Les derniers voluntiers de M. Abraham Montefiore ont été de laisser la ferme de Worth Park, a Joseph. A Nathaniel, Brighton ferme, et."

MONTAGUE *v.* MONTAGUE. Consistory Court of London, Michaelmas Term, 1st Session, 1824.—In a cause of divorce, where the alleged marriage is denied to be valid, the Court may probably permit third parties who have estates expectant, inter alia, upon the issue of such alleged marriage being illegitimate; and who consequently are interested in the question of its validity; to be cited to "see proceedings" in the cause, so far as relates to the marriage.

(On motion.)

This was a cause of divorce, instituted by the wife against the husband, by reason of adultery.

In the libel, as on this day brought in, on the part of the wife, the marriage of the parties at Gretna Green, according to the laws of Scotland, was very especially pleaded (*a*)[1]—and the prayer of the libel, in the first instance, was that it might be pronounced a good and valid marriage, agreeably to the laws and customs of Scotland, in order to found the sentence of separation further prayed in the libel.

The husband was now said to be tenant for life of large real estates; entailed or limited under the will of an uncle—first, to his own issue male; and on failure of such issue male (as also, in the then further event, of his not disposing of the said estates, either by deed or will), secondly, to his two sisters, Miss E. A. W. Montague, and a Mrs. Crawford. The parties to the marriage pleaded were also said to have issue living three children.

Under these circumstances it was submitted that, as the sisters had an expectant estate on the children **[373]** of the marriage pleaded being illegitimate, they had an interest in the validity or invalidity of the alleged marriage. It was therefore prayed (principally it should seem in anticipation that the husband's possible defence might be a denial of the marriage) that the sisters should be cited to "see proceedings" in the cause, so far as related to the marriage pleaded to have been had between the parties.

In support of the motion the counsel for the wife principally relied on the precedent in the case of *Chichester* v. *Donegal* (see 1 Add. 5); which they maintained was a case not to be distinguished from the present, in point of general principle. They also contended that, as no objection was raised, or was meant to be, on behalf of the parties proposed to be cited by the one party principal, the wife; it was scarcely competent to the other party principal, the alleged husband, to be heard, in objection to the issue of a decree of the nature of that now prayed.

On the contrary, it was insisted, on the part of the husband, that the application, notwithstanding the alleged precedent, was actually unprecedented—that of *Donegal* v. *Donegal* (1 Add. 5) being a suit of "nullity of marriage;" in which suit the marriage is the principal, or rather the sole, point at issue; whilst in a suit like the present, the marriage, though necessary to be pleaded and proved, is a point merely incidental, or preparatory only, to the principal issue in the cause. It was monstrous, too, as they held, to imagine that a sentence either for or against the marriage in such a suit would have the slightest obligatory effect on third **[374]** parties, though cited to "see proceedings" relative to it. Consequently that such a decree, in the end, would be unproductive of any benefit to the wife or children—whilst its issue in the meantime would be extremely injurious to the husband; by the introduction, namely, of additional parties into the cause, who might probably at least much protract and impede, and to his infinite cost and vexation, any determination of the preliminary question. At all events, that the motion was premature; and founded in statements not duly verified.

The Court said that it was disposed to reject the application at present, as made on mere verbal suggestions with respect to family settlements, &c., before an issue given, and even before the admission of the libel, in the cause. At the same time, especially as with reference to and under sanction of, a proceeding similar to that now prayed in the cause of *Donegal* v. *Donegal*, it should probably be inclined to accede to it, if duly repeated, in a proper stage of the cause—especially in the event of the husband's giving a general negative issue to the libel, and consequently denying the marriage.

Motion (at present) rejected.(*a*)[2]

(*a*)[1] See the next case, post.

(*a*)[2] In the event the husband actually put the wife on proof of the marriage, by giving a general negative issue to the libel, as she, the wife, had expected. [See the

[375] MONTAGUE *v.* MONTAGUE. Consistory Court of London, Michaelmas Term, 4th Session, 1824.—A valid marriage between parties may be had, by their consent per verba de præsenti, in Scotland, such parties being respectively above the age of pupillage, without either banns or license, and without the intervention of any religious ceremony.—The public cohabitation of parties as husband and wife, in Scotland, is presumptive proof that they are validly married; and becomes conclusive evidence of such, their marriage, in the event of its not being distinctly proved that "they did not intend" to contract matrimony.—A certificate so purporting to be, of a Gretna Green marriage, is not pleadable, quâ certificate, as in proof of that marriage; but it may be, as a constituent, wholly or in part, of the marriage; accompanied by averments (to be sustained by evidence) of such being its effect, in and by the law of Scotland.

(On the admission of the libel.)

This was a suit of separation, â mensa et thoro, by reason of adultery, instituted by Margaret Green Montague, the wife, against the husband, George Conway Montague.

The first article of the libel pleaded—that, by the laws, immemorial usages, and customs of Scotland, a valid marriage between a man and woman may, by their consent per verba de præsenti, be contracted by them in that kingdom; such man and woman being respectively above the age of pupillage; (*a*)[1] without any banns published or licence had; and without the intervention of any religious ceremony—and, that the acknowledgment by the parties of each other as husband and wife, and their public cohabitation as such, is, by the laws, usages, and customs aforesaid, presumptive proof that such parties are validly married; and the same is taken to be conclusive evidence of their marriage; unless it be distinctly proved that they did not intend to contract marriage—and, that no consent of **[376]** parents or guardians is necessary to the validity of a marriage between persons both above the age of pupillage, by the laws, usages, and customs aforesaid.

2. That, in the months of August, September, &c., 1803, all, some, or one of them, G. C. Montague, then a bachelor, aged twenty-seven years, and free from all matrimonial contracts and engagements, paid his addresses to M. G. Wilson, then a spinster, aged seventeen years, and free from all matrimonial contracts and engagements—that they, the said parties, mutually agreeing to become husband and wife, went to Scotland, for the purpose of intermarrying there—and, on the 29th day of December, 1803, in the presence of divers credible witnesses at Gretna Green, in the kingdom of Scotland, mutually acknowledged each other to be husband and wife, and were validly joined together in matrimony, according to a form of celebrating marriage occasionally used in the said kingdom; (*a*)[2] and, that the marriage so had and celebrated was, and is, a valid marriage, according to the laws, immemorial usages, and customs of Scotland.

5. The fifth article of the libel pleaded that the parties consummated their said marriage, and lived and cohabited together, in Scotland [at Edinburgh], as husband and wife, till the end of March, 1804, **[377]** during which time they constantly owned

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note appended at the foot of the next case.] But the project of citing the sisters to "see proceedings" seems to have been abandoned by the wife—as the motion, at present, rejected by the Court, was not repeated on the part of the wife; although the judge had intimated, as above, his probable intention of acceding to it, if it had been repeated.

(*a*)[1] "Which, by the law of Scotland, is the age of fourteen years in males, and twelve years in females." These words were inserted after the word "pupillage," on an objection taken that the libel should have stated what the age of pupillage is by the law of Scotland.

(*a*)[2] For these words "according to a form of celebrating marriage, occasionally used in the said kingdom," were substituted in the libel, as reformed "by Joseph Paisley, who, upon that occasion, read, in the presence of the said G. C. Montague, and the said M. G. Montague, formerly Wilson, the office for matrimony contained in the liturgy of the Church of England, as by law established." It had been objected that the original pleading was too indefinite; and that the party was bound to describe the form.

and acknowledged each other as husband and wife; and were commonly accounted, reputed, and taken to be such by and amongst their friends, acquaintance, neighbours, and others. And,

8. The eighth article pleaded that, at the time of the marriage of the parties pleaded as above, he the said G. C. Montague "obtained a written certificate (*a*) of his said marriage from Joseph Paisley, the person who celebrated the same at Gretna Green aforesaid, which said certificate,(*b*) he the said G. C. Montague preserved, and had frequently shewn to divers persons of credit and reputation, upon one occasion as lately as the month of May, 1823;" and that "the said certificate (*c*) was still in the custody, power, or possession of the said G. C. Montague."

Of this libel the first and second articles were objected to, in certain particulars, which produced a reform of the articles in those particulars, under the direction of the Court, as specified in the margin. The fifth was unopposed. But the main objections were addressed to the eighth article, as pleading, sub modo, a certificate, inadmissible in evidence. In support of this objection the husband's counsel chiefly relied on a late cause, that of *Nokes* v. *Milward*,(*d*) in which a similar certificate had been rejected; and repeated and re-adduced the principles and authorities adverted to by the learned judge in that cause, in support of his **[378]** rejection of the certificate. Upon these grounds they contended that this article of the allegation was altogether inadmissible.

For the wife it was submitted, in answer to this, that the certificate in the case of *Nokes* v. *Milward* was pleaded, alio intuitu; not as the constituent, in any sense, of a marriage, but in proof of a marriage otherwise constituted; in which character they admitted it not to be pleadable. But where pleaded, either wholly or in part, as a constituent of the marriage at issue (accompanied with an averment, to be sustained by evidence, of such being its effect in, and by, that law, which was ultimately to determine its validity), as in this instance, they maintained it to be clearly pleadable; and to have been so held, impliedly at least, by the learned judge, who determined the cause of *Nokes* v. *Milward* itself. Here the acknowledgment of each other as husband and wife by the parties, and their public cohabitation, as such (pleaded in the fifth article, which was not objected to), was pleaded, in the first article, to be, of itself, a valid marriage by the laws and customs of Scotland. Non constat but that this certificate was, it most probably was, an acknowledgment of each other, by the parties, as husband and wife, of the most authentic character; and so, of itself, not the proof, but the actual constituent, in part, of a marriage between the parties; in the event of their cohabitation as husband and wife being proved, as pleaded in the fifth article, and of the laws and customs of Scotland being also proved, as pleaded in the first article of the libel. So that, granting it to be inadmissible quâ certificate, it was clearly an instrument pleadable in this last character; and being expressly so pleaded in the **[379]** possession, or under the control, of the other litigant, it was competent to the party to plead it, on general principles, as in the article of the allegation, now objected to.

Court—Sir Christopher Robinson. I am quite of opinion, on the principles and authorities adduced, that the paper referred to in this article of the allegation is inadmissible quâ certificate, and that it ought not even to be so styled in the pleadings. But taking it to be, what it may not improbably amount to, a declaration, under the hands of the parties, of their mutual acknowledgment of each other as husband and wife, would it not be admissible in that character, in conjunction with the facts, and the law pleaded in this allegation? I think that it would; and, consequently, that this article of the plea, with a slight alteration, for the reason suggested, in the form of pleading, is entitled to stand. Should the instrument, on its production by the husband, not turn out to be what I have said that it probably is, the counsel for the husband will have the benefit of insisting upon this, or any other, topic in favour of the husband, arising from the appearance of the instrument, in a future

(*a*) Paper writing, purporting to be a certificate.
(*b*) Paper writing.
(*c*) Ibid.
(*d*) See *Nokes* v. *Milward* (a case in the Consistory Court of Rochester), post p. 386.

stage of the cause; as permitting it to be pleaded in this form determines nothing with respect to its ultimate effect in the cause.

Allegation admitted, as reformed.(*a*)[1]

[380] THE MARQUESS OF WESTMEATH *against* THE MARCHIONESS OF WESTMEATH. Consistory Court of London, Michaelmas Term, By-Day, 1824.—The Court, if prayed, will direct its officer to attend with the papers in a cause, at the trial of an indictment preferred by one of the two litigant parties, against certain witnesses examined on behalf of the other, for a conspiracy to sustain, by false oaths, the case of that other. And, upon their conviction ensuing, it will permit this to be pleaded, in exception to the testimony of such witnesses.

[See further, 1826, 2 Hagg. Ecc. Supp. 1.]

(On motion.)

This was a cause of restitution of conjugal rights, promoted by the most noble George Thomas John, Marquess of Westmeath, against the most noble Emily Ann Bennett Elizabeth, Marchioness of Westmeath.

In answer to the libel, which was in common form, her ladyship gave an allegation pleading cruelty and adultery, which produced a second allegation on behalf of the marquess. Evidence had been taken on these several allegations; and stood "for publication," at the prayer of both parties.

The proctor for the marquess now brought in an affidavit, made by his lordship, and prayed the judge to direct certain exhibits annexed to his allegation to be attended with in Dublin, on the first of January ensuing, for the purpose stated in such affidavit, viz. to be produced at the trial of an indictment preferred by his lordship, in Dublin, against certain parties, witnesses in the cause, for a conspiracy, to sustain the commission of adultery (alleged in the cause) by the said marquess, with a certain female in Ireland.

[381] The Judge, after decreeing "publication," directed that the exhibits should be attended with by the officer of the Court as prayed—and, at the same time, at the prayer of the proctor of the marchioness, further directed that such other papers and evidence in the cause as might be deemed requisite should also be produced by the said officer at the same time and place.(*a*)[2]

(*a*)[1] To this plea, as reformed, a general negative issue being given on the part of the husband, it became incumbent on the wife, in the first instance, to prove her libel, so far as related to the marriage pleaded and propounded in the cause. This she, accordingly, proceeded to do—and the question at issue between the parties, so far as [380] regarded the marriage propounded, came to a hearing in Trinity Term (8th July), 1825; when the judge held that the marriage was proved to have been had, as pleaded, and was also proved to be, as pleaded, a good and valid marriage by the laws of Scotland—whereupon he pronounced, decreed, and declared the said parties to be lawful husband and wife.

(*a*)[2] The papers, generally, in the cause were accordingly attended with, in Dublin, by the officer of the Court, as severally prayed by the parties. Of the result it is sufficient to say (so far as respects the suit depending in this Court) that, on the first session of Trinity Term [1825], the proctor for the marquess brought in an allegation (which was admitted by the Court) pleading "that no faith or credit was due to the depositions of three witnesses (by name) examined on the allegation, wherein the said marquess was charged to have committed adultery with a certain female, named Ann Connell—and further pleading that, in the month of November preceding, the said marquess had preferred a bill of indictment, in Dublin, against the said three witnesses, and others, for conspiring and combining together to maintain and establish by false oaths that he, the said marquess, had committed adultery with the said female—that on trial the said three witnesses were found guilty; that, thereupon, one of the said three witnesses was sentenced to pay a fine of 20l., and each of the other two a fine of one mark; and further, that all three were sentenced to be imprisoned in his majesty's gaol of Newgate, in Dublin, for eighteen calendar months."

A copy of the record of conviction (pleaded to be a true copy, &c.) was exhibited, annexed to this allegation.

The principal cause in which these proceedings were had is still unheard.

Had the bill of indictment been preferred in this country, the object of this motion

[382] ORME *v.* ORME. Consistory Court of London, Michaelmas Term, By-Day, 1824.—The Ecclesiastical Court can only interfere, in the way of restitution, where matrimonial cohabitation is suspended. The single duty which it can enforce by its decree in a suit of this nature is that of married parties "living together:" it cannot attempt to enforce any in super-addition to this. Hence, it is incompetent to the wife to sue the husband, or the husband the wife, for "restitution of conjugal rights," pending cohabitation.

(On the admission of the libel.)

This was a suit, brought by the wife against the husband, for restitution of conjugal rights.

The libel was in common form, mutatis mutandis, save and except in the fourth article, which pleaded that "the said Robert Orme (the husband), being unmindful of his conjugal vow, had, ever since his arrival in England, in the year 1821 (as pleaded in a former article), without any lawful cause, withdrawn, and still did withdraw, himself from bed, board, and mutual cohabitation with the said Margaret Orme (the wife); and had refused, and still did refuse, to render conjugal rights to her—and that the said Margaret Orme, though allowed by the said Robert Orme to reside in the same house with him, was denied access to his person and bed; and refused common necessaries for her support and maintenance."

In objection to the admission of the libel it was said that this was an attempt to enforce matrimonial intercourse, as distinguished from matrimonial cohabitation, for which there was no precedent—that Courts never interfered in the way of restitution but where matrimonial cohabitation was suspended; that the only restitution of conjugal rights to the wife by the husband, or vice versâ, which an Ecclesiastical Court could make by its decree in a suit of this nature, was by compelling them to cohabit; consequently, that it was incompetent to married parties to sue either the other [383] as for restitution of conjugal rights, they, the parties, already cohabiting. The words of the decree, in such suits as the present, are that the husband shall "take the wife home and treat her with conjugal affection:" there is no instance of a decree in such a suit that he "shall treat the wife with conjugal affection;" she, the wife, being at home. The only remedy which the law affords to either of two married parties, in case of ill treatment by the other, is a proceeding for a separation â mensa et thoro, as by reason of cruelty: and if the conduct of the party complained of fails to amount to legal cruelty, the complainant, however harshly or injuriously treated, is still without legal redress.

On the other hand, it was submitted that, though the Court had no means of regulating matrimonial intercourse in minor points, where the great duties of matrimony were performed, still, that it had authority to interfere in the description of the case laid in the libel; where no one of those duties was fulfilled by the party complained of, save and except that of mere cohabitation, or living in the same house, with the complainant. And this was attempted to be made out by reference to a proceeding of the Court of Arches in a late cause, that of *Gill* v. *Gill*,(*a*) in which the dean refused to dismiss a husband who had taken his wife home, in obedience to a decree of the Court, in a suit for restitution of conjugal rights, made in the usual form, as above, on the distinct ground of his non-compliance with that other part of the decree which enjoined him to "treat her with conjugal affection." Hence, [384] it was inferred that the Court might enforce the latter, notwithstanding the subsistence of the former: if the Court can regulate matrimonial intercourse after cohabitation restored, why not as well, it was said, before it is suspended?

Judgment—Sir Christopher Robinson. I think the objection taken to this libel is well founded; it sets up a case either altogether without the jurisdiction of the Court, or one, at least, very far transgressing those bounds of interference to which it has restricted itself in modern practice. The parties are admitted to be actually cohabiting; and, being so, it is, in my judgment, quite incompetent to the Court to interpose between them in the manner, and upon the grounds, now prayed. No instance of a libel, so framed as the present, in a cause of restitution of conjugal rights is even pretended on the part of the wife. The case of *Gill* v. *Gill*, cited, I

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might, probably, have been attained by a "subpœna duces tecum" served on the officer of the Court without any special application to, or order of, the Court itself.

(*a*) Arches, Easter Term, 1823.

presume, as the nearest, is very far from being strictly in point. The husband had been decreed there in the usual form (that suit commencing by a libel in the usual form) to "take his wife home, and treat her with conjugal affection;" and, moreover, to "certify his obedience to the decree on a given day:" as the usual and necessary preliminary step to his dismissal from the effect of the original citation. On that day a certificate was tendered by the husband; in objection to the receipt of which the wife prayed, and was permitted, to be heard "on her petition:" and it clearly appearing in the result, namely, on the facts disclosed in that petition, fully sustained by affidavits, that although the wife had taken herself home (for so it appeared) in the absence [385] of the husband, still, that the husband on his return, though without actually ejecting her, had treated her in a manner certainly evincing any thing but "conjugal affection," under circumstances, the particulars of which were specified by the wife in her petition, and constituted, as there laid, a case of great hardship, the Court did refuse then to dismiss the husband; but directed him to certify over, as above, on a future day; when his certificate not being objected to, he was, ipso facto, dismissed. But this is far short of a precedent for the institution, de novo, of a suit for restitution of conjugal rights on grounds, similar to the present, of the wife not being treated by the husband with conjugal affection—the cohabitation of the parties neither being, nor ever having been, suspended, that I am aware of. Matrimonial intercourse may be broken off on considerations (of health, for instance, and there may be other) with which it is quite incompetent to this Court to interfere. As to that other charge of the wife being "denied common necessaries" by the husband, this, however proper in the libel, in a cause of divorce by reason of cruelty, is improper and unprecedented in the libel in a cause of this description. The precedent sought to be established would lead to an infinity of suits, in no one of which the Court could embark with any reasonable prospect of satisfying or doing justice between the parties—and, so thinking, I hold that I am bound to reject the libel.

Libel rejected.

[386] NOKES *v.* MILWARD, FALSELY CALLING HERSELF NOKES. Consistory Court of Rochester, Michaelmas Term, 1824.—In a cause of nullity of marriage, the alleged fact of marriage, of the legal nullity of which a declaratory sentence is prayed, must be duly proved; in which part of his case, if the plaintiff fails, it is the duty of the Court to withhold its declaratory sentence of nullity; how clearly soever all the several facts may be established in evidence upon which, had the marriage itself been established by similar evidence, a sentence declaratory of its nullity might well have been founded.—This, at least, is the rule where the plaintiff and defendant respectively are the alleged contracting parties.

This was a proceeding to annul a marriage, by reason that one of the two contracting parties, the female, was another man's wife at the time of its celebration. But the Court refused to pronounce a declaratory sentence of nullity, as thinking the marriage, in respect of which a sentence to that effect was prayed, not duly proved.

Judgment—Dr. Swabey. This is a suit in which Mr. John Nokes, of the parish of Woolwich, in the county of Kent, and diocese of Rochester, is the plaintiff, and a female described in the proceedings as "Rosa Milward, wife of Luke James Milward, falsely calling herself Rosa Nokes, wife of the said John Nokes," is the defendant. The plaintiff's object in the suit is to obtain a sentence declaratory of the nullity of a fact of marriage alleged to have been had between him and the defendant, in Scotland, in the month of October, 1822; she, the defendant, then (and still) being, as pleaded, the wife of Luke James Milward.

The libel, the only plea which has been given in in the cause, and none of the witnesses upon which have been cross-examined, first pleads that the defendant, [387] then Rosa Ward, widow, was lawfully married to Luke James Milward, then a bachelor, in the parish church of Islington, in the county of Middlesex, on the third of October, 1821. A copy of the register of the said marriage is then exhibited; and the signatures thereto, Rosa Ward and Luke James Milward, are alleged to be of the proper hand-writing, respectively of the parties so married. It is also pleaded that the said parties consummated their said marriage; and cohabited, were reputed, and mutually acknowledged each other, as husband and wife until in or about the

month of July, 1822. The libel then pleads that at or about that time the wife separated herself from the husband, and went to reside at Margate; where she assumed the names and description of Rosa Haden, widow: by which names, and under which description, she was introduced to, and formed a connexion with, Mr. John Nokes, party in the cause; and that, subsequently, she the said Rosa Milward was married to the said John Nokes, in manner as pleaded, at Gretna Green in Scotland, in the month of October, 1822, living the said Luke James Milward—of the nullity of which alleged marriage, as I have already said, it is the plaintiff's object in this suit to procure a declaratory sentence.

Now that the present defendant is the identical female so married to the said Luke James Milward, as pleaded in the libel; and that the said Luke James Milward was living in, and subsequent to, the month of October, 1822, the date of her alleged marriage, de facto, with the plaintiff in the cause, as also pleaded, it may be sufficient to state once for all that I am satisfied [388] upon the present evidence. But, in my judgment, something still remains to be proved, in order to found the sentence prayed. Where the sentence prayed is a sentence declaratory of the nullity of an alleged marriage, that alleged marriage itself, at least in ordinary cases, surely requires especially to be proved. If then the plaintiff has failed in this part of his case, namely, in the proof of that marriage of the nullity of which he prays a sentence, it is still the duty of the Court, in my judgment, to withhold its sentence of nullity; how clearly soever all the several facts may be established in evidence upon which, had the marriage itself been established by similar evidence, a sentence of nullity might well have been founded.

Let us see then, first, what, in particular, are the pleadings as to the alleged fact of marriage between the plaintiff and defendant in this cause; and, secondly, what is the proof.

The libel pleads (art. 4) that a marriage between the defendant (then, and still, Rosa Milward, wife of Luke James Milward, but passing by the names and description of Rosa Haden, widow) and John Nokes, the plaintiff, was had and solemnized, or rather prophaned, at Gretna, in the parish of Springfield in the shire of Dumfries, and in that part of the United Kingdom called Scotland, on or about the 24th day of October, 1822; and that they the said parties then and there acknowledged each other as husband and wife respectively, in the presence of divers credible witnesses, who, together with the said parties, signed their names to a "certificate" of the said marriage. And it then pleads (art. 5) a certain paper writing or exhibit, marked B, [389] annexed to the libel to be, and contain, that identical "certificate."

Such are the pleadings as to this essential part of the case. And here it may be convenient that the Court, as in the first instance, should dispose of the exhibit, purporting to be, and contain, a "certificate" of this marriage, before it proceeds to consider the proofs, if any, furnished by witnesses examined in support of it.

I would first, however, observe that the pleadings themselves as to this essential part of the case are in the highest degree vague and unsatisfactory. It is first pleaded that a marriage was had or prophaned between the parties—a marriage—but what kind or description of marriage; whether by or without the intervention of any, or if of any, of what, religious ceremony, and whether valid or otherwise by the law of Scotland, and so on, the very pleadings are silent about. It is then pleaded that the parties mutually acknowledged each other as husband and wife in the presence of witnesses, at this place, Gretna; which acknowledgment, the Court has been told of itself constitutes a valid marriage, by the law of Scotland. But the Court knows nothing of this, at least judicially; nor can take counsel's word, which is all that it has for this. It should have been so pleaded; accompanied with an averment, to be sustained by evidence, that such was its effect by the law of Scotland. It could hardly be that evidence taken upon a plea so constructed in this part of it as the present could amount to any such proof of the marriage sought to be annulled as would justify this Court in proceeding, as by its sentence, to annul it. But to the proofs.

[390] The exhibit in question, marked B, is in these words:

B.

Kingdom of Scotland.
County of Dumfries.
Parish of Gretna.

These are to certify, to all whom it may concern, that John Nokes, from the parish

of Chatham, in the county of Kent, and Rosa Haden, from the parish of St. Maries, in the county of Nottingham, being both here now present, and having declared to me that they are single persons, but have now been married conformable to the laws of the Church of England, and agreeable to the kirk of Scotland.

As witness our hands at Springfield, this 4th day of October, 1822.

Witness me, DAVID LANG.
Witness, Jane Rae. JOHN NOKES.
John Ainslie. ROSA HADEN.

Now that a certificate of this description is any proof whatever of the marriage which it purports to certify, the Court has still to learn. It would have rejected this fifth article of the libel with its accompanying exhibit altogether, had the libel itself been submitted to it in the outset of the cause: and although, from this circumstance of the libel not having been objected to by counsel for the defendant, the certificate in **[391]** question remains an exhibit in the cause, and claims as such to be noticed by the Court; still the arguments of the plaintiff's counsel have failed to induce the Court to regard that certificate as any proof whatsoever of a marriage between this plaintiff and the defendant. Even the certificate of the King himself under his sign manual is, it is well known, no evidence of a mere fact (*a*)[1] (much less is the certificate, so styled, of a private individual, without any designation of character or office which is the description of this exhibit), on the broad principle that "in judicio non creditur nisi juratis." It is to be remembered all along that this certificate is exhibited as a proof of the alleged marriage; not, in any sense, as a constituent of it—which precludes any consideration of what might have been its effect if introduced, eo intuitu, into the cause. If this exhibit was meant to have been offered to the Court as a constituent, either wholly or in part, of the marriage in question, it should have been pleaded to have been such, as I have said, in quite another form; accompanied with an averment, to be sustained by evidence, that such was its effect by the laws, customs, and usages of Scotland.

It is upon this same principle that certificates tendered in proof of irregular marriages had in this country (for instance, of Fleet marriages, which, though irregular marriages, were still valid marriages, prior to the marriage act of 26 Geo. II. c. 33), have often been rejected by Courts of Common Law.(*b*)[1] And the Court, in the course of the hearing, referred, though not **[392]** by name, to a case in 1763, in which a certificate of a Scotch marriage, pleaded in proof of that marriage, as in this instance, was rejected by Dr. Bettesworth, sitting in the Consistory Court of London.

The name of that case I have since ascertained to be *Owen, the Mother, and Testamentary Guardian, of Small* v. *Spence.*(*a*)[2] In that case, which, like the present, was a suit of nullity of marriage, Dr. Harris objected to the certificate of Dr. Grant being received in proof of a marriage certified to have been had between the minor and the defendant, at the Red Lion Inn, in Edinburgh; contending, that no such certificate was admissible as evidence, on the principle already explained. It was said in answer to this by Dr. Hay that the minor had signed it, and that the certificate would be proved to have been actually given. The Court, however, sustained the objection taken by Dr. Harris, and rejected the exhibit; admitting the rest of the allegation to proof.

The Court has been furnished, indeed, with an earlier case, that of *Wescombe* v. *Dods*,(*b*)[2] in which **[393]** a certificate of this description should seem to have been

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(*a*)[1] See *Ormichund* v. *Barker*, 2 Willes, 549.

(*b*)[1] See *Lloyd* v. *Passingham*, 1 Cooper, Ch. C. 155. *Read* v. *Passer*, Peak, N. P. C. 231. *Howard* v. *Burtenwood*, 1 Esp. N. P. C. 342. *Morris* v. *Miller*, 4 Burr. 2057, &c.

(*a*)[2] Consistory of London, 2nd of July, 1763, before Dr. Bettesworth.

(*b*)[2] Consistory of London, Easter Term, 1748. In this cause a libel was given in on the 13th of May, 1748, by William Wescombe, bachelor, against Rebecca Dods, spinster, alleging that she falsely reported herself to be contracted in matrimony with him.

On the first session of Trinity Term, 1748, an allegation was given in by Rebecca Dods pleading in substance—

Art. 1. That in October, November, and December, 1740, William Wescombe paid his addresses to her.

2. That they were married 26th of March, 1741, in the house of James Dow,

admitted by the Consistory Court of London. But the cause of *Wescombe* v. *Dods* was a "jactitation cause" (not a suit of nullity of marriage, to which description of cause, not improbably, different considerations may apply in this particular); and the libel in *Wescombe* v. *Dods* might, like that in the present cause, have been admitted to proof unopposed by counsel. What weight or effect, if any, was attached to it by the Court at the final hearing of that cause does not appear. True it is, again, that in the case of *Compton* v. *Bearcroft*,(*a*) a suit, like this, too, of nullity of marriage, a [394] certificate perfectly similar to the present was annexed to the libel, as urged by the plaintiff's counsel: but the libel in *Compton* v. *Bearcroft* was opposed by counsel for the defendant, and was rejected by the Court, in toto; so that its being annexed to the libel in that case is no proof whatever of the admissibility of such a certificate in evidence.

The Court, having thus disposed of the "certificate," will now proceed to consider what is the proof by any witness who can depose of his own knowledge to the fact of any marriage whatever (whether good or otherwise by the law of Scotland) having been celebrated in Scotland between the parties to this suit; which, by the libel, is pleaded to have been had in the presence of "divers witnesses," to this, however, the single witness examined is John Ainslie; and what is the effect of his testimony?

This witness, Ainslie, says, in substance, "that he was, and still is, a postboy at the Bush Inn, at Carlisle—that one morning, about eighteen months before, as nearly as he can recollect the time, he was desired by the ostler to get ready a chaise and pair, to proceed with a lady and gentleman, who had arrived at Carlisle that morning by the London mail, to Gretna, meaning to Gretna Green, in the parish of Springfield, and shire of Dumfries, in Scotland, distant about eleven miles from Carlisle—that accordingly he prepared a chaise, [395] in which a lady and gentleman, neither of whom he had ever seen before, were by him, the witness, driven to Gretna, and alighted at a small inn, called the Queen's Head, kept by one James Rae—that he, the witness, went with his horses into the yard, where the landlady, Mrs. Rae, presently came and desired the ostler, in his presence and hearing, to 'go for the parson'—that shortly after he saw one David Lang, whom he had known for many years, as officiating 'on similar occasions,' arrive at the inn, and accompanied him into a room near the kitchen, where they sat down together and had a good deal of talk—that the parson, Lang, was then summoned by the landlady to the 'gentleman up stairs,' where his, the deponent's, presence was also required in about three-quarters of an hour or an hour after by the said landlady, whom the witness followed accordingly into a room up

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gardener, at Castlebarns near Edinburgh, in presence of ——— Dow, spinster, Margaret King and others, by David Patterson, a minister of the Established Kirk of Scotland, according to the ceremony of marriage of the said Established Presbyterian Scotch kirk, of which the said Rebecca Dods was a member.

3. Article three exhibited, in supply of proof, a certificate under the hand of the said David Patterson, and pleaded the hand-writing of Patterson; and that it was the usual form of certificates of marriage, solemnized by ministers of the Scotch kirk, and the identity of the parties.

4. Pleaded consummation at the house of George Blyth.

5. Pleaded confessions of the husband to George Blyth and others.

6. The birth and baptism of a child.

7. That the husband soon left the wife.

8. That shortly afterwards he wrote her a letter, subscribed "your loving husband."

9. Exhibited that letter.

10. That married women in Scotland are addressed (as in that letter) by their maiden names.

11. Was the formal concluding article.

This allegation was signed, THOMAS SALUSBURY.

(*a*) Arches, 16th February, 1767. Delegates, 4th February, 1769. The certificate, pleaded in the 7th article of the libel, was as follows:—"This is to certify that I married, after the manner of the Church of England, Edward Bearcroft and Maria Caroline Compton, at Dumfries, 13th March, 1760.

"R. JAMIESON, Minister of the English Chapel, at Dumfries.

"(Witness) Thomas English, Thomas Huddleston."

one pair of stairs, in which he found David Lang, and the lady and gentleman whom he had driven from Carlisle—that, the room door being shut, Lang desired the lady and gentleman to stand up; and the deponent and Mrs. Rae also standing up, then proceeded to repeat (or apparently to read from a book in his hand) something, of which the deponent can only say that a part was like what is read by clergymen in solemnizing marriages in churches in England—that during the same, Lang, the parson, placed a ring on one of the lady's fingers, at the tip, which the gentleman applied his hand to and slipped further down the finger—lastly, that at one part of the ceremony the said lady and gentlemen respectively acknowledged each other as husband and wife." The witness then speaks to his having signed the certificate (a part of his evidence [396] which the Court will dispense to itself with reciting, as being disposed to reject the certificate altogether, further than merely to observe that it is extremely slight and unsatisfactory; especially in that the deponent, who describes himself as a poor "scholar with respect to reading or writing," is unable to depose any thing specific as to the signature of that instrument by the parties to the alleged contract; (*a*)) after which, [397] having received orders to get his horses ready, he put to and drove the said lady and gentleman back to the Bush Inn at Carlisle. The deponent says that he has seen no more of either of the parties until quite recently; when a person, a stranger to him, and whom he did not recollect ever to have seen before, came to him at Carlisle and introduced himself as Mr. John Nokes, whom he, the deponent, had driven with a young lady to Gretna Green about eighteen months before, and bespoke his attendance in London to be examined as a witness in this cause. The deponent afterwards states himself to have seen the same person two or three times here in London; and he speaks to his belief of the identity of that person with the gentleman of whose marriage at Gretna Green, in 1822, he has previously been deposing, and with Mr. John Nokes, party in this cause.

Such, in substance, is the testimony of the single witness who can depose of his own knowledge to any fact of marriage between the parties in the cause: and it is, in my judgment, obviously of itself far short of furnishing any such proof of a marriage as will sustain the prayer of the libel that it may be pronounced null and void. Nor is this lack of primary evidence at all compensated for by any secondary proof in the cause; as of consummation, cohabitation, mutual acknowledgments, &c. For even granting such secondary proof to be admissible in the case, which is very doubtful (it being a case brought inter vivos, and by the one against the other contracting party), save only in corroboration of other and more direct testimony—namely, that of persons present (there being persons still living vouched [398] to have been

(*a*) This part of the witness's deposition was—"That, after the ceremony was over, Lang, the parson, said to Mrs. Rae and deponent, 'Here, you will sign the certificate' (pointing to a paper writing which the witness had before said that he observed lying on a table when he first entered the room) on which deponent and Mrs. Rae subscribed their names as witnesses; which he so did, without reading the same—that he believed it at the time to be a certificate of the marriage of which he has before deposed; but he does not recollect whether the parties, or either of them, signed the said certificate in his presence, or whether their names (as sometimes happened on similar occasions) appeared already on the certificate when the deponent signed his name thereto—and they, the deponent and Mrs. Rae, having, as witnesses, subscribed their names to the said certificate, Lang, the parson, lapped it up and gave the same to the lady." And, at the conclusion of his deposition this witness, after verifying the certificate, as by the signature, "John Ainslie" being of his hand-writing, says "that he does not recollect whether it was subscribed in his presence by the parties" purported to have been married.

Upon this evidence it should seem that the paper in question would have been no proof, strictly taken, of a written acknowledgment of each other by the parties as husband and wife in Scotland: for non constat when or where it was so subscribed by the parties, though the signatures "John Nokes" and "Rosa Haden" were proved by other evidence to be, respectively, in the hand-writing of the parties. Consequently, it should seem that it would not materially have assisted the proof of an acknowledgment by the parties of each other as husband and wife in Scotland; even supposing this to constitute a valid marriage by the law of Scotland, which, that it did, was not pleaded even, nor was the Court at all judicially informed.

present) at the alleged fact of marriage—yet still, of the little of such secondary proof as appears in the cause, the whole is extra-libellate, and so, strictly speaking, is no proof; for with the taking leave by the parties of the postboy on their return to Carlisle the part of the plaintiff's case as laid in the libel absolutely ends. No consummation, no cohabitation, no mutual acknowledgments beyond such as are alleged to have formed a part of the ceremony are averred in the plea; so that the whole, I repeat, of what little is said by the witnesses as to either of these particulars, incidentally, is extra-libellate. And here, again, with respect to these omissa in the pleadings, the Court may observe by the way that, although a fact of marriage celebrated in England, in facie ecclesiæ, by a priest or minister in holy orders, according to the rites and ceremonies of the Church of England; and perhaps a Scotch marriage, howsoever contracted, may be good, though it should not have been followed by consummation, or cohabitation, or mutual acknowledgments of each other by the parties respectively as husband and wife; yet it recollects no case where these have been omitted to be pleaded, except the present, from whatever cause, in regard to the second marriage only—as to which it should seem that they ought especially to have been pleaded, in order that the defendant might have the opportunity (whether she availed herself of it or not) of making that species of defence suggested by the nature of her case, from the almost total absence of any proof by witnesses who could speak to the alleged fact of marriage from their own personal knowledge—the only evidence, probably, [399] after all, as to such a marriage upon which the Court would have been justified to itself in pronouncing that alleged fact of marriage null and void.

Upon this view of the case, the Court, I think, is bound to pronounce that the plaintiff has failed in proof of his libel; and, consequently, is bound to dismiss the defendant. It is first necessary, however, to advert briefly to one or two cases, cited by the counsel for the plaintiff, in which an Ecclesiastical Court has proceeded to a sentence of nullity without full proof of the marriage declared null by its sentence—being supposed precedents by which they have recommended this Court to be guided in disposing of the present suit; in the event of its not conceiving the marriage in question so established in evidence as to justify it in declaring that marriage to be null and void, upon higher and more legitimate grounds.

The cases cited were those of *Heseltine* v. *Murray*, *Fust* v. *Bowerman*, and *Watson* v. *Faremouth*; in each of which, the Court in which the suit was depending pronounced a marriage, therein pleaded, to have been void, if any such were had; plainly in the absence, as appears by the sentence itself, of full, at least, proof of the marriage.

Such are the cases cited. But there is one feature of dissimilarity between each of those cases and the present that bars any reasoning from the one to the other, in this particular, in my view of them. It is this. In no one of those suits were the plaintiff and defendant, respectively, as they are in this suit, the alleged contracting parties; for the marriage sought to be impeached, in every one of them, was not only a marriage to which the party complainant was, personally, not [400] privy; but it was a marriage, the particulars of which, in all probability, were studiously concealed from the party complainant by the defendant; and this, expressly in order to defeat the object of the suit, namely, a sentence annulling that marriage. Consequently, it would have amounted at once, in effect, to a defeazance of the suit, to have required strict proof of the marriage sought to be annulled from the complainant in any one of those cases—a special consideration, which accounts for the hypothetical form of the sentences in all those cases, but is, in no degree, applicable to, or would justify a sentence in that form, in a case circumstanced like the present.

In the first of those suits his late majesty, acting by his procurator general, was the plaintiff or complainant (*a*)—the object of the suit being, to obtain a [401] sentence

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(*a*) *Heseltine* v. *Lady Augusta Murray.*

This was a suit brought by letters of request, from the judge of the Consistory Court of London, in virtue of which, Heseltine, the King's proctor, prayed a citation, on the 20th of January, 1794, against Lady Augusta Murray, in a cause of nullity of marriage.

An appearance having been given for the party cited, a libel was afterwards brought in, and admitted, pleading the statute of 12 Geo. III. c. 11, rendering any descendant of the body of King George II. incapable of contracting marriage, under the age of

declaratory of the nullity of the marriage, de facto, of his present Royal Highness, the Duke of Sussex, with Lady Augusta Murray, the defendant, as **[402]** had in violation of the Royal Marriage Act. In *Fust and Bowerman*, the wife, de facto, was a lunatic; and the marriage was sought to be avoided, on her behalf, and by her committee. And the case of *Watson* v. *Faremouth* (a cause of nullity of marriage by reason of incest) was, at the promotion of a party having a civil interest in the husband's estate, liable to be defeated in the event of his marriage not being impeached, with effect, during the joint lives of himself and his wife, de facto, the contracting parties. Now in either of those suits, I repeat, to have exacted strict proof of the marriage from the complainant would have been at once to defeat the suit: so that, in each of those cases, the nature of the decree is accounted for by the special circumstances of the case. And the decree, consequently, in no one of them, furnishes a precedent, by which the Court, in my judgment, should be guided in disposing of the present case.

The Court has been prayed, indeed, to rescind the conclusion of the cause for the purpose of receiving additional pleadings and proofs as to this asserted fact of marriage —in support of which prayer it has been told that the complainant is a young man, now, or lately, in his clerkship to his brother, an attorney, and one whose means are probably small. But the plaintiff is not one for whose relief an Ecclesiastical Court is bound to go out of its way, as it appears to me upon several considerations. For instance, in cases of a similar description, an allegation has commonly appeared **[403]**

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twenty-five, without the royal consent declared in council, and pleading the birth and descent, of Prince Augustus Frederic (now Duke of Sussex), and that no royal consent had been given to his marriage; and further pleading that, on the 4th of April, 1793, Prince Augustus Frederic being under twenty-one years of age, a marriage, or rather a shew or effigy of marriage, was, in fact, had or solemnized, or pretended so to be had, or solemnized, in the house of Lady Dunmore, at Rome (but by whom the party proponent was unable to set forth), between the Prince and Lady Augusta; that they shortly after came to England, and on the 4th of December, 1793, were married by banns in the parish church of St. George, Hanover Square; and that both the marriages were void, for want of the royal consent, by virtue of the statute aforesaid.

Two exhibits were pleaded, viz. an extract from the baptismal register of his royal highness, and an extract from the marriage register of St. George's, Hanover Square.

The law of Rome, or the validity or invalidity of the marriage by that law, was in no manner whatever pleaded in the cause. The libel was settled by the present Lord Stowell (then Sir William Scott, King's Advocate).

Lady Augusta's proctor declared that he confessed the statute 12 Geo. III. to be a public act: and also confessed the two marriages pleaded in the libel; but, otherwise, contested suit negatively.

There was no direct proof of the marriage at Rome; but Lady Dunmore deposed that she believed (because she was so assured by her daughter Lady Augusta, and also by a letter from the Prince) that they were married in her, Lady Dunmore's, house, at Rome, by a clergyman of the Church of England in full orders.

Extract from the interlocutory, pronounced by Sir William Wynne (dean of the Arches), 14th July, 1794.

"And the judge did also pronounce, decree, and declare, that in respect to the fact of marriage, or rather shew or effigy of marriage, pleaded in the said libel to have been had, or solemnized, or pretended to have been had, or solemnized at the house of the Right Hon. Charlotte Countess of Dunmore, in the city of Rome, on the 4th day of April, 1793, there is not sufficient proof by witnesses that any such fact of marriage, or rather shew or effigy of a marriage, was, in any manner, had or solemnized at the said city of Rome, between his said Royal Highness, Prince Augustus Frederic, and the Right Hon. Lady Augusta Murray, spinster, the party cited in the cause; but that if any such marriage, or rather shew or effigy of a marriage, was in fact had or solemnized at the said city of Rome, between the said parties, the said pretended marriage was, and is, absolutely null and void, to all intents and purposes in law whatsoever."

The sentences in *Fust and Bowerman* [Arches, Delegates, 1789] and *Watson* v. *Faremouth* [Arches, 1811] were in a similar form, mutatis mutandis, and for similar reasons. For the last of these cases, see 1 Phillimore, p. 355, 357.

in the libel that the complainant has withdrawn from all further cohabitation with the defendant from the time when he discovered the alleged invalidity of his marriage. The fact may have been so in the present instance; but there is no proof to that effect, nor even any plea. Again; if no impediment to the plaintiff's marriage with the defendant was known, or supposed, at the time, to have existed, why was their marriage to be celebrated in Scotland? The parties were both majors; and that the plaintiff, prior to that time, had introduced the defendant to his mother and brothers as his intended wife, is in evidence in the cause; so that no motive, as of concealment in that quarter, can be probably suggested. Upon the whole, should I err in refusing to pronounce a declaratory sentence, upon my impression from the proofs before me, the party may still be able, namely, on appeal, either to amend his case by pleading and proving new facts, if he shall be so advised, or to obtain a revision of it (if that be preferred) on the present evidence—but from the result of that evidence, I feel myself called upon to pronounce that the plaintiff has failed in proof of his libel; and to dismiss the defendant.

[404] BRUCE *v.* BURKE. Arches Court, Hilary Term, 1st Session, 1825.—A party who has once prayed publication, though stopped by an asserted allegation, is not at liberty to produce further witnesses upon his plea, as a matter of course—that is, not without special ground laid, and by leave of the Court—in the event of such asserted allegation not being actually filed.

(On motion.)

Court. Where publication of the evidence taken in a cause has been prayed by one of two litigant parties, the mere assertion of an allegation by the other is not sufficient, per se, to re-open the term probatory to that one; no such asserted allegation being filed by, and, consequently, no new term probatory being assigned to, the other litigant. A party therefore who has once prayed publication, though stopped by an asserted allegation, is not at liberty to produce and examine a further witness, or further witnesses, upon his libel or allegation, as matter of course—that is, not without special ground laid, and by leave of the Court—in the event of such asserted allegation not being actually filed.

In the particular case—a cause of nullity of marriage by reason of a former marriage—there being no affidavit in support of the prayer to examine a fresh witness on the part of the defendant, who had formerly prayed publication (which publication, however, was stopped **[405]** by an asserted further allegation on the part of the plaintiff; she, the plaintiff, now declaring that she gave no further allegation and praying, in her turn, publication of the whole evidence in the cause), the Court refused leave to produce and examine the proposed witness on behalf of the defendant, and ordered publication to pass.

BURGOYNE *v.* FREE. Arches Court, Hilary Term, 1st Session, 1825.—"Letters of request" from a bishop's "commissary" go in the same course with the "appeal"—that is, not to the diocesan, but to the metropolitical, Court; the Court of Arches.

[See further, p. 414, post; and 2 Hagg. Ecc. 456, 663.]

(On protest.)

This was a cause of office (*a*) promoted by Montague Burgoyne, Esq., against the Rev. Edward Drax Free, D.D., rector of the parish of Sutton, in the county of Bedford, and archdeaconry and commissaryship of Bedford. The citation issued under and in virtue of request made to the dean of the Arches by "the worshipful Richard Smith, A.M., commissary of the Hon. and Right Rev. Father in God, George, by divine permission, Lord Bishop of Lincoln, in and throughout the whole archdeaconry of Bedford, in the diocese of Lincoln lawfully constituted."

An appearance was given for the party cited under protest: and

It was contended on his behalf that the letters of request signed in this cause lay properly not to the Court of Arches, but to the diocesan Court at Lincoln—so that a citation issued in virtue of such letters of request was not compulsory on the party cited—for the following reasons:—

[406] Letters of request ordinarily lie where the appeal lies, and for this reason.

(*a*) For offences of what description, see the next case.

The judge who signs them by so doing waiving or remitting his own Court (which is all that he can do), the jurisdiction which, generally speaking, at once alone attaches, is that of the appellate Court. Thus from all peculiars [i.e. places exempt from episcopal jurisdiction] both appeals and letters of request lie at once to this, the metropolitical Court: for it is the jurisdiction of this Court that, at once, alone attaches in those cases. For instance, where an archdeacon, who has a peculiar, waives or remits his Court, there is no other Court which can take cognizance of the cause than this, the Court of Arches; to which accordingly (being also the appellate Court) letters of request undoubtedly lie. So, again, from Courts which are not peculiars, but subject to the diocesan, letters of request, generally speaking, go in the same course with appeals, for the same reason. Thus where an archdeacon, who has no peculiar, waives or remits his Court, the jurisdiction that immediately attaches is that of the diocesan Court; to which Court, accordingly, letters of request lie (being here also, again, the appellate Court) repeatedly so decided. In short, where the inferior ordinary waives or remits his Court, the appellate Court, generally speaking, is alone competent to take cognizance of the cause: and this it is which has given rise to the notion—a notion, generally speaking, perfectly correct—that letters of request go in the same course with appeals; or, in other words, that the inferior ordinary must make request or instance of jurisdiction to that judge into whose Court the cause must have been appealed, had he himself proceeded in it in the first instance.

[407] But if letters of request from a commissary lie to the diocesan, and not to the Court of Arches in this instance, it should seem that they lie in a different course from the appeal. For by the statute of appeals, 24 Hen. VIII. c. 12, the appeal from a bishop's commissary, it should seem, lies to the metropolitan. But what then? Where is the authority for saying that letters of request must universally, and under all circumstances, lie where the appeal lies. No authority whatever can be cited for that position. On the contrary, it is obvious, from the following considerations, that in this particular (the present) instance, though the appeal may lie to one Court, the letters of request must lie to another.

By the canon law, beyond all doubt or question, the appeal from a commissary lies to the diocesan, and not to the metropolitan. This may be proved by a host of authorities. Maranta, for instance, after stating "Quod a sententia vicarii seu substituti non appellatur ad substituentem, puta episcopum, ex quo fit idem tribunal, sed appellatur ad superiorem substituentis," immediately adds that this rule only applies in the case of a vicar general, "quia ille dicitur habere ordinariam jurisdictionem quam habet episcopus. Secus, si esset aliquis deputatus vicarius particularis, in una causa tantum, vel in uno loco particulari diœcesis qui dicitur vicarius foraneus seu ruralis" (the precise definition of a modern commissary), "quia tunc dicitur iste vicarius habere delegatam jurisdictionem; et ab eo potest appellari ad episcopum, vel ad alium substituentem, seu ad vicarium generalem." (*a*)[1] So Lyndwood, speaking of official principals, says an official principal is he "qui habet idem consistorium cum episcopo deputante"—[408] whence (*a*)[2] he adds—"à tali officiali non appellatur ad ipsum episcopum sed ad eum ad quem appellari debet ab ipso episcopo—ab officiali vero foraneo" [that is, from a commissary], "ad ipsum episcopum appellatur."(*b*) And, not to multiply instances, these doctrines are adopted nearly in the same words by Aylyffe, in his Parergon, p. 165.

It perhaps may be conceded on these authorities that, by the canon law, the appeal from a commissary lies to the bishop. The statute of appeals, however, 24 Hen. VIII. c. 12, seems to say that the appeal from a commissary lies to the metropolitan. This expression "seems to say" is adopted from Gibson for the following reason:—The statute of appeals, as clearly appears, both from the preamble and the purview of that statute, was simply meant to prevent appeals to the See of Rome, out of the realm, and not at all to alter the course of appeals within the realm. And by the word

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(*a*)[1] Spec. Aur. vi. ii. 381. See also iii. v. 14, 15.

(*a*)[2] That is—"Ne ab eodem ad seipsum appellatio interposita videatur"—as the bishop and chancellor have both but one auditory; in the language of the canon law, "faciunt idem consistorium." It is manifest that no such absurdity resulted from an appeal lying from the bishop's commissary to himself or his chancellor, which is the same thing—and by the canon law, most unquestionably, the appeal did so lie.

(*b*) Lynd. Oxf. edit. pp. 80 and 105.

"commissary" in that statute most probably was meant and intended the bishop's chancellor or chief commissary (*c*)[1] (often styled his commissary simply **[409]** in acts and instruments at that time), and not a commissary in partibus such as the commissary of Bedford, who signed these letters of request. But be that as it may—admit that by practice and on the authority of the case of *Cart* v. *Marsh* [Strange, 1080] the appeal, even from such a commissary, lies to the Court of Arches and not to the diocesan Court, what is that to letters of request? There is not only no authority, as already said, for the position that letters of request must lie where the appeal lies; but the contrary is even plainly directed in this instance by the "Bill of Citations," 23 Hen. VIII. c. 9. For the "Bill of Citations," after providing that none shall be cited out of their dioceses, under great pains and penalties, but in particular cases (one of such cases [see the fifth reservation] being in case of letters of request), adds "that such letters of request shall still be governed by the canon law." Consequently, if by the canon law, that is, before and independent of the statute of appeals, appeals lay from the commissary Court to the diocesan Court, and not to the metropolitical Court, letters of request still lie to the diocesan and not to the metropolitical Court; for the statute of appeals, at least, has made no alteration in the law as to letters of request.

And this course of making request is precisely con-**[410]**-sonant to the general principles of the canon law for this further reason. The bishop's vicar-general or chancellor, which is the same thing, is an ordinary. The bishop's commissary is not an ordinary, but a mere delegated judge,(*a*) who is bound by the canon law to keep strictly within the terms of his commission, which is "stricti juris et extraordinariæ jurisdictionis, neque extendi potest ultra quod stricte comprehensum in rescripto. Quicquid igitur in rescripto non est expressum, pro omisso habetur." (*b*) Here the commissary's patent, by the way, giving him no power to sign letters of request, it may be questionable, at least upon principle, whether it be competent to him by the canon law to make request at all. But if it be, he must make it to the diocesan. For being, as already shewn, a delegated judge, he is bound by the canon law as such, if for no other reason, to make request to him only who deputes him. The canon law is express to this. Thus Alciat, for instance [Praxis, p. 40], "Judex delegatus semper ab eo debet quærere,(*c*)[2] a quo delegatus est"—a position repeated in nearly every practical book of authority as one that admits of no question.

[411] In short, the true principle (the only principle of universal application) as to letters of request is, that the judge who signs them, by so doing, merely waives or remits his own court: it being constantly added to this, that "he hath no power to give or appoint a Court." Consequently, there being still within the diocese a superior

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(*c*)[1] The term "chancellor" not occurring in the statute at all—so that, if by the term "commissary" was not meant his "chancellor," the statute is silent as to where the appeal from the bishop's "chancellor" lies altogether. The words of the statute are, "from a bishop or his commissary to the archbishop"—And this, says Gibson [Cod. 1036], commenting upon these very words, for the reason given in the canon law, namely, lest (having both but one auditory) the appeal might seem to be made from the same person to the same person, if it lay to the bishop. Gibson plainly, then, by this word "commissary" in the statute understood the bishop's "chancellor:" for though a bishop's chancellor or chief commissary has "idem consistorium cum episcopo deputante," his commissary in partibus, as already shewn, has not—so that if the word "commissary" in the statute is understood of a commissary in partibus, Gibson's reason is inapplicable altogether.

(*a*) Vicarius, generalis dicitur ordinarius—secus vicarius specialis datus in una terra diœcesis, vel in certâ parte causarum tantum, quia ille est delegatus, non ordinarius, judex: Maranta, iv. v. 14.

Officiales principales vices episcoporum generaliter tenent, et ideo ordinarii sunt censendi: secus tamen æstimo in officialibus foraneis, etiam episcoporum: hi tantum delegati judices. Lynd. p. 80. Nor, he says, does it make any difference in this respect that they are delegated "ad universitatem causarum," so long as they are restricted to a certain part only of the diocese. And see to the same effect, Ayliffe, Par. p. 165.

(*b*) Gail, Praxis, 68.

(*c*)[2] That is—ad eum referre causam—or, to make request to him.

Court competent to take cognisance of the cause, be what it may, after and notwithstanding request made by a commissary, a compulsory citing out of the diocese by the metropolitical judge, merely in virtue of such request to him addressed (rightly or wrongly) by a commissary, is against the "Bill of Citations" and radically faulty: it not being open to the commissary by his mere signature to pass over his diocesan; (*a*)[1] and to send up the subject, against his will, out of his own diocese, to the metropolitical Court, in the first instance. The "Bill of Citations" has for its great object the ease of the subject in two particulars—to save him expense and charges and to give him a double appeal. The object of the statute has been so judicially expounded: and the subject has also been judicially said to be entitled to the most favourable interpretation of that statute.(*b*)[1] But the **[412]** sole interpretation of the statute which can avail to defeat this protest must be an unfavourable one: and to the prejudice of the subject in both those particulars as to which the "purpose of the statute was to provide for his ease." (*a*)[2] Admit, however, that a commissary may sign letters of request to the metropolitan, especially at the instance of a promovent, ante litem,(*b*)[2] for this reason, that the promovent might have cited the party into the diocesan Court at once without any letters of request from the commissary, where, as admitted in this case, the chancellor has a concurrent jurisdiction with the commissary in places within the commissary's more immediate jurisdiction. Admit that this may lay even a good foundation for the commissary's signing letters of request to the metropolitan. But the question still occurs, what is the true effect of a citation issued by the metropolitical Court, in virtue of such letters of request? It should seem clearly to be only this. It may, very possibly, be sufficient to found the jurisdiction of the metropolitical Court, if the party appears and submits. On this very same principle it is that an appeal may be good "omisso medio." Thus Maranta, after laying down that appeals must be made "gradatim," and that "appellatio non valet omisso medio," **[413]** adds that this does not hold [non procedere] "quando fieret appellatio omisso medio et non opponeretur: tunc enim procedit appellatio, et valet processus; quia videntur partes consentire, et jurisdictionem prorogare" (Aur. Spec. vi. 11, 368, 373). So here, if letters of request are signed by a commissary to this Court, and "non opponerentur, valet processus." But if they are opposed "non valet processus"—a citation issued in virtue of them is not compulsory; nor is it competent to this Court to enforce them, by putting the party in contempt for not giving an absolute appearance to the citation.

In reply to this it was contended—that the uniform course of request had been from a commissary to the metropolitan—that no instance could be cited of an objection ever taken to this; and that the practice, so acquiesced in, had become settled law; and was not liable to be altered or defeated on the grounds and for the reasons now suggested. That in truth and substance the Court would provide better the ease of the subject by strictly maintaining this practice than by sanctioning any abandonment of it—the effect of which might be the introduction, in many instances, of a third Court, before the suitor could arrive at a final decision of his cause, namely, by the Court of Delegates—that the subject had an appeal, though his cause was heard in the first instance in the Court of Arches; and that this was sufficient: as the law (granting it to have been otherwise, at one time even judicially expounded) discounten-

(*a*)[1] In support of this, the case of *Hodges* v. *Hodges* [Arches, 1791] was cited, in which the letters of request signed by Dr. Heslop as commissary for the archdeaconry of Buckingham were counter-signed by Dr. Beaver as chancellor of the diocese. But the Court held that this might have been done, in that instance, ex majori cautela, and did not infer it to be actually necessary.

(*b*)[1] See *Jones* v. *Jones*, Hob. 185. It is there, too, expressly said that a commissary cannot refer a cause to the archbishop, but only to his diocesan. This long after the statute of appeals. And of all the common law reporters, Lord Ch. J. Hobart seems to have been the one best acquainted with ecclesiastical proceedings.

(*a*)[2] *Jones' case*, ub. sup.

(*b*)[2] For it is to be remembered that by the canon law request or instance of jurisdiction may be made by an inferior to a superior judge, in any part of the cause, if he thinks fit; as well as at the instance of a plaintiff or promovent ante litem, or before the instituture of the suit. Thus Durand [de rel per.]: "Judex referre potest causam quandocunque sibi videbitur expendiens—ante litem; in medio litis; vel quandocunque." And Alciat to the same effect [Praxis, p. 141]: "Quoties expedit, ex justa causa et necessaria, fit relatio."

anced double appeals ; deeming such double appeals really inconvenient to suitors, and not any benefit—finally, that suits of this nature were more fitly instituted in the Court of Arches (where the **[414]** assistance of counsel was to be had) than in any diocesan Court; in no one of which were the aid and advice of civilians (at least immediately) attainable. And

The Court, as inclining to this view of the subject, generally, for the reasons stated above, overruled the protest, and ordered the defendant to appear absolutely.

BURGOYNE *v.* FREE. Arches Court, Hilary Term, 1825.—Articles against the defendant (a clerk) for incontinence, among other offences of ecclesiastical cognizance, admitted to proof (though no incontinence was charged within eight months before the commencement of the suit), notwithstanding the statute 27 Geo. III. c. 44—it being held by the Court that this statute only applies to suits against laymen for mere incontinence, in order to the infliction of penance ; and not to suits against clerks for general unfitness to discharge their clerical functions (such general unfitness to be inferred from this of incontinence, among other offences) ; in order to their suspension or deprivation.

[See in King's Bench, 1826, 5 B. & C. 400, 765. Referred to, *Oliver* v. *Hobart*, 1826, 1 Hagg. Ecc. 46.]

(On admission of the articles.)

This was a cause of office promoted by Montague Burgoyne, Esq., against the Rev. Edward Drax Free, D.D., for incontinence, profaneness, irregularity in the performance of divine offices, and other offences of ecclesiastical cognizance.

Upon the admission of the articles, an objection was taken for the defendant to the admission of those articles (the 4th to the 13th inclusive) charging the defendant with several acts of incontinence with different females. These charges commence, it was said, in 1810—fifteen years ago—the last act charged is in the beginning of May, 1823—the citation issues in the middle of October, 1824. Consequently, it is incompetent to the Court to put the defendant on his answer to such charges, under the statute 27 Geo. III. c. 44, which expressly provides, that "no suit shall be brought **[415]** in any Ecclesiastical Court for fornication or incontinence, after the expiration of eight months from the time when the offence shall have been committed." Hence it was prayed that the Court would reject the articles in question, from the 4th to the 13th inclusive—and so dismiss that part of the charge altogether respecting the fornication or incontinence, objected to the defendant.

In answer to this it was argued on behalf of the promovent, that the act would appear from its title—"an act to prevent frivolous and vexatious suits"—to be inapplicable to the present proceeding—that it could only be taken to apply to suits commenced against laymen for mere incontinence or fornication : and not to grave charges against a clerk, of general unfitness to discharge his clerical functions, for sundry offences—some of such, among many other, being the offences of fornication or incontinence.

In reply to this, again, it was contended on the defendant's part that the purview of the act was general—"no suit shall be brought, &c."—and that no rule of interpreting statutes was better understood than this : that although the preamble (including the title) of an act may be called in to open or explain the act ; still, that it shall not be to restrain the operation of enacting clauses which have general words from that full latitude which the clauses expressed in such general words of themselves and without any such reference to the preamble of the act would plainly import—that the act, on the face of it, implies no distinction between clerks and laymen in this particular ; and that to argue clerks protected from suits for mere fornication or incontinence, after the expiration of eight months, by **[416]** the act ; and yet to be liable at any time to suits for unfitness to discharge their clerical functions, such unfitness to be inferred from their having been guilty of fornication or incontinence, notwithstanding the act was absurd : that if the mere insertion of other charges was to render it competent to the Court to proceed at any time against clerks for fornication or incontinence, the statute might be so easily evaded, namely, by the insertion of one or two other offences, how frivolous or unfounded so ever, in the articles of charge, as to render it, in its application to clerks at least, altogether nugatory—that the act by its very title respects vexatious as well as frivolous suits ; and that suits of this nature, out of time, against either clerks or laymen (after a lapse of five or of ten or, as in this case, of fifteen

years), whether frivolous or not, are vexatious, on that ground only—that in proportion as such offences are more penal in clerks than in laymen, some limitation, in point of time, as to suits for such offences is perhaps more necessary in the instance of clerks than it is in that of laymen—lastly, that the statute had constantly received the interpretation now contended for in practice, to this extent at least; that opinions to that effect had repeatedly been given by (possibly every) counsel of (any) standing at the bar; (*a*)[1] **[417]** and that no suit similar to the present, under similar circumstances, had been attempted to be instituted in the long interval between the passing of the act and the present day. If the Court had any reasonable doubt, the defendant was said to be clearly entitled to the benefit of that doubt, so as to be dismissed from this part of the charge.

Court—Sir John Nicholl. The question raised by this objection is a new question, and it is one not unattended with some doubt and difficulty. On the one hand, the title of the act, which may be looked to for its object in the case of this as of other statutes, would seem to imply that it was for the protection of individuals (laymen) from suits for fornication, in order to the mere infliction of penance after a limited time: and the particular occasion of the passing of the act which the Court recollects to have been, certain suits against laymen for fornication long after the alleged commission of the offence then lately depending in an ecclesiastical Court in the west of England, and the proceedings in which were the subject of pretty general comment at that time, infers this again to have been its true object. Hence I am strongly disposed to think that the legislature in passing this act had no intention to interfere at all with suits instituted for the correction of clerks; or, in other words, to prevent suits like the present against clerks, in order to their suspension or deprivation for incontinency among other offices, though **[418]** no actual incontinence should be chargeable upon the particular defendant within eight months from the commencement of the suit. On the other hand, however, the words of the enacting clause in themselves, and without reference to the preamble of the act, certainly are sufficiently broad, as contended, to render it incompetent to the Court to entertain the present suit, so far as the charges of incontinence are concerned. Upon the whole, however, after the best consideration that I have been able to give to the subject, the statute appears to me so clearly to have been framed, alio intuitu to that for which it is invoked, that I shall admit the articles objected to; leaving it to the defendant to appeal, if he thinks proper, to a tribunal, of which judges of the common law are necessarily a component part; (*a*)[2] or if he prefers that course, to apply for a prohibition to one of these Courts whose peculiar province it is to construe acts of parliament—any one of which is, of course, more able than this Court to put a right interpretation on the statute, on which alone the objection taken to these articles avowedly rests.(*b*)

[419] FULLER *v.* LANE. Hilary Term, Arches Court, By-Day, 1825.—Faculties appropriating pews in parish churches to particular families, in different forms and under different limitations, too lavishly granted by ordinaries in former times—the numerous exclusive rights to particular pews vested, or supposed to be vested, in particular families to which this has given rise, nuisances to parishes at large—it is

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(*a*)[1] See too the case of *Schultes* v. *Hodgson*, ante, vol. 1, page 321, where the incontinence charged on the defendant (a clerk in orders, like this defendant, and proceeded against in a similar suit, in order to the infliction of a similar penalty) was expressly pleaded to have been committed "within eight calendar months from the commencement of the suit." In the case of *Schultes* v. *Hodgson*, indeed, the articles were admitted where the suit commenced in the Consistory Court of Sarum; it only came to this Court, the Court of Arches, by appeal. It was not therefore cited in the argument, by way of "authority;" but merely as illustrative of the construction that had been generally put upon the statute.

(*a*)[2] The Court of Delegates.

(*b*) The defendant, in the following Easter Term, moving the Court of King's Bench for a prohibition, a rule was made to shew cause why the Court of Arches should not be prohibited from holding suit as to the charges of incontinence objected in these articles. Upon "cause shewn," the Court of King's Bench directed that the plaintiff (the defendant in this Court) should declare in prohibition. And here at present (September, 1825) the matter rests.

the duty of ordinaries to prevent, so far as may be, their continuance or increase, by treating all applications for such faculties with great reserve; and by suffering none to issue but under very peculiar circumstances.

[Followed, *Woollocombe* v. *Ouldridge*, 1825, 3 Add. 4. Distinguished, *Taylor* v. *Timson*, 1888, 20 Q. B. D. 677. Referred to, *Chapman* v. *Jones*, 1869, L. R. 4 Ex. 279; *Stileman-Gibbard* v. *Wilkinson*, [1897] 1 Q. B. 759; *London County Council* v. *Dundas*, [1904] P. 31; *Rex* v. *Bishop of Sarum*, [1916] 1 K. B. 471. Applied, *Phillips* v. *Halliday*, [1891] A. C. 228.]

(On appeal from the commissary of Surry's Court.)

This was a question respecting the appropriation of a pew in a parish church by faculty; in which the law respecting the appropriation of pews by faculties; and the principles by which ordinaries should be governed in disposing of applications for the issue of such faculties, especially as with reference to the circumstances of the times, were fully entered into; and were stated by the Court at large in its judgment.

Judgment—Sir John Nicholl. This is a question respecting the appropriation by faculty of a certain pew, in the parish church of Lingfield, in the diocese of Winchester and county of Surry, to Thomas Lane, the respondent in this Court. Mr. Lane originally applied for this faculty to the commissary of Surry, within the limits of whose jurisdiction Lingfield is situate. Accordingly a citation issued from the commissary of Surry's Court in June, 1821, calling upon the minister, churchwardens, and parishioners of the said parish of Lingfield in special, and all others having or pretending to have any right, title, or interest in the premises in general, to appear and shew cause why a license or faculty should not issue for confirming and appropriating the use of the said pew to Mr. Lane and his family, so long as he and they should continue parishioners and inhabitants of Lingfield—with the usual intimation.

[420] An appearance was given to this citation as well by the minister and churchwardens as by a Mr. Kelsey, a parishioner of Lingfield, both as opposing the grant: and two several allegations were filed nominally on the part of both, but really on the part of Kelsey only: it being the purport of those allegations to set up an exclusive right to the pew sought to be appropriated in Kelsey, as appurtenant to a mansion in the parish called Batnors, which he, Kelsey, had then recently purchased. In point of fact the minister and churchwardens took no step in the cause during its pendency in the Court below, beyond that of a mere appearance to the citation; and which step they seem to have taken only as conceiving, somewhat erroneously indeed, that they were bound to appear to the citation. Kelsey's second allegation, I should say, was responsive to a plea filed by Lane in answer to the first; in which not merely Kelsey's asserted prescriptive right to the pew was denied, but in which the pew was claimed as already appertaining to Lane, in virtue of his connection with the former proprietors of Batnors, even though no faculty should issue as prayed. The question, so far, then, was a question of right between Lane and Kelsey; the minister and churchwardens neither interfering (except as already stated) nor being called upon to interfere. From the rejection in part of Kelsey's second allegation by the Court below, an appeal, as from a grievance, was prosecuted to this Court; which sustained the judgment of the Court below, but retained the principal cause at the prayer of both parties. But the question here, in substance, is quite another question to that which was depending in the Court below: this Court having disposed at once of any legal title to **[421]** the pew set up on either side in pronouncing its judgment upon the merits of the appeal. For it clearly appeared to this Court, at the hearing of the appeal, that, for reasons presently to be stated, neither of these parties had, though both were asserting it, any legal right whatever to the pew in dispute. The question here then became, and still is, not any question of right; it is merely whether the Court, in the exercise of a sound discretion, shall or shall not proceed to appropriate this pew by its license or faculty, ex gratia, to the respondent, upon the grounds stated in and pursuant to the tenor of the original citation. From the instant of the question assuming this shape, namely, from the hearing of the appeal, it became the duty of the minister and churchwardens (Kelsey withdrawing from the suit) to lay before the Court the facts necessary to guide its discretion upon such a question. This they have done through the medium of two allegations (the second, again, responsive to a plea filed by Lane in answer to the first); and it now becomes the duty of the Court to state whether, upon a review of all the facts and circumstances brought to its notice in the evidence taken upon these

allegations, this is or is not an application on the part of Mr. Lane proper to be acceded to.

It appears, then, by this evidence that Mr. Antony Faringdon, in the occupation at that time of a house and estate in the parish of Lingfield, called Batnors, of which he was also the proprietor, somewhere about the year 1709 made certain presents to the church; in return for which the parish conceded to him and his family the exclusive use and possession of a certain pew in the church, being the identical pew which **[422]** is the subject of the present proceeding. This is verified in part by the following order of vestry made in the year 1709, extracted from the parish books under that year.

"Memorandum.—In the year 1709, when the parish church of Lingfield, in the county of Surry, was new beautified, and a great many new pews added, it was agreed between the then churchwardens, parishioners, and Antony Faringdon, Esq., for and in consideration that the said Antony Faringdon, Esq., presented an altar cloth, and Mrs. Elizabeth Faringdon, wife of the said Antony Faringdon, presented a silver salver, for the use of the communion; that therefore the said Antony Faringdon, Esq., should have and hold for his own use, and the use of his family, a certain seat or pew adjoining the pulpit stairs."

Batnors continued in the possession of the Faringdon family from 1709 to 1820; when a Mr. James Faringdon, its then proprietor, and the great grandson of Mr. Antony Faringdon, the first grantee of the pew, if he may be so called, sold the estate to Mr. Kelsey. Such was the origin of Mr. Kelsey's supposed claim. Now to that of Mr. Lane. Mr. James Faringdon, it seems, has two sisters—the one, unmarried; the other, the wife of Mr. Lane, who, I should say, is an attorney in London. Up to 1820 the Faringdons are admitted to have had the exclusive use of the pew; in which, from the time of his marriage in 1807, Mr. Lane of **[423]** course sat with his wife occasionally as a visitor at Batnors; but I presume as a visitor only. In 1816, indeed, some repairs were done to the pew apparently at the expense of Mr. Lane: but he, Lane, at that time was the actual mortgagee, and was in treaty for the purchase of Batnors.

Upon the sale of Batnors to Kelsey, in 1820, the question as to the (supposed) ownership of this pew, to which I have already adverted, immediately arose. Kelsey claimed it as an appurtenant to the mansion; obviously without any legal foundation —as the facts stated, the order of vestry, &c., are conclusive against any annexation of this pew to Batnors by prescription; a title the only legal foundation of which is immemorial usage. On the other hand, Mr. James Faringdon maintained, upon equally untenable grounds, that the pew was still absolutely and exclusively his—claiming it as the immediate descendant and representative of Mr. Antony Faringdon, the first donee; in which capacity, and not as the mere owner of Batnors, he insisted that the right had all along vested in him. Accordingly, he both claimed to occupy the pew exclusively, during his continuance for about nine months, in the parish, after leaving Batnors; and upon finally quitting it, affected to convey or assign his interest in the pew to his brother-in-law Mr. Lane; he, Lane, having purchased twelve or fifteen acres in the parish, upon which he had began to build a house at that time, which has since been finished, and which he now inhabits. Such was the origin of Mr. Lane's asserted title, persisted in (like that of Kelsey) up to the hearing of the appeal: as also, indeed, that the pew was his, in right of his wife, in virtue of her descent from **[424]** Mr. Antony Faringdon, independent of any conveyance or assignment from his brother-in-law Mr. James Faringdon; for this also was set up in the allegation filed on his part, in the commissary of Surry's Court. I need scarcely say that, upon this shewing, Lane had no right to the pew any more than Kelsey. The last person who had a vested right to the pew of any description was Mr. James Faringdon: but even his right was a mere possessory right; as such it was liable to defeazance by the ordinary, and by the churchwardens as officers of ordinary, even during his continuance in the parish: it ceased and determined ipso facto upon his ceasing to be a parishioner; when the pew reverted to the parish at large, and became as liable as any other pew in the church to the disposal of the ordinary and of the churchwardens again, in the first instance, still as officers of the ordinary. However, Mr. Lane and Mr. Kelsey mutually assert their right to the pew, from the time of Mr. James Faringdon quitting the parish in January, 1821; but without any legal step taken till the month of June in that year—when Mr. Lane applies to the

ordinary (the commissary of Surry) for a faculty appropriating to him (or rather confirmatory to his alleged title to) the pew in question. The subsequent proceedings, both in the Court below and in this Court, and the true state of the question here, have already been stated. It only remains to add, that Mr. Lane still insists that the faculty prayed should issue ex gratia, though he no longer claims it ex debito justitiæ, as, partly at least, in the first instance; submitting also, that it may issue as prayed, without any prejudice to the parish. The minister and churchwardens deny this; maintaining that a grant of the **[425]** faculty prayed (of the validity of Mr. Lane's pretensions to which they leave the Court to dispose) would be manifestly inconvenient —as with reference, this, to the increasing population of Lingfield, and even to the present want of accommodation for those who are authorised and disposed to attend divine service at its parish church. Such have been the several proceedings up to the present time—such are the cases severally undertaken to be made—and such is the whole question of which the Court has now finally to dispose.

The general law with respect to pews and sittings in churches is little understood; erroneous notions on this subject are current, at least, in many parts of the country, and have led to much practical inconvenience. It is necessary that the Court should briefly advert to these topics, in order to dispose intelligibly to the parties of the question at issue.

By the general law, and of common right, all the pews in a parish church are the common property of the parish: they are for the use in common of the parishioners, who are all entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens as the officers, and subject to the control of the ordinary. Neither the minister nor the vestry have any right whatever to interfere with the churchwardens in seating and arranging the parishioners, as often erroneously supposed: at the same time the advice of the minister, and even sometimes the opinions and wishes of the vestry, may be fitly invoked by the churchwardens; and, to a certain extent, may be reasonably deferred to in this matter. The general duty of the churchwardens is to look to the general **[426]** accommodation of the parish, consulting as far as may be that of all its inhabitants. The parishioners, indeed, have a claim to be seated according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be afforded them. Accordingly, they are bound, in particular, not to accommodate the higher classes, beyond their real wants, to the exclusion of their poorer neighbours; who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation; supposing the seats to be not all equally convenient.

Such, then, are the general duties of churchwardens in seating and arranging the parishioners in their several parish churches. But the actual exercise of their office in this particular is too frequently interfered with by faculties appropriating certain pews to certain individuals, in different forms and with different limitations; and by the prescriptive rights to pews which these faculties have been the occasion. Faculties of this description have certainly been granted in former times with too great facility; and by no means with due consideration and foresight. The appropriation has sometimes been to a man and his family "so long as they continue inhabitants of a certain house in the parish." The more modern form is to a man and his family, "so long as they continue inhabitants of the parish," generally. The first of these is, perhaps, the least exceptionable form. It is unlikely that a family continuing in the occupation of the same house in the parish shall be in circumstances to render its occupation of the same pew in the church very **[427]** objectionable. The objection which applies to the other class of faculties is, that they often entitle parishioners to the exclusive occupancy of pews of which they themselves are no longer in circumstances to be suitable occupants at all, whatever their ancestors might have been. A third sort of faculty not unusual after churches had been new pewed, either wholly or in part, appears to have been a faculty for the appropriation of certain pews to certain messuages or farm houses; the probable origin (the faculties themselves being lost) of most of those prescriptive rights to particular pews, recognized as such, at common law—the parties claiming which must shew the annexation of the pews to the messuages, time out of mind; and the reparation from time to time, of the particular pews, by the tenants of such houses or messuages, in order to make out their prescriptive titles. Some instances there are, too, of faculties at large; that is, appropriating

pews to persons and their families without any condition annexed of residence in the parish. But such faculties are, so far at least, merely void, that no faculty is deemed either here, or at common law, good to the extent of entitling any person who is a non-parishioner to a seat even in the body of the church. As to an aisle or chancel, that, indeed, may belong to a non-parishioner; for the case of an aisle, or chancel, depends upon and is governed by other considerations. But whenever the occupant of a pew in the body of the church ceases to be a parishioner, his right to the pew, howsoever founded, and how valid soever during his continuance in the parish, at once ceases and determines; though the contrary is very often supposed; as, for instance, that he may sell or assign it, or let it **[428]** to rent as part and parcel of his property in the parish. So again of pews annexed by prescription to certain messuages, it is often erroneously conceived that the right to the pew may be severed from the occupancy of the messuage: it is no such thing; it cannot be severed: it passes with the messuage; the tenant of which for the time being has also de jure, for the time being, the prescriptive right to the pew. The result, upon the whole, however, of these faculties is, that in many churches the parishioners at large are deprived, in a great degree, of suitable accommodation by means of exclusive rights to pews, either actually vested in particular families, by faculty, or prescription, or at least, and which is the same thing as to any practical result, supposed to be so vested. I add this last because, in very many instances, these exclusive rights are merely supposititious; and would turn out upon investigation to be no rights at all. In this very case, for instance, there are two claims as of right set up to this identical pew, neither of which it now seems is legally valid; I mean Kelsey's asserted prescriptive right, and that of Mr. Lane, derived through the Faringdons; whose right itself was a mere possessory right, that actually ceased and determined upon Mr. James Faringdon ceasing to be a parishioner in 1821.

With this experience of the mischief that has resulted from a too lavish grant of these faculties in former times, it is the duty of the ordinary to prevent its recurrence by proceeding in this whole matter with the utmost prudence and circumspection. It is especially this, incumbent upon every ordinary looking to the times—with which he is bound to keep pace, in all matters appertaining to his jurisdiction, so far as the **[429]** same is compatible with his positive duties. Faculties of this sort might issue, a century or two ago, without much or without any impropriety; the issue of which at the present day would be in the highest degree improper. The population of the country, throughout, has immensely increased of late, and is still increasing. Dissent from the church, too, especially among the lower classes, has also increased—and partly, no doubt, from the lower classes being indifferently accommodated with church room, and even being precluded, in many instances, from attending divine worship in their parish churches at all. It is to remedy this want of church room, which is much felt generally, that parliament has granted the vast sum of a million and a half, expressly for building new churches. By aid of this parliamentary fund ninety-eight churches have already been built—accommodation has already been provided for 150,000 persons—and the present applicants for similar accommodation, by means of similar aid, are probably as many more. Large funds have also been raised, in the way of voluntary contribution, by a society for enlarging churches: 370 parishes have been assisted, accordingly, at an expence of 80,000l.; and 110,000 additional sittings in churches have actually been provided. The funds, too, of that society are failing, though new calls upon them are still being made. In the actual expenditure of the funds to which I have just alluded, attention has been paid in both instances to the accommodation of the poor, no less than to that of the higher and middle orders of society. In the new churches to be built by aid of the parliamentary funds, a fifth at least of the room was positively to consist of free sittings for the **[430]** poor, by an express provision of the legislature: practically, and in fact, a third of the room, taking the new churches throughout, has consisted of free sittings. Of the additional sittings again to be provided by aid of the church-enlarging society, it was a condition expressed that one half should be free sittings. But here again, practically and in fact, the proportion of free sittings to the other has been still greater; for of the 110,000 sittings actually provided, 80,000 are free sittings; about three-fourths of the whole. These are strong features of the times in this particular—of the want of church room generally, and of the propriety of affording additional church room, especially to the poor; and they are not to be overlooked by ordinaries, when applied to on occasions like the present, for obvious reasons. With

respect to the poor, indeed—every possible reason exists why no concessions should be made at all likely to infringe upon the due accommodation of the poor in their several parish churches. It is to be presumed that they are the persons most in want of religious instruction; and their title as such in particular to receive it is expressly recognized by the divine founder of Christianity Himself. If disabled from receiving it, by want of room in their parish churches, they are almost driven to seek it in places of dissenting worship—a circumstance exceedingly to be deplored; although they are clearly entitled, and should freely be allowed, to resort to such places of worship if they prefer it; provided, that is, they are really dissenters in opinion from the doctrine or discipline of the church.

Following then the times, and taking all these circumstances into due consideration, a strong case **[431]** should be made out to induce the ordinary, in the exercise of a sound discretion, to appropriate any pew, by faculty, to a particular parishioner and his family at the present day. True it may be that, at the particular time when the faculty is applied for, its issue may not be generally inconvenient: the parishioners at large may be sufficiently accommodated after and notwithstanding its issue. But in this even, the most favourable case, there are obvious reasons for inducing the ordinary to entertain such applications with a good deal of reserve. For instance, additional room may be soon, or at some time, wanted, suggesting the propriety of new arrangements in the church: but such future arrangements may be formidably obstructed by the actual issue of the faculty then prayed; being, as it is, if once issued, good and valid, even against the ordinary himself. This consideration alone might well induce the ordinary to pause, when applied to for a faculty of this nature, though no present inconvenience should seem to result from its concession to the applicant.

What then, in the first place, is the case set up by Mr. Lane to induce the ordinary to grant him, ex gratiâ, the permanent and exclusive possession of this particular pew? I say ex gratiâ; for as to any claim of right that he has abandoned. It appears to me by no means a strong case. It is founded, merely, upon his connexion, by marriage, with a family, one of the members of which, more than a century ago, presented the parish with a pulpit cloth and a silver salver, said (the latter) to be still in use. But in return for this, in itself no very splendid benefaction, the head and representative of that family has had the exclusive use **[432]** and possession of this pew, perhaps the best in the church, for more than a century, until the sale of Batnors, the family mansion, in 1820. The parish account with the family, on the score of that benefaction, seems to me to be fairly balanced. Mrs. Lane's claims, as a descendant of the original donee of the pew, are of the very weakest description. She married, and quitted Lingfield in 1807; and she was domiciled with her husband in London, having no connexion whatever with Lingfield, except as an occasional visitor at Batnors for fifteen years. At the expiration of that time Lane becomes a parishioner: but he is a new settler, a novus homo, to all intents in the parish: it is extremely doubtful even whether he was a parishioner at the time when the citation issued which is the foundation of this whole proceeding: he is the tenant of a house scarcely begun to be built at that time: he is entitled, most undoubtedly, to suitable church room for himself and his family; to the best which the circumstances of the parish will afford him, without prejudice to other parishioners. But as reasons for inducing the ordinary to allot him, ex gratiâ, the exclusive and permanent possession of this particular pew by a faculty, the case set up on his part would, under any circumstances of the parish, be, in my judgment, extremely feeble.

But how, secondly, is the parish circumstanced in this particular? What, I mean, is the population of the parish in proportion to the number of sittings in the church, and is it an increasing or a diminishing population? These are necessary enquiries, previous to any grant of a faculty of this description; but they are most necessary, and the result should be most **[433]** satisfactory in favour of such an applicant to ensure the success of his application. The size of the pew, too, and the proportion of the number of sittings in the pew to that of the applicant's family are also to be taken into the account. It remains to state the result of the evidence on these several particulars; which I think decisive against the application.

In the first place, then, this pew is one of the largest in the whole church, in point of capacity—it appears, I think, that there are only three pews in the church as large, and that there are none larger. It is capable of holding ten or twelve persons,

according to Lane's own witnesses; and twelve or fourteen, according to several witnesses examined on the part of the parish. Mr. Lane's family, however, consists of six persons only, including a Miss Faringdon, the wife's sister, and said at present to be domiciled with Mr. Lane.

Next, as to the capacity of the church to accommodate all the parishioners. The parish church of Lingfield appears to be an old collegiate church, with three chancels as they are called, or, more properly, aisles: the number of pews in these aisles is twenty-three—but the aisles themselves, and the pews in them, are the mere private property of three several parishioners, who keep them in repair; and the sittings in these aisles are not open in any sense to the general accommodation of the parishioners. The number of pews in the church is sixty-six; capable of containing, according to the evidence, from six to eight persons each on an average. But the population of Lingfield is fixed at 1770, and the number of families at 325, by authentic documents. Consequently, there are nearly five times as many families as there are pews in the body of the church; and the **[434]** pews in the body of the church (the only part of it in question), to contain the whole population, should be capable of holding twenty-seven instead of seven persons each. Hence, though sittings in the church may not be necessary for the whole population; and though it may not be necessary again that each family should have a separate pew, yet still the result is that there can be no superabundance of church room; which Mr. Lane undertook to shew, but in which, in my judgment, he has failed. The same inference results from the present arrangement of the church, as I collect it from the evidence. Every part of the body of the church is filled with pews; nor do I understand that there is any accommodation for the lower classes out of the pews but certain benches in the aisle, appropriated in part at least to a Sunday school. This is a large agricultural parish; the labourers, however (many perhaps aged and infirm), should seem to have no free seats with backs, to which they can resort with convenience to attend divine worship in the church. It also appears that several heads of families (respectable farmers) sit together in one pew: their wives and families (in one instance to the number of seven) in another separate pew. This again suggests that the parish is driven to shifts for want of church room. It is a matter of feeling with many to perform their religious duties by the sides of their wives and families. It is matter of practical benefit, so far as may be, to indulge this feeling. Parents, in that case, are more attentive, as setting an example to their children; who are likely to be, and undoubtedly in many instances are, benefited by that example. As a matter, therefore, both of feeling and practical advantage, families should be **[435]** seated together in church where this can be done; and its not being done in this instance suggests, like all the rest, that this parish church of Lingfield is, even at present, unequal to the fair general accommodation of the parishioners.

But a subject of enquiry, not unimportant, still remains. Is the population of this particular parish an increasing or a diminishing population? For this is obviously a material consideration. Now upon this head the Court is left in no doubt. It appears by the evidence of Sir Thomas Turton, an old parishioner, and Mr. Lane's own witness, that in about thirty years the population of Lingfield has nearly doubled itself; increasing in that time from 900 to 1700 persons. It is still, too, a rapidly increasing population, as results both from the evidence and from the strong probability of the thing. I allude as well to the easy distance of Lingfield from the metropolis as to the several villas, &c., said to have been recently built, and to be now building, in the parish. The very situation indeed of Lingfield, independent of any evidence, renders it utterly improbable, that whilst the population of the country throughout is, as it is, on the increase, that of this particular place, of all others, should be on the decline.

Upon the whole, then, I am of opinion, for the reasons stated, that the present is by no means an application which the ordinary would be justified in acceding to: taking into consideration the merits (so to call them) of the applicant, and the circumstances of this parish in the particulars to which I have just been adverting. And this I do, without at all meaning to say that no possible case may arise in which a faculty of this description might be issued **[436]** with great propriety, even in these times. For instance, a parishioner might well possibly entitle himself to such a faculty, by contributing liberally to the enlargement, or even the new pewing, of his parish church; in order to furnish additional accommodation for his fellow parishioners,

and especially free seats for the poor—a matter this which may soon be called for in this particular parish of Lingfield, and would perhaps be very proper, even now, upon some considerations which have already been stated. A benefactor of this description might have strong claims to a faculty of the kind now prayed. But even the claims of such benefactors should be duly weighed by ordinaries; and the indulgence sought by them should be fettered with all due restrictions and limitations. For instance, in allotting them by faculty good or even the best sittings; ordinaries should be careful at the same time not to afford them a too great proportion of room, or one exceeding their real (actual and probable) wants, to the exclusion of other parishioners: for that would be justifiable under no circumstances. In short, I repeat that it is the ordinary's duty, keeping pace with the times, to proceed in this whole matter at the present day with the utmost care and circumspection.

In respect to costs, of which something was said in the argument—the Court is disposed to make no order upon costs in favour of either party. Of the original litigants, both were in error. From the time, indeed, of the appeal heard, when the Court intimated its opinion that Mr. Lane had little chance of obtaining a faculty, but in the event of the circumstances of this parish being just the reverse of what they appear to the Court to be on the evidence, I think that Mr. Lane **[437]** should have desisted from his application. From that time, too, it became the duty of the minister and churchwardens, the parties cited specially, and particularly of the latter, ex officio, to put the Court in possession of those facts and circumstances necessary to guide its discretion in the premises; and upon which it has just decided that this application is not one of a nature fit to be acceded to. But, in the hope of promoting conciliation, and with a view to give a triumph to neither party, I am not disposed to accompany the refusal of a faculty, in this instance, with any decree against Mr. Lane for costs. As to the costs of the opposition, those, I am clearly of opinion, should be borne by the parish from the time of the hearing of the appeal. Up to that time the opposition proceeded upon the ground of a particular parishioner's (Kelsey's) asserted right to the pew; a question in which the parish had no concern whatever. I must presume it to have been matter of indifference to the parish to which of these parties, if to either, this pew of right exclusively belonged. Up to that time the parish then may reasonably decline; and leave the costs of the opposition to be defrayed by Kelsey alone.

The churchwardens may possibly wish to know what the Court would recommend to be done on their part with respect to this pew, now ascertained to be at their disposal. Certainly not to seat either Lane or Kelsey exclusively in the pew. Their claims to be seated in it perhaps are pretty equal. Lane, from his marriage into the Faringdon family, may have contracted a something of attachment to the pew, not improper to be gratified to a certain extent and within reasonable limitations. Kelsey, on the other hand, as the now proprietor of Batnors, the owners of which, for **[438]** the time being, have exclusively occupied this pew for more than a century, may have just reason to complain (at least probably in his own opinion, and in that of many of his fellow parishioners) if actually and altogether dispossessed of it. Not that there are not certain grounds of expediency which would excuse or even justify the churchwardens in declining to seat either of these parties in this particular pew. There are doubtless parishioners whose claims to be seated in it are superior to those of Mr. Lane, a new settler, abstract from his connexion with the Faringdons; which has nothing to do with his being seated in this pew, de jure at least. And with respect to Kelsey—generally speaking, most undoubtedly churchwardens act more correctly in allotting vacant pews to such parishioners as have the best claim to them in point of standing in the parish and general respectability, rather than to those who happen to succeed as tenants of the houses inhabited by the late occupiers of those pews. The occupancy of pews being thus altered from time to time, according to circumstances, is the best provision against the birth or growth of those prescriptive rights to pews, as in certain families, or annexed to certain messuages, the existence of which I have said is so injurious to the general interests of the parishioners. But the present proceedings may have rendered this unnecessary as a measure of precaution in the present instance. Supposing it not to be, and that no other good objection applies to the proceeding now about to be recommended, I see no reason why the present churchwardens should decline allotting this pew to Mr. Lane and Mr. Kelsey jointly or in common. It is sufficiently roomy, according to all the evidence, to

accommodate both families. But should **[439]** the parties in question unfortunately be on such a footing as to render their common occupancy of one and the same pew grating to the feelings of both, or either, it may not, perhaps, under the circumstances, be quite improper that the churchwardens should convert this into two pews. Each of such pews would be capable of holding five or six persons. Mr. Kelsey might be seated in the one of these pews, and Mr. Lane in the other. To this it should seem that there could be no reasonable objection; although of the exact state of the parish in all its details the Court is not in possession of sufficient information to be enabled to form a very decided opinion on this part of the case. It can only, therefore, in conclusion, recommend the churchwardens generally to act impartially in the premises between these and all parties; subject to the principles just laid down. In the performance of this part of their duty they will be assisted by the advice, though they are not governed by the authority, of the minister.

CAMBIASO *v.* NEGROTTO. Prerogative Court, Hilary Term, 1st Session, 1825.—Quære whether, even on grants of administration to foreigners of the property of foreigners generally, the administrator is not compellable to give bond here in England, with two sureties, British subjects, for the due administration of the effects.

(On motion.)

In this case administration with the will annexed of a Genoese subject had been decreed to the committee of a lunatic, the residuary legatee named in the said will **[440]** (there being no executor), for his use and benefit. The parties interested in the effects apparently were all Genoese subjects; all resident at Genoa. A question however had been mooted whether the committee were not compellable to give bond with two sureties, British subjects here in England, for the due administration of the effects, in the usual penalty, namely, in the double amount of the effects to be administered; such sureties to justify (this being also, in the particular case, further requisite). And the Court had expressed itself as strongly inclined to doubt whether a mere bond given at Genoa, with Genoese sureties (parties wholly out of its reach and control), would be that "sufficient bond," which the ordinary is required to take on grants of administration, by statute 22 and 23 Car. II. c. 10.

Some arguments had been addressed to the Court by counsel on a preceding Court-day against the necessity of compelling the administrator to give bond, &c. here, at least in the present case; which was under special circumstances: (*a*) as with reference to which,

The Court now said that it should dispense with sureties being found in this country in the particular instance: intimating at the same time considerable doubts whether it ought not to require this in cases of foreign grants generally.

[441] BROGDEN *v.* BROWN. Prerogative Court, Hilary Term, 4th Session, 1825.—Lucid intervals are much easier to be proved, as they are much more likely to occur, in cases of delirium than in those of (proper) insanity. And proof of much less capacity is sufficient to sustain a testamentary paper of an "officious" character procured through unsuspected agency than is necessary to sustain a testamentary paper of an opposite description in those particulars, one or both. The rule that where capacity is at all doubtful there must be direct proof of instructions only applies, with any degree of stringency, where the instrument is "inofficious;" and obtained through parties whom it purports, materially, to benefit.

This was a question respecting the legal validity of a testamentary paper, propounded as the last will and testament of Mary Jones, deceased. It was opposed as by reason that the deceased was not of testamentary capacity at the time when the paper was executed. The circumstances of the case are fully stated in the judgment: in which the Court distinguished cases of delirium from those of (proper)

(*a*) For instance, the party deceased had died testate: so that the bond was not exacted by force of 22 and 23 Car. II. c. 10. The party too had been dead upwards of seventeen years: so that the creditors probably were all satisfied. Lastly, the committee was the lunatic's eldest son, so appointed by the Courts of Genoa; who probably had taken bond for the faithful discharge of his duties, &c., &c.

insanity; especially in respect of the much greater ease with which a lucid interval is proveable in a case of delirium than in one of (proper) insanity. At the same time, the Court also distinguished between the much greater proof of capacity which it is necessary to sustain an "inofficious" testament; and the much less which is sufficient to establish a will consonant with the testator's natural affections and moral duties; especially being either his own sole act, or one, his coadjutors in which are parties who themselves take no benefit under it.

Judgment—Sir John Nicholl. The Court has been reminded, not improperly, that it has no power to make wills for parties—in other words, that, however consonant to reason and justice any paper propounded as a will may be, in the Court's view of it, it must still appear to be, in substance and effect, the very act and deed of the deceased, and of no other person or persons whatsoever, acting in the name and on the behalf of the deceased, how well **[442]** soever intentioned, to be entitled to probate as that for which it is propounded, namely, a valid will. To this as a legal principle the Court readily subscribes. Assuming the instrument now propounded to be intrinsically of the character described in the Court's view of it, is there, or is there not, sufficient on the evidence to satisfy the mind of the Court, under all the circumstances, that the factum of that instrument is justly to be ascribed to the alleged testatrix in the cause herself? This is the question, and the sole question, to which the Court has to address itself.

Mary Jones, the alleged testatrix, died on the 13th of June, 1823. The will propounded bears date on the 12th June, the day preceding, on which very day the deceased lost her only child, a daughter, aged about ten years. The mother and child had sickened with the same disorder on the same day, about ten days preceding; which terminated in the deaths of both on the 12th and 13th days of June, as I have just said. She had been a widow some years.

The deceased left a father, John Brown, party in the cause, the (nominal) opposer of the will; being the only person entitled to her personal estate and effects if dead intestate in law. She also left a brother, Edward Brown, and a sister, Ann M'Gregor —not, however, of course, parties entitled in distribution, as a father was and is still living. Mr. Brogden, who propounds the will as sole executor, is a brother-in-law, having married a sister pre-deceased. The widow, Ann Brown, of John Brown, a brother also pre-deceased, is an attesting witness to the will. The father of the deceased is far advanced in life, and, to say the least, of very doubtful capacity. He appears to have been **[443]** repeatedly under superintendence as a person non compos mentis. From June, 1819, to June, 1823, when his daughter died, he was so placed in lodgings at Hatfield. It is only upon that event that he is removed to the house of his son, Mr. Edward Brown, in the neighbourhood of London; plainly, I think, by way of colour, and merely in order to the present suit. The real instigator of that suit is the son; though it is necessarily instituted in the name of the father; he being the sole person who has any apparent interest to establish an intestacy.

Next, as to the contents of this will. It is a will under which Mr. Brogden, the sole executor, and who propounds it as such, takes no interest and derives no benefit whatever. It bequeaths the property to him in trust for the father, to the extent of 45l. per annum; the surplus interest or produce, if any, to the brother and sister in equal division: and the principal to the same brother and sister, also in equal division, on the death of the father. The only property not so disposed of is 50l., which Mr. Brogden is empowered by the will to distribute to such persons as he chuses to remember on behalf of the testatrix. Such is the will. Of Mr. Brogden, who propounds it, it may be sufficient to say, without entering into particulars, that his conduct to this whole family from his first connection with it—to the father and to each of the children, and to no one of them more than to this Edward Brown, his real opponent on the present occasion—has been more than merely upright or honourable; it has been generous and benevolent in a very uncommon degree. He was also the sole executor in trust of a will made by the deceased in 1822, in favour of her child; in **[444]** which, as in that now propounded, he had no interest and took no benefit. It was necessary to say thus much of the character and conduct of Mr. Brogden, being such as I have described, for the following reason:—This circumstance, and that of his being a party purely disinterested in the event of the suit, are material features in a cause of the shape and complexion which this cause has assumed. It is difficult to conceive fraud, or circumvention, both of which are imputed in this

cause, to a party, where there is not only no apparent motive for these, but where the whole conduct of the party to whom they are imputed so strongly negatives the imputation, as it clearly appears by the evidence to do in the present instance.

The ground of opposition taken is that the deceased, at and about the whole time when the will purports to bear date, was delirious; and was rendered incapable thereby of making and executing a will, or of doing any other act of that or the like nature, requiring thought, judgment, and reflection. That she was at times delirious for the last three or four days of her life (a period covering the whole transaction of this will) I may say at once is indisputable upon the evidence.

The case then set up in opposition to the will is confessedly one of delirium, as contra-distinguished from fixed mental derangement, or permanent proper insanity. Now the two cases, however similar in some respects, are still distinguished, each from the other, in several particulars; and in no one particular more than in the greater comparative facility of proving a lucid interval in the one, than in the other, case. A principal reason of this is the following:—In cases of **[445]** permanent proper insanity the proof of a lucid interval is matter of extreme difficulty, as the Court has often had occasion to observe, and for this, among other reasons; namely, that the patient so affected is, not unfrequently, rational to all outward appearance, without any real abatement of his malady: so that in truth and substance he is just as insane in his apparently rational as he is in his visible raving fits. But the apparently rational intervals of persons merely delirious for the most part are really such. Delirium is a fluctuating state of mind, created by temporary excitement; in the absence of which, to be ascertained by the appearance of the patient, the patient is most commonly really insane. Hence, as also indeed from their greater presumed frequency in most instances in cases of delirium, the probabilities, a priori, in favour of a lucid interval, are infinitely stronger in a case of delirium than in one of permanent proper insanity: and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former than it is in the latter case, and has always been so held by this Court.

It appears by the evidence that, on Tuesday, the 10th of June, [1823], the deceased, then for the first time conceiving herself seriously indisposed, sent a message to Mr. Brogden earnestly requesting to see him immediately. He came to her about five or six o'clock. The deceased received him with evident satisfaction; and they were left alone together for about two hours. After he was gone she told the witness who deposes to this, a Miss Bromhead, that she should now die happy—that she had made provision for her dear little girl, whom Mr. Brogden had promised to educate at home, without sending her to a **[446]** school, of which she expressed a great dislike; and that she "knew she could rely on his word."

In the evening of Wednesday the deceased was visited by Dr. Uwins; both her own condition and that of her child having at that time become extremely alarming. On the following day a second physician, Dr. Cholmely, was also called in. He saw the deceased (the mother) about four o'clock: but the child was dead; having died about two o'clock on that day. That event was attempted, or affected, to be concealed from the mother; but she must have known it; and there are plain indications in the evidence (quite independent of those certain ones, to be collected from the tenor of the instrument now propounded) that she was fully aware of it.

Now the evidence of Dr. Uwins is to this effect. He says that "on the Wednesday evening, and on the morning of Thursday, the deceased was clearly capable of any business: she was of sound mind, and capable of giving instructions for, and making and executing, her will, though in a state of high nervous irritation" (produced, as he had before deposed, rather by anxiety for her child, than by the degree of fever then upon her). When the deponent again saw her on that day, in company with Dr. Cholmely, namely, about four o'clock, he "considers it to be doubtful whether she was capable of doing so or not: his opinion rather is that she was not: there was increase of fever: delirium shewed itself decidedly: she could, and did, answer questions rationally and sensibly when her attention was fixed; but there was a confusion in her mind and an inclination to ramble when her attention was not excited and fixed by questions addressed to her." **[447]** He says that when he saw her once or twice (he forgets which) afterwards, "she was quite delirious and clearly incapable:" but he adds that he cannot depose to her incapacity at intervals between his visits: "it is not improbable that she might have had lucid intervals,"

though she was delirious and irrational at the particular period or periods of his visit or visits to her.

The evidence of Dr. Cholmely, an opposing witness, is on the whole less favourable: but he saw the deceased only once, for about a quarter of an hour, in the afternoon of the 12th, at which time her agony as to the state, or rather for the death, of her child was probably at its height. He, indeed, conceives her, at the time of his visit, to have been "quite incapable of any complicated act; undoubtedly of any thing that required fixed attention, or any exercise of mental faculty." Yet even Dr. Cholmely admits that "her attention being strongly roused, she could command it so as to answer simple questions;" and there is nothing whatever, even in his evidence, to negative the probability of a lucid interval of fully sufficient length to cover the whole transaction, the history and real character of which is about to be investigated.

But the Court has also the evidence of a third medical practitioner, Mr. Rolls, to this part of the case; and to what does that amount? In brief, to this—that her delirium was solely produced by those severe paroxysms of bodily pain suffered by the deceased, from time to time, during the last three days of her life; and that this effect subsided with the cause—so that the one was, at no time, scarcely perceptible, but [448] when the other was in actual operation. This deponent fortifies his opinion by references to much that was said, and even to some things that were done, by the deceased during the last forty-eight hours of her life, inferring her perfect capacity: and, although of an inferior rank in the profession to the two other medical gentlemen, of whose evidence I have already disposed, yet I am to recollect that Mr. Rolls is by no means the witness whose testimony should weigh least with the Court upon this particular question, for the following reason:—He had been acquainted with the deceased for years; and seems to have attended her throughout the whole of her last illness with uncommon assiduity: whereas Drs. Uwins and Cholmely were perfect strangers until their introduction to her under the distressing circumstances just alluded to; and were much less likely, therefore, to form a true estimate as to the real state of her mind and its capacity to the act in question, than her apothecary, Mr. Rolls.

Such, then, is an outline of the general evidence as to capacity: next for that to the act itself; I mean, as to the factum of this will.

It appears by this evidence that on the evening of Thursday Mr. Brogden again called on the deceased with a will which he had prepared for her to execute, from instructions which she is pleaded to have given him on the preceding Tuesday. It is proved that he was again left alone with the deceased for more than an hour; and it is pleaded that, at this interview, he received instructions for the new will—that which he had brought with him being necessarily abandoned in consequence of her daughter's death: and that Mr. Brogden went into another room and prepared a will [449] accordingly; which is admitted to have been presently executed by the deceased, as I shall state in the sequel, and to be the identical paper propounded.

Now, Mr. Brogden being party in the cause, and the sole person present at the giving of the instructions pleaded, the fact of any instructions being given is one plainly incapable of any direct proof. But instructions may be presumed, from the conduct of the party to whom they are pleaded to have been given, and from that of the several other parties engaged in the same general transaction at the time without any direct proof; and this, if any, is precisely the case in which that presumption may safely be acted upon. The rule that where capacity is at all doubtful there must be direct proof of instructions, only applies, or at least only applies with any degree of stringency, where the instrument is inofficious, or where it is obtained by a party materially benefited; or, a fortiori, where it is both. It has really no application to a will prepared by an agent, purely disinterested, and whose character for perfect integrity and benevolence stands so high as that of Mr. Brodgen: and of which at the same time the dispositive part is so just and so proper, so consonant to the deceased's natural affections and moral duties, that it speaks for itself, and carries, upon the face of it, its own recommendation. Such an alleged will, if suggested, the Court may readily presume that the alleged testator would acquiesce in, and adopt, if not wholly deprived of consciousness: and mere acquiescence and adoption in such a case would so compensate for any want of direct evidence of instructions given, a priori, that proof of these alone, in conjunction [450] with proof of almost any, what-

ever, glimmering of capacity at the time of the execution, would be good to support the will; and would sufficiently indicate mind and volition to justify a Court of probate in pronouncing for it as a genuine and valid will, in my judgment.

The application of these principles to the case before the Court will render the conclusion at which it is bound to arrive upon it inevitable. In the evidence as to general capacity, I have already said that there is nothing whatever to negative the probability of full capacity, at least at intervals; quite the contrary. I come then to the act of execution—and what does the evidence as to that suggest; or at least the only part of it upon which the Court can place the slightest degree of reliance? It furnishes full proof of mind and volition on the part of the deceased; and as fully negatives all suspicion of any unfairness, on the part of Mr. Brogden, in the whole conduct of the transaction. The preparation of the will being completed, he returns with it to the deceased's bed-room: it is then and there read over to the deceased (an admitted fact) in the presence of this Edward Brown, the brother of Ann Brown, the sister-in-law, and of a young woman in the deceased's service, named Robson, the two last attesting witnesses. The deceased is sitting up in bed, without support; in great affliction, no doubt, but perfectly calm, and with nothing whatever in the evidence, entitled to one jot or tittle of belief, to suggest to my mind any appearance even of wandering or delirium at that time. The will is then put before her, which she subscribes in her usual form, with a dash below: and **[451]** with the attestation of the instrument by Robson and Mrs. Ann Brown the transaction terminates. Of these attesting witnesses, Robson, the one, speaks to full capacity. The deposition of the other, Mrs. Ann Brown (as well as that of Mr. Edward Brown, a present, though not an attesting, witness), tells a different story: but in the conduct at the time and long after of both these witnesses (of the attesting witness especially) the Court has evidence of the same tenor with that furnished, both by the conduct at the time, and by the present testimony of Robson, too firm to be shaken by any opinions which they now venture, pretty unreservedly, to express that the deceased, at the period of this transaction, was delirious and incapable. As to Ann Brown, she is a witness deposing against her own act: she attested the will, not taken by surprize, but with a perfect knowledge, I must presume, of the true tenor and import of that attestation, and of what the Court is bound to infer from it; as well as from her conduct in the premises, as it appears in the evidence long after. For instance, both this witness and Edward Brown were not only present at the reading over, and actual execution, of the will, but they were both present at a second reading of the will after the deceased's funeral: still no objection whatever on the score of that incapacity of the deceased which they now both depose to was intimated by either of those persons, at either of those occasions; or, I repeat, till long after, that I am able to discover. Again, ten days after, Mr. Brogden is sworn as executor; no caveat in the goods of the deceased has been entered in that interval; all parties are acquiescing. Ann Brown takes a donation, in the **[452]** nature of a legacy, as under the will.(*a*) As executor, Mr. Brogden administers the effects; converts the property; contributes to the father's maintenance. At last, however, probate is prevented from actually issuing, by a caveat: and Mr. Edward Brown, dissatisfied, as it should seem, at the executor's not chusing to suffer him to appropriate a chest full of china and other articles, to which he had, or laid, some claim, thinks fit to institute this suit in the name of his lunatic, or at least imbecile, father; in which he is himself (in effect produces himself as) a witness to the deceased's incapacity; against the uniform tenor, as already explained, of his whole conduct persisted in up to that time; from which the Court is bound to infer that the deceased had capacity, and that the will is valid. As for his sister-in-law and fellow witness, Mrs. Ann Brown, what may have induced her to take a similar part upon this occasion it would be useless to conjecture. Not only is her present deposition neutralized, to say the least of is, by her prior conduct in the premises, but she is directly and positively contradicted as to facts which she has deposed to (one in particular) in a manner which, with the rest, leaves her unworthy of the slightest belief. She says that in the course of the day on which the deceased died, she, the witness, having mentioned to Dr. Uwins that the deceased had made a will on the preceding evening, he, Dr. Uwins, replied, "Oh, that's of no more use

(*a*) Viz. out of the 50l. left, as said above, to Mr. Brogden, to be distributed at his option on behalf of the testatrix.

than a piece of brown paper: " this in the presence of Mr. Rolls. Now, Dr. Uwins positively denies having made any observation of the sort, to any person whatever, at any [453] time, either in the presence or absence of Rolls; and he is as positively confirmed by Mr. Rolls, to this at least (the only feasible) extent—that no observation of the kind was ever made by Dr. Uwins in his presence.

Upon the whole I am quite satisfied that the institution of this suit, in the name of the father, is a mere scheme produced by an afterthought of the son—his object being to get possession himself of the deceased's property, and unincumbered with the trusteeship of Mr. Brogden. For the sake even of that father, the (nominal) opponent, I pronounce for the will: convinced as I am, that he is far better off in the hands of his trustee, Mr. Brogden, than he would be in those of his son, Mr. Edward Brown. With respect to costs—the son is fixed with the costs of opposing this will already: he admits upon an interrogatory that he has undertaken for these. The Court regrets that it has no power to condemn him in the costs to which the executor has been put, through his means of sustaining it. The father, indeed, the (nominal) party in the cause, it might condemn in these: but a sentence to that effect would be futile in itself; nor, I am sure, does the executor wish it. It is upon this consideration only that in pronouncing for the will I give no costs.

[454] COOPER *v.* GREEN. Prerogative Court, Hilary Term, By-Day, 1825.—In all cases of " process " served on a minor, the Court requires a certificate of its having been served in the presence of the natural or legal guardian of the minor; or at least in that of some person or persons upon whom the actual care and custody of the minor, for the time being, has properly devolved.

(On motion.)

This was a cause of business of accepting or refusing letters of administration (with the will annexed) of Leah Jones, deceased; or, otherwise, of shewing cause why the same should not be committed and granted to John Cooper, a creditor of the deceased; promoted by the said John Cooper against Eliza Green, spinster, a minor, the residuary legatee, there being no executor named in the said will. A decree to that effect had issued with the usual intimation; had been personally served on the minor, and returned into Court; and letters of administration were now prayed, pursuant to the tenor of that decree.

The Court signified that under the circumstances it required further information by affidavit, both as to the amount of the property, and also as to that, and the nature of the debt: intimating at the same time, that in all cases of process served on a minor it required to be certified of its being served in the presence of the natural or legal guardian of the minor; or, at least, in that of some person or persons upon whom the actual care and custody of the minor for the time being had properly devolved. The " certificate " in this case was of a " personal service " on the minor merely.

Accordingly it directed the motion to stand over generally.

[455] MARTINEAU *v.* REDE AND OTHERS. Prerogative Court, Hilary Term, 1825. —Before granting letters of administration to a creditor, the Court always requires an affidavit as to the amount of the property to be administered; where there has been no personal service of the usual citation on the parties entitled to the administration in the first instance.

(On motion.)

This was an application for administration of the goods of William Oxberry, deceased, at the suit of a creditor of the deceased to the amount of 1100l. and upwards. The whole property of the deceased was said to be under 1000l. in value: still, however, there was no statement on affidavit as to the amount of property exhibited. But

Per Curiam. This is not absolutely necessary where, as in this case, there has been a personal service of the usual citation on the parties entitled to the administration in the first instance—otherwise the Court always requires it.

Motion granted.

GIBBENS AND GIBBENS *v.* CROSS. Prerogative Court, Hilary Term, By-Day, 1825.— A will is presumptively revoked by the testator marrying and having issue. That presumption, however (the strength of which varies according to circumstances) may be rebutted by evidence (strong in proportion) to shew that the testator

meant it to operate, notwithstanding his marriage and the birth of issue: but such evidence, to be effectual, must satisfy the Court as to this, unequivocally. A formal codicil, subsequent, referring in direct terms to that identical will, would undoubtedly, as a republication of the will, be effectual to this.

This was the case of a will presumptively revoked by marriage and the birth of issue; in which the presumption was sought to be rebutted, by evidence tending to shew that the deceased meant it to operate.

[456] *Judgment—Sir John Nicholl.* The deceased in this cause, George Cross, made a will bearing date the 14th of May, 1820, regularly executed and attested, by which he disposed of his whole property, real and personal, pretty equally, among his nephews and nieces. It is by one of these nieces, Mary Cross Gibbens, and her husband James Gibbens, the surviving executors, that this will is now propounded. The deceased at the time of making it was a widower without children; and the nephews and nieces, whom it purports to benefit, were his next of kin.

But in the month of December, 1820, the deceased intermarried with Mary Cross (the other party in the cause, contending for an intestacy in law), his present widow: and they had issue of their marriage, a daughter born on the 14th of February, 1822; and a son born on the 13th of January, 1824. About five weeks after this, namely, on Saturday, the 21st of February, in that year, the deceased was suddenly struck with apoplexy, so as to deprive him totally of his faculties, as well mental as bodily: in which state he continued till the following Monday, when he died.

Now the will, such as I have described it, is clearly revoked, primâ facie; for if a testator after making his will, marries and has issue, that will is presumptively revoked. Still, however, it is only presumptively revoked; and the legal presumption that it is, like any other legal presumption, is subject to be rebutted. The difficulty of rebutting it is greater or less, according to circumstances. In the present case, for instance, it is enhanced by the circumstance of there being two **[457]** children, issue of the marriage, one of them a son; especially as the will disposes both of real and personal property. The presumption to be rebutted is the ordinary legal presumption (for to have raised that, marriage and the birth of a single child would have sufficed), somewhat fortified: and the evidence to rebut it must be strong in proportion. It must satisfy the Court unequivocally that the deceased meant and intended this will to operate, notwithstanding that presumed change of intention, consequent upon his altered circumstances; with reference to which the law deems it to be revoked, primâ facie. It rests with the parties setting up the will to produce such evidence to the Court. The onus probandi is clearly upon them: for they are the parties undertaking to rebut the legal presumption as to its being revoked.

Now they have attempted to effect this, in the first place, by pleading disaffection to the wife—and witnesses are produced to this, and to certain declarations which are also pleaded, purporting that the deceased meant to abide by his former will. But of serious permanent disaffection to the wife there is no proof—the contrary, indeed, is pleaded on the part of the wife, and, I think, is fully proved. Again, of declarations to abide by his former will, the principal, and spoken to by a witness eighty years of age after an interval of six months, turns out to have been words of mere heat and passion, produced by a transient quarrel with the wife; by no means inferring any thing like a deliberate intention on the part of the deceased to carry his threats into effect. On the contrary, there are declarations infinitely more likely to be sincere, and infinitely less likely to be misrepresented, utterly inconsistent with **[458]** any intention on the part of the testator to adhere to the will now propounded. These are spoken to by the medical man who attended the wife on the occasions of both her confinements; and by his attorney, to whom the deceased repeatedly expressed, in substance, an intention to make a new will; as in the month of September, 1823, and in that of January, 1824. Looking, then, to the state of his affections, as it appears on the evidence, I see no reason for concluding it at all likely that the deceased should prefer his nephews and nieces to his wife and his children —and with respect to testamentary declarations, the evidence is such as to satisfy my mind that they fortify and confirm, instead of weakening or impugning, the presumption said to be rebutted.

But this effect, again, is sought to be ascribed to a codicil made, it is said, a few days after the birth of his first child. This has been argued to amount to a republication of the will, so as to leave no doubt of the testator's intending it to operate. Now

had the deceased proceeded on that day to execute a formal codicil, referring in direct and express terms to this identical will, the Court, I admit, must have so considered it, and would have been bound to pronounce the presumption adverse to the will effectually rebutted. But I am inclined to think, for several reasons, that no such legal effect can be ascribed to it. In the first place, it is an extremely imperfect paper, unattested, and with blanks unsupplied the body of it; although the deceased, supposing it to have been written in February, 1822, survived the making of this codicil two whole years. But, secondly, and principally, its reference to the identical will now propounded **[459]** is extremely equivocal. It begins, "This is a codicil to my will dated the 18th of February, 1822." Now the reference here (18th February, 1822) should seem to be to a will of that date, and not to signify that the codicil was made on that day—especially as a date 1822 (generally) appears at the foot of the codicil. This, undoubtedly, is the grammatical construction of the phrase; for the substantive will (not codicil) is that which last immediately precedes the date in question. True it is that no will of that date appears: but it is far from improbable that a will of that date, or something in the nature of a will, was actually made by the deceased. He had a daughter born on the 14th of February in that year. It is very probable that he soon after made a will to provide for that daughter; and that the codicil in question had reference to that will, and not to the will of 1820, now propounded. At all events, the reference of the codicil in question to the will now propounded is equivocal; and it is not, therefore, sufficient, in my judgment, to amount to a republication of that will so as to rebut the presumption that he had intentionally abandoned it—fortified as it is, instead of being weakened, or detracted from, by what appears in the evidence as to the state of his affections, and even as to his testamentary declarations, in my view of their effect. The circumstance of this codicil being found in the same envelope with the will of 1820 by no means unequivocally proves that it was deposited there, in order to its being considered a part of that will. It has various bends and folds, and so has the envelope; which renders it probable that it was not deposited there, in contact with that will, immediately, and in the first instance.

[460] Lastly, there is a third testamentary paper before the Court, every way imperfect, indeed, and without date or signature, but not unimportant in the cause. As to the particular time when this was written, all which appears is, that it was subsequent to the birth of the daughter but preceded that of the son. It is not impossible that this was the "will" (so styled) meant to be referred to by the codicil, supposed to have republished the will of 1820. But be that as it may, this third paper, though inoperative per se, under the circumstances, notwithstanding the sudden death of the testator, is strong to repel the notion of any intentional adherence on his part to the will of 1820. For its object is to postpone the nephews and nieces to the wife and children; giving the bulk of the property to the wife and her issue in the first instance.

Upon the whole, if the legal presumption were the other way—did the law presume the will of 1820 to be adhered to, instead of presuming it, as it does, to be abandoned —I am of opinion that this third paper, coupled with the evidence as to the state of his affections, and as to his intention of making a new will altogether, would be almost sufficient to repel that presumption, and to compel the Court to pronounce for an intestacy. But the actual, legal presumption being as it is; and being, as it is, fortified and confirmed by the evidence, in every part, as well as by this third paper, I pronounce the will of 1820 to be revoked; and that this deceased is dead, so far as appears, intestate in law.

[461] IN THE GOODS OF DON FRANCISCO RIOBOO, Deceased. Prerogative Court, Easter Term, 4th Session, 1825.—Administration, under certain limitations, of the goods of a foreigner decreed to the substituted attorney of his executors, with an official copy annexed of "extracts" (only) "from his will"—such extracts consisting of the beginning and ending of the will; and of two clauses therein; the one containing the appointment of executors; and the other a bequest of the testator's (only) property in this country.

(On motion.)

Don Francisco Rioboo, late of Lima, died several years ago in Lima, having made his will, bearing date the 15th of June, 1819, of which he appointed certain executors,

who appeared to have taken various steps relative to the effects of the testator in the Courts at Lima.

The testator had remitted 40,000 dollars to two mercantile houses in London, at interest; each having received 20,000 dollars; in whose hands such sums, with interest, were still remaining.

An official extract consisting of the inception of this will—a clause therein (the 34th) being that bequeathing these 40,000 dollars—the appointment of executors—and the concluding part of the will, had been transmitted to this country; together with a power of attorney from the executors, and a substitution under it to Samuel Winter, Esq., of London, authorising him to recover from Messrs. Darthez Brothers, merchants in London, such sum or sums of money as might be in **[462]** their hands, belonging to the estate of the testator; and to take all needful measures for the recovery thereof, before all competent tribunals—Messrs. Darthez being one of the two houses, to each of which 20,000 dollars, as already said, had been remitted by the testator in his life time. No other property belonging to the said testator than the said 40,000 dollars, with interest, was in this country.

The extract, as above, from the said will, together with authenticated copies of the probate of the same granted by, and of several petitions and decrees relative thereto had before, the legal Spanish authorities at Lima were now exhibited: as also were the power of attorney and substitution to Mr. Winter, in the Spanish language, with notarial translations and affidavits in verification of the several facts stated in the case. Whereupon

The Court was pleased, on motion of counsel, to decree administration, with the said extract from the said will annexed, limited to the effects of the deceased in the hands of Messrs. Darthez, merchants, in London (and also further limited until the will itself, or a more authentic copy of the extract, should be brought into the registry), to Mr. Winter, as substituted attorney of the executors named in the same.

[463] WILLIAMS *v.* GOODYER. Consistory Court of London, Easter Term, 1st Session, 1825.—Quære, whether one who chides and brawls in a vestry room partly in and partly out of a church-yard incurs thereby the penalties of 5 and 6 Edward VI. c. 4, s. 1.—And quære, whether the gross abuse of a minister, while presiding at a meeting of his parishioners in vestry, be not an ecclesiastical offence, and punishable, as such, by the general ecclesiastical law: although it be not liable to be dealt with as a "chiding and brawling" within the statute of 5 and 6 Edward VI. by reason that the vestry was clearly not held in a consecrated place, *i.e.* within a church or church-yard.

This was a cause of office, promoted by the Rev. Theodore Williams, vicar of Hendon, in the county of Middlesex and diocese of London, against James Goodyer, a parishioner, for "quarrelling, chiding, and brawling, by words, at a vestry meeting, in the vestry room belonging to, and situate in the church-yard of, the said parish of Hendon"—and also for "using scurrilous and insulting language to the Rev. Theodore Williams, clerk, the vicar of the said parish, while presiding as chairman of the said vestry."

The articles, after pleading the statute of Edward VI. against quarrelling, chiding, and brawling, by words, in any church or church-yard—and also that, by the laws, canons, and constitutions ecclesiastical of this realm, all persons are bound to demean themselves orderly, soberly, and peaceably, in chapels, churches, and church-yards, upon pain of ecclesiastical censure—proceeded to charge Mr. Goodyer, specifically, with the offence (or offences) in question—expressly pleaded to have been committed at "a monthly vestry meeting, held on the 29th of October, 1823, in the vestry room belonging to, and situate in the church-yard of, the parish of Hendon, for the purposes of auditing the overseers' accounts, and other parish business;" at which Mr. Williams, as vicar of the parish, was in the chair.

[464] In answer to this, it was pleaded on the part of the defendant that the articles were false; at least in that part of them which alleged that the said vestry meeting was held in a room situate in the church-yard of the said parish of Hendon—for that, in truth and fact, "the articulate vestry meeting was held in a certain room, called the parlour, situate on the ground floor of an inn, alehouse, or public house, known by the name or sign of the Greyhound, that the said house is licensed as a public house—that the said room or parlour is constantly used by persons resorting

to the said public house for entertainment or refreshment—that parish dinners for the said parish are, usually, had in the said room or parlour—that public ordinaries, or dinners, on Sundays, and on other days, are frequently held in the same—that balls and dances are occasionally given therein—and that no part of the said room or parlour or of the public house of which the same is a part is situated in the churchyard of the said parish of Hendon." The allegation also went into circumstances to shew that the true character of the transaction articulate was not that ascribed to it in the articles; and that the offensive expressions imputed to Mr. Goodyer, in answer to an observation of Mr. Williams, the vicar, were not meant to apply to that gentleman personally; but to some anonymous informant, upon whose authority the remark that provoked them was avowedly made.

A second plea on the part of Mr. Williams was now tendered, in reply to that of the defendant, pleading in substance—

That "the inn known by the name or sign of the Greyhound, situate in the parish of Hendon, was [465] formerly 'the church house,' and adjoins to, and the back of the same abuts on the church-yard of the said parish—that at various times subsequent to the year 1754 divers alterations and repairs have been made in the said inn; and, at some such times, considerable encroachments have been made on the said church-yard, parts of which have been taken into the said inn—particularly, that the room in the said inn, called the parlour, was enlarged, or built out, upon the churchyard of the said parish—and that at the present time the said parlour does encroach upon the said church-yard to the extent of thirty superficial feet or thereabouts." In part supply of proof, a plan of the church-yard of Hendon, taken by an experienced surveyor in the year 1754 at the expence of the then lord of the manor of Hendon, was annexed to the allegation—as also was a second plan of the same, taken also, as pleaded, by an experienced surveyor, in the present year 1825—and it was expressly pleaded that, on a careful comparison of the two, the encroachment of the parlour of the Greyhound inn upon the parish church-yard of Hendon, to the extent of thirty, at least, superficial feet, as before pleaded, subsequent to the year 1754, was distinctly apparent.

The admission of this allegation was opposed on the part of the defendant. It was said, it furnishes no answer to the case laid by the defendant. It admits that the meeting was held at a public house; in a room or parlour, constantly used by persons frequenting the said public house, in manner as, and for the purposes stated by, the defendant in his allegation; in doing which it admits the defendant's whole case. Granting the fact to be, as pleaded, that a part of this room or [466] parlour (a comparatively small part) is locally situate within the true boundary of the churchyard, it would fail to sustain this the original case as charged in the articles: nor would the defendant, clearly, be subject (it was said) to the penalties of brawling by words in a church-yard for any words whatsoever uttered in such a place, howsoever proved. It was also argued that no evidence upon the plea was likely to satisfy the Court as to the truth of the main fact pleaded: though it was admitted that the fact must be taken as true for the purpose of the argument: its relevancy being the sole point strictly cognizable by the Court in this stage of the cause.

In support of the allegation it was urged, on the other hand, that the fact now pleaded of a part of this room or parlour being within the church-yard, coupled with those other admitted facts of the house itself being church property, and this particular room or parlour being immemorially used as the parish vestry room, was sufficient to sustain the description of it contained in the articles; and to subject the defendant, if proved to have uttered there the words imputed to him, to the penalties of having chode or brawled in a consecrated place. It was also said that to disturb an incumbent while presiding at a meeting of his parishioners in vestry, in the manner charged in the articles, was an ecclesiastical offence by the general ecclesiastical law; although the vestry were not held in a consecrated place, or within a church or church-yard. But this last part of the argument, it should seem, rather went to the defendant's conduct, viewed in another light, and to the general merits of the case, than was applicable to the question immediately before [467] the Court, the admissibility of this particular allegation.

The Court said it should admit the allegation, if this were insisted upon, not deeming it so clearly irrelevant as if proved to be of no possible weight and efficacy at the final hearing of the cause. At the same time, it earnestly recommended that

the case should be adjusted out of Court for the sake of both parties—looking to the difficulties which must attend its progress, and the uncertainty of what the result would be.(*a*)[1]

[468] ATKINSON *v.* ATKINSON. Arches Court, Trinity Term, 2nd Session, 1825.—A witness, upon cross examination, is compellable, if required by the ministrant, to produce all written communications addressed to him, the witness, by the solicitor or other agent of the producent relative to his examination as a witness in the cause.

[See further, p. 484, post.]

(By letters of request from the diocese of Winchester.)

(On motion.)

This was a cause of divorce or separation a mensâ et thoro by means of cruelty (*a*)[2] and adultery, promoted by Elizabeth Atkinson, of Alverstoke, in the county of Southampton and diocese of Winchester, against her husband, Thomas Atkinson.

The following interrogatory had been addressed to William Price, surgeon, a witness on the libel.

Let the witness, William Price, be asked—"Are you not well acquainted with Mr. Weddell? (*b*) Did not the said Mr. Weddell call upon you to become a witness in this cause? Has he at any time, and when, made suggestions or remarks to you, concerning the **[469]** ministrant, adapted to prejudice the ministrant in your esteem? Has he not told you that a tremendous and most disgraceful case would be established against the ministrant? On your oath, has not Mr. Weddell, either by letters (if by letters, let the witness be desired, if they are in his possession, to leave them with the examiner to be annexed to his deposition), or verbally, requested you to state, that you at one time attended the ministrant when afflicted with the venereal disease, or, that you might safely depose to that effect? Let the witness be desired to set forth all that passed between him and the said Mr. Weddell on the subject interrogate."

In answer to this interrogatory, the witness had deposed in substance.

"That he, the respondent, was well acquainted with Mr. Weddell—that Mr. Weddell did call upon him to be a witness in this cause—that he had expressed to the respondent, and stated reasons for it, a very unfavourable opinion of the ministrant; and that such opinions and reasons were certainly calculated to prejudice the ministrant in the mind of the respondent, whatever opinion he might have previously entertained of him; but that such, Mr. Weddell's communications, were private and confidential—that Mr. Weddell has expressed himself to the respondent as sanguine that the charges against the ministrant would be proved; but he, the respondent, forgets in what particular terms—that Mr. Weddell applied to the respondent, both verbally and by letter, respecting his becoming a witness: on such verbal application, he asked the respondent whether he, the respondent, had not attended the ministrant for a venereal complaint; but without, otherwise, requesting the res-**[470]**-pondent to state such to be the fact, or observing that he might safely so depose (*a*)[3]—the respondent has four or five letters which he received from Mr. Weddell on the subject interrogate, but he refuses to deliver them to the examiner, as desired by the interrogatory, or to state the contents of them, unless compelled so to do by the mandate of the Court—his reason for such a refusal is not a wish to benefit either party in the

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(*a*)[1] The parties to the suit, profiting by this advice of the Court, came to an amicable arrangement—and the suit itself was afterwards on the same court day dismissed by mutual consent. No costs were given on either side.

(*a*)[2] The Court, on the admission of the libel, had directed the articles charging cruelty to be struck out.

(*b*) Mr. Weddell was the producent's solicitor. It appeared in the cause that he had formerly been the solicitor of Mr. Atkinson; and was now employed by his wife against him. Mr. Weddell himself also was a witness examined on the libel.

(*a*)[3] The witness's deposition to this part of the case in effect was—that the complaint for which he had attended the ministrant was a gonorrhea—that such a complaint may originate from other causes, though it actually does originate in the one suggested in the libel in nine cases out of ten—lastly, that he, the witness, had made no inquiries at the time as to the manner in which it actually did originate in the instance in question.

cause—it merely proceeds from his considering that a delivery up of the said letters, unless by the directions of an authority that he is bound to obey, would be, on his part, an unjustifiable breach and violation of private confidence."

The Court was now moved by counsel to decree a monition against the witness Price—calling upon him to bring into, and leave in, the registry of the Court the letters so referred to by him in his deposition—such letters being communications from the solicitor of Mrs. Atkinson, and addressed to the witness upon the subject of his examination.

Court. I think that the witness is bound to produce the letters. If, upon cross examination, a witness is bound to state verbal communications between himself and the producent's solicitor relative to his examination; it seems to me that he is compellable, a fortiori, to produce written ones. Verbal communications may **[471]** have been misinterpreted by the witness, or may be mis-stated, through the witness's imperfect recollection of them, to the necessary prejudice of one of the litigant parties. Written communications speak for themselves; being independent of the witness's memory—and upon the tenor of such, in point of propriety or impropriety, the Court is able to put its own interpretation. The letters in question, I observe, are not suggested to be relative to confidential matters of any other sort: the witness expressly restricts them in his deposition to the subject interrogate, namely, that of his examination as a witness in the cause. Unless the letters are procurable from the witness by other means, let the monition issue, as prayed.

BRUCE *against* BURKE. Arches Court, Trinity Term, 3rd Session, 1825.—A marriage in Ireland in a private house at any hour of the day or night is valid, if celebrated by a person in holy orders, between two Papists, according to some Catholic ritual. A marriage so celebrated between two parties in a private house in Ireland alleged to be null by reason (a sure ground of nullity) that one of the said two parties was a Protestant. That alleged ground of nullity held not to be sustained: and consequently a second marriage, de facto, of that one of the said two parties, in the life time of the other, pronounced null and void.—It is competent to a party to set up the nullity of a first marriage in bar of a sentence prayed of the nullity of a second by reason of that first: though he is convict already of bigamy in respect of the said two marriages.

(By letters of request from the official principal of the Consistorial Episcopal Court of Winchester.)

This was a cause of nullity of marriage, on account of a former subsisting marriage, promoted on behalf of Mary Anne Bruce, against Tobias Burke. The defence set up was the alleged nullity of the former (an Irish) marriage; under the circumstances stated in the judgment.

[472] *Judgment—Sir John Nicholl.* This is a suit of nullity of marriage promoted and brought by Mary Anne Bruce against Tobias Burke—the alleged ground of such nullity being that he, the defendant, had a wife living at the time of his marriage, de facto, with the plaintiff or complainant. Most of the facts are indisputably proved. I mean the following. The double marriage of a Tobias Burke, first with Mary Butler in June, 1815, and secondly with Mary Anne Bruce, the complainant, in December, 1820, living the said Mary Butler, is indisputably proved. It is also indisputably proved that a Tobias Burke was indicted at the Old Bailey, in 1822, for having so feloniously, in the life time of a first wife, intermarried with Mary Anne Bruce, the present complainant—that he was convicted of the felony in the said indictment specified and sentenced to transportation for seven years—and that at the time of the issue of the citation in this cause he was and, I may add, still is, a convict on board the "Leviathan," a convict hulk lying in Portsmouth harbour. The identity of this Tobias Burke with Tobias Burke the party proceeded against in this suit, and of the second marriage in respect of which he was so convicted of bigamy, with that of which a sentence of nullity is now prayed, is also, I think, amply established. In addition to the substantive proofs of such double identity, I observe that the defence set up plainly admits it. For the defence set up is not a diversity in either; but that at the time of the first marriage the defendant, admitting his identity and that of his second marriage with the marriage now sought to be annulled, was a Protes-**[473]**-tant—his said first marriage being pleaded and proved to have been celebrated in a private house at Cashel, in Ireland, by a Popish priest, and to be a valid marriage, both parties

being Papists, on the one hand (*a*)—and it being expressly pleaded and proved to be essential to the validity of a marriage so celebrated, on the other hand, that at the time of its actual celebration both the contracting parties should be Papists.(*b*)

[474] The first marriage, then, as I have just said, was celebrated at Cashel in June, 1815—and it is proved, and indeed admitted on all hands, to have been a valid marriage, if both parties were Papists. It is in the negation of this last particular, as to one of the parties, that the defence set up solely consists. Accordingly, the substance of the defensive plea is that Burke, the defendant, was born at Templederry, in the county of Tipperary, in the year 1794; and was baptized in that year by the then vicar of the parish, a priest, or minister, in holy orders, of the Church of Ireland—that in 1801 he was sent for education to a Protestant school in Templederry—that from 1807 to 1811 he was resident with a wine and spirit merchant, to whom he had been apprenticed in the first of those years, at Carlow—and that in 1811 he went to Dublin and there continued up to the period of his pretended marriage (so styled in the allegation) with Mary Butler, **[475]** in June, 1815. And the allegation expressly pleads that during the whole of the above period (but more particularly for the last twelve months anterior to the said pretended marriage) he, Burke, was and professed himself to be a Protestant of the Church of Ireland—attended divine service in churches of the Protestant communion—and conformed to the rules and ordinances of the Protestant establishment.

It thus appears, by his own plea, that Burke was a native of Tipperary, not far from Cashel; and that he had been resident in Dublin for some years prior to June, 1815. And it appears, by the evidence of a witness named Willis, that he had occupied and carried on business as a spirit dealer in a house situate in North King street,

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(*a*) The libel pleaded that "by the law prevailing and established in Ireland in the year of our Lord 1815 and long before, in that part of the united kingdom of Great Britain and Ireland called Ireland, a marriage had and celebrated by a Roman Catholic priest, in a private house, according to the rites and ceremonies of the Roman Catholic Church, between two persons, both of the Roman Catholic religion, was and is valid to all intents and purposes whatever in law." This article of the libel was deposed to in terms of positive affirmance by two gentlemen, barristers, each of whom had practised at the Irish bar. According to their evidence "there is no restriction of time or place as to Catholic marriages in Ireland—a private house is as good as a church and the afternoon or evening as any canonical hour." The marriage, however, must be "by a Roman Catholic priest, or a person in orders (for a Protestant minister will do as well), and according to the form of the Roman Catholic ritual," as it is expressed by one of those gentlemen. The other expresses it: "It may be celebrated by a Roman Catholic priest, or a priest of any other denomination. But it must be by the Roman Catholic form, or at least some form that unites the parties in the state of matrimony." The form of marriage as celebrated according to the ritual used in the Roman Catholic Church was stated at length by a witness examined on the libel, Mr. Henry, a Catholic priest, in answer to a special interrogatory addressed to him as to that particular.

(*b*) The defensive allegation pleaded art. 1. "That in and by an act of parliament, passed in the kingdom of Ireland, in the nineteenth year of his late majesty King Geo. II. c. 13, entitled 'an act for annulling all marriages to be celebrated by any Romish priest between Protestant and Protestant, or between Protestant and Papist, and to amend and make more effectual, an act passed in this kingdom, in the sixth year of her late majesty Queen Anne, entitled an act for the more effectual preventing the carrying away and marrying children against the wills of their parents and guardians;' it is, amongst other things, enacted in the words, or to the effect following, to wit—that every marriage that shall be celebrated after the first day of May, which shall be in the year of our Lord God, 1746, between a Papist and any person who hath been and professed himself to be a Protestant, at any time before such celebration of marriage; or between two Protestants; if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever." No exhibit was annexed to, or witness examined upon, this article—the act in question being expressly so pleaded a public act and as such to be known and taken notice of by all judges and courts of judicature.

Dublin, from the month of March, 1814, to that of September, 1815, including the twelve months immediately preceding his marriage; during which it is pleaded in particular that he, Burke, was, and professed himself to be, a Protestant. Willis is confident as to dates; having purchased of Burke the remainder of his term in the house in North King street, on his quitting it in September, 1815.

Being so resident in North King street, it appears that Burke became acquainted with his then future wife, Mary Butler, on occasions of her accompanying her father from Cashel, where he resided, to Dublin. Butler, the father, who was a leather merchant, often went from Cashel to Dublin on business; and sometimes, at least, lodged with Burke in North King street during his stay in Dublin. After a short courtship, Burke proceeds to Cashel, the residence of the wife's father, in order to be married there, at Cashel; taking with him a certificate from his parish priest, in **[476]** Dublin, as to the fact of his being a Catholic—this it seems being always required of a non-parishioner, before a Roman Catholic priest will venture to celebrate the marriage of a non-parishioner as a Roman Catholic and according to Catholic rites. The witness Ryan (a sister of Mary Butler) positively deposes to having seen and read such certificate the evening before the marriage; as also to its actual production by Burke to the officiating priest, at the time of the wedding. Indeed, the penalty to which every Catholic priest is liable for celebrating a marriage between a Catholic and a Protestant (*a*) creates a strong presumption that such, the usual, precaution was taken in the instance in question, independent of the positive proof of that fact furnished by Ryan's testimony. And I must also presume that the priest who granted the certificate was satisfied as to Burke being a Papist—a matter this with respect to which he could not well be mistaken; as Burke had been for the preceding twelve months residing in one and the same house in his parish, that in North King street.

At Cashel, then, in the house of the wife's father, Burke and the first wife, Mary Butler, were married according to the rites and ceremonies of the Roman Catholic Church by Dr. Wright, the then parish priest of Cashel, but who is since dead: the marriage is deposed to by two witnesses actually then and there present; and it clearly was a valid marriage, both parties being Papists.

As to the wife this admits of no question—and it should seem to admit of as little with respect to the **[477]** husband, even upon the facts in evidence already stated. Added to which, every circumstance of the case is strongly corroborative of the fact of Burke being of the Catholic persuasion. His whole family, with the exception of an elder brother, are proved to have been Papists—a brother, Edmund Burke, a Papist, was present at the marriage. The wife's family were all Papists: nor of course would they have consented to the marriage at all, or at least not to its celebration in that form, had they entertained any suspicion that Burke was a Protestant. But the father, in the course of his visits to Dublin already stated, must have known the fact to be so; if, as pleaded, he, Burke, at all times professed himself to be a Protestant; and attended divine service in the churches, and conformed to the rites and ordinances, of the Protestant establishment.

But the fact so constructively, primâ facie, proved, is not left to rest either on the proofs already stated, or upon mere inference from the circumstances to which I have just adverted. Several witnesses have been examined on the libel, who not merely depose to their belief, and to the general reputation, of Burke being a Papist; but who speak to other facts, utterly inconsistent with the case now set up, of his being, in truth, a Protestant. They depose to his attending mass—not indeed very frequently, but still to his attending mass—both at Carlow and Dublin, up to the period of his marriage in 1815. The witness Kehoe, who had been his fellow apprentice at Carlow, and renewed his acquaintance with him at Dublin, speaks to this; and to his demeaning himself, in all respects, as a worshipper at mass, sprinkling himself with holy water on entering **[478]** the place where it was celebrated, and so on. The witness Mr. Henry, a Roman Catholic priest, deposes to the following fact:—He says that Burke had at one time, lodging in his house in North King street, a Roman Catholic clergyman named M'Quirk; who being very ill, he, the deponent, as the Roman Catholic curate of the parish, was requested by Burke to go and read prayers to Mr. M'Quirk, in the ordinary way of chapel service—Burke adding, that if the deponent would attend, he would himself assist in the responsive part of the

(*a*) Namely, transportation; and a pecuniary forfeiture—that of £500.

service, and get the two lights and wine and other things ready; which he said he knew how to do very well, as he himself was of the same persuasion. The witness goes on to say that he attended accordingly, but declined performing the service, as he found Mr. M'Quirk in too flighty a state of mind to attend to it. Burke, however, he adds, was very urgent with him to proceed, notwithstanding; as considering the prayers in the service for the sick effectual to drive away fairies and evil spirits; "a notion," says the witness, "which none but very weak and superstitious Catholics entertain." Accordingly, "it being a maxim with him," he says, "to discourage such notions," he refused to perform the service. From this, as well as from other circumstances, and from the result of his inquiries at the time of Burke's first coming into the parish as to his religious persuasion, this witness concludes, by expressing his firm conviction and belief that "what religion he, Burke, had during his residence in North King street, in 1814 and 1815, was, without any manner of doubt, that of the Roman Catholic Church."

After this marriage with Mary Butler, in 1815, **[479]** Burke, accompanied by his wife, went to Dublin; where, and at Clonmell and other places in Ireland, they continued to live and cohabit together as husband and wife, till about the year 1817; he, Burke, still being all this time, or professing himself, a Catholic. This is proved by a variety of circumstances. For instance, they had two children, daughters, Honora and Johanna; each of whom was baptised by a Catholic priest, after the Catholic form; on one, at least, of such occasions, Burke being actually present. In 1817 or 1818, Burke having, as some of the witnesses express it, become "unfortunate in business," left Ireland, and came to this country, accompanied by his wife and children, or one of them, Johanna. Of his history in this country prior to his courtship of Miss Bruce, all that appears in the evidence is, that in 1819 he procured the admission of Mary Butler (or Burke) and a sick child, the daughter Johanna, into Pancras workhouse; where the mother and child remained from the 22nd of September in that year till the 25th, when the child died; immediately upon which the mother quitted the workhouse. Of the mother (the first wife) nothing more appears in the evidence than that she was living at the time of the second marriage. The witness Lee proves that she was actually present in Court, at the Old Bailey, during the defendant's trial for bigamy, in 1822—where, as already said, he was convicted and sentenced to transportation for seven years. So far, then, the marriage with Butler should clearly seem to have been a valid marriage.

In the year 1820, however, notwithstanding the premises, Burke, the defendant, pays his addresses in the way of marriage to Miss Bruce, the complainant; **[480]** representing himself as a bachelor; and, after a correspondence of some length, clandestine in every part of it, and in defiance of the express prohibition of the lady's father, on its coming to his knowledge, a marriage de facto, by licence, of the parties, is had at Islington church, on the 4th of December, 1820. In the spring of 1822 Mr. Bruce, the father, having learnt that Burke was a married man at that time, procured, in the first instance, his trial and conviction for bigamy; and subsequently the institution of the present suit; in order to obtain a sentence declaratory of the nullity of the marriage de facto so had in December, 1820, between the defendant and his (Bruce's) daughter, the complainant in this cause.

In the history of the trial for bigamy I observe that the bill was found by the grand jury in May, 1822, but that the trial itself was not had till the following July. Burke therefore had full time, as he had every inducement, to set up at that time the invalidity of the first marriage, by the case now sought to be made in this Court; on proof of which to a jury he would most unquestionably have been acquitted. Notwithstanding, however, he is convicted; either not having set up, or having failed to sustain, the case now sought to be made, on the occasion of his trial for bigamy. It was still, however, open to him, in spite of that conviction, to plead and prove in this Court the invalidity of the first marriage, in bar of the sentence now prayed. In order to this he has, here, at least, regularly put in issue the fact of his having been a Protestant at the time of his first marriage in June, 1815; and, by proving it, he will clearly entitle himself to a sentence of dismissal. The matter so pleaded, if it be, is surely **[481]** not even difficult of proof. For instance, confining it to the last, and most material period of time, the twelve months immediately preceding the marriage—Burke, during all that time, was stationary in North King street. If a Protestant during all that time, frequenting divine service in the churches, and con-

forming himself to the ordinances of the Protestant establishment, could that, in such a place as Dublin, have escaped the knowledge of his neighbours, friends, and acquaintance? It must have been matter of pretty general notoriety; and easy of proof, in the same proportion. At the same time, the burthen of proof as to this particular fact clearly rests upon him, on every consideration. The fact of his having been a Protestant, against his own professions, at least on the occasion of his first marriage—contrary to all probabilities, and to the understanding, at that time, of all parties and privies to the marriage; and contrary to much at least of his own conduct, as well prior as subsequent to the marriage—he must prove, and by evidence most satisfactory, to bar the sentence prayed by the present complainant. And this the rather, as the conduct of this person to one of these two females (the only question being to which of the two) is infamous, upon his own shewing. Either to Butler, as inveigling her into a sham marriage by passing himself off to her, and her family, as a Papist, whilst in truth he was a Protestant; or to Bruce, as practising on her the equally or still more infamous artifice (to accomplish the same object) of representing himself to her, and her family and connexions, as a bachelor, free from matrimonial engagements, whilst in truth he was under such engagements, and a married man.

[482] Of the evidence actually adduced by Burke of his being a Protestant at the time of his first marriage, it may be sufficient to say that it fails to sustain that alleged fact in every particular. Three witnesses have been examined on the defensive allegation. The two first of these indeed depose pretty confidently, in general terms, to the fact that Burke at all times, according to their impression and belief, was a Protestant—but their grounds of inference, their assigned reasons for that impression and belief, are, most of them, extremely vague and unsatisfactory: nor do the witnesses, as to the few of a contrary description, depose in terms to which the Court can attach much or any credit, contrasting them with the much more probable evidence to a contrary effect, given by the much more credible witnesses on the libel. Dwyer, for instance, the first of the two, who represents himself as a native of the same district in Ireland, and connected by marriage with the defendant, after saying that he knows nothing of his birth, baptism, or education (of which by the way being as pleaded, there is nothing in the shape of proof), but merely that he "always understood that he was bred up a Protestant," goes on to depose that he lived with the defendant, in North King street, for nine or ten weeks, as a sort of assistant in his business (till he could procure some better situation, which he was on the look-out for, as a clerk or accountant), in the winter of 1814. During that period, he says, "Burke, the defendant, by his conversation and habits, always led him, the deponent, to suppose, that he was a Protestant. Deponent could not think otherwise of him. He used regularly every Sunday, at least once a day, to go to church, the regular English **[483]** Church in Dublin, either to Christ church, or St. Patrick's church: never to chapel or mass. Besides this, he used often to be talking to deponent about his principles, deponent being a Catholic. He used to give him books to read on controversy, and try to persuade him to turn Protestant, and to read the New Testament; and, several times, he prevailed on the deponent to accompany him to church." Does all this appear credible in contrast with what is deposed to of this same Burke, at the same period, by the witnesses on the libel? The witness Dwyer, I should say, is a journeyman painter in this metropolis—as his fellow witness, Egan, whose evidence is of the same general complexion, is a common day labourer. Mr. Armstrong indeed, the third, is a fully credible witness; but his evidence amounts to little or nothing. He, like the others, speaks to his belief that Burke was a Protestant; but it seems to be a belief taken up upon slight grounds—the principal being, his having once seen him at Christ church, in Dublin. He says too that Burke, being a posthumous child, the chief charge of him of course fell upon his eldest brother, Thomas, a Protestant and subsequently a clergyman of the Established Church; from which circumstance he infers that Burke was educated in Protestant principles. But that he really was so; or that he ever professed himself a Protestant; or evinced his adherence to Protestant principles by any act of outward conformity, as by constant attendance at churches of the Protestant establishment, as pleaded, or any thing of that sort, he, the witness, disclaims, in terms, any knowledge whatever.

Upon the whole evidence, of which the above is a **[484]** summary, I have no

hesitation in saying that the defence set up is not made out in proof—but that the defendant's first marriage was a valid and subsisting marriage at the time of his marriage, de facto, with the present complainant; and, consequently, that she is entitled to a sentence declaring and pronouncing that marriage null and void.

ATKINSON *v.* ATKINSON. Arches Court, Trinity Term, 4th Session, 1825.—An allegation exceptive to the testimony of a witness, to be admissible, must plead matter not pleadable before publication: and it must be such as, if proved, will materially discredit the witness. It must be pleaded, too, with all possible specification as to times, places, persons, and so on.—Where a witness is designed (a fortiori vouched) by the one party to precise facts, it is open to the other to plead, before publication, declarations of the witness contrary to those facts: which if he does not, he shall not plead them after publication in exception to the testimony of the witness: unless they are noviter perventa, &c. i.e. come to his knowledge since publication.

(On the admission of an exceptive allegation.)

This was a cause of divorce, or separation â mensa et thoro, by reason of cruelty and adultery promoted by the wife against the husband, as stated in the case next but one preceding. The present question arose upon the admission of an allegation, exceptive to the testimony of a witness examined upon the libel.

Judgment—Sir John Nicholl. The principles applicable to pleas of this description are sufficiently familiar to admit of their being referred to, without the formality of any previous detail of them. As with reference, then, to those principles, it appears to me that the present allegation is altogether inadmissible.

The witness whose testimony is excepted to is a **[485]** young woman named Harriet Hobbs. She, it seems, has deposed on the 15th and 16th articles of the libel as follows:—On the 15th, that "from what she, the witness, saw on those occasions" (thereby meaning the occasions specially referred to by her in her deposition on the said article), "she has no doubt but that Mr. Atkinson (the defendant) and Ann Rolls" (a party with whom the said defendant is charged to have committed adultery in the libel) "upon many other occasions of their being alone together in the house of the latter, as deposed, had the carnal use and knowledge of each other's bodies," &c. And on the 16th, that she, the deponent, has no doubt but verily believes that Mr. Atkinson and Mrs. Rolls, upon the occasion just deposed of" (thereby meaning upon an occasion specially referred to in her examination upon the said article), "had also the carnal use and knowledge of each other's bodies," as above. The alleged contradiction is that "she, the said Harriet Hobbs, hath, in the presence of divers credible witnesses, both shortly before and shortly after her said examination in this cause, admitted and confessed that she verily believed that they, the said Thomas Atkinson and Ann Rolls, never had the carnal use and knowledge of each other's bodies," and that she hath also, since her examination, in conversation with some of her friends and acquaintance, stated that "she verily believed no such adulterous intercourse had taken place—that it could not, as she verily believed, have taken place without her knowing of or seeing it; and that she never had seen or known of any thing improper passing between the said parties."

[486] Such, in substance, is the first article of this allegation—it is, in a word, that the witness having deposed on the 15th and 16th articles of the libel, to her belief that adultery was committed between the parties articulate; has made verbal declarations out of Court to her belief that it was not.

Now it seems to me that, to the admission of this article of the allegation, there is an objection almost fatal in itself, in limine—it pleads matter which might, and which therefore should, have been pleaded before publication. The 15th and 16th articles of the libel each conclude with averring that adultery was committed between the parties articulate on certain occasions therein severally specified. And the witness designed, and almost vouched, to those articles was Harriet Hobbs. Now if Hobbs, at any time before publication, had asserted her disbelief that adultery was committed between the parties on the occasions articulate, might not this have been pleaded before publication? What inference is justly deducible from such a fact—I mean, how far it impeaches the witness's credit, supposing it to be—is another thing: but it was clearly open to the party to have pleaded the fact itself, if he had deemed it a material fact before publication; so that its being pleaded at the present time, after

publication is improper, and strictly inadmissible. Where a witness has been designed to particular parts of a plea it is always open to the other party to plead, before publication, declarations on his part contrary to the facts and averments contained in those particular parts of the plea. Is the party to lay by till he has seen the witness's deposition, and then, if convenient, to plead them? **[487]** Certainly not. For instance, in the case of a subscribed witness to a will, examined on a condidit. Is the party opposing the will to wait till publication of the evidence has passed, and then to plead that the witness has said he "never attested the will," or, as the case may be, in the shape of an exception to his testimony? I think that such declarations should have been pleaded before publication—unless indeed they had "noviter perventa" newly come to the knowledge of the party pleading them so averred and so proved. Here there is no averment even that these declarations of Hobbs have come to the knowledge of Mr. Atkinson since the evidence has been published in the cause.

But there are other objections strongly applicable to the admission of this article. In excepting to the credit of a witness from what arises out of his deposition, it has been always held that you must shew him to have sworn falsely and corruptly. Would it be matter of just inference that the witness has sworn falsely and corruptly, in this instance, should the allegation, this part of it, be admitted and proved? It assigns a contradiction which does not involve any material impeachment of the witness's credit, in my view of it. What the witness is said to have stated differently, at different times, is not a matter of fact, but a matter of mere inference or opinion. In her deposition she has spoken to her belief that adultery was committed between the parties—at other times she has spoken to her belief (assuming this, for argument's sake) that it was not. But the witness may have entertained different impressions at different times—so that little derogatory to her credit would result from this part of the allegation being proved. The assigned contradiction is not one of that **[488]** positive and precise nature alone sufficient to discredit a witness. For instance, suppose that an interrogatory had been addressed to Hobbs to this effect. Have you never stated so and so [namely, your belief that the defendant never committed adultery with Mrs. Rolls], either generally, or, à fortiori, specifically; that is, have you never so stated to such or such persons, and so on? Why, the witness might then, not improbably, have admitted that she had so said, and might have accounted for her having deposed differently; as, for instance, by averring that she had altered her opinion as to the conduct of the parties; or that what she had said on that subject was not meant seriously; and that her real opinion and belief was only expressed when she was put upon her oath. Had she denied it, however, the assigned contradiction, as being positive and precise, might have been pleadable. But no such interrogatory was administered to her—and the discrepancy, as pleaded, being, accordingly, not one of a nature to affect her credit materially, if proved, it ought not, I think, to be pleaded, were it upon this ground only. This witness's belief, either way, I may add, is obviously itself quite unimportant in the cause. Her belief, either way (she, too, a mere girl) is no proof that adultery was, or that it was not, committed between the parties articulate. To what inference as to this, either way, is the Court led by the facts and circumstances to which she has deposed? They constitute the material part, the only material part, of her evidence. The Court can draw from these its own inference; in doing which it is likely to derive little aid from the belief, either way, of (especially such) a witness.

[489] Lastly, the allegation, this part of it, is destitute of all that specification so absolutely essential where matter is pleaded to discredit a witness after publication. It merely pleads that the witness has stated so and so—not saying when, where, or to whom in a single instance. How is this to be counter-pleaded; or how can interrogatories be addressed with any effect to the witnesses produced to prove such alleged declarations? In every view of the case it appears to me that this first article of the allegation is one that the Court is bound to reject.

Nor has the second, the only remaining article of the allegation, in part, for the same reasons, any better claim to be admitted. It recites the answer of the same witness, Hobbs (to the effect that "she has not received, or been promised, nor does she expect to receive, any reward, present, or gratuity, or satisfaction for giving evidence in this cause"), upon a general interrogatory addressed to her on that head. And it then pleads, not that she has been bribed, but that she, Hobbs, since her examination, has admitted and confessed "that her father did receive money from

Mr. Weddell, the solicitor of Mrs. Atkinson, for her use and in order to supply her with clothes—that her mother had actually purchased clothes for her with such money; and that Mrs. Atkinson had furnished it." Now these again are facts, namely, that the witness had been bribed, or at least had been tampered with, which, unless they are noviter perventa to the knowledge of the other party, which they are not averred to be, should have been pleaded before publication—and here again, with respect to these admissions and confessions, there is all that want of due specification of times, [490] places, and persons already observed upon, as with respect to the alleged declarations pleaded in the preceding article. Upon the whole, the plea now tendered appears to me to be purely dilatory; and to be made up of matter not pleadable in this shape and in this stage of the cause. Consequently, I reject it; and assign the cause itself to be concluded on the next Court-day.

ALLEN *v.* MANNING. Prerogative Court, Trinity Term, 3rd Session, 1825.—A testator made a will to please his wife: then a second (unknown to his wife) to please himself: sometime after he went to his attorney and gave him instructions for a new or third will—telling him at the same time that he was going that day to make a codicil to (and so, in effect, to revive) the first, terming it his wife's will; but would come the next day and execute the third, which he meant to be his will, expressly in order to defeat the first. He revived the first will accordingly; but died without executing the third. The Court, holding that upon the evidence he was only prevented from executing this third will by the "act of God," in the true sense of that phrase, pronounced for a draft will which had been prepared in his life-time from the instructions so given by the testator as aforesaid.

Thomas Allen, the party deceased in this cause, died on the 16th of December, 1823, leaving personal property only to the amount in value of about 2000l. At the time of his death he was clerk to Messrs. Whitbread and Co., and had been so for nearly forty years.

In 1806 the deceased, being then a widower with two children, daughters, intermarried with Mary Huke, who survived him, being party in the cause as Mary Allen, his widow and relict. She, at the time of her marriage with the deceased, was a widow, and was possessed in her own right of certain freehold and leasehold property and other effects, producing together an income of about 200l. per annum. The [491] whole of such property previous to the marriage was settled on her for life; and afterwards as she by deed or will should appoint. The deceased had issue by this marriage two children, a son and a daughter, both minors at the time of his death. His daughters by the first wife were both married in his life-time—Ann the elder (party in the cause) to Thomas Manning in 1809—and Frances the younger to William Garnham in 1822.

In the months of February and March, 1821, the deceased made a will with two codicils, whereby he bequeathed the bulk of his property to his then wife for her life; and the whole after her death to his four children in equal proportions. This will and codicils, together with a third codicil (of which in the sequel), were propounded by the widow. It appeared in evidence that they were prepared by a solicitor, Mr. Earnshaw, whom the deceased was in the habit of employing, from his own instructions: and they were formally executed and attested. It was expressly pleaded on the part of Mrs. Manning that the deceased was prevailed upon to execute the said will only by the undue influence and importunity of his wife, the other party in the cause; and that the same was contrary to his real wishes and inclinations. But of such express allegation there was no proof; with the exception of the evidence to certain declarations to that effect made by the deceased himself, on two subsequent occasions, that will presently be stated.

In the month of June, 1822, the deceased executed another will, which had been prepared for him by a Mr. Hull, a solicitor in his neighbourhood, but not the solicitor regularly employed by the deceased, from [492] instructions given by him, the deceased, to Hull in the month preceding. The deceased, it was pleaded and proved by the testimony of Hull, both on occasion of his giving instructions for, and on that of his executing, the said will, spoke in strong terms of the injustice of which, as he said, he had been guilty towards his two elder children by the will and codicils of February and March, 1821, alluding to the property settled upon his then wife and, as he

expressed it, upon her children; who consequently would be better provided for than his other children in the event of that will remaining operative. On both such occasions the deceased added, "It," meaning the will of February, 1821, "is my wife's will and not mine." Accordingly, by the will of June, 1822, the bulk of his property after his wife's death was given by the deceased to his two elder children in equal proportions, and a legacy only of 200l. each to the two younger, the children of the subsisting marriage. This last will was left with Mr. Hull, to be delivered to his executors after his death—the deceased assigning as a reason for this that "it would occasion words if he took it home," and that "he did not wish his wife to know of it."

On the 10th of December, 1823, the testator called upon Mr. Hull, and told him in the presence of his clerk, a person named Dury, that he wished to make a new will; and desired that his will of June, 1822, should be read over to him. This being accordingly done, the testator proceeded to give instructions for a new will. Such instructions, as taken from the deceased by Dury, purported to be expressed in a paper writing, indorsed "Instructions for altering Mr. Allen's will," written by Dury; and in certain alterations noted in **[493]** pencil, also by Dury, on the margin of the former will. The general purport of the proposed will, for which instructions were so taken, was to be as follows:—After the death of the testator's wife his property was to be divided into thirds—a third was to be given to each of his two elder children; and the remaining third in equal division to the two younger. At the same time the testator directed (so positively deposed by Hull and Dury, and so purported to be contained in the instructions) that a note of hand for 200l. of his son-in-law, Manning, which the deceased held as a security for money lent him to that amount, should be cancelled; and that a further sum of 100l. also lent or advanced to Manning by the deceased, but for which he had no security, should be retained by him, Manning, over and above a clear third of the residue, so proposed to have been given him by the will.(*a*) The instructions so **[494]** taken as above, when completed, were read over to the deceased, who approved of them, and directed that a will should be drawn out conformable thereto, in order that he, the deceased, might execute the same on the following day at Hull's office, by way of concealing all knowledge of the

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(*a*) The "instructions" only purported to express this, sub modo, being in these words:

Personal property to be divided into three shares.

1st share, to daughter Manning, having had 300l.

2nd, to daughter Garnham.

3rd, George Thomas Allen, and my daughter Mary Allen, spinster, now seventeen, all payable at my wife's decease.

Manning gave a note of hand for 200l. 1st Jauuary, 1823—100l. advanced before.

Executor to cancel the note on payment of all interest.

Remaining 3rd to be divided between George Thomas and Mary Allen.

Receipt of wife a sufficient discharge.

Cancel note.

Now it certainly might have been a question of construction, on the face of the instructions propounded, whether the testator meant and intended that his son-in-law, Manning, should have a third of his property plus or minus the sum of 300l. which he was so indebted to him. And there was much in the evidence to shew that whatever benefit the testator meant and intended to Manning, it was always his intention to make him account to his estate for this sum of 300l. which he had so had in advance. The Court, however, instead of pronouncing for the instructions propounded, which had been read over to and, as sworn, approved by the deceased, pronounced for the draft will, prepared by Hull from those instructions, which the deceased had never seen; and which only appeared as a script in the cause annexed to Mrs. Manning's affidavit of scripts. Upon the face of the paper so actually pronounced for there was no such ambiguity; it being there expressed clearly enough that Manning was to have a third over and above the 300l. which he was indebted to the testator; and Hull and Dury positively deposed (and no doubt understood and conceived) that such was the deceased's intention. It was objected on the part of the widow that it was not competent to the Court under these circumstances to pronounce for a paper which had never been seen by the deceased—but the Court over-ruled that objection; and actually pronounced, as said, for the draft will.

transaction from his wife. The deceased at the same time said, "I am going to execute another will at home to-day, prepared by Mr. Earnshaw; but it will not be my will—it is not just, it is not right, but I will do it to preserve peace at home. I will come to-morrow and sign this will which will overturn the will that I am going to sign to-day at home." These declarations of the deceased were positively deposed to by Hull and Dury.

On the 11th of December the deceased executed at **[495]** his own house a codicil to his will of February, 1821. Such codicil was, unquestionably, the instrument referred to by the deceased as a will in his declarations to Hull and Dury: it was to have been executed on the 10th, and its execution was merely deferred till the 11th, by reason of a press of business in the attorney's office, which prevented its being completed, as originally proposed, on the first of those two days. It was prepared by Mr. Earnshaw, from instructions which the deceased had himself called at his office and given to him on the 9th of December. The sole purport of that codicil was to secure the return to his estate of the 300l. which the deceased had lent or advanced to his son-in-law, Manning. In order to this, it directed that the said sum of 300l. should be taken and considered as part of the fourth share to which Mrs. Manning was entitled in and by the will of February, 1821: and the codicil in question confirmed the said will, that of February, 1821, and the two former codicils, in all other respects. It was pleaded on the part of Mrs. Manning that this codicil was only procured from the deceased, as the will had been, by the undue influence and importunity of his wife: but of this again there was no other proof than resulted from the deceased's previous declarations to that effect to Hull and his clerk, Dury.

On the said 11th of December the deceased, who had long been afflicted with cough and asthma, feeling himself worse, sent for his apothecary; by whose advice he staid at home on that day: nor did the deceased, in fact, ever quit his house after the 10th of December. He died in the night of the 16th. It was pleaded on the part of Mrs. Manning that he was **[496]** incapable of quitting his house after the 10th, and, consequently, of fulfilling his engagement with Mr. Hull. On the contrary, it was pleaded by the widow that the deceased, although indisposed on the 11th, and gradually getting worse till he died, still was down stairs each day; and might, if he had chosen, have gone to Hull's office, situate only 200 yards from his own house, any day previous to the 15th. And Mr. Gore, his apothecary, deposed to this part of the widow's plea that he had recommended the deceased to stay at home on the 11th, merely as a matter of precaution, there being no actual necessity for his staying at home on that day; and he, the deponent, having frequently seen him out, and employed in his ordinary pursuits, when he was worse—that on the 12th he was much better than on the 11th—and that his illness only assumed an alarming character, and was only considered by the deceased himself, and by those about him, likely to be fatal, on the evening of the 14th December.

The will (and its three codicils) of February, 1821, was propounded on behalf of the widow—and the will of June, 1822, in conjunction with the pencil notes on its margin, and the instructions taken by Dury, as above, on the 10th of December, 1823, was propounded on behalf of the daughter, Mrs. Manning.

Judgment—Sir John Nicholl. The evidence taken upon the several allegations leaves no doubt upon my mind, either as to the intentions of this testator, or as to the legal construction to be put upon his several testamentary acts.

The testator made a will in 1821, leaving his property to be divided among his children in equal **[497]** proportions. It was prepared for and executed by him under circumstances, and in a manner, as appears by the evidence, which negative the imputation of improper interference on the part of the wife or any other of a nature in the slightest degree to affect the legal validity of that will. He might have made it to please his wife; and even at her instance, and through her importunity: still nothing of all this appears in the evidence of a nature at all, I repeat, to affect the legal validity of the will. However, in the month of June, 1822, the deceased makes a new will, through the agency of another solicitor, of a somewhat different tenor from the former: and by this, of itself, and quite independent of any declarations as to his dissatisfaction with that former will, and so on, the will of 1821 clearly stood revoked. This will of June, 1822, would indisputably have been entitled to probate had the testator died without doing any other, or further, testamentary act.

Next in order of time follows the codicil of December, 1823; it was to have been

executed on the 10th, but was actually executed on the 11th of December. It confirms and revives the will of February, 1821; and that again, so far, became the deceased's last or effective will. Undue influence and control on the part of the wife is here again charged: but of such, here again there is no proof of a nature to affect the validity of the act, or to prevent its operating as a complete and effectual revivor of the will of February, 1821; and the Court, if matters had stopped here, must have so considered it.

But it also appears that on this 10th of December, [498] the very day upon which the codicil reviving the will of February, 1821, was to have been executed, the deceased goes to Mr. Hull and gives him instructions for a new will altogether; accompanying those instructions with declarations that he is going to execute that day, at home, a will of a different tenor, prepared for him by Mr. Earnshaw; but that he will call on the following day and execute a will prepared from the instructions so then given by him, expressly in order to defeat the will that he is going to execute that same day at home. And the case set up by the daughter, Manning, is that these instructions and accompanying declarations, under the circumstances, are sufficient in law to defeat the actual revival of the first will.

Now it neither has been, nor could be, contended that these instructions and declarations could have the effect sought to be ascribed to them of themselves. Accordingly, it is further alleged, on the part of Mrs. Manning, that the deceased would actually have fulfilled his promise of calling at Hull's office, and executing the proposed will, if he had not been prevented from doing so by what is technically described as the "act of God." This is the daughter's case: and I admit, as insisted, that in order to sustain it she is bound to satisfy the Court in the three following particulars:—First, that the deceased fully meant and intended to execute a will of the same tenor with that which he directed to be prepared on the 10th of December. Secondly, that he was only prevented from carrying that intention into effect by extrinsic circumstances. And, thirdly, that those extrinsic circumstances were such as he himself had no control over; [499] amounting in themselves to what this Court is in the habit of considering a case of prevention by the "act of God."

Is the evidence such, then, as should satisfy the Court as to these particulars? Now, as to the two first, I am quite persuaded, from the deceased's own declarations, and from the circumstances under which the several wills were executed, as both the one and the other appear in evidence, that it was not his intention to bequeath his property to his four children in equal proportions; but that he did intend, and had long intended, a distinction in favour of his children by his first wife, in consideration of what those by his second wife would probably derive from the money in settlement at their mother's disposal. The wife's interference, I have said, is not proved so as at all to invalidate either the will of 1821 itself, or the revival of it by the codicil of December, 1823, viewing those several testamentary acts in themselves. But it is shewn, to a quite sufficient extent to satisfy my mind, that the codicil of December, 1823, may justly be so far ascribed to the husband's anxiety to "preserve peace at home," as he expressed it, that the actual revival of the will of February, 1821, by means of that codicil, is not at all incompatible with the case set up, that the deceased fully meant to execute a will of a different tenor to that so revived by the codicil on the next immediately following day. And viewing this in connection with the admitted facts of the case, and the testator's own positive declarations to that effect, as deposed to by Hull and Dury on the 10th of December, I think I am bound to conclude that his mind was made up to execute the will now in substance propounded on [500] behalf of the daughter: and that he was only prevented from so doing by extrinsic circumstances.

The sole remaining consideration is, whether those extrinsic circumstances do, or do not, constructively amount to, and constitute, a case of prevention by the "act of God," as the Court is in the habit of construing that phrase? Now in order to this it is not necessary that a case of physical prevention should be made out. In the case in question, for instance, it is not necessary to be shewn that it was actually, or even morally, impossible for the deceased to have gone to Hull's office on the 12th of December. If the Court is convinced upon the evidence that he was prevented from going by extrinsic circumstances of such a nature as render his failing to keep his engagement with Hull not justly imputable to any change of intention on his part, the exigency of the law, in the particular in question, appears to me to be fully satisfied.

And I do think the fair result of the evidence is that the deceased was solely prevented by the "act of God," in this sense and construction of the phrase, from executing the will now in substance propounded by Mrs. Manning. It is admitted that he never left his house after the 11th of December; and it is proved that he staid at home on that and the subsequent days, by the advice of his medical attendant. His disorder was asthma, accompanied by a violent cough, and tendency to inflammation; though no symptoms of this were, perhaps, actually discoverable by those about him till the 13th or 14th. The time of year (the middle of December) makes it apparent that such a patient must have left his home at considerable risk, even to go 200 yards, the distance to Hull's office. It has been said that **[501]** Hull might have been sent for. But the deceased had himself told Hull (so he deposes) that he did not dare send for him: and as the deceased got weaker and worse he probably felt himself more and more unequal to that breach of domestic peace which he, at least, apprehended that his sending for Hull upon such an errand would surely occasion. Under these circumstances I hold that I am bound to carry into effect what I feel to have been the testator's real intentions, by pronouncing for the instructions propounded by Mrs. Manning; in preference to pronouncing for the will of February, 1821, as revived by the codicil of December, 1823, propounded by the widow.(*a*)

LYON AND WERRINGTON *v.* BALFOUR AND OTHERS. Prerogative Court, Trinity Term, By-Day, 1825.—A creditor cites an executor to accept or refuse probate, &c. The executor, sub modo, denies the jurisdiction of the Court as not having any knowledge of assets. The creditor, then, in order to found the jurisdiction, is compelled to disclose assets; whereupon the executor retracts his qualified denial of the Court's jurisdiction, and prays probate. Probate decreed to the executor, with costs; as incurred solely by reason of the creditor's undue suppression of the fact of there being assets.

(On petition.)

William Sibbald, a domiciled Scotchman, died sometime in the year 1817 at Edinburgh, leaving a will and codicil, which were duly proved by his executors, one of such executors being Mr. Balfour, in the proper Court in Scotland, on the 19th of December, 1817.

[502] In the month of March, 1824, a decree by letters of request issued under seal of this Court, at the instance of two creditors of the deceased, Messrs. Lyon and Werrington, citing the executors to accept or refuse probate of the said will and codicil in this Court, with the usual intimation.

This decree, having been duly served, was returned in Court, when the executors appeared, and, sub modo, denied the jurisdiction of the Court, by reason, as alleged in their act of Court, that the deceased had, whilst living, and at the time of his death, no "goods, chattels, or credits within the province of Canterbury sufficient to found the jurisdiction of the Court," to their knowledge and belief—offering, at the same time, and alleging that they were ready and willing to take probate of his will and codicils in this Court on being satisfied to the contrary.

The creditors, upon this, were compelled to disclose in their act of Court in reply to that of the executors, in order to found the jurisdiction of the Court, that the sum of about 60l., being a dividend of one shilling in the pound upon about the sum of 1200l. due and owing to the deceased on simple contract from a mercantile house in this town, which house had become insolvent in the year 1812, was now in the hands of a trustee of the said insolvent's estate; which dividend the said trustee was ready to pay to any legal representative of the deceased who was duly qualified, as such, to give him a legal discharge for the same.

The executors hereupon retracting their qualified denial of the jurisdiction of the Court and praying probate, the question had now simply become one of **[503]** costs—the executors praying that the creditors might be condemned in costs, and the creditors the executors—as also that their further expences in the premises might be decreed to be paid out of the testator's estate.

(*a*) The Court, in fact, pronounced for the "draft will" prepared from those instructions (propounded under its directions, apud acta), and not for the instructions themselves, as already said. See note (*a*), page 493.

Court—Sir John Nicholl. I have no hesitation either in rejecting the prayer of the creditors altogether or in condemning them in costs, as prayed by the executors. The amount of property recoverable under a probate taken here is only about 60l. The executors, if apprized that any property was recoverable, would, at any time, have taken probate; they so allege, and the Court is bound to believe them. Under these circumstances a formal decree, citing the executors to accept or refuse probate, and so on, was an abuse of the process of the Court; the expence consequent upon which ought, of course, to be borne by those to whom that abuse itself is imputable; I mean the creditors. The creditors have themselves given occasion to the whole by their undue suppression of the fact of there being assets here—a fact, at last, only extorted from them by the necessity which they were under of disclosing it, in order to found the jurisdiction of the Court. And their motive for all this has been to become the legal representatives of the testator within this jurisdiction; in order to apply this sum of 60l. in discharge of their own debt, to the manifest prejudice of all the other creditors of this avowedly insolvent estate. The executors are entitled to probate of this will and codicil of course: and I think myself bound to condemn the creditors in the costs of obtaining it to which the executors have been put through their means.

[504] In the Goods of the Rev. Cavalier Jouet, Deceased. Prerogative Court, Trinity Term, 1825.—The statute 38 Geo. III. c. 87, though entitled only "an act for the better administration of assets where the executor to whom probate has been granted is out of the realm," is equally applicable where an executor (though not "out of the realm") is out of the jurisdiction and out of the reach of the process of his majesty's English Courts of law and equity.

The Rev. Cavalier Jouet, deceased, died in the year 1810, having first made his will, of which he appointed two executors. Probate of this will was granted to one of his two said executors; power being reserved of making a similar grant to the other: and, on the death of that one, probate was actually so granted to the other, in the month of June, 1822. The surviving executor was living in England at the time of the grant; but left it some time after, and settled at Stirling, in North Britain, or Scotland.

Under these circumstances, administration of the effects of the said testator was granted to the nominee of a creditor, limited to the purpose of his "becoming and being made a party to a bill or bills to be filed against him in a Court or Courts of equity," and to that of "his carrying the decree or decrees of the said Court or Courts into effect, but no further or otherwise," under the provisions of the statute 38 Geo. III. c. 87.(*a*)

(*a*) Any possible doubt with respect to the propriety of this grant, as by reason that the executor was resident "in Scotland" at the time, and not "out of the realm," might have been obviated by what occurred in the following case of *Hannay* v. *Taynton*, determined by Sir William Wynne in Easter Term, 1800:—

[505] *Hannay* v. *Taynton.* Easter Term, 1800.

In March, 1798, probate of the will of John Hannay, Esq., deceased, was granted to Johnstone Hannay, Esq., the sole executor; who having gone to reside in Scotland, a limited administration (with the will annexed), pursuant to the provisions of 38 Geo. III. c. 87, was granted to the nominee (Taynton) of one of the residuary legatees named in the said will.

In December, 1799, a citation issued at the instance of the executor, calling upon the administrator to bring in the administration, and to shew cause why it should not be revoked; as not duly granted within the statute—expressly by reason that he, the executor, was resident in "Scotland" at the time of the grant, and not "out of the realm."

An appearance was given for the party cited; and both parties wrote to an act on petition—the question being, the propriety of the grant solely as with reference to the executor's domicil or place of residence at the time of its issue.

The question so raised was determined by Sir William Wynne (the then judge of the Prerogative Court), on the 30th of April, 1800. He pronounced, upon argument,

in favour of the grant, as clearly of opinion that the act was equally applicable to the case of an executor resident out of the jurisdiction, and out of the reach of the process of (see *Done's case*, 1 P. Wms.) his majesty's English Courts of law and equity, as to that of an executor resident "out of the realm." Indeed, upon reference to the act itself, it should seem to admit this of but little question; although the "title" of the act is only—"an act for the administration of assets in cases where the executor to whom probate has been granted is out of the realm."

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By J. ADDAMS, LL.D., an Advocate in Doctors' Commons. Vol. III. Containing Cases from Michaelmas Term, 1825, to Trinity Term, 1826, inclusive. In Continuation of the ECCLESIASTICAL REPORTS of Dr. PHILLIMORE. London, 1827.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

WOOLLOCOMBE *v.* OULDRIDGE. Arches Court, Michaelmas Term, 3rd Session, 1825.

—Ordinaries at the present day are bound not to issue faculties appropriating pews to individuals, but under special circumstances.—Sentence of the Court below, refusing a confirmatory faculty for so appropriating a pew, &c., affirmed generally—but quære as to the propriety of an order, part of that sentence, dispossessing the applicant for the faculty of the pew in question in favour of the opponent; that opponent, though setting up, failing to sustain any prescriptive right to the pew, the possessory right to the pew seeming, of the two, to be rather in the applicant for, than in the opponent of, the faculty; and such order not regularly connecting itself with the proceedings, pleadings, and prayers in the cause.

(An appeal from the Consistorial Episcopal Court of Exeter.)

Judgment—Sir John Nicholl. This is a cause of appeal from the Consistory Court of Exeter. It is described originally as a business of "shewing cause against the grant of a license or faculty for confirming a pew, then lately made by the conversion of one large pew into two pews, in the parish [2] church of Lifton, in the county of Devon," to Mrs. Woollocombe, the present appellant. She was the applicant for that license or faculty in the Court below; and its issue was there opposed by Mrs. Ouldridge, the present respondent.

The appellant is described in the evidence as a woman of considerable property, resident at Whiteley House, the principal mansion in the parish of Lifton. But though resident at, she is not the proprietor of, Whiteley House. She is the mere under-tenant of a Mr. Mason, himself not the proprietor. Whether the appellant is, or is not, nominally rated to the parish for Whiteley House, is a circumstance, I think, pretty immaterial. If she the appellant is not, Mason is; who, of course, is repaid his disbursements on that score by the appellant, in the shape of additional rent. Being the occupier of Whiteley House, the appellant was clearly entitled to sittings in the parish church of Lifton, proportioned to and befitting her status in the parish of Lifton, as the occupier of that house, if such could be afforded her.

In this church of Lifton, it seems, was a large pew capable of holding twelve or fourteen persons, exclusively occupied by females; among others, by the respondent, Mrs. Ouldridge and her daughter. She, the respondent, is the owner or proprietor

of an estate in the parish, called Poulston; which, however, is rented by a Mr. Ambridge: she herself living at a house in the village of Lifton, for which she is rated to the parish in the sum of 3l. per annum.

In the years 1821 or 1822 the appellant, Mrs. Woollocombe, not being at that time (at least not regularly) seated, applied to the then churchwardens for a seat in the church, suitable to the accommodation [3] of herself and her family, consisting of two daughters. In consequence of this application the churchwardens, by and with the consent of the minister, appropriated a part of this long pew, capable of holding four persons, separated off from the other, to the appellant; who, after fitting up and lining the same, took possession of, by putting a lock upon it; and sat there undisturbed for a considerable time. To this it now seems that Mrs. Ouldridge, who for many years had sat in that part of the pew so appropriated to the accommodation of the appellant, all along dissented; but still without entering any formal protest, or instituting any formal complaint. On the contrary, she withdrew from the pew altogether, sitting as pro tempore in a pew in the regular occupation of her sister, in a different part of the church; and applying in the end to the churchwardens for other sittings in lieu of those of which she, then, for the first time, at least formally, complained that she had been dispossessed for the accommodation of Mrs. Woollocombe, the appellant. And at the end of a twelvemonth, such her application not having been acceded to by the churchwardens, either as wanting the inclination to accede to it, or more probably as wanting the means, she, the respondent, asserts her right as she deems it, to the pew so appropriated, as already said, to the appellant; and endeavours through her son, as by taking off the lock, &c., to recover the actual possession of it, to some extent, by forcible means: when the appellant, instead of suing the respondent (which, probably, she ought to have done) as for a "perturbation," upon this—founding such suit on her possessory right to, as regularly seated in, this pew by the churchwardens—chuses rather to apply to the ordinary for a [4] grant of the confirmatory faculty in question. Mrs. Ouldridge appears in the Court below, in objection to this grant; pleas are given on both sides; and the result is a disclosure in evidence of those facts to which I have thus briefly and generally adverted.

At the hearing of the cause, upon this evidence in the Court below, the judge was pleased to reject the application for a faculty, as prayed by the appellant, and at the same time to order and decree that the respondent "should have peaceable and quiet possession of her usual place or sitting in that part of the seat in question divided off from the original pew or seat;" and, moreover, to condemn the appellant in the sum of 60l. nomine expensarum. An appeal from this order or decree has been duly prosecuted, and it now rests with this Court either to affirm or reverse it.

The first and principal question is, whether the judge below was right or wrong in rejecting the application for a faculty in this instance. I think him decidedly right in this part of his sentence. Applications of this sort are rarely to be acceded to by ordinaries, at the present day, for reasons to which the Court had occasion to advert at some length, in a recent judgment; (*a*) and which, on that account, it does not formally repeat. Ordinaries are not at this day to tie up their hands against such future arrangements in the churches within their several jurisdictions, as the rapidly increasing population of the country may soon render necessary or convenient, in order best to provide for the general accommodation of those several parishes, respectively, by a too lavish issue of faculties of this description, or by their issue at all, but under special [5] circumstances. I see no circumstance that in my judgment would have justified the issue of the faculty prayed in this case. The applicant for that faculty, the present appellant, was a person whose connection with this parish was recent, and perhaps transitory. She was the mere under-tenant of a mansion, in respect of which she was not, formally at least, it should rather seem, even rated to the parish; and, although entitled to suitable accommodation in the church, as already suggested, still she had no claim whatever, in my judgment, to the issue of a faculty allotting her the permanent and exclusive possession of this, or any pew in the church; a faculty good and valid if once issued, even against the ordinary himself. In the rejection, then, of this application for a faculty I think that the ordinary was quite right. But even if I had doubts upon this head, faculties generally are matters so much within the discretion of the local judge that I should scruple to reverse his

(*a*) See case of *Fuller* v. *Lane*, vol. ii. pp. 419, et seq.

sentence so far: for I should be unwilling to disturb the judgment of any local ordinary in a matter of this nature, unless it could be clearly shewn that it either involved the plain violation of some private right, or would give rise actually or probably to some considerable degree of general inconvenience. Costs, too, are pretty much within the discretion of the Court that awards them; so that, also, I see no ground for reversing that part of the sentence appealed from, whereby the ordinary accompanied the refusal of a faculty with a decree against the petitioner for that faculty, for the payment to the other litigant, of 60l. nomine expensarum. It was open, indeed, to the Court to have condemned her in full costs, she having failed to make out her claim (if I may so call it) to the [6] faculty, in her petition for which this suit commenced.

My only doubt has been with respect to the propriety of that part of the sentence by which the respondent is ordered to be put in "the quiet possession of her usual seat," as it is termed, in the pew in question. No reasons were given by the judge for this part of his sentence that I am aware of. If it proceeded upon a notion that the respondent had made out a good legal title to be seated in this part of the pew—good, I mean, even as against the disposition of the ordinary or his officers the churchwardens—it proceeded upon an erroneous notion; and if the necessary inference were that it did proceed upon any such notion, I should hold myself bound to reverse this part of the sentence. It seems that the respondent did originally set up a title of the sort to which I am adverting: for instance, the fourth article of her first allegation pleads "that she, the respondent," "is owner of a considerable estate called Poulston, in the parish of Lifton; and that, in right of that estate, she and her family have for 60 years and upwards sat in that part of the seat now unlawfully divided off and appropriated to Mrs. Woollocombe," the appellant. What is this but setting up a prescriptiver ight to the pew (and this, too, without alleging reparations from time to time, which are absolutely necessary to be pleaded and proved in order to make out a prescriptive title)? But a prescriptive title to a pew, in virtue of the ownership of an estate, is a legal absurdity. It can only be annexed by prescription to a house—it cannot be so annexed to lands. When an-[7]-nexed to a house, the occupier of the house for the time being is entitled to the use of the pew, not the owner of the estate. Consequently, the respondent's asserted prescriptive right in this pew, in virtue of her ownership of Poulston, an estate not in her occupation, is one that could never have been sustained—even had reparations of the pew from time to time been pleaded, which they were not, as already said.

But supposing this part of the sentence not to have proceeded upon any such notion as that which the Court has been combating, still I incline to think it not altogether correct. It must then have been, and indeed it most probably was, founded upon the notion of a possessory right to these sittings in the respondent. But, in the first place, a possessory right is only co-extensive in duration with actual possession—if abandoned, it actually ceases and determines—so that any possessory right which the respondent might once have, as to sittings in this pew, should seem to have been subsequently lost, or forfeited, by her quasi abandonment of that right. When dispossessed of her sittings, by or in favour of the appellant, she acquiesces for a twelvemonth—she withdraws from the pew altogether, and applies to the churchwardens for sittings elsewhere; on her failing to obtain which, only it was, that her right of any sort to sittings in this particular pew came to be asserted. The possessory right was I think, at that time, in the appellant Mrs. Woollocombe, as regularly seated in this pew by the churchwardens, the officers of the ordinary, without the dissent, if not with the (tacit, at least) approval, of the respondent herself: and the appellant would, in my judgment, have acted more wisely in asserting her pos-[8]-sessory right to the pew, at the first invasion of this right on the part of the respondent, by means of the suit already suggested, than in merely seeking to quiet her possession of the pew by this application for a faculty—to a grant of which she had no claim; nor has made out, I think, any valid pretensions. I must also observe, secondly, that the subject-matter of this part of the sentence was not regularly before the judge, nor was it included, as I collect, in the prayer of either party. Ouldridge indeed prays in her first allegation that "the partition may be taken down;" but not even that prayer does she repeat in her second allegation—nor does she at all pray, nor does she porrect, any sentence to the effect that she, Ouldridge, may be replaced in the seat then occupied by Mrs. Woollocombe. All she prays is a refusal of the faculty; and to that and the order as to costs the sentence should have confined itself. This latter part of the sentence

is irregular, as being unconnected with the proceedings and prayers—and, though the order itself made in it may be quite correct, and indeed probably is, under all the circumstances of which this Court may be unaware (for I am not to presume that the local ordinary would have lightly repudiated what had been regularly done long before, by the minister and churchwardens, with the apparent consent of all parties), still I think that that order would more fitly have been by the ordinary in his domestic forum, at his visitation, than have been introduced into, as a formal constituent part of the present sentence. Upon the whole, however, I affirm the sentence and remit the cause. When so remitted, the local ordinary will do what is right as to these different sittings, in which respect he is not confined by this gene-[9]-ral affirmance of the present sentence; especially after what has fallen from this Court as to the irregularity, in its opinion, of that one part of it. And as I think that this question has been not altogether improperly appealed, I shall follow the example of the local ordinary, in condemning the appellant in the sum of 40l. only nomine expensarum, and not in full costs.

Sentence affirmed.

BALL *v.* BALL. Arches Court, Michaelmas Term, Bye-Day, 1825.—An exceptive allegation lies to the testimony of a witness, not examined in the principal cause, but examined only in support of an exception to the testimony of a witness in the principal cause. And if admissible generally [i.e. if pleading (and within time) facts of a nature materially to discredit the witness excepted to; and if duly specifying times, places, persons, and so on], such an exceptive allegation is clearly entitled to go by proof.

(On the admission of an exceptive allegation.)

This was an appeal from the Consistory Court of London, in which the cause originally depended, being a cause of divorce, by reason of adultery, promoted and brought by Sarah Ball (wife of George Ball) against the said George Ball. The judge of the Consistory Court had pronounced for the divorce prayed.

In the appellate Court the appellant (the husband) had given an allegation, exceptive to the credit of Ann Tuppy, a (material) witness examined on the respondent's (the wife's) libel in the Court below. This exceptive allegation was, of course, accompanied by an affidavit on his part, and it was also expressly pleaded in the allegation itself, that "the facts and circumstances pleaded in it, in exception to Tuppy's credit, had only come to his, the appellant's, knowledge since the judgment pronounced in the cause in the Court below, and immediately prior to their being so pleaded in this, the appellate Court."

[10] The grounds of exception to the credit of this witness Tuppy, laid in the exceptive allegation so brought in on the part of the appellant, were in substance as follows:—"That she, Ann Tuppy, had at several times, and upon several occasions, expressed herself in terms of the greatest revenge and malevolence against Ann Pennie;" being the person (the sole person) with whom the appellant was charged in his wife's libel, to have committed the adultery, upon the supposed proof of which the Court below had pronounced for the divorce—"that particularly, upon an evening, happening shortly before she, Tuppy, was turned away from the service of the appellant, in or about the month of February, 1820, she, the said Ann Tuppy, told John Garrett, a watchman upon the premises of the appellant (a brewery situate in Bowl Yard, Broad Street, St. Giles's in the Fields), that she had on that evening had some words with the said Ann Pennie, who had been scolding and finding fault with her—and that she, Tuppy, on that occasion, grossly abused the said Ann Pennie, and declared to the said John Garrett that she would match her and do for her some day or other; or words to that very effect."

The appellant had produced as a witness on this allegation the party vouched in it, John Garrett, who was examined both in chief and upon interrogatories. And the question now at issue was the admission of an allegation brought in by the respondent, exceptive to the testimony of this witness John Garrett.

This witness, it seems, had deposed in his answers to the 6th, 7th, and 8th interrogatories, as follows:—To the 6th: "The respondent has on many occasions opened the gates of the Bowl Yard Brewery, to admit [11] and let out the said Ann Pennie, but never at a late hour of the night; and he has not seen her at all on the premises for the last two years. He never knew the said Ann Pennie to come to the brewery

early in the morning, in the absence of the ministrant (Sarah Ball), and stay there with the producent (George Ball) for several hours together. He does not know, and has no reason to believe, that such, the conduct of the said Ann Pennie, created suspicions in the neighbourhood unfavourable to the character of herself and the said producent. He does not know, and has no reason to believe, that the people in the neighbourhood, on seeing her about the premises of the said brewhouse, used to call out, 'There goes that whore,' or made use of other terms expressive of her criminality. The respondent does swear that he has not declared that the neighbours, or some of them, used so to call out. The respondent has not declared that the character of the said Ann Pennie began to be known; and that she was hooted at. He does swear that he never did declare to that, or the like, in the presence of the interrogate Hannah Colcott, a servant of the ministrant, Miss Julia Webb, and of the ministrant; or of any, or either of them, or of any other person." To the 7th: "The producent has never been without a female servant at any time while the respondent has lived in his service." And to the 8th: "The respondent does not know, or believe, that an improper intimacy subsisted between the producent and the said Ann Pennie during the absence of the ministrant from the Bowl Yard Brewery. The respondent will swear that he has never stated that such was his opinion. He has **[12]** not declared that he considered the said Ann Pennie to be worse than a common prostitute. He will swear that he never expressed himself in words to that or the like effect, in the presence of the said Hannah Colcott, Miss Webb, and of the ministrant; or of any, or either of them, or of any other person."

Such were the answers of this witness to the several interrogatories recited in the allegation which now stood on admission. The facts pleaded in the same, in order to found the exception to his testimony, were—that "the said John Garrett, the witness, had frequently declared at the house of William Small, situate at Stockwell, in the county of Surrey, in and between the months of April and August, 1821,(*a*) in the presence of Hannah Colcott, Julia Webb, Sarah Ball, the ministrant, and Elizabeth Small, wife of William Small," (*b*)—so and so—that is, in substance, to the very effect of the several declarations, which he denied upon oath that he ever did make, in his answers (recited) to the several interrogatories.

Judgment—Sir John Nicholl. This allegation has one feature of novelty, as being in exception to the credit of a witness not himself examined in the principal cause, but examined only in support of an exception to the credit of a witness examined in the principal cause. But its fate must be governed by those principles which are applicable to this class of allegations generally—in accordance to which, I think **[13]** that I am bound to admit the allegation. The several declarations pleaded to have been made by the witness excepted to are to the precise effect of those declarations which he has sworn that he never made in his answers to the 6th, 7th, and 8th interrogatories. Accordingly, they are declarations in themselves clearly pleadable upon general principles; as being of a nature, if proved, materially to discredit the witness who is pleaded to have made them. Garrett, indeed, is no witness, or at least no material witness, in the principal cause: so that the question, credible or not, as applied to this witness, is pretty unimportant as to any material fact in the cause in its direct result. But the plain object of the allegation is by discrediting this witness Garrett (though not a witness in the principal cause) to set up the testimony of Tuppy, a witness, and a very material witness, in the principal cause; so that the credit due to Garrett thus becomes, in its indirect and ultimate result, a question of no mean importance in the principal cause itself. Being then an allegation admissible in its general substance, is its admissibility detracted from by any special circumstance? By none that I am acquainted with. The times at and the places in which, and the persons to whom the several declarations now pleaded are alleged to have been made, are, I think, under the circumstances sufficiently specified in the allegation, as now reformed by the Court.(*c*) And it is not even suggested that they are pleaded out of time or anything of that sort. The allegation, indeed, is brought in

(*a*) "And at other times." These words were struck out by the Court previous to admitting the allegation.

(*b*) "And of other persons." These words were also struck out by the Court previous to admitting the allegation.

(*c*) Vide notes (*a*) and (*b*).

at as early a period as it could be—that is, immediately upon **[14]** the publication of the witness's testimony, in exception to whom (an exception founded upon that testimony) it expressly pleads. This allegation, then, has every requisite to ensure its title to be admitted in my view of it. And, so thinking, I have no scruple in directing it to go to proof.

Allegation admitted.

ROSHER *v.* VICAR, &C., OF NORTHFLEET. Peculiars Court of Canterbury, Michaelmas Term, 3rd Session, 1825.—Where a faculty is sought to be had for erecting a vault in a church-yard, &c., the Court will scruple to decree it without being satisfied that the proposed erection is not likely to be generally prejudicial to the parish—even though its issue be unopposed either on the part of the parish or on that of any particular parishioner.

Jeremiah Rosher, Esquire, a parishioner and inhabitant of the parish of Northfleet, within the peculiar and exempt jurisdiction of the deanery of Shoreham, in the county of Kent, being desirous of obtaining a faculty for the erection of a vault in the church-yard of the said parish, and of setting apart and appropriating the same as a burial place for the interment of himself and the members of his family, to the exclusion of all others (and having also, in this instance, first procured the formal consent thereto of the vicar and churchwardens):

A decree had issued, under seal of the court, citing the vicar, churchwardens, and parishioners of the said parish in special, and all others in general, to appear on the sixth day after publication, if a court day; otherwise on the court day then next following, and shew cause why a license or faculty should not be granted as aforesaid; with the usual intimation. That **[15]** decree was duly published in the parish church of Northfleet on the 30th of October (1825), and was returned into court, duly certified, on the second session; which certificate was continued till the third session of the following Michaelmas Term, the present court day.

No appearance being given, and certain particulars (*a*) having been previously ascertained, in compliance with the desire of the judge, from which it resulted that the faculty prayed might issue without probable inconvenience to the parish.

The Court was pleased to decree a faculty pursuant to the citation so issued and returned into Court.

PITCHER *v.* THE VICAR, &C., OF NORTHFLEET. Peculiars Court of Canterbury, Michaelmas Term, 1825.

This was an application for a faculty precisely similar to the former; and similarly disposed of by the Court on the same grounds; on the part of Henry Jones Pitcher, Esq., a parishioner and inhabitant of Northfleet.

[16] IN THE GOODS OF JOHN TOLCHER, ESQ., Deceased. Prerogative Court Michaelmas Term, 2nd Session, 1825.—Where probate, in common form, is sought to be had of a testamentary paper, which the Court is convinced could never be established by proof in solemn form as a will, the Court may feel itself bound to withhold probate in common form of that testamentary paper; even though this be assented to by the only party or parties who have either any apparent right or interest to contest it. At all events, under circumstances, it will require more stringent proof that the party or parties so assenting are conusant of the full import of their act than is furnished by the mere exhibiting of a formal "proxy of consent" executed by such party or parties.

(On motion.)

John Tolcher, Esq., formerly of Plymouth, in the county of Devon, the deceased

(*a*) Those particulars were the following:—That in 1821, when the last census was taken, there were 351 occupied houses in the parish and 1965 inhabitants; a number supposed in the interval to have rather decreased than augmented—that the church-yard comprised about two acres and a half, being full one-half of it unoccupied by graves—and that the unoccupied part of it was chiefly on the north side of the church where the vault was to be erected.

The judge had said that without satisfactory information, at least to some extent, on this head, he should scruple to decree the faculty prayed; even though no appearance in opposition were given on the part of the parish or that of any particular parishioner.

in this cause, died at Chantilly, in France, on the 2nd of August, 1825. He had been travelling for several years prior to that event on the Continent in a declining state of health; and was on his return to this country when he so died at Chantilly. He left behind him two brothers and a sister, his only next of kin. The sister had accompanied him on his travels. One of the brothers, Christopher, joined him at Chantilly on the 26th of July, having been apprised by the sister of the deceased's increased illness at that place.

On the day subsequent to that of his brother's arrival at Chantilly (the 27th of July) the deceased merely stated to him in conversation that "he had made no will;" but in two days after, on the 29th, he communicated to his brother some of his wishes respecting the disposition of his property, and requested him to draw up a paper expressive of such wishes, which he promised to sign. Mr. Christopher Tolcher accordingly **[17]** drew up such a paper,(*a*) of which he afterwards made a transcript; but he never offered either of the papers to the deceased for his signature, as suggested, from motives of delicacy: for the paper, so written, purported to bequeath the deceased's real estates to the two brothers in equal proportions, he, Christopher Tolcher, being the younger, and consequently not entitled to any portion of the real estate. The deceased never asked for the paper, and died without having seen it. In the paper so drawn up (as also in its transcript) was a legacy of 10,000l. 3 per cents. to the sister; and a legacy of 100l. sterling to the deceased's servant. Three other persons were named as legatees, but the **[18]** amount of their several legacies was left in blank. The residue, personal as well as real, was given and devised equally to the two brothers. The real estate was said to be very large, and the personalty was sworn to amount in value to between 50 and 60,000l.

It is obvious that neither of the above papers could have any effect with regard to the real estate; but it was endeavoured to give to the paper first drawn up operation with respect to the personalty. The only person whose interest could be affected by it was the sister: as she, in case of an intestacy, was entitled to a share of the personalty much exceeding in value the specific sum purported to be bequeathed to her. But the sister had executed a proxy of consent to administration of the deceased's effects with this paper annexed, passing to her brothers as the two joint residuary legatees. And she also had joined with the brother Christopher in an affidavit of the circumstances of the case above stated, as to that (not, however, the most material) part of them within her knowledge.

Under these circumstances, upon this affidavit and proxy of consent, the Court was moved by counsel to decree administration with the first of the two testamentary papers annexed, of which the second was a mere transcript, to the deceased's brothers, Edward and Christopher Tolcher, Esquires, as the residuary legatees therein named.

Court—Sir John Nicholl. I think that I am bound not to grant this prayer, although it is seemingly at least assented to by the only party who has any interest to oppose it; I mean by the sister of the deceased, who joins in making the **[19]** affidavit upon which this motion is founded; and who has also executed a proxy of

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(*a*) The paper so drawn up was in these words:—

My sister, 10,000l. 3 per cents.

My servant, Mary, 100l. sterling.

———— Magrath, l. sterling.

William Hawker, l. sterling, in lieu of the cottage at Buckland, which I promised him.

My god-child, James Brooking, l. sterling.

The rest of my property, of whatever kind or description, both real and personal, to be equally divided between my brothers, Edward and Christopher Tolcher, and to their heirs and assigns for ever.

It was stated by Mr. Christopher Tolcher in his affidavit that the legacy or bequest to the sister, as directed by the deceased, was 10,000l. sterling. But that he, knowing his brother's personal property to have chiefly consisted of money invested in the 3 per cent. Consolidated Bank Annuities, through misapprehension and inadvertency, took down the sum as 10,000l. in that stock.

This paper was subscribed—"N.B.—These wishes were expressed to me this morning by my brother, John Tolcher, as forming the important parts of his last will.

"Friday, July 29th, 1825. "CHRISTOPHER TOLCHER."

consent to the administration passing as prayed. Had the sister spoken (being capable of speaking) to the material facts contained in the affidavit—were the Court perfectly satisfied, again, that she had executed this proxy of consent with a just knowledge and true apprehension of her legal rights, in case of her brother's intestacy —lastly, had the question itself, testate or intestate, been a question in any way doubtful in the case, the Court might possibly, in all these events, have had no scruple in giving operation to the paper now sought to be established. But the sister neither has spoken, nor could speak, to the material parts of the affidavit, as she was not present at either of the conferences between Mr. Christopher Tolcher and the deceased, relative to his proposed testamentary arrangements: and the Court has no proof beyond the ordinary presumption (hardly, I think, quite satisfactory in such a case), that in signing this proxy the sister was fully aware of its legal import; and that, in fact, by so doing, she was giving away property to the amount in value of nearly 10,000l. Thirdly, however, and principally, so far is the question testate or intestate from being a doubtful question, in the present case, that I am quite satisfied of the utter impossibility of the paper sought to be rendered operative ever, if opposed, being established as a will. In the first place, that it was written at all by the direction of the deceased rests solely (although the Court, morally speaking, has no doubt whatever of the fact) upon the testimony of Mr. Christopher Tolcher, an interested and, therefore, an incompetent witness. And the Court could never establish such a [20] paper on the testimony of a single releasing witness, even should Mr. Christopher Tolcher, by releasing his interest, regain his competency. Consequently, that the deceased was privy to the contents of this paper at all is a fact incapable of being so put in evidence, as to have much, if any, weight with the Court in deciding upon its legal validity.

But were the whole history of this paper, as furnished in the affidavit, put in plea, and proved to the Court by the most unquestionable testimony, it would still, I think, be quite inefficient to sustain the paper itself as a will. On the 27th of July the deceased merely says that he has no will, but expresses no wish or intention to make one. What passed on the 29th would, at the utmost, only be proof, to my mind, that some loose notions as to the future disposal of his property by will were floating in the deceased's brain at that time; it would be no proof, to my mind, that at that time the deceased seriously conceived that he was making his will. The subject itself seems never to have suggested itself to him, either previous or subsequent to that time. If previous, he would have been prepared with fuller instructions at that time; whereas, of the proposed legatees, a majority of the legacies are left in blank. Subsequent to that time the subject is never recurred to. His promised signature is never obtained; and as the deceased had large real property, which the paper purports to bequeath, he must have known, I presume, that not only its execution, but that its execution in the presence of witnesses, was essential to give this paper full operation. The legacy to the sister is 10,000l. 3 per cents., both in the original paper of instructions, and in the transcript. But it is [21] now discovered, by what process I do not very clearly comprehend, that the legacy to the sister was meant to be 10,000l. sterling (see note, p. 17). What then is the paper, upon this shewing, but the hasty inception of a testamentary project; neither much considered in its origin, nor far advanced in its progress? As an imperfect paper, however, which this is, in the fullest sense of the term imperfect, it could only be sustained by proof, first, that it expresses the deceased's final intentions; secondly, that he was prevented by extrinsic circumstances from putting those final intentions into a more formal and legal shape. But what was to prevent the deceased in this case from putting his final intentions, as expressed in this paper, if such were his final intentions, which I can hardly deem them, into a legal shape? He lived till the 2d of August, without any allusion or reference whatever to this paper, even as suggested in that interval. The legal presumption, accordingly, is, either that he thought no more of this paper at all, the whole transaction relative to which I must then suppose to be the result of a mere transient impression; or that, if he did, he had altered his mind about it, and finally meant to die intestate—in the teeth of which presumption it would be out of the question to establish this paper as a will. In every view of the case, therefore, it appears to me that I am bound to reject this motion, and to pronounce that the deceased is dead, so far as appears, intestate in law.

Motion rejected.

[22] IN THE GOODS OF CHRISTOPHER COKE, Deceased. Prerogative Court, Michaelmas Term, 2nd Session, 1825.—Special certificates to the facts of the case, necessary to found the grant, superadded to the oath of the applicant, in the instance of every administration applied for (the obvious and only general scheme suggested for preventing frauds in obtaining letters of administration) would involve a general inconvenience, less tolerable than the particular evil in question. But the Court may direct such special certificates in certain cases: and if, being exhibited, they are unsatisfactory to the Court [for instance, as failing to certify the principal facts by the testimony of third persons, speaking of their own knowledge; or, as the case may be], the Court will, at least, suspend, and may probably in the end altogether reject, the application for the grant itself in such case.

Judgment—Sir John Nicholl. The party deceased in this cause is a Mr. Christopher Coke; described as late of the Million Bank, in the parish of St. Clement's, East Cheap, in the city of London. He is alleged to have died in the month of August, 1802, intestate, and a bachelor, without parent, brother or sister, uncle or aunt, nephew or niece; leaving behind him Eleanor Norris, his lawful first cousin, and one of his next of kin; and, consequently, one of the parties entitled to letters of administration of his personal estate and effects. The present claimant of the said letters of administration is her attorney, a Mr. Joseph Adey, described as of No. 16 Houndsditch, hatter. He, Mr. Adey, has annexed certain documents in support of his claim to a memorial which he has addressed to the Court. And the question is whether those documents furnish such precautions as the Court required to be furnished with, previous to a grant of administration, in any case, issuing to this particular individual, Mr. Joseph Adey.

The Court's motive or inducement to make any order of the sort applicable to this person in particular may be said in a few words. The Court had been given to understand that Mr. Adey was a dealer in this traffic; a kind of trader in administrations—that he was in the practice of sending circulars all over the [23] kingdom, addressed to particular individuals, promising to make disclosures of monies to be obtained under letters of administration of the goods of parties dead intestate (mostly at very distant periods in point of time), with whom the individuals addressed were ascertained or presumed to be connected; on condition of being secured a specific sum in return for such disclosures; or, more frequently, a per centage on the monies to be recovered. In the course, and by reason, of this traffic the Court was given to understand that administrations had, in several instances, been unduly taken by persons so addressed by Mr. Adey, or by him on their behalf; and that, in some cases, in which Mr. Adey had taken letters of administration, as the attorney of parties entitled to them resident out of the province, those who were interested in, could obtain from Mr. Adey no satisfactory account of the property. Representations to this effect were made to the Court by a public body—which suggested several schemes in the nature of a general plan to obviate fraud and circumvention in grants of administration by the Court generally. The Court was fully disposed to have adopted any one of these, if any one general plan had been suggested, of remedying the particular evil, without involving a greater general inconvenience. No such, however, was suggested. Were the Court to require special certificates to the facts of the case in the instance of every administration applied for (the obvious, and, in fact, only general remedy suggested), the general inconvenience would greatly overbalance the particular evil. Accordingly, it limited the precautions suggested to cases under special circumstances—[24] and, at the same time, it did, in particular, direct that no grant of administration should pass to Mr. Adey, as the attorney of any other person or persons, but under the order of the Court itself; after being certified as to all the principal facts necessary to found the grant, by the testimony of third persons; who could speak to them as of facts within their own knowledge, and not from mere hearsay or report.

What, then, is this particular case? The deceased, it is said, died intestate twenty-three years ago; leaving a cousin-german, among others related to him in the same degree, next of kin. This cousin-german is an old woman aged eighty years, resident at Gateshead, in the county of Durham; and she it is who appoints Mr. Adey, her attorney, to take administration to her use and in her behoof. Such is the foundation of Mr. Adey's claim. Now it seems to me that the documents

annexed to his memorial are insufficient to sustain that claim—and that, if in shew and semblance, still, in substance and effect, they do not amount to that proof which the Court required to be furnished with, under the circumstances of this particular case.

These documents, exclusive of the usual power of attorney, are two affidavits. The first of these, that of Norris herself, a markswoman, is to the mere effect that the deceased did die, as alleged, intestate, leaving her, the appearer, his first cousin, and one of his next of kin. The other affidavit is that of a Mr. Daniel Robertson, of Gateshead, nearly as short as the first; and to the mere effect that he has for many years known, and been acquainted with, Eleanor Norris, who is upwards of eighty years of age; and that, knowing her **[25]** to be a woman of good faith and credit, he believes, &c.—that is to the precise effect of what she, Norris, has sworn.

Now, I think that these affidavits are no effectual compliance with the order of the Court; at least not in this particular case. In the case of a party who had died recently—a case, too, otherwise attended with no special circumstances—I won't say that the Court might not have decreed administration to Mr. Adey upon affidavits, even to the mere effect of those just stated. But the case in point is one attended throughout with very special circumstances. In the first place, the deceased died twenty-three years ago, possessed of or entitled to property, said to amount in value to 500l., though of what consisting or where deposited nothing is said. He left behind him, it is admitted, two at least, probably many, and possibly very many more, next of kin; not related to him in any remote degree; being, as alleged, first cousins. Yet the sole applicant for administration, and at this remote period, is this aged female, resident at Gateshead, out of the province, by her attorney, Mr. Adey. It is to be observed, by the way, that it is only on behalf of a person resident out of the province of Canterbury that administration can be taken here by an attorney. Accordingly, of Mr. Adey's principals in the several grants to which I have before adverted, the whole have been (indeed necessarily) fixed, some, like this Norris, in the province of York; some, in North Britain; and more, in Ireland. Under the special circumstances, then, to which I have adverted, do the affidavits exhibited sustain Mr. Adey's claim, as the Court required it to be sustained? They certainly do not, in my view **[26]** of them. The Court required to be certified, as to the principal facts necessary to sustain that claim, by the testimony of indifferent parties, themselves not unacquainted with those facts. How are these affidavits a compliance with that requisition? Norris's affidavit is merely to her kinship and to the deceased's intestacy, without any nearer relations—that of the other appearer, again, is to the same mere effect; and upon what founded? Not upon any, pretended even, knowledge of the facts; but upon the appearer's belief (a belief possibly well founded) that she, Norris, is a person who would not wilfully perjure herself. The Court is not forward to suspect that Norris has so done. It must still, however, have fuller and more satisfactory information as to the facts of this case, before it grants these letters of administration to her attorney; that attorney being Mr. Joseph Adey. It must be better assured (under the circumstances of this case) that she, Norris, is this intestate's cousin-german; and that he died, leaving no person or persons of kin to him in a nearer degree. She may, somehow, have been persuaded to believe all this; and the facts after all may not so be. Her discoveries on this head, no doubt through the instrumentality of Mr. Adey, at this remote period, are, however, a little suspicious. But the Court has also, I think, a right to know something of the other next of kin; for Norris admits herself not to be the sole person entitled. They, assuming, as the fact probably is, more than one other next of kin, have a majority of interest; and, so having, are entitled to this administration in preference to Norris herself; à fortiori in preference to her attorney, Mr. Adey; in whom they may have scruples to confide, though she, **[27]** Norris, has none. Even a single other cousin-german has an equal interest with Norris; and, consequently, is equally entitled with Norris to the letters of administration now applied for. Some other cousin-german, too, may be resident here, though Norris resides out of the province; and, if any, I do think that, under the circumstances, an opportunity should be afforded him or her of taking out these letters of administration in his and her own right; and that they should not be hastily and blindly committed to Mr. Adey, as the attorney of Mrs. Norris. At present, then, I direct this motion to stand over, for fuller and more satisfactory information generally. In the event of the Court ultimately acceding

to Mr. Adey's application, on being furnished with such, it will still, however, most undoubtedly require his securities to justify.

Motion suspended.

HUTCHINSON *v.* LAMBERT AND CURLING. Prerogative Court, Michaelmas Term, 2nd Session, 1825.—The ordinary practice, where an executor fails to represent a testator, is to grant administration, with his will annexed, to the residuary legatee, in trust, if any; and failing such residuary legatee in trust, then to grant the same, not to his or her representative, but to such person or persons as have the beneficial interest in the residuary estate under the will.—Administration decreed, however, in this case, to the representative of a surviving trustee, in preference to either or both of two other claimants, styling themselves "residuary legatees" simply, but without any violation of the ordinary practice, as explained above; such other claimants being in fact residuary legatees for life only, each in a fifth of the residue; she, the representative of the surviving trustee, having also, as such, herself a beneficial interest in the residuary estate greater than that of either of the other claimants; and the will of the testator plainly excluding the interference or control of those other claimants, or either of them, in the general management of his estate.

(On petition.)

This was a cause, or business, of calling in letters of administration (with the will and codicils annexed) of **[28]** the goods, chattels and credits of James Hutchinson, deceased, left unadministered by Bury Hutchinson, also deceased; while living, the son, and surviving executor, and residuary legatee in trust named in the said will; thentofore obtained by Nutty Lambert, wife of William Lambert, Esquire, and Harriet Curling, wife of Bunce Curling, Esquire; in the said letters of administration described (ex parte) as two of the children, and as such two of the residuary legatees named in the will of the said testator; and of citing the said Nutty Lambert and Harriet Curling to shew cause why the same should not be revoked, and declared null and void; and why letters of administration of the testator's effects left unadministered as aforesaid should not be committed and granted to Esther Mary Hutchinson, widow, the relict and administratrix of the goods of the said Bury Hutchinson, promoted by the said Esther Mary Hutchinson against the said Nutty Lambert and Harriet Curling.

James Hutchinson, Esquire, the testator, by his will dated on the 16th of June, 1823, appointed Robert Sherson, M.D., and his son, Bury Hutchinson, executors and residuary legatees in trust. Mr. Bury Hutchinson, alone, took probate of the will, on the renunciation of Dr. Sherson, in October, 1807; and having survived Dr. Sherson, died in October, 1824, intestate, leaving goods of the testator unadministered. The testator by his said will devised and bequeathed his real and personal estates (directed to be converted into money) to the said Robert Sherson and Bury Hutchinson, their heirs, executors, administrators, and assigns, upon trust that they, or the survivor of them, and the heirs, executors, administrators, or assigns of such survivor, should, after payment of debts and **[29]** legacies, apportion the residue of his personal, and produce of his real, estate among his five children, a son and four daughters, share and share alike; that is to say—a fifth to his son Bury Hutchinson, absolutely; and the remainder in separate parts to his trustees, for each of his four daughters, in trust, to invest and lay out the same in the purchase of stocks or funds, or at interest upon Government or real securities, in the trustees' own names; and upon further trust, to pay from time to time the dividends or annual produce of such stock, &c., to each daughter, for her life, independent of her husband, if any; and at her decease to transfer her fifth to her children, if any; but in the event of either of his said daughters dying without issue, then to stand possessed of her fifth, in trust for such of his, the testator's, other children (including his son, Bury Hutchinson) as should then be living; such accruing shares to go to and among the said survivors, in like manner as the original shares; and to be subject (those of the daughters) to the same limitations. And in case of his said trustees, or either of them, or of any future trustees or trustee, dying, or declining to act in the trusts of his said will, the said testator especially provided that each of his said daughters should or might nominate and appoint new trustees, or a new trustee, as to her peculiar share, in the place and stead of the trustees or trustee so dying, or declining to act; which power of

nomination or appointment each of the daughters, for herself, had actually exercised, on Mr. Bury Hutchinson becoming by the renunciation of Dr. Sherson sole executor and trustee of and in the said will.

In support of the grant of letters of administration so [30] made as aforesaid, it was principally alleged by the parties cited, in their act of Court, and principally insisted by their counsel at the hearing, that it was a grant made in strict conformity with the ordinary practice of the Court; it being stated as the ordinary (or rather as the constant) rule and practice of the Court, in all cases where an executor fails to represent a testator, to grant administration with his will annexed to the residuary legatee in trust, if any—and, failing such legatee in trust, then to grant the same, not to his or her representative, but to such person or persons as have the beneficial interest in the residuary estate, under the provisions of the will.

On the other hand, it was alleged and contended that the case in point was exempted from the operation of the ordinary rule in such cases, admitting it to be, as well by the double character of the son, Mr. Bury Hutchinson, who was not only the residuary legatee in trust, but had a beneficial interest in the residuary estate, greater than that of either of the daughters; as also by the circumstance that the daughters, especially if under coverture, were virtually excluded from any right of intermeddling personally in the administration of his effects by the testator himself. The son, it was said, took under the will an absolute and beneficial interest in a fifth of the residue: he had also a contingent interest in each of the remaining four fifths, expectant on the demise of either of the daughters without issue; which contingent interest was a vested interest, and constituted part of his personal estate. The daughters, on the contrary, had not, like the son, an immediate or disposable interest in or over even their own shares—they had a mere life [31] interest in these; and the limitations of the will were plainly intended by the testator to exclude his said daughters from any power or control in or over even their own shares beyond that of nominating, each for herself, a trustee for her own share, in a certain contingency; which power of nomination each, for herself, had actually exercised. Of the husband of either of his married daughters, the testator had carefully excluded all interference; even in respect to his wife's own portion. Here, the administratrixes being both married women, in the event of this grant being unrevoked, their husbands in effect will be administrators of his general estate; in plain opposition to the testator's intention. Under these circumstances it was said Mrs. Bury Hutchinson, as administratrix of her husband, the surviving trustee, is become, according to the will of the testator, the trustee of the residue of his personal estate and effects; and in her the legal title thereto is clearly vested—in respect of which, as well as in that of a priority of interest, she is preferably entitled to letters of administration. Nor can she, as representative of her husband; nor can the trustees of Mrs. Lambert and Mrs. Curling, trustees of their own nomination and those of the other daughters, safely permit the letters of administration to remain in the hands of Mrs. Lambert and Mrs. Curling, the present administratrixes.

Court—Sir John Nicholl. The practice relied on in support of the grant sought to be revoked may obtain without inconvenience in ordinary cases. But in no case similar to the present is [32] it shewn to have obtained at all—still less is it shewn to have obtained in any similar case, the circumstances of which were brought, judicially, to the notice of the Court and solemnly decided upon. I have, therefore, no hesitation in saying that, in this particular case, Mrs. Hutchinson, as the personal representative of the residuary legatee in trust, and not either of the residuary legatees themselves, so styled, is the proper person to represent the testator. As administratrix of Mr. Bury Hutchinson, she it is who has a right to administer the estate; both in regard to the beneficial interest given by the will to the son, Mr. Bury Hutchinson, for his own use—an interest greater than that of either of the daughters—as also in regard to the shares given to the said son, in trust for the daughters and their issue. The testator himself has restricted the daughters (especially if under coverture) from intermeddling, personally, in the administration of his general estate; by interposing trustees from whom they are to receive the interest or proceeds each of her fifth share and for life only. Accordingly, they are not, though so described in the grant, residuary legatees simply—they have a mere life-interest, each in a fifth, of the residue: and nothing can be more contrary to the testator's plain intention than that the general management of his estate should fall into the hands of any one or more of his

daughters, if a married woman or married women; as their husbands are expressly excluded from any power or control, in, or over, even their particular shares. Without disturbing the general rule, I am of opinion that it has no application in the present case; and that I am at full liberty to direct **[33]** this administration to be revoked; and to decree administration as prayed to the widow and administratrix of the surviving trustee.(*a*)

CURTIS *v.* CURTIS. Prerogative Court, Michaelmas Term, 3rd Session, 1825.—It is incompetent to the Court to strike out or expunge any part of a will (however immaterial) on mere verbal statements to the fitness of this [i.e. statements unsupported by any evidence, &c.], even though with the consent of all parties whose interest it can by possibility affect.

[Referred to, *In the Estate of White*, [1914] P. 154.]

(On motion.)

This was a business of proving, in solemn form of law, the last will and testament of James Curtis, deceased; promoted and brought by Joseph Curtis, as administrator of Mary Curtis, also deceased, whilst living the sister, and universal legatee, named in the said will, there being no executor named therein, against Emma Maria Curtis, widow, the relict of the said deceased.

The will to be proved, all in the deceased's hand writing, was in these words:

"I leave all property of every kind to my sister Mary, in consequence of the cruel and murderous conduct of my wife, in this illness, as well as in past instances.

"13th December, 1823. "JAMES CURTIS."

[34] An allegation had been given, propounding this will, and witnesses examined; and publication of their evidence was now prayed. It was stopped by the proctor for the wife, asserting an allegation. At the same time he stated that his principal, the wife, though perfectly satisfied of her capacity to oppose the paper propounded, effectually, by reason that the deceased was of unsound mind at the time of his writing it, still, in consideration of the small amount in value of the property, would waive her asserted allegation, and consent to administration with the paper annexed passing to the other party; provided the Court would strike out that extraneous part of it, so injurious to her (the wife's) character—for which there was said not to be the slightest foundation—but that it solely proceeded from, and indeed was evidence of, the deceased's insanity, at the time when it was written. The property, after such erasure, would still stand wholly bequeathed to the sister.

The Court said that, not having authority to strike out or expunge any part of a will written by a testator, propriâ manu, upon a mere verbal application like the present, it was compelled, unwillingly, to withhold its assent to the proposition, now made on the part of the wife. It remembered that a similar application on the part of a nobleman, whose wife had made serious reflections upon him in her will, had been rejected by its predecessor, Sir William Wynne, on similar grounds; although in that, as in the present case, all parties were consenting.

Under these circumstances the proctor for the wife asserted an allegation.

[35] IN THE GOODS OF MARTHA FENTON, Deceased. Prerogative Court, Michaelmas Term, 4th Session, 1825.—It is the practice of the office not to receive the renunciation of an executor, &c., without the original will. Hence the Court, when applied to for letters of administration, limited to assign a satisfied term of years to the nominee of the owner of the fee (in which case it is not the practice of the office to annex the original will), on the renunciation of the party

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(*a*) As administratrixes of James Hutchinson, deceased, Mrs. Lambert and Mrs. Curling had also obtained administration of the unadministered effects of John Hutchinson, who died at Anjingo, in the East Indies, in the lifetime of his father, a bachelor and intestate, to whose effects James Hutchinson, the father, while living, had been administrator. The propriety of this grant depending on that of the former, the leading grant, the Court, at the same time, revoked the letters of administration thentofore granted to Mrs. Lambert and Mrs. Curling of the unadministered effects of John Hutchinson, deceased, and decreed letters of administration of the said unadministered effects to Mrs. Hutchinson, as the true representative of the father, the former administrator.

entitled to the administration of the deceased's effects with her will annexed, in preference to receiving the renunciation without the original will (this not being to be had), decreed the party entitled to be cited to accept or refuse, &c., promising to grant the administration to the nominee of the owner of the fee, on the other's default.

(On motion.)

By indenture, dated the 3rd of December, 1759, certain premises situated at Sampford, in the county of Essex, were assigned to Martha Fenton, for the then remainder of a term of 1000 years, as security for the payment of a principal sum of 365l., with interest to her, the said Martha Fenton.

Martha Fenton died in the year 1760, without having been paid the said mortgage debt; having made her will, and thereof appointed her daughter, Martha Brentnall, sole executrix, who proved the same in the Court of the Archdeacon of Suffolk. She, Martha Brentnall, also died, having made her will, and thereof appointed Daniel Fenton and John Stephen Debenne, executors; who proved the same in the Consistory Court of Norwich.

In September, 1790, the said mortgage debt and interest then due thereon, amounting to 420l., was paid to the said executors; who, on the 29th of that month, by indenture, acknowledged the receipt thereof; and assigned the said term to a trustee of the then owner of the fee, to attend the inheritance of the premises.

Lastly, John Stephen Debenne, the survivor of the said two executors, also died, having made his will, and thereof appointed two executors, who proved the same in the Court of the Archdeacon of Norfolk—one of **[36]** which two executors, Mr. Charles Clark, was still living.

Martha Fenton, the original testatrix, had of course made no assignment of the term; and the assignment thereof made by the executors of her daughter and sole executrix was deemed invalid in law by reason that they were not her representatives by the authority of a competent Court, as a prerogative probate of her will should have been had: consequently, the legal right or interest in the remainder of the said term of 1000 years was still held to be an unadministered part of the personal estate and effects of Martha Fenton—the whole of her personal estate and effects, save as to such remainder, having been long since fully administered.

The present owner of the estate, being the only person equitably and beneficially interested in the said term, had by proxy, under his hand and seal, authorised his proctor to obtain an administration of the effects of Martha Fenton, deceased, limited to her interest in the said term, to be granted to his nominee; and Mr. Clark, the surviving executor of the surviving executrix of the sole executrix of the original testatrix (Martha Fenton), had, by proxy, under his hand and seal, renounced his right to letters of administration, with the will annexed of the goods of the said original testatrix, Martha Fenton. But the office had scrupled to pass the grant, by reason that this renunciation had not been accompanied with the original will of the deceased,(*a*) (which Mr. Clark had no means of obtaining, it having been proved, and still remaining in the **[37]** Court of the Archdeacon of Suffolk); and it not being the practice of the office to receive the renunciation of a party, unless it be accompanied by the original will of the deceased, probate of which or administration, with that will annexed, it purports to renounce. Under the special circumstances, however, of the case, the Court was moved to decree administration, limited as above, to the nominee of the owner of the estate, upon the renunciation of Mr. Clark, without the production of the deceased's will. But

The Court said that in preference to so doing, in violation of a settled rule of practice, it would decree Mr. Clark to be cited to accept or refuse letters of administration, with the will annexed, &c., of the unadministered effects of Martha Fenton, deceased; and that in the event of his not appearing, or of his appearing and failing to shew cause to the contrary, it would then decree a limited administration, as now prayed, to the nominee of the owner of the fee. Accordingly, it directed a decree to that effect to issue.

(*a*) Note, that it is not the present practice of the office to annex the will to an administration limited to assign a satisfied term of years.

CLEMENT *v.* RHODES AND OTHERS. Prerogative Court, Michaelmas Term, 4th Session, 1825.—No party, whether such originally, or a mere intervener in a cause, can, of right, plead in the principal cause after publication has once passed of evidence taken in that cause. But the Court, if prayed, may still, ex gratia, permit a party so to plead on cause shewn. Facts set forth in an affidavit, in order to found a prayer to that effect, on the part of an intervener, stated by the Court; and held, for reasons stated, to be insufficient to sustain the prayer. But the party so praying permitted, under the circumstances, to cross-examine the witnesses on the other side (so, after their evidence published, that is), on first giving security for the payment of costs if finally awarded against him by the Court.—Interveners must take the cause in which they intervene as they find it at the time of such their intervention. Hence they can only of right do what they might have done, had they been parties in the first instance; or had their intervention occurred in an earlier stage of the cause.—Facts noviter perventa, newly come to the knowledge of the proponent, are the sole facts pleadable after publication (and that only by special leave of the Court), except under circumstances very extraordinary.

(On motion.)

Judgment—Sir John Nicholl. This application, which is one of some importance in its bearing upon a point of practice, arises out of the following case:—

[38] The testator in the cause, Thomas Millson, died on the 20th of March, 1825. The will propounded in the cause bears date on the 21st of March, 1821. On the 26th of April, 1825, a decree issued at the instance of Alice Clement (a natural daughter of the testator), sole executrix of this will of the 21st of March, 1821, against Thomas Rhodes, the testator's nephew, and one of his only two next of kin,(*a*)[1] and against Thomas Millson (the testator's natural son) or legatee, or annuitant, in and under a former will of the said testator, bearing date in the month of August, 1820, citing them, the said Thomas Rhodes and Thomas Millson, to see the said will of the 21st of March, 1821, propounded and proved in solemn form of law; with the usual intimation. This decree to see proceedings was personally served, both upon Mr. Rhodes and upon Mr. Millson, on the 30th of the same month of April.

On the first session of the ensuing Trinity Term a proctor appeared for, and exhibited a special proxy under the hands and seals of, the said Alice Clement and her husband, Richard Clement, and brought in a special affidavit of his said parties, as to scripts, with scripts annexed, marked from letter A to letter N; and then, in pain of the parties cited, propounded the paper marked letter A, being the will of March, 1821; **[39]** and asserted an allegation. That allegation (a common condidit) was brought in on the second, and was admitted on the third, session of the term. On the fourth session additional articles were brought in and were admitted on the bye-day; such additional articles pleading merely the death, character, and hand-writing of one of the three subscribed witnesses to the will.

On the condidit, and these additional articles, five witnesses were examined;(*a*)[2] and on the first session of the present (Michaelmas) term the Court decreed publication and assigned the cause for sentence on the first assignation; upon which, and the usual accompanying assignation as to exceptive allegations, the cause stood till the third session. All the above proceedings were regularly had on pain of the parties cited. But on this third session of Michaelmas Term an appearance is at length given for Mr. Thomas Millson; not as in order, either to defend his case by counsel at the hearing, or to plead, as he would be entitled of right to do, in exception to the testimony of the witnesses examined on the condidit; but as praying, now, in this last stage of the cause, and after the publication of evidence already taken in it, to be permitted to plead in the principal cause. The question to which this prayer gives rise, being that now to be disposed of, is whether the petitioner is entitled de jure, or should be permitted, ex gratia, so to plead.

(*a*)[1] The sole other next of kin, John Rhodes, brother of Thomas Rhodes, had previously executed a proxy of consent to a probate of the will of the 21st of March, 1821, issuing to Alice Clements, the executrix.

(*a*)[2] Namely, on the condidit, Mr. Langton, a solicitor who prepared the will, and the two surviving subscribed witnesses; and, on the additional articles, two persons, to the death, character, and hand-writing of the third subscribed witness.

[40] Now the question of right may be disposed of in a very few words. No party can, of right, plead in a principal cause after publication has once passed of evidence already taken. And the rule as to interveners being that they must take the cause in which they intervene as they find it at the time of their intervention; and that they can, at such time, as of right, only do what they might have done had they been parties in the first instance, or had their intervention occurred in an earlier stage of the cause, it follows that Mr. Millson can, of right, only plead in exception to the testimony of the adverse witnesses; and that he cannot, of right, now, after publication, give any plea whatever in the principal cause.

But the Court may even rescind the conclusion of a cause in order to new facts being pleaded; so that clearly it may accede to this petitioner's prayer, ex gratia, as the cause at the time of his intervention was not actually formally concluded. And the real question, in this view of the case, is whether the grounds laid by the petitioner, in an affidavit which he has filed in support of his prayer, are, or are not, of a nature to induce the Court, in the exercise of a sound legal discretion upon all the circumstances of the case, to permit him to plead now, after publication, not in exception to the testimony of the witnesses whose depositions are so published, but in the principal cause.

The petitioner's affidavit is to this effect: it states that the testator in the cause died in the month of March, 1825, at the age of eighty-eight years, having first duly made and executed his last will and testament, bearing date on the 14th of August, 1820, [41] wherein he bequeathed the petitioner an annuity of 200l., charged upon his real property, for life; and afterwards to his, the petitioner's, children; that in the month of November, 1824, the testator was found to be of unsound mind, and to have so been from the 25th of September, 1820, under a commission in the nature of a writ de lunatico inquirendo, which issued about that time out of Chancery, at the instance of the petitioner, founded upon the testator's incompetency to manage his affairs; and that a committee, ad interim, of his person and estate was afterwards (for so the affidavit generally expresses it) appointed by the high court of Chancery; consequently, that the will propounded in this cause was made six months after the time from, and subsequent to, which a jury had found and returned that the alleged testator was non compos mentis.

Now, of the facts so alleged or disclosed in the affidavit, being the facts (if not the sole, the principal facts) proposed to be pleaded, it is evident that Mr. Millson was in possession of the whole even prior to the commencement of this cause. None of these are facts newly come to his knowledge; the sole facts pleadable after publication, and only by special leave of the Court, except under circumstances very extraordinary. The petitioner fails, then, to lay in support of his prayer the only ground upon which the Court, except in a case, I repeat, very extraordinary, would be justified in acceding to it.

A case, however, to justify the Court's interference, is attempted to be made in a subsequent part of the affidavit, in which the petitioner states that he was disabled from appearing to the decree to see proceed-[42]-ings in this cause, in the first instance, by extreme poverty and indigence; that ever since the month of April, when he was personally served with the said decree, he has been busied in applying to his friends for assistance; but, that only on the 22d of November, just prior to this third session of the term, his father-in-law came forward and consented to afford him the pecuniary means of opposing the will propounded in this cause on behalf of Mrs. Clement.

Now is the case so set up? is this attempt to account for the petitioner's late appearance in the cause, for it only comes to this, strictly satisfactory? I can hardly so deem it. If in extreme indigence, as he now states, the petitioner's regular course was to apply for leave to sue in formâ pauperis. He might well, indeed, have experienced some difficulty in obtaining that privilege, as he is an annuitant in the sum of 100l. for life, under the will which he now opposes. He did not, however, even seek to obtain it; which not having done, I think that I am bound not to suffer the fact, admitting it to be, of the petitioner's extreme indigence, so averred in this stage of the cause, to operate unduly to the prejudice of the other litigant.

But a circumstance discloses itself in this part of his affidavit, not of a nature to sustain the petitioner's prayer. His annuity under the will of August, 1820, as I have said, doubles in amount that which he is entitled to under the will of March, 1821. If, then, his friends had conceived that he had good legal grounds of opposing the

latter, in order to set up the former, will, would not their assistance have been furnished him earlier? Would they, especially his father-in-law, not have come forward till after the evidence was pub-**[43]**-lished, and when the cause was on the point of being concluded? The father-in-law had every inducement, for the sake of his daughter and her children, to whom the annuity of 200l. is limited by the will of August, 1820, failing the petitioner. Their backwardness, especially that of the father-in-law, who now comes forward, tends to shew that they, at least, are not sanguine in their belief that any effectual opposition can be raised to the will propounded in this cause.

The rest of the petitioner's affidavit is simply this: After making oath that neither he nor any person on his behalf has seen or perused any of the depositions published in the cause, he concludes by averring his belief that the will propounded was made while the deceased was of unsound mind; and that he, the petitioner, shall be able to prove that fact by the evidence of good and competent witnesses, if allowed to do so by the Court.

Now the principal averment in this part (indeed in the whole) of the affidavit is, that the deceased was incompetent at the time in question of the making of this will. The petitioner swears to his belief that he was so incompetent; but he assigns no ground for such his belief; save and except that of the finding of the jury, mentioned at the head of his affidavit. It appears, however, from the affidavit of Mr. Langton, the deceased's solicitor, which has been filed by the executrix in answer to that of the petitioner, that the circumstances respecting that verdict, and the application for a commission of lunacy itself, are a little extraordinary. It appears by this that the commission issued at the suit of Millson, the present petitioner, on the 20th of November, 1824; and that the writ of inquiry **[44]** was executed on the 26th of November; no notice whatever, either of the commission itself, or of the execution of the writ of inquiry, having been communicated either to Mr. and Mrs. Clement, with whom the deceased was residing, or to Mr. Langton, his solicitor, till the 25th, the day immediately preceding the execution of the writ of inquiry. It appears by this that, under these circumstances, proceedings were immediately instituted in the Court of Chancery to traverse the inquisition, and set aside the verdict; which proceedings were actually depending when the testator died in March, 1825. And lastly, it further appears by Mr. Langton's affidavit that, though a committee, ad interim (the reason of such conditional appointment of a committee now, for the first time, disclosing itself), was appointed as sworn by Millson, yet that such committee, ad interim, was the testator's daughter, Mrs. Clement, the executrix of, and party propounding, this will. All these circumstances are extremely suspicious; to which I may add another, namely, the period fixed upon by the jury as that at which the testator's incapacity is found to have commenced. They find him to have been of unsound mind from the 25th of September, 1820. Now the will, under which the petitioner Millson takes the annuity of 200l. for his own life and that of his children, is dated in August, 1820. But it does so happen that at the back of this will is a codicil, dated in December, 1820, by which Millson's powers, in respect of this annuity, are materially abridged; this codicil providing that his life-interest shall be forfeited in the event of his attempting to anticipate this, as by sale or mortgage or otherwise; and that the annuity shall then go **[45]** to his children as if he were naturally dead. Hence the verdict of the jury, fixing the commencement of the testator's mental incapacity so precisely between the date of the will and that of this codicil, is, in conjunction with those other facts stated in Mr. Langton's affidavit relative to the commission of lunacy itself, and the execution of the writ of inquiry, to which I have already adverted, a very singular and alarming feature of the case.

I have looked through the several testamentary papers in this cause in order to see whether they afford any circumstances tending to sustain the present application. That, however, I am bound to say, is not their effect by any means. The son is a mere annuitant in every one of these wills; the principal estate, both real and personal, is given and devised to the daughter in each and all of them.(*a*) The trustees in all are the same, particularly Mr. Langton; and through his agency every one of these wills appears to have been executed. There is a paper of instructions

(*a*) The testator died possessed of real and personal estate valued, each, at about 4000l.

for a will of March, 1821, dated on the 14th of that month, in the testator's handwriting; and that will itself (dated on the 19th of March) is drawn up and attested by Mr. Langton; who also attests as well the will of August, 1820, as the codicil of December in that year; by which Millson's powers in respect of his annuity are abridged, as already said. The will of the 21st of March, 1821 (that propounded), is precisely to the same effect with that of the 19th of March, two days prior, except in some legal technical particulars, not at all interfering with the substance of the will. **[46]** This last will, indeed, is not attested by Mr. Langton (possibly as with reference to his being a trustee), but he prepares that will, like all the others, and two of the three attesting witnesses are persons in apparent connexion with him; being described as he, Mr. Langton himself, is, of Clothworker's Hall. The circumstances, then, so disclosed on the face of these testamentary papers are not at all of a nature to sustain this application—as they go strongly to negative the testator's asserted incapacity, at the time when this will was actually executed; the sole ground of the projected opposition to the will itself.

What, however, lastly, as appears from the petitioner's own affidavit, is the sort of case meant to be set up in opposition to the will? It is obviously a case of general insanity. But if this be established on his part, it is still open to the executrix to set up a lucid interval or capacity at the time in question of the making of the will—on proof of which, notwithstanding general insanity proved, the Court will still be bound to pronounce in favour of the will. What the Court then is to expect from Mr. Millson is probably a lengthy allegation, setting up a case of general incapacity or unsoundness of mind—its effect after all, at the utmost, being to throw some additional onus probandi on the executrix—and so to render a stricter proof of the factum of the will in question, especially in the article of capacity, essential than the Court might otherwise possibly require. Now, for the petitioner's own sake, it is surely best not to allow him to involve himself and his friends in the intricacies of such a case—especially if I can put him in the way of attaining his object by a more summary and less expensive mode. And if I **[47]** allow him, as I incline to do, to cross-examine the witnesses on the condidit, in particular, Mr. Langton, it appears to me that, by so doing, he may attain all the benefit which he proposes to himself, by going into a substantive plea. He may bring out by this process the commission of lunacy, and the finding of the jury, that the deceased was non compos mentis at the time when this will was executed. Mr. Langton must admit, for he has already sworn to, this. He may arrive, by this same process, and it should seem by this alone, at all the circumstances connected with the preparation and execution of the will, which is the immediate subject of this suit. He is even to some extent placed by this in a better situation than he would be in the event of his being permitted to plead. If that privilege is accorded to him, the executrix will be entitled to plead again, of course—and though he, so sworn, has not seen the depositions, she has seen them; and may bolster up her case, if at present a weak one, by a new plea, so shaped as to supply any defect of proof in her case, as it now stands. Upon the whole, therefore, it appears to me that I go the utmost length, and at the same time provide best for the petitioner's own interest, by restricting him to a cross-examination of the witnesses on the condidit. This privilege, accordingly, under the circumstances which are stated in his affidavit, I propose to concede to him—but, in justice to the other party, I think that I am bound to accompany that concession with a condition that, prior to availing himself of this privilege, he, the petitioner, gives security in the sum of 100l., for the payment of such costs as the Court, if it should be of opinion that his opposition to the will, and consequently that this application to the Court, are frivolous or vexatious, or both, may in the **[48]** result think fit to award against him. The friends who have consented to assist the petitioner in opposing this will by plea will, of course, I presume, be bound for him in the sum now required—but, be that as it may, such security must be given before I can permit him, in this stage of the cause, to cross-examine the adverse witnesses with any shew of justice to the other party in the cause.(*a*)

(*a*) In the event of this suit the Court, in Trinity Term, pronounced for the will—Mr. Millson, after giving the security required, having cross-examined the witnesses on the condidit—but without condemning Mr. Millson in costs.

LONG *v.* ALDRED. Prerogative Court, Michaelmas Term, 26th Nov., 1825.—If a will be made before marriage, and the wife survive the husband, that will does not revive by and upon the mere death of the husband. But if a woman republish, in her widowhood, a will that she had made, being a feme sole, such will is equally good and valid to dispose of her property, as if it had been actually and originally made by her in her widowhood.—Note, facts and circumstances of what nature will amount to the republication of a will of personal estate.

(On the admission of an allegation.)

In the year 1813 Margaret Brown, widow, the deceased in this cause, then resident at Bengal in the East Indies, duly made and executed her last will and testament, bearing date the 12th of April, 1813; whereby she bequeathed the whole of her personal property in equal moieties between Mary Ann Brown, her heirs, &c., and Mary Aldred (party in the cause), her sister, and appointed Henry Churchill, Esq., sole executor.

After executing the above will the deceased intermarried with Henry Minson Baker, by whom she had no issue; and who died on the 15th of June, 1819.

The party deceased in the cause (then Margaret Baker) died on the 9th of June, 1820, leaving behind **[49]** her Mary Aldred and Samuel Aldred, her sole next of kin; and supposed, at that time, the only persons entitled to her personal estate and effects, in case of her legal intestacy.

The sole executor named in her said will having died shortly after the deceased herself, without proving the same, administration, with the said will annexed, was granted by the Court in the month of October, 1821, to Mary Aldred, the sister, as one of the universal legatees therein named; Samuel Aldred, the brother, and the supposed only person interested to contest the will, consenting to that grant.

It subsequently appeared, however, that the deceased left certain nephews and nieces entitled in distribution to her personal estate, if dead intestate in law: and a decree was now taken out at the instance of one of those parties, James Long, a nephew, citing the sister, Mary Aldred, to bring in the letters of administration, with the will annexed, so obtained as aforesaid, and to prove the will in solemn form of law; on pain of the deceased being pronounced to have died intestate. The sister, Mary Aldred, had appeared to that decree; and the question at issue was the admissibility of an allegation propounding, on her part, the said will.

This allegation pleaded in the 1st and 2d articles, or positions, the factum of the will of April, 1813—the subsequent intermarriage of the testatrix with Henry Minson Baker—and the death of Mr. Baker in the month of June, 1819, as already stated. It then pleaded in the 3d and 4th articles as follows:—

3. "That on a day happening in or about the month of March, 1820, the said Margaret Baker, the **[50]** deceased in this cause, being confined to her room by illness, desired her nurse, Jane Leader, who was then attending her, to bring her a mahogany box, in which she kept her papers of moment and concern, for the purpose of taking therefrom her marriage bond—that the said Jane Leader accordingly delivered the said box to the said deceased, and whilst engaged in looking over the papers therein, the said deceased took therefrom her will, being the very will pleaded and propounded in this cause, and observed to her, the said Jane Leader, pointing to the said will, 'Nurse, this is my will'—and upon the said Jane Leader observing that it was not a will and that it was all eaten by mice, the deceased replied, 'that it was so eaten by cockroaches—that it was the will she would abide by—that people wished her to make another; but that she would not, as, if she did, she should not alter it;' or words to that very effect. That the deceased then observed to the said Jane Leader that she, the deceased, would read the said will to her, which she accordingly began to do; but on some person coming into the room she desisted therefrom and replaced the said will in the said box, desiring the said Jane Leader not to mention that she, the said deceased, had a will; and adding, 'Now, nurse, if any thing should happen to me, you know where it is,' meaning the said will, which she, the deceased, had so replaced in the said mahogany box."

4. "The said Margaret Baker has also, since the death of the said Henry Minson Baker, on several occasions, up to the time of her death, declared to various persons, and particularly to ——— Claypole, spinster, **[51]** and Benjamin Baker, that she had made a will in India, of which Captain Churchill (meaning the said Henry

Churchill, Esq.) was executor—that she intended the same to operate—and that her affairs were to be settled according to the directions contained in such will."

5. The fifth article of the allegation merely pleaded the finding of the will propounded among the deceased's papers of moment and concern in the box where she was pleaded, in the third article, to have deposited the same—and that no other testamentary paper whatever of the said deceased had been found, either there or elsewhere. And,

6. The sixth article only went to the death of the executor, without proving the will; and to the granting of letters of administration, with the will annexed, to Mary Aldred, as already stated in the case.

The admission of this allegation was opposed, principally, as with reference to an old case, before the Delegates,(*a*)[1] in which it was held that, "if a will be made before marriage, and the wife survives the husband, yet the will shall not revive upon the husband's death." But,

The Court was decidedly of opinion that the case cited only went to shew that the will, under such and similar circumstances, did not revive by the mere circumstance of the husband's death—but that if a woman republished a will which she had made prior to her coverture in and during her widowhood, that will, upon general principles, was equally good to dispose of her property, **[52]** as if the same had actually and originally been made in, and during, her widowhood. Consequently, as being of opinion that the facts and circumstances pleaded in the third and fourth articles of the allegation would, if proved, clearly amount to a republication of the will propounded by the party deceased in the cause, in and during her widowhood, so far as respected her personal estate, it admitted the allegation to proof.

Allegation admitted.(*a*)[2]

[53] KNIGHT AND LITTLEJOHNS *v.* GLOYNE. Arches Court, Hilary Term, Bye-Day, 1826.—It is, though usual, not essential to the validity of a church-rate, that it be "confirmed by the ordinary;" and the circumstance of a church-rate not being so confirmed, is no obstacle to its being sued upon, in the Ecclesiastical Court.

(An appeal from Winchester.)

This was an appeal from the Consistory Court of the Lord Bishop of Winchester. The cause, in that court, was a cause of subtraction of church-rate, promoted by James Knight and Joram Littlejohns, the churchwardens of the parish of Farlington, in the county of Southampton and diocese of Winchester, against Samuel Gloyne, of the said parish of Farlington, yeoman. A libel in the usual form was given in, in the Court at Winchester; upon which the defendant's answers were taken; and two witnesses had also been produced and examined. A third witness was about to be produced; when the defendant took an objection to the rate as "not having been confirmed by the ordinary." This objection the judge allowed: and on the 21st of October, 1825, "pronounced the rate to be invalid," on the ground that the same "had not been confirmed by the ordinary;" and dismissed the suit with costs. The present was an appeal from that sentence, duly prosecuted, to the Arches Court of Canterbury. But,

[54] The counsel for the respondent admitted that they were unable to sustain the sentence. Prideaux, indeed, says, speaking of a church-rate, that "when the churchwardens have got the rate confirmed by the archdeacon, or other ordinary authorized thereto, they may then sue it upon all that shall refuse to pay their proportions." This would certainly seem to imply that it was not competent to the churchwardens to sue upon a church-rate, until it was so "confirmed by the archdeacon or other ordinary." But Prideaux's book, however excellent, is not, in itself, authority; nor does it appear, either in any book of authority, or by any adjudged case, that a confirmation of the rate by the ordinary is essential to the validity of the rate. On the contrary, there is much to shew that the rate may be sued upon, equally, whether so confirmed or not. This, for instance, is to be collected from the precedents in "Oughton;" in which are many libels in causes of subtraction of church

(*a*)[1] *Mrs. Lewis's case*—as reported in 4th Burn's Ecc. Law, p. 51.

(*a*)[2] The allegation, so admitted, being proved, and there being no shewing contrà, the Court, in Trinity Term, 1826, pronounced for the will.

rate—in about the one half of which the rate is pleaded to have been, and in the other it is not pleaded to have been (and therefore must be taken not to have been), confirmed by the ordinary. Accordingly,

The Court pronounced for the appeal; reversed the sentence; and retained the principal cause: reserving the question of costs till the principal cause came to a hearing.(*a*)[1]

[55] In the Goods of James Milnes, Esquire, Deceased. Prerogative Court, Hilary Term, 1st Session, 1826.—Administration, with the will annexed, may be committed to a residuary legatee during the lunacy of a surviving executor and residuary legatee, in trust; at least by and with the consent (given or implied) of the committee of the lunatic.

(On motion.)

This was an application for letters of administration, with the will annexed, of the goods of James Milnes, Esquire, during the lunacy of the surviving executor and residuary legatee in trust, to be granted to the joint residuary legatees for life named in his will.

On the 18th of May, 1805, the will, with three codicils, was proved by the oaths of two executors; one of whom died, leaving a surviving executor, who was afterwards (under a writ de lunatico inquirendo) found a lunatic.

The two executors were also residuary legatees in trust; and were directed, by the will, to lay out such residue in the purchase of freehold estates; one moiety of such estates to be settled to the use of Benjamin Gaskell, Esquire, for life, and then to the first son and his heirs; and, in default, to the second son and his heirs, and so on: the other moiety to Daniel Gaskell, Esquire, &c., in like manner. Under these circumstances,

The Court was pleased, on motion of counsel, to decree letters of administration (with the will annexed) of the unadministered effects of the deceased to be granted, during the lunacy of the surviving executor and residuary legatee in trust, to Benjamin and Daniel Gaskell, **[56]** Esquires, the joint residuary legatees for life; by and with the consent of the committee of the lunatic.(*a*)[2]

Motion granted:(*b*)

Urquhart and Waterman *v.* Fricker. Prerogative Court, Hilary Term, 2nd Session, 1826.—Where a next of kin calls for proof, per testes, of a will, and merely interrogates the witnesses produced in support of it, he is not liable to costs for this; at least under ordinary circumstances. Aliter, in the case of a mere legatee, under a former will—whom the Court, as it may, is at all times disposed to condemn in costs, wholly or in part; where, in putting the executors of a latter will on proof, per testes, of such latter will he so interrogates (although he merely interrogates) the witnesses in support of it, as to manifest any spirit of vexatious or undue litigation on his part.

[Followed, *Beale* v. *Beale*, 1874, L. R. 3 P. & D. 180. Distinguished, *Leigh* v. *Green*, [1892] P. 17.]

This was a cause, or business, of proving in solemn form of law the last will and

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(*a*)[1] It should seem, from the answers (taken in the Court below), that the defendant's original objections to the rate were general inequality; and that the rate was made at a vestry held without due and legal notice.

(*a*)[2] It had been suggested that, under a recent statute (6 Geo. IV. c. 74) relating to estates and funds vested in lunatic trustees, &c., the Court of Chancery could make such an order respecting the property not administered as would render a temporary grant of administration, in this case, unnecessary. But a Chancery barrister, who was consulted upon this point, having given an opinion, that that act did not enable the Court of Chancery to make any order respecting the unadministered property until a legal personal representative was appointed by the proper Ecclesiastical Court to act for the lunatic executor, the present application was resorted to.

(*b*) Same term, bye-day. In the case of *Rodnall* v. *Webb* an administration was decreed, under circumstances precisely similar; only, that there was no actual consent of the committee of the lunatic. But there had been a personal service of the citation, calling upon him to shew cause, &c., upon the committee, and no dissent expressed.

testament (with a codicil) of Ann Timbrel, late of Sevenoaks, in the county of Kent, deceased. It was propounded by the executors, Mr. Urquhart and Mr. Waterman; and was opposed by Mr. Fricker, one of the principal legatees under a former will of the deceased. Seven witnesses were examined in support of the will; to each of whom Mr. Fricker had addressed interrogatories: and the [57] cause now came on to be heard upon their evidence. The will and codicil were admitted to be fully proved; so that the question merely resolved itself into one of costs; which, it was prayed, by Mr. Fricker, might be taken out of the estate of the deceased.

Judgment—Sir John Nicholl. The argument which has been addressed to the Court on this question of costs appears to me to have taken a wrong direction. The counsel for the executors have argued against costs being taken out of the estate; as if it were a rule, in similar cases, that costs should be taken out of the estate of the deceased, to which they were bound to make out this particular case an exception. But the rule in such cases is, that costs are not to be taken out of the estate; so that the burthen of excepting this case from the operation of a general rule clearly rested with their opponents—the counsel for the legatee under the former will.

I am much disposed to think that the question as to costs, if any, in this case, should have been, whether the legatee, who prays to have his costs allowed him, ought not to be condemned, partly at least, in the costs, to which the executors have been put, through his means. True it is that where a next of kin calls for proof of a will, per testes, and merely cross-examines the witnesses produced in support of that will, he is not subject to costs, generally speaking. I add this last, because I can easily conceive a case in which even a next of kin may exercise his undoubted right in this matter so vexatiously as to make himself responsible, if not wholly, in part, for the costs of his opponent. But next of kin are favourites of courts of law; [58] their interests in cases of intestacy accrue by mere operation of the law; and they have the plainest and most undoubted right to be satisfied that those interests are not defeated but upon good and sufficient grounds. A legatee under a former will is not so favourably regarded: he may certainly call for proof, per testes, of a will, by which his interests, under a former will, are prejudiced: he, as certainly, may interrogate the witnesses produced in support of that will; but he, I apprehend, must clearly do this at the risk of being condemned in costs; if the Court has reason to suspect him of undue and vexatious litigation. And this, especially, in a case like the present, where the legatee is a mere legatee, acting for his own sole benefit; that is, where he is neither an executor at the same time of the will under which he claims, nor a trustee in it for the benefit of some other person or persons; for whose interest, in common with his own, he can be suggested to have acted in opposing the latter will.

What, then, are the circumstances of the present case? It appears that in 1815 the deceased, who was then resident at Lewisham, made a will in favour, among others, of Mr. Fricker. About ten years before her death she removed to Sevenoaks; and there, in the year 1819, was first introduced to a Mr. Urquhart, a solicitor, at that place, to whom she subsequently became much attached; and whose next-door neighbour she was for the last two or three years of her life. In 1822, after an intimacy of three years, she made the will now propounded, leaving the bulk of her property to Mr. Urquhart—a will executed, in duplicate, in the presence of three witnesses; not at Sevenoaks, [59] or through the agency, in any manner, of Mr. Urquhart; but in London, at the office of her solicitors, Messrs. Egan and Waterman, in Essex-street, by whom it had been prepared. In September, 1822, two months after, she executes the codicil, in the presence of two witnesses, increasing the benefit to Mr. Urquhart, her residuary legatee, by reducing several legacies given in and by her will. This codicil is executed at Sevenoaks; but not, again, through Mr. Urquhart's agency—it is prepared by Mr. Austen, of Sevenoaks, pursuant to instructions taken by that gentleman, a solicitor, verbally, from the deceased herself. Added to this are now produced the "instructions" for the will, all in the deceased's hand-writing, and executed in the presence of three witnesses, in the month of June, 1822; expressly in order to give them effect, in case of her dying without executing a formal will of the same tenor. There also are produced two letters written by the deceased; the one to Mr. Waterman, who prepared the will; the other to Mr. Austen, who drew up the codicil. In these letters the deceased both asserts her right to make a free disposition of her property, "as she has no relations;" and recognizes the disposition which she has actually made of it, in favour of Mr. Urquhart; whom she terms "her sincere

friend;" adding, that she has not, in her own opinion, met with suitable returns from those in whose favour her former will was made. She survives the making of this will and codicil two years; and she is proved to have been a shrewd woman; in perfect possession of her intellects at all times, down to the day of her death.

Yet, aware of all these circumstances (not, indeed, **[60]** possibly of the "instructions," and of these "letters," till after the allegation was given in to which they now appear annexed as exhibits), Mr. Fricker institutes and persists in his opposition to this will and codicil; to each of the witnesses examined in support of which he has addressed interrogatories; not suggesting that the deceased was incapable, or any case of fraudulent circumvention; but only, or at least principally, that these "letters" were not of the deceased's composition; but that they were either dictated (or written from a form supplied to the deceased) by Mr. Urquhart. Even these suggestions are wholly negatived; especially by the witnesses, Mr. How and Mr. Austen, who both swear to their belief of the letters being her own composition, from what they know of her habits of thinking, and style of expressing herself, and conducting business—it appearing, from all the evidence, that the deceased was fully capable of drawing up such papers. Not that, if the fact had accorded with Mr. Fricker's suspicions, it would have carried his case any further, or at all have interfered with the obligation of the Court to pronounce for this will and codicil. Now, under these circumstances, the question as to costs, if any, I again say should have been, whether Mr. Fricker was not liable, in part at least, to the costs of the executors. Not that I am disposed to take this step in the present instance; the executors have not prayed costs: but I wish it to be distinctly understood that, if a mere legatee under a former will puts the executors of a latter will on proof, per testes, of that will, and interrogates such witnesses at length (especially if upon suggestions wholly negatived in their answers, and with nothing in the transaction to **[61]** justify such a procedure), the Court is fully disposed to act, in any future case, upon the principle that he is liable, in part at least to reimburse his opponents for the expenses to which they have been put, through his means, in proof of the latter will.

BYRNE *v.* DALZELL AND OTHERS. Prerogative Court, Hilary Term, 2nd Session, 1826.—A. dies leaving a will and codicil, whereby he appoints B. residuary legatee for life; two other codicils (so styled) propounded by the executors, and opposed on the part of C., one of the contingent residuary legatees substituted in the will and a legatee in the (first) codicil. Part of an allegation setting up that B. had no interest, in consequence of A.'s property being insufficient to pay the legacies bequeathed in his will and (first) codicil (in order, this, to make out B.'s competence as a witness against the second and third codicils so styled), admitted to proof. But the Court said that, howsoever proved, it would pay little respect to B.'s evidence; unless she also qualified as a witness, in the usual mode, by releasing; which she, B., could have no difficulty in doing if, in effect, she had no interest.

(On the admission of an allegation.)

John Simon Farley, the deceased in this cause, a lieutenant-general of his majesty's forces, died on the 5th of June, 1824. The deceased left a will; a regularly executed codicil; and two testamentary papers marked C and E, propounded as second and third codicils to his will by John Francis Byrne, Esquire, one of the executors named in the will. The will and (first) codicil were not opposed; the second and third codicils so styled were opposed by Eliza Rebecca Cuthbert, spinster, one of the contingent residuary legatees substituted in the will, and a legatee in the (first) codicil.

An allegation, propounding the papers C and E, had been filed by the executor, Mr. Byrne. A responsive allegation was now brought in on the part of Miss Cuthbert; the first article of which pleaded as follows:—

"That John Simon Farley, Esquire, the deceased in this cause, died on the 5th of June, 1824, aged about seventy-six years; that the said deceased, in and **[62]** by his last will and testament, bearing date the 10th day of May, 1821, appointed the Reverend Robert Hesketh and John Francis Byrne, Esquire, executors; and Elizabeth Cuthbert, wife of Robert Cuthbert, Esquire, now Elizabeth Cuthbert, widow, residuary legatee for life; and that in and by such will (and a codicil thereto, bearing date the 30th of December, 1823) he, the said deceased, gave and bequeathed divers legacies,

and an annuity, which he directed to be paid free of legacy duty; that the deceased's property left behind him was insufficient to pay the legacies and annuity given and bequeathed by the said will and codicil; so that by reason of the premises she, the said Elizabeth Cuthbert, widow, was to all intents and purposes in law competent to be examined, as a witness in this cause, on the part and behalf of Eliza Rebecca Cuthbert, spinster." And the allegation, accordingly, went on to vouch Mrs. Cuthbert as a witness to nearly all the principal facts pleaded.

The admission of this first article of the allegation was opposed by the executor, Mr. Byrne; as by reason of the facts pleaded not going (it was said) so absolutely and totally to the extinguishment of Mrs. Cuthbert's interest under the will, as to render her a competent witness against the second and third codicils (so styled) now propounded.

The Court—Sir John Nicholl. I shall admit this article, in order to the proposed witness being examined; but there must be the clearest proof (as by the answers admitting this or otherwise) that her interest in the event of the suit is extinguished **[63]** before the Court will permit her evidence to be read. If, however, which is pleaded, she really has no interest as residuary legatee under the will, she can have no difficulty in releasing; which will remove at once all objections to her competence as a witness. A biassed witness she must still be, and open to observation as such; even should she release, and also be proved (sub modo, at least) to have no direct interest in the event of the suit; a matter this, which, after all, must depend upon contingencies. She is the mother of the party who proposes to examine her; and has, herself, been cited to "see proceedings" in the cause, though she has given no appearance. I have only further to observe that, to whatever the evidence furnished upon this article of the plea may amount, the Court will pay little respect to the testimony of the witness whose competency it sets up; unless prior to her deposition being taken she qualifies as a witness in the usual mode, by releasing.

THE EARL OF PORTSMOUTH, BY HIS COMMITTEE *v.* THE COUNTESS OF PORTSMOUTH. Consistory Court of London, Hilary Term, 1st Session, 1826.—In all suits of nullity of marriage brought by or on the part of the husband, the wife, de facto, is regularly entitled, as well to alimony, pending suit, as to payment of all such costs as she incurs in her defence. Hence, the costs of the defence are (in the first instance at least) as necessary a charge upon the husband's funds, as are those of the prosecution of every such suit; and this, although fraud in procuring the marriage is expressly charged upon the wife in the libel; and although costs are prayed in the libel (and may ultimately be awarded by the Court) against the wife.

[See further, 1 Hagg. Ecc. 355.]

(On petition.)

This was a cause of nullity of marriage, promoted and brought by John Charles, Earl of Portsmouth, acting by Mr. Fellows, his committee, against Mary Ann, **[64]** Countess of Portsmouth (styled in the proceedings Mary Ann Hanson, spinster, falsely calling herself Countess of Portsmouth), "by reason" (as stated in the citation) "of the said John Charles, Earl of Portsmouth, being at the time when the said marriage was solemnized of unsound mind, and incapable of forming such a contract; and also by reason of the fraud and circumvention practised on the said John Charles, Earl of Portsmouth, by Mr. Hanson, the father of the said Mary Ann Hanson, and his family, on that occasion." (*a*)

A citation in the cause had been duly served and returned—and on the fourth session of Michaelmas term, 1825, a libel with exhibits was admitted, and the proctor for the party cited was assigned to answer thereto on the bye-day. On the bye-day that assignation was continued till the first session of the ensuing Hilary Term, when the proctor stood assigned to answer under pain of suspension.

On the first session of Hilary Term (1826) the defendant's proctor gave an issue, confessing the marriage; but otherwise contesting suit negatively. At the same time, he brought in a "bill of costs," on behalf of his party; which he prayed might be referred to the registrar for taxation—a step objected to by the proctor of Mr. Fellows, the committee; out of which objection the present question arose.

(*a*) The earl had been found to be of unsound mind on the 28th of February, 1823, and to have so been from the 1st day of January, 1809. The fact of marriage sought to be annulled was had on the 7th day of March, 1814.

[65] In support of that objection it was principally alleged, on the part of the committee, that this was a suit, not commenced by the husband or his committee merely, but under the express authority of the high Court of Chancery, signified by a special order in that behalf—and that the facts pleaded in the libel were of a nature to enure, being proved not only to a sentence of nullity, but to a condemnation of the party proceeded against in costs, which costs were prayed in the libel—that the committee had no power over the funds of the lunatic; but that the same were under the control of the Lord High Chancellor, and could only be appropriated by his special order—that the sum of 6000l. per annum, allowed to the committee by the Lord High Chancellor, was required to be expended for the "maintenance and establishment" of the lunatic—and that by the "costs, &c., of the present proceeding," specially directed by an order of the Chancellor to be paid by the committee (under the sanction of a Master in Chancery) out of the lunatic's surplus income, were meant and intended the costs only of the prosecution, not those of the defence, of this suit; (*a*)[1] which last it was expressly alleged that the **[66]** Master would not be authorised to allow under the aforesaid order—lastly, that the Chancellor having allotted 1500l. per annum for the maintenance of Lady Portsmouth and her infant child, she would not be without means to defend her cause; although the Court should reject her present prayer.

In reply to this, it was submitted on the part of the defendant that in all suits of nullity of marriage brought by the husband, the wife, de facto, was entitled to payment of all the costs incurred in her defence; so that the wife's costs, in this case, as forming a part of the usual, and therefore the "reasonable, costs, charges, and expences, of the proceeding," might well be paid by the committee out of the husband's surplus income, by the very letter, even, of the order under which the suit was instituted—that as to the allowance of 1500l. per annum made to the wife by the Court of Chancery, this, having been made long prior to the commencement, and without any view to the expences of this suit, could only be considered in the nature of alimony—and that as well from the contents of, and the number of witnesses already produced upon, the libel, as by reference to proceedings in another Court, which involved to a considerable extent the same inquiry, the wife's probable costs in this suit would absorb that sum of 1500l. per annum so allowed her, in the nature of alimony, altogether.

Court—Sir Christopher Robinson. I am unable to distinguish this case, in principle, **[67]** from a late case, that of *Smith* v. *Smith*, in the Court of Arches,(*a*)[2] in which that Court refused to proceed in a suit, perfectly similar to the present, until funds were provided by the committee of the husband to enable the wife to conduct her defence. In that, as in this, case, fraud in procuring the marriage was expressly imputed to the wife; and the libel there, as in this case, concluded by praying costs against the wife. The spirit of the "order" under which this suit commences clearly, I think, enables the committee to defray the wife's costs out of the husband's surplus income, if decreed by the Court; and if no such provision (which may be doubted) occurs in the letter of the order, this is probably owing to the mere circumstance of its not being in the immediate contemplation of the person or persons who drew it up that the costs of the defence are as much a charge upon the husband's funds as those of the prosecution in a suit of this nature, by the regular practice of these Courts. If, however, the "order" be defective in this particular, it may, no doubt, be cured, on application

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(*a*)[1] By this order, made by the Lord Chancellor for instituting the present suit (under the Master's report) on the 23d day of August, 1824, it was directed—that "the surplus income of the said Earl of Portsmouth (after providing for the allowances already made for the maintenance of the said Earl of Portsmouth and his establishment, and of the present Countess of Portsmouth and her infant child, and also the costs of suing out and prosecuting the commission of lunacy in this matter, and of the defence thereto, and such other costs as have been, or may be, incurred therein, and be directed by any other order or orders in this matter to be paid thereout) be, with the approbation of Master Courtnay, from time to time applied by the petitioner (Mr. Fellows) in discharging the reasonable and proper costs, charges, and expenses of the aforesaid proceeding, until further orders."

(*a*)[2] *Smith, by his Committee* against *Morris, falsely calling herself Smith*, Arches, 1818.

made to the Chancellor on the part of the committee. The allowance to the wife, I am quite clear, is to be taken in the nature of alimony—and, as such, it of course does not prejudice her claim to her costs—to which, as well as to alimony, pending the suit, she is of right entitled.

[68] DEVEY *v.* EDWARDS AND TAPPEN. Prerogative Court, Easter Term, 3rd Session, 1826.—If the Court be prayed, at the instance of parties in distribution, to pronounce an administration-bond forfeited, &c., in order to its being put in suit, against the sureties to that bond, at common law; the question for the Court is not, properly, the ultimate responsibility of the sureties; it is, generally speaking, the mere fact of whether the conditions of the bond have, or have not, been fulfilled. If unfulfilled, it will be the Court's duty, generally speaking, to pronounce for the forfeiture of the bond; without any reference to that other question of whether the sureties are, or are not, ultimately responsible; leaving it to the sureties to plead and prove elsewhere, if they are capable of so doing, that the parties putting it in suit are still, as by their own laches or otherwise, not in a condition to recover upon the bond, notwithstanding its forfeiture.—In the case of principal and surety there is not, as between the obligee and the surety, any obligation of active diligence on the part of the obligee against the principal. Still the abandonment of a suit, once commenced by the obligee against the principal, is clearly a circumstance in favour of the surety; and one that may even possibly operate to his full discharge.—Administration-bonds are too frequently considered to be, and treated as, mere matters of form. It is the duty of practitioners not to countenance this erroneous notion by being privy to parties who, to their knowledge or belief, are not responsible parties becoming sureties to administration-bonds.

(On petition.)

Blanch Wollaston, the party deceased in this cause, died sometime in the year 1809, intestate, and a widow; without child or parent; leaving behind her Sir Thomas Hyde Page, Knight, Ann Pugh, widow, and Sarah Ostler, widow, since respectively deceased, her natural and lawful brother and sisters, and only next of kin; and, together with Sarah Devey (then Sarah Perry, spinster), Mary Blanch Perry, and Anna Barbara Perry, the children of her sister, Mary Perry, deceased, the only persons entitled, in distribution, to her personal estate and effects.

In the month of May, 1809, letters of administration of all and singular the goods, chattels, and credits of the deceased were committed and granted to Sir Thomas Hyde Page, the brother of the deceased: and Messrs. Edwards and Tappen became, jointly and severally, bound with Sir Thomas Hyde Page, for his due administration of the effects of the deceased, in [69] the usual administration-bond, in the penal sum of 12,000l.

In the month of November, 1825, a decree issued, at the instance of Sarah Devey, one of the parties in distribution, as above, calling upon Messrs. Edwards and Tappen, the sureties, to appear and shew cause why the said administration-bond should not be pronounced to be forfeited; in order to its being put in suit by the said Sarah Devey, the party so entitled in distribution at common law.

An appearance having been duly given for the said sureties, an act on petition was entered into by the proctors of the several parties in which the facts of the case were stated, on the one side and on the other, to the following general effect:—

On the part of the sureties it was alleged that the said Blanch Wollaston having died in the year 1809, intestate, administration of her effects was duly granted, in the month of May in that year, to Sir Thomas Hyde Page, as one of her next of kin; when they, the sureties, at his request, consented to execute the usual administration-bond: that Mr. Edwards was induced to this, as being Sir Thomas's solicitor, and his then receiver of rents and other income to the amount in value of 1300l. per annum (of the whole of which he continued to be the receiver for some years after; and of part, to the death of Sir Thomas Hyde Page, in June, 1821); and also as knowing that he, Sir Thomas, had a life-interest in other real property of the clear annual value of 300l., or thereabouts; and was entitled for life to the interest of 17,000l. 3 per cent. reduced Bank annuities, standing in the names of trustees; and that the other surety, Mr. Tappen, had [70] consented to execute the bond on the faith of Mr. Edwards, whom he knew to be connected with the administrator, as above, being his co-surety;

that in the month of May, 1809, Sarah Devey, the party now proceeding, was a spinster, and had attained her majority; that she subsequently received of the said Sir Thomas Hyde Page, by payments to herself and to her husband, Richard Devey, for her use, several sums of money on account of her distributive share of the said intestate's estate; and that if she, the said Sarah Devey, not having received the whole thereof, had proceeded against the said Sir Thomas Hyde Page, in due course of law, within a reasonable time, she might and would have recovered the whole of her distributive share of the said deceased's estate; that the said Sarah Devey, however, took no legal steps as for the recovery of the same until the month of January, 1819, when she cited the said Sir Thomas Hyde Page, by a decree of this Court, to exhibit an inventory and render an account of his administration of the effects of the said intestate; and to see portions allotted, and distribution made, of the surplus of the said effects; that the said Sir Thomas Hyde Page appeared to the said decree; and subsequently exhibited an inventory and rendered an account, and produced vouchers in verification thereof; whereupon he was dismissed from all further observance of justice in the cause in the month of February, 1820, without opposition on the part of the said Sarah Devey; that, had the said Sarah Devey then proceeded to enforce the terms of the said decree, and had called upon the sureties to make good the same, in the event of failing to obtain her distributive share, the said Richard Edwards could and would have indemni-[71]-fied himself and his co-surety, by means of the income of the said Sir Thomas Hyde Page passing at such time through his hands; but that neither of the said sureties had now any means of reimbursing themselves for any sum which they might be called upon to pay if the penalty of the said bond or any part thereof were recovered of them, the bond being now put in suit; upon all which several grounds they prayed to be dismissed.

On the part of Mrs. Devey it was alleged, in reply, that the party deceased having died in 1809, and letters of administration having been committed to Sir Thomas Hyde Page, as aforesaid, Messrs. Edwards and Tappen, the other parties, did, in fact, howsoever induced, consent to become sureties; and entered into the usual administration-bond in the month of May in that year; that numerous applications were made in that and the subsequent years by the said Sarah Devey and her husband, Richard Devey, to the said Sir Thomas Hyde Page, for payment of her distributive share of the personal estate and effects of the deceased; but that the same were only successful to the extent of procuring several sums of money to be paid to her, on account, between the years 1809 and 1819, amounting together to the sum of between 170l. and 180l.; that in the month of January, 1819, the said Sarah Devey being unable to obtain any account of her distributive share of the said estate, or any payment of the same, save as aforesaid, caused the said Sir Thomas Hyde Page to be cited, by the authority of this Court, to exhibit an inventory, and to render an account of his administration of the said estate, which inventory and account were subsequently [72] exhibited; whereupon the said Sir Thomas Hyde Page was dismissed; that, in the said account, the said Sir Thomas Hyde Page admitted a balance in his hands, amounting to the sum of 4664l. 17s., the part or share of which, due to the said Sarah Devey, amounted to nearly the sum of 400l., exclusive of interest; and that the said inventory and account were prepared from instructions furnished by Mr. Edwards (the surety) himself to the proctor of the said Sir Thomas Hyde Page; that the said inventory and account were considered by the then legal advisers of the said Sarah Devey very defective and erroneous; but, it being also considered that it would be more advisable, on their parts, to proceed against the said Sir Thomas Hyde Page, in the Court of Chancery, as the said account could be investigated therein, with more effect than in this Court, she, the said Sarah Devey, did instruct her proctor not to oppose the prayer of the said Sir Thomas Hyde Page to be dismissed from the suit in this Court; immediately, however, upon which dismissal she caused a bill in Chancery to be filed against the said Sir Thomas Hyde Page, to recover the amount of her said distributive share; pending the proceedings in which Court, to wit, in the month of June, 1821, the said Sir Thomas Hyde Page died in insolvent circumstances; that the said Sarah Devey was also administratrix of the goods of Blanch Wollaston (the original intestate), left unadministered by the said Sir Thomas Hyde Page; as well as of the goods of Sarah Ostler, widow, deceased (whose distributive share of the estate of the said Blanch Wollaston, deceased, had likewise never been paid, or accounted for), with her will annexed, left unadministered

by the said Sir **[73]** Thomas Hyde Page and George Watts, the executors and residuary legatees named in her said will; and the act, on the part of Mrs. Devey, concluded by averring that she, the said Sarah Devey, proceeding in each and every of the above several characters, had no remedy in the premises but by putting the administration-bond in suit against the sureties, which bond it accordingly prayed that the Court would pronounce to be forfeited, in order to its being put in suit; and that, being put in suit, it would further direct the said bond to be attended with, and produced, when and wheresoever such its production might be requisite, to the furtherance of justice in the suit so proposed to be instituted.

Judgment—Sir John Nicholl. This is a proceeding at the instance of a party entitled to a distributive share of the effects of an intestate, of which administration had been duly committed by this Court to a next of kin many years ago, calling upon the sureties to the administration-bond to appear and shew cause why the bond should not be pronounced to be forfeited, as a preliminary step to its being put in suit at common law. The sureties have appeared to that call, suggesting and contending, not so much that the bond is not forfeited, as that they, the sureties, are still not responsible. But the question here, as I take it, is not properly the ultimate responsibility of the sureties; it is rather, generally speaking, the mere fact of whether the bond is or is not forfeited. In the latter case the sureties are clearly entitled to be dismissed; in the former, parties in distribution are as clearly, at least generally speaking, entitled to a sentence of this Court, pronouncing for the forfeiture of the bond. **[74]** The bond itself, pronounced to be forfeited, is to be put in suit, not here, but elsewhere; and there it is for the sureties to plead and prove, if they are capable of so doing, that the parties who put it in suit are still not in a condition to recover upon it. True it is that under circumstances the Court might hesitate to pronounce a bond of this sort forfeited, although its conditions were shewn not to have been complied with. In other words, the parties seeking to put it in suit might be proved to have exonerated the sureties so incontestably and beyond any possibility of question, as to justify the Court in declining to pronounce an administration-bond forfeited at their instance, although the mere fact of its being forfeited were ever so clearly established in evidence to the Court. Still the rule laid down above as to the proper office of the Court in this matter of administration-bonds will be found, I conceive, to apply in all ordinary cases.

Such, then, being the proper office of the Court, the questions for my consideration in respect to this administration-bond are, first, whether, the bond itself is or is not proved to be forfeited; and, secondly, whether, being proved to be forfeited, the sureties are so clearly exonerated as to be entitled to a dismissal.

Now what, so far as respects the present question, are the conditions of an administration-bond? The bond is conditioned for the administrator exhibiting an inventory, and rendering a true and just account of his administration; and for making due distribution of the residue of the effects of the intestate, as the Statute of Distributions limits and appoints.

Such, then, being in brief the conditions of an administration-bond, it admits of no question that the **[75]** bond in this instance, which is in the usual and accustomed form, is in the article of distribution absolutely forfeited. Mrs. Devey, the party proceeding, is herself entitled to a distributive share of the effects of the intestate in her own right. What is suggested as to her is merely that she has received several sums on account; it is not that she has received the full distributive share accruing to her, even in her own right. But she is also the representative of an aunt, a sister of the party deceased in the cause, entitled in distribution to a fourth of the residue of her effects, no part of which is suggested to have been paid; not even, that I see, any sums on account. She is administratrix, again, of the unadministered effects of the party deceased in the cause herself. She is proceeding in all these characters; and, that the condition of the bond has been complied with by distribution made, or that any funds have been placed in her hands, as administratrix of the original intestate, to enable her to make distribution, retaining her own distributive share, is not pretended. The bond, under these circumstances, is clearly forfeited; its condition in the most essential article, that of distribution, not having been in any sort complied with.

Have, then, the sureties, the only other question, made out their exemption from liability so incontestably and beyond all question as to justify the Court in declining

to pronounce for the forfeiture of the bond? They have not so done, by any means, in my judgment, although, whether they are or are not in fact ultimately responsible, is a question, as I have already said, for another forum. The case set up on their [76] part, in effect, is that they are exonerated by the laches of the next of kin, in not having proceeded in due time and with due activity against their principal, the administrator; coupled with the relation in which the sureties, or, at least, one of them, Mr. Edwards, stood to that principal, the administrator. The case so set up in both parts of it may be well considered under one point of view.

As with respect, then, to the connexion which subsisted between Mr. Edwards and the administrator, this, as it appears to me, is a circumstance which, though (in part) he grounds his exemption upon it, aggravates his liability. He was the land-agent or receiver and solicitor of his principal; with whom from time to time he must, consequently, have been in communication; and with whom he must, from time to time, have had a current account. He must have known then, I think, all along, that the administrator had not proceeded to fulfil the conditions of the bond. As this is a matter, however, differently represented by the parties prior to 1819, I lay no great stress upon what Mr. Edwards's knowledge of that fact might or might not have been up to 1819. But from 1819, ten years after administration taken, there is no pretence for saying that Mr. Edwards was not fully aware that the conditions of this bond were still unfulfilled. In 1819 Mrs. Devey, the party now proceeding, calls for an inventory and account; it is proved that Mr. Edwards assisted in making up this inventory and account: so that, to the true state of the case, from 1819, at least, he could be no stranger. The principal survives this two or three years; yet, what steps were taken by [77] Mr. Edwards in that interval to relieve himself and his co-security, the guarantees, from responsibility? Absolutely, so far as appears, none whatever.

At length, however, in 1819, this inventory and account having been exhibited, the administrator is dismissed; and it is a circumstance very much relied upon that he was so dismissed without any objection on the part of Mrs. Devey. This, primâ facie, does certainly form a ground of exemption; for although, in the case of principal and surety, there is not, as I have always understood, as between the obligee and the surety, any obligation of active diligence on the part of the obligee against the principal (which disposes of one supposed ground of exemption set up by the sureties); yet still, if the obligee begins to sue the principal, and then actually or virtually abandons that suit, this is a circumstance which the surety is clearly entitled to the benefit of; and it may even, for any thing that I know to the contrary, operate as suggested to his full discharge. But what was the case here? Did the obligee (the next of kin, that is) abandon her suit against the principal, as she must have done in order properly to raise the question as to the effect of such abandonment? Certainly not. Immediately upon the dismissal of the administrator in this Court she causes a bill of complaint to be filed in the High Court of Chancery against the administrator for the recovery of her distributive share; that is, of two jurisdictions, either open to her, she resorts to one (possibly the one most convenient, but certainly the one most usually resorted to for such purposes); and pending proceedings in that jurisdiction the administrator dies, it is said, insolvent. Now, under these circum-[78]-stances, it seems to me, though it is a matter which I am not called upon to decide, that Mrs. Devey has a remedy, by putting the bond in suit against the sureties. At all events it is by no means clear that she has not any such remedy—the only circumstance which could justify a dismissal of the sureties, or any hesitation on the Court's part to pronounce for the forfeiture of the bond. If upon this state of facts the party proceeding has no claim upon the sureties, these administration-bonds should really seem (what, too frequently, they are considered to be, and are treated as) mere matters of form. It is the duty of practitioners in this Court, a duty which they owe to their profession and to the public, to correct this erroneous notion, so far as in them lies, by not being privy to parties who, to their knowledge or belief, are not responsible, becoming sureties. It is the duty of the office, too, which has been cautioned in this respect, not to suffer persons to be sureties whose frequent appearance on such occasions warrants a suspicion of its being a matter of traffic on their parts. This is rather, indeed, in the nature of a digression from, though naturally suggested by, the subject immediately before the Court, for the Court has no reason to suspect that any thing of this sort has occurred in the present instance; or that the present sureties, Mr. Edwards and Mr. Tappen, are, like those others to whom the Court has been alluding,

mere "men of straw," as it is called. In this case I have only to pronounce that the bond is forfeited; and to direct that it shall be attended with as prayed, in the event of Mrs. Devey proceeding to put it in suit at common law. It will be for the sureties to set up their defence if any; that is, that they are not re-[79]-sponsible at common law; or to apply to a court of equity to restrain proceedings upon the bond, if they should be advised that a court of equity is best calculated to afford them that relief to which they claim to be entitled.

DEW *v.* CLARK AND CLARK. Prerogative Court, Easter Term, 1st Session, 1826.—Partial insanity is good in defeazance of a will founded immediately (so to be presumed) in or upon such partial insanity. If A. then make a will plainly inofficious in respect to B., and is proved at the time of making it to have been under a morbid delusion as to the character and conduct of B., the Court of Probate will relieve against by pronouncing this will to be invalid, and holding A. to have died intestate in law; how sane soever, in other particulars, or even generally, A., at the time in question of making the will, may be proved to have been.

[S. C. in Chancery, 5 Russ. 163; 6 L. T. (O. S.) Ch. 186. Discussed, *Waring* v. *Waring*, 1848, 6 Moore, P. C. 353. See further, 1 Hagg. Ecc. 311.]

Judgment—Sir John Nicholl. This is a question as to the legal force and validity of the will of a Mr. Ely Stott, who is the party deceased in the cause. He died on the 18th of November, 1821, at the age of seventy-two years; leaving a widow, and a daughter by a former wife, an only child; and it should seem that, at the time of his death, he was possessed of personal property to the amount in value of nearly 40,000l. In the month of February, 1821, a commission (in the nature of a writ de lunatico inquirendo), to inquire of the lunacy of the deceased, issued from the High Court of Chancery, at the instance or petition of Mary Stott, the supposed lunatic's then wife. And the deceased was found, under that commission, to be of unsound mind; and to have been in the same state of mind from the first day of January preceding or in the same year, 1821.

The will, however, the subject of the present suit, was made previous to this finding of the jury by several [80] years, bearing date the 26th of May, 1818. The following, in substance, are the contents of that will:—

It gives and bequeaths to Mary Stott, the wife of the deceased, all the deceased's household furniture, linen, china, and books; to his nephews, Thomas and Valentine Clark, legacies of 100l. and 150l. respectively; and to his friend, Mr. Daniel Goff, a legacy (the sum left in blank). It gives and bequeaths to his three executors (after appointed), Mr. Reid, Mr. Fletcher, and Mr. Rawlings, their executors, administrators, and assigns, the sum of 1333l. 6s. 8d. 3 per cent. annuities, upon trust, to pay the dividends or interest to Lydia Iley, spinster, for and during the term of her natural life; and a further sum of 1333l. 6s. 8d., like stock, upon trust, to pay the dividends or interest unto, and equally between, the children of Elizabeth Jouls, deceased, for and during their natural lives, and for and during the natural life of the survivor of these; so that such survivor during his or her life shall enjoy the whole of such dividends or interest. It gives and bequeaths to his said executors a further sum of 2833l. 6s. 8d., like stock, upon trust, to pay the dividends or interest to his (the deceased's) daughter, Charlotte Mary Dew, wife of George Dew, for her life, to her own sole and separate use: and it directs that his said executors do, and shall, lay out and invest all such monies, when recovered, as may be due to the deceased at the time of his death, as the representative of his first wife, Mary Stott, under the will of the honourable Charlotte Clive, in the public stocks or funds; and that the interest or dividends of such public stocks or funds shall also be paid to his said daughter for and during her life to her own sole and separate use as [81] above. It provides that if one or more servant or servants shall have lived with the deceased five years, and shall be living with him at the time of his death, his said executors shall invest so much in the public stocks or funds as will produce an annuity or annuities, for life, of 40l., payable to such servant or servants. It directs that each and every of the said several principal sums shall, from and after the several deaths of the said several annuitants, respectively, fall into, and become part of, the deceased's residuary estate after disposed of. It gives and bequeaths that residue, real and personal, of what nature or kind soever, to the said executors, upon trust, to convert the same into monies, and invest such monies in the public stocks or funds, or upon

government or real securities, at interest; and, upon further trust, to pay to his said wife, Mary Stott, from and out of the interest, dividends, or annual produce of the said stocks, funds, or securities, the sum of 400l. per annum, for her life, or during her widowhood; and it appoints that, from and after the decease or marriage of his said wife, they, the said executors, shall stand possessed of as well the stock, &c., from which such annual sum shall accrue, as all other the stocks, funds, and securities to be purchased by and with the monies by them got in, as aforesaid, upon trust, for the benefit of all and every the child or children of him, the deceased, by his said wife, Mary Stott, with benefit of survivorship, &c. But in the event of his leaving no child by his said wife; or in the event of his leaving a son or sons only, that die under age without lawful issue; or a daughter or daughters only that die under age, and unmarried, it then provides that they, the said **[82]** trustees, do and shall transfer the whole of the aforesaid stocks, funds, and securities to the nephews, the said Thomas and Valentine Clark, or the survivor of them, absolutely; further provided only, in case of the death of either of his said nephews in his (the deceased's) life-time leaving issue, then that his share shall be payable unto and equally between such issue if more than one; but if only one, to such sole issue. Lastly, Mr. Reid, Mr. Fletcher, and Mr. Rawlings are named executors, and the said Mary Stott, during her widowhood, executrix of the will. Such is the will, the subject of the present suit, in point of substance: in point of form it is an instrument of some length, contained in seven sheets of paper, technically drawn up; and it was executed by the deceased in the presence of three subscribed witnesses.

Several scripts are before the Court in the shape of drafts or sketches of former wills or codicils of the deceased. There is also a former will itself, bearing date the 19th of March, 1817, being the script marked No. 5. The purport of each and every of these is to give the daughter a life interest in a comparatively small portion only of the property of the deceased. For instance, the purport of No. 1 is to give her an annuity of 80l. for life—the residue to her child or children, if any, born in lawful wedlock, on attaining the age of twenty-one; "such child or children to be put out to nurse, and then to school, unconnected with the parents, and brought up in evangelical principles:" in case of the daughter having no children, then the residue to the Bible Society. By the script No. 3 the daughter is to have 100l. a year for **[83]** life—the residue to her issue as above at the age of twenty-one; and failing such to the Bible Society and the Church Missionary Society in equal moieties. The same in script No. 4, with an express provision that the child or children of the daughter, from and after the age of six years, shall "be placed entirely under the direction of his (the deceased's) executors and trustees for the time being as to the manner of their education and every other matter connected with their bringing up, maintenance, and support." By the script No. 5 (the will of March, 1817), certain parts of the residue (failing the daughter's issue as above) are bequeathed to trustees, in trust for Thomas and Valentine Clark; and the remainder only in trust for certain public institutions. But by the will now propounded, as already said, Thomas and Valentine Clark are the general residuary legatees in the first instance: no part of the property of the deceased is bequeathed by this to the issue of the daughter (then a married woman) if any. Even the principal stock, out of which the daughter's provision for life, of somewhere about 100l. per annum, is to accrue, is not given and bequeathed by this will upon her death to her issue; it is to fall into and become part of the residuary estate bequeathed as above to the nephews, the Mr. Clarks.

Administration, with this will of May, 1818, annexed, of the effects of the deceased is granted to Thomas and Valentine Clark, the residuary legatees (the executors renouncing), on the 29th of December, 1821. In the month of April, 1822, a citation issues at the suit of Charlotte Mary Dew, the deceased's only child, in effect, calling upon the administrators either to prove **[84]** the will per testes, in solemn form, to the satisfaction of this Court, or to submit to the Court's pronouncing the deceased to have died intestate in law.

The nephews (the administrators), so called upon, formally propound the will, in a plea known here as a common condidit, from its merely pleading the deceased to have made the will, being of sound mind and so forth, in a set form—in common use as of common application in this description of cases.

The daughter's plea, in opposition to this, admits the facts of the case to be as pleaded in the condidit, with a single exception. It admits in effect that the deceased

gave instructions for and made this will as alleged in the condidit; and that he did all this of his own mere motion. It imputes no fraud or circumvention either to the nephews or to any other party or parties as with relation to this will; it ascribes it in no degree or respect whatever to external control or influence of any sort exercised over or upon the deceased. It consents, in effect, to its being taken as the act of the deceased alone—but it denies it to have been his act, being of sound mind at the time; in which denial consists the sum total of the case which it sets up, on the daughter's part, in opposition to the will. It alleges, in order to sustain that case, that the deceased conceived an irrational antipathy to this daughter, his only child, in her earliest infancy; and that he was actuated by such during and throughout the whole remainder of his life: and it charges that the will sought to be impeached was founded in, and owing solely to, this irrational antipathy; not being (as averred in, and necessarily to be proved upon, the condidit) the act of a testator of sound and disposing mind. [85] And it further alleges, in aid of that case, insanity or mental aberration, as visible in and to be collected from other parts of the deceased's conduct, into the particulars of which it enters—though at the same time principally betraying itself in his feelings towards and treatment of his daughter; which last are, accordingly, more especially pleaded, and upon which last it is evidently meant by the daughter principally to rely.

A responsive allegation is filed, on the part of the nephews, consisting of thirty-one articles; accompanied with a variety of annexed exhibits. The objects of that allegation, briefly stated, are: 1st, to sustain the deceased's general sanity, by reference to his general history, and to his conduct throughout his whole life, generally; 2dly, but very principally, its aim is to shew that the deceased's treatment of his daughter, so in particular relied on in proof of the contrary, as I have said, admitting it, possibly, to have been harsh and severe, was still not irrational or insane. Accordingly, it formally imputes it to a series of gross misconduct on the daughter's part; and to the operation or effect of this upon "great violence and irritability," upon "great pride and conceit," upon ideas of the "total and absolute depravity of human nature, and the necessity of sensible conversion (derived from rigid Calvinistical principles)," and upon "high notions of parental authority;" of all which it pleads, in form, the deceased's character to have been made up.

Lastly, the daughter rejoins upon this allegation, either contradicting or explaining the several principal facts, of both descriptions, pleaded in it; and in some few particulars also amplifying and amending [86] her own original case, as the Court permitted her to do, under special circumstances in the case, for reasons into which it entered, at large, when the admission of this rejoinder was formally debated (see vol. ii. p. 102, et seq.).

The above is a mere outline of the several pleas, sufficient, however, to shew that the case before the Court is one of great difficulty (in some of its features, indeed, a perfectly novel case), and consequently to be treated by the Court with proportionable care. Its importance, indeed, is sensibly felt by the Court, which has, most attentively, considered the whole evidence upon which its judgment is to be ultimately framed.

It thus appears, upon the shewing of these several pleas, that the true question at issue between the parties in this cause is a mere single question of fact: Was the deceased, who is admitted to have made this will, insane at that time? or, was he a person of sound mind, and memory? His daughter it is who alleges him to have been the first of these, or insane at that time: and the onus probandi, the burden of proving this, clearly rests with her, she being the party who affirms or sets it up.

In discharge of that onus she has produced a body of evidence to much in the conduct of the deceased, to say the very least of it, extraordinary and extravagant, in the highest degree. I feel myself at liberty, even here, to go this length in speaking of the evidence on her part; as the adverse counsel, in the course of their argument, have admitted it to be good so far. The adverse case indeed, taken as a whole, has admissions to nearly this extent, on the face of it. Still, however, [87] it was pleaded, it was endeavoured to be proved, and it has been strongly argued, as the true result of the whole evidence, on the part of the nephews, that no part of the deceased's conduct ever evinced actual insanity; that the whole of it is to be fairly accounted for by the operation of untoward circumstances, upon peculiar feelings and habits; and that nothing occurs in the evidence to justify any other conclusion than

that the deceased was at all times in the full possession of (and so was competent, at all times, to the performance of any act requiring), in the technical language of these Courts, "thought, judgment, and reflection."

And here a subject of inquiry presents itself, fit, and necessary even, to be disposed of, in the first instance (previous, that is, to any consideration of the evidence, for the purpose of arriving at a due estimate of the merits of the case), which is this: What is the true criterion of madness or insanity? And herein, very principally, as with reference to the present question, where is it that mere eccentricity or extravagance ends and that this begins?

It may safely be assumed, at least to the present auditory, in the outset of this inquiry that madness subsists in every variety of shape and degree. It subsists in the maniac chained to his floor—it subsists in the patient afflicted with mental aberration on certain subjects, or on a certain subject only; and in respect of such even never betraying itself in violence or outrage. The affliction is the same in both cases in species; the difference is only in degree. The intermediate degrees between the highest and lowest grade of insanity are almost infinite. Patients afflicted with this terrible infirmity, in some minor degree, often **[88]** conduct themselves rationally in all but certain respects; and this, not in shew or semblance only, but in truth and substance. Instances have occurred of patients in Bedlam employed as keepers, in some sort, of their fellow-madmen; they themselves being, at the same time, essentially insane. It is well known that a sufferer in this class who fancied and styled himself Duke of Hexham, became the agent of his own committee for the management of his own estate; and did for a time the duties of that office, it is said, not incorrectly. Few madmen are so mad as to be incapable of some degree of self-control; and the cunning which madmen are often found to exercise, if bent upon carrying some favourite point, is a circumstance of the malady too well known to require any specific illustration. Instances again of the extraordinary power of, at times, concealing their infirmity, commonly inherent in madmen, are familiar to most people, as having occurred within their own personal observation.(*a*) Still, however,

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(*a*) The following instances were especially noticed by the Court, from Mr. Erskine's speech of the trial of James Hadfield, for shooting at his late majesty. The first may be given in Mr. Erskine's own words.

"I examined," he says, "for the greater part of a day, in this very place" [the court of King's Bench], "an unfortunate gentleman, who had indicted a most affectionate brother, together with the keeper of a mad-house, at Hoxton, for having imprisoned him as a lunatic; whilst, according to his evidence, he was in his perfect senses. I was, unfortunately, not instructed in what his lunacy consisted, although my instructions left me no doubt of the fact; but not having the clue, he completely foiled me in every attempt to expose his infirmity. You may believe that I left no means unemployed which long experience dictated, but without the smallest effect. The day was wasted; and the prosecutor, by the most affecting history of unmerited suffering, appeared to the judge and jury, and to a humane English audience, as the victim of the most wanton and barbarous oppression. At last, Dr. Sims came into court, who had been prevented by business from an earlier attendance; and from him I learnt that the very man whom I had been above an hour examining, and with every possible effort which counsel are in the habit of exerting, believed himself to be the Lord and Saviour of mankind; not merely at the time of his confinement, which was sufficient for my defence, but during the whole time that he had been triumphing over every attempt to surprise him in the concealment of his disease. I then affected to lament the indecency of my ignorant examination; when he expressed his forgiveness, and said with the utmost gravity and emphasis, in the face of the whole Court, 'I am the Christ!' and so the cause ended."

The other, a still more memorable instance of the power of concealing this malady, is the following, as stated to Mr. Erskine by Lord Mansfield:—

"A man of the name of Wood," said Lord Mansfield, "had indicted Dr. Monro for keeping him as a prisoner in a mad-house, at Hoxton, while he was sane. He underwent the most severe examination by the defendant's counsel, without exposing his complaint; but Dr. Battie, having come upon the bench by me, and desired me to ask him 'What was become of the princess, whom he had corresponded with in cherry-juice?' he shewed, in a moment, what he was. He answered that there was nothing

with all this, among [89] the vulgar, some are for reckoning madmen those only who are frantic or violent to some extent. Insanity, [90] however decided, unaccompanied with such symptoms, they are content to refer to eccentricity or extravagance. Others, again, in the opposite extreme, are too apt to confound mere folly with phrensy; and to describe as odd or eccentric, or in some such phrase, patients who, in better judgments, are actually and essentially insane. What, then, to come back to our proposed subject of inquiry, is the true criterion of insanity? and, principally, how is it distinguished (this being obviously our principal concern) from eccentricity or extravagance merely.

The true criterion—the true test—of the absence or presence of insanity I take to be, the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely—delusion. Wherever the patient once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception; such a patient is said to be under a [91] delusion, in a peculiar, half-technical, sense of the term; and the absence or presence of delusion so understood forms, in my judgment, the true and only test or criterion of absent or present insanity. In short, I look upon delusion, in this sense of it, and insanity to be almost, if not altogether, convertible terms; so that a patient under a delusion, so understood, on any subject or subjects, in any degree, is, for that reason, essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, with whatever extravagances a supposed lunatic may be justly chargeable, and how like soever to a real madman he may either speak or act on some or on all subjects; still, in the absence, I repeat, of any thing in the nature of delusion, so understood as above, the supposed lunatic is, in my judgment, not properly or essentially insane.

The Court is confirmed in, or rather possibly has derived this, its own, view of the subject by and from writers, as well medical as other, best qualified to discuss it; and upon whose authority, accordingly, it may safely rely. It is thus, I apprehend, that delusion, in the sense that I have explained it, is made the distinguishing feature of insanity by Dr. Battie in the first chapter of his celebrated essay or treatise on that disorder. On the same principle it is that Dr. Willis, in a recent publication on mental derangement,(*a*) lays it down that insanity from disease (as contra-distinguished from native insanity) chiefly consists in the "pertinacious adhesion of the patient to some delusive [92] idea in opposition to plain evidence of its falsity." And Mr.

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at all in that, because, having been (as every body knew) imprisoned in a high tower, and being debarred the use of ink, he had no other means of correspondence but by writing his letters in cherry-juice, and throwing them into the river which surrounded the tower, where the princess received them in a boat. There existed, of course, no tower, no imprisonment, no princess, no river, no boat; but the whole was the inveterate phantom of a morbid imagination. I immediately directed Dr. Monro to be acquitted: but this man Wood, being a merchant in Philpot-lane, and having been carried through the city, in his way to the mad-house, he indicted Dr. Monro over again, for the trespass and imprisonment, in London, knowing that he had lost his cause, by speaking of the princess, at Westminster; and such is the extraordinary subtlety and cunning of madmen that, when he was cross-examined on the trial in London, as he had successfully been before, in order to expose his madness, all the ingenuity of the bar and all the authority of the Court could not make him say a single syllable upon that topic which had put an end to the indictment before; although he still had the same indelible impression as before, as he signified to those who were near him: but conscious that the delusion had occasioned his defeat at Westminster, he obstinately persisted in holding it back." *

See Mr. (afterwards Lord) Erskine's speech, on the trial of James Hadfield. Howell's "State Trials," vol. 27, p. 1307, et seq.

(*a*) A treatise on mental derangement, containing the substance of the Gulstonian Lecture for 1822, by Francis Willis, M.D.

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* This evidence at Westminster was then proved against him by the short-hand writer; upon which Dr. Monro was, of course, again acquitted.

Lock, in treating of the difference between idiots and madmen, had before said, in perfect accordance with the above, that the infirmity of madmen was not so much in any "loss of the reasoning faculties," as in "delusion" on their parts: or, as he terms it, in their "mistaking for truths some ideas wrongly joined together." The passage from Mr. Lock, indeed, is illustrative of the subject before the Court in so many respects (as will appear in the sequel) as to justify the Court's taking this occasion to recite it at length:—

"The defect in naturals," says Mr. Lock, "seems to proceed from want of quickness, activity, and motion in the intellectual faculties, whereby they are deprived of reason; whereas madmen, on the other side, seem to suffer by the other extreme. For they do not appear to me to have lost the faculty of reasoning: but having joined together some ideas very wrongly, they mistake them for truths; and they err, as men do that argue from wrong principles. For by the violence of their imaginations, having taken their fancies for realities, they make right deductions from them. Thus you shall find a distracted man fancying himself a king, with a right inference, requires suitable attendance, respect, and obedience: others, who have thought themselves made of glass, have used the caution necessary to preserve such brittle bodies. Hence it comes to pass that a man who is very sober, and of a right understanding in all other things, may in one particular be as frantic as any man in Bedlam; if, either by any sudden very strong impression, or long fixing his fancy upon one sort of thoughts, incoherent ideas have been cemented to-**[93]**-gether so powerfully as to remain united. But there are degrees of madness as of folly; the disorderly jumbling of ideas together is in some more, in others less. In short, herein seems to be the difference between idiots and madmen; that madmen put wrong ideas together and so make wrong propositions, but argue and reason rightly from them: but idiots make very few or no propositions, and reason scarce at all." (*a*)

It may be assumed that these authorities sufficiently fortify the Court's position, with respect to the true test or criterion of insanity, to justify it in pronouncing that, if the evidence in this cause be satisfactory to the existence of delusion in the mind of the deceased at the time of his making this will, it is also satisfactory to the existence in the mind of the deceased at that time of some degree of insanity; whether, indeed, of that degree of insanity; and whether of insanity of that kind, or rather on that subject, which should operate to defeat this will, is another question. But before I proceed to consider the nature and effect of the proofs to this delusion, both on the one side and on the other, it may be proper that I should dispose of an objection raised by the counsel for the residuary legatees, founded on the term "partial insanity;" which had often been used by the counsel for the next of kin in the course of their argument in the cause.

It has been said then repeatedly by the counsel for the residuary legatees that this "partial insanity" is a something unknown to the law of England. Now if it **[94]** be meant by this that the law of England never deems a person both sane and insane at one and the same time, upon one and the same subject, the assertion is a mere truism (as well indeed in reason as) in law; and as such is incapable of being effectively opposed. At the same time, as no such sort of partial insanity is set up by the daughter, the case of partial insanity, which she has really undertaken to sustain, is at no risk from the truth of that position so understood being conceded. But if by that position it be meant and intended that the law of England never deems a party both sane and insane at different times upon the same subject; and both sane and insane upon different subjects (the most usual sense, this last, of the phrase "partial insanity;" and the one in which I take it to have been used throughout by the counsel for the next of kin), there can scarcely be a position more destitute of legal foundation; or rather, there can scarcely be one more adverse to the stream and current of legal authority.

It is only, I should conceive, by the way, in point of legal consideration, that the existence of this sort of partial insanity could by possibility be meant to be questioned. It is a common parlance to say of a man that he is mad on such a subject or on such subjects; and it is a common parlance not by any means founded upon notions which are confined to or only entertained and pressed by the vulgar. For instance, Mr. Lock, if it be worth while to refer to his authority for so self-evident a position,

(*a*) Lock's treatise concerning the Human Understanding, book ii. c. xi. § 13.

has just told us that "a man who is very sober and of a right understanding in all other things may, in one particular, be as frantic as any man **[95]** in Bedlam;" which is precisely in point. But to consider briefly what occurs of legal authority on the subject of partial insanity.

A single passage from Lord Chief Justice Hale upon this head may render possibly any other authority on the subject unnecessary. Lord Hale says, "There is a partial insanity of mind and a total insanity. The former is either in respect to things [quoad hoc, vel quoad illud insanire—some persons that have a competent use of reason in respect to some subjects are yet under a particular dementia in respect of some particular discourses, subjects, or applications]; or else it is partial in respect of degrees [and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason]." (*a*)

In what follows upon this passage Lord Hale is considering the application of the doctrine of partial insanity to criminal cases only; in other words, his observations, occurring in a work on criminal law, are limited to the species or degree of insanity necessary to protect their agents from criminal responsibility for actual crimes committed. But the case of *Greenwood*,(*b*) **[96]** often referred to in the argument, is good in proof of the equal applicability of the doctrine to cases of contract or civil cases. It is even more than this; being not only good in proof of the applicability of the doctrine of partial insanity to civil cases generally; but recognising in particular that such partial insanity will avail to defeat a will, the direct offspring of that partial insanity, both here and at common law; though the testator at the time of making it were sane in all respects upon ordinary subjects. Consequently the case of *Greenwood* is a precise recognition of the principle upon which the Court admitted the allegation originally setting up, and to which it is bound to adhere in ultimately adjudicating upon, the present case of partial insanity; and it furnishes of itself a more than sufficient answer to the objection that this partial insanity is a something unknown to the law. At the same time the case of *Greenwood*, however accordant with the present case in point of general principle, is materially distinguished from it by one not unimportant circumstance. There the deceased being insane, and so admitted to be on all hands, insanely conceived, among other no doubt equally absurd imaginations, that his brother, and only next of kin, had administered poison to him. His recovery, admitted in other respects, was denied in this last particular; and influenced (so said) by still subsisting insanity in this last particular, the deceased made the will disinheriting his **[97]** brother, the validity of which was at issue in that cause. And the question in *Greenwood's case* accordingly was, whether that insane aversion which the deceased was admitted to have once felt towards his brother had or had not subsided—was or was not in operation at the time when he made his will. Here the question is, whether that actual aversion or antipathy, or call it what you will, which the deceased is admitted to have felt towards his daughter, and under the present impression of which he is hardly denied to have made this will, was either founded in, or ever had any connection with, insanity at all, on his part? It is whether he, the deceased, at the time of making this will, had ever laboured under mental derangement, either on the subject of his daughter in particular; or, in fact, on any subject? It is this which distinguishes the present case from that of *Greenwood;* and which constitutes, at once, the novelty and difficulty of the present case—the

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(*a*) Pleas of the Crown, part. 1, c. 4, p. 29.

(*b*) See 3 Bro. C. C. 444, and speech of Mr. Erskine on the trial of James Hadfield, ub. sup.

"That gentleman, 'Mr. Greenwood," whilst insane, took up an idea that a most affectionate brother had administered poison to him. Indeed it was the prominent feature of his insanity. In a few months he recovered his senses. He returned to his profession as an advocate, was sound and eminent in his practice; and in all respects a most useful and eminent member of society; but he never could dislodge from his mind the morbid delusion which disturbed it, and under the pressure, no doubt, of that diseased pre-possession, he disinherited his brother."—Mr. Erskine's Speech, ub. sup.

Of *Greenwood's case*, see further in the judgment, post, and notes (*a*) and (*b*), p. 97, post.

novelty and difficulty, I mean, in point of proof; for, really, in point of general principle, I do not see that *Greenwood's case* and the present are distinguishable. In speaking of *Greenwood's case* throughout I am to be understood as confining myself to the principle adopted as the law in that case: of the evidence, I can know nothing; publication of the evidence (if any) taken in *Greenwood's case* not having passed in this Court. *Greenwood's case*, in this Court, terminated early in a compromise; (*a*)[1] as it also terminated, [98] though not till after two conflicting verdicts, at common law.(*a*)[2]

The Court, after this ample discussion of the principles applicable to the facts of the case before it, now approaches, at some advantage, the facts of the case themselves. But it may be convenient, in preparatory to a discussion of that part of the evidence which requires to be thoroughly investigated, that the Court should dispose, in limine, of some facts which, either from the parties being agreed as to them, or from their being in the judgment of the Court of minor only, and very subordinate, importance in the cause, admit of being treated by the Court somewhat summarily. And, first, as to certain parts of the case, hardly in dispute between the parties.

1. It is pleaded by the nephews, in support of the deceased's capacity, that "the deceased had considerable practice as a surgeon and medical electrician," from the year 1795 to the year 1820; and that "he, at all times before, and down to the end of the year 1820, conducted and managed the whole of his pecuniary and domestic affairs in a rational manner; and rationally conducted all matters of business" until he was afflicted with a paralytic stroke, which impaired his intellects, towards the end of the last-mentioned year.

Now, the whole of this which is so pleaded by the nephews is fully proved; and the parties who pleaded, having so proved it, are clearly entitled to the full benefit of that whole. My only reason for [99] stating this part of their case somewhat generally is, as already suggested, that it is a part of the case as to which there is little, if any, conflicting evidence: it is not even denied by the daughter, generally, in plea. The single question as to this respects its effect on the whole case. That effect I take to be this. It is undoubtedly a strong, but it is by no means a conclusive, circumstance, against the case set up by the daughter; as it is not, by any means, wholly inconsistent with that case. The deceased might be, and do, all which he is deposed to have been, and to have done, in such respects—and might still be under a delusion, and therefore insane, on certain subjects—particularly on this of his daughter, as she, the daughter, in particular charges. Still, its effect undoubtedly is to require the very strictest evidence of this; and to render still more difficult of proof a case difficult enough of proof, in its own nature—as indeed the Court, it will be remembered, suggested the daughter's case to be, when the allegation pleading it stood before the Court on admission, after being debated (see vol. 1, p. 279, et seq.).

2. Secondly, of the exhibits annexed to the allegations filed on behalf of the nephews, something may be said here in preparatory, not inconveniently by the Court confining itself, however, in this place, to a mere general view of the contents of these. Now these exhibits (I mean that part of them consisting of letters from the deceased) may, as contended, be, indeed, many of them undoubtedly are, forcibly and correctly written—they may, and do, furnish many proofs of strong powers of reasoning couched in as [100] strong and energetic language. But upon what premises are such reasonings founded? Are they true or false? are they realities; or are they fancies which have no basis but in the mere imagination of the deceased? The ultimate effect of these exhibits on the true point at issue in the cause must depend on the answers proper to be returned to these questions; which answers, again, are only to be collected from all the circumstances of the case, taken as a whole. If the facts bear out the letters, these last are among the strongest proofs of sanity; but in the other event, so far are these letters from being any proofs of sanity, that they actually themselves evince the contrary, or that the writer of them was really insane.

(*a*)[1] After an allegation given by the brother, responsive to the condidit—upon which, however, it is believed that no evidence was taken—

The Court, it should be said, also referred, in this part of its judgment, to a case actually determined, partly on the principle adopted as law in *Greenwood's case*, that of *Heath* v. *Watts*, Pr. 1798, Del. 1800.

(*a*)[2] The jury finding for the will on the first trial in the Court of King's Bench; and against it on the second trial in the Court of Common Pleas.

3. Thirdly, of the evidence on the condidit, the Court may dispose here, in limine, for the same reason, with a single observation. In proof of the condidit have been examined two of the three subscribed witnesses to the will—one of these being also the solicitor who prepared or drew it up. It may be sufficient to say of this, once for all, that if the question at issue rested upon their sole evidence, there could be no doubt as to the result. Their evidence would, in that case, be amply sufficient to sustain the will. The solicitor deposes fully to instructions for the will given by the deceased, with whom he had several interviews on the subject as the will was in course of preparation; and he deposes fully to his belief that the deceased was at all such times of sound mind. He also, with the other subscribed witness, proves the deceased to have executed the will; and to have then also been, according to his conviction (and so says the other witness), in full possession of his memory and understanding. Proofs, too, are before **[101]** the Court, taken upon this plea, to the death, character, and hand-writing of the third subscribed witness—which account for, and supply in a manner not unsatisfactory, the absence of the testimony of this third subscribed witness. I have only to add to this that the counsel for Mrs. Dew have abstained from any argument tending at all to impeach the sincerity of the witnesses on the condidit.

So much, then, for those parts of the case as to which the parties, in a certain sense, are agreed. Next, to dispose summarily of certain points, which seem to admit of being so disposed of; as being in the judgment of the Court of minor and subordinate importance in the cause.

1. At the head of these may be fairly reckoned, in the judgment of the Court, the conduct of the several parties, as to which there is much in the evidence, subsequent to the death of the deceased. On the one hand, it is pleaded and proved as to this that the daughter, to a certain extent, acquiesced in the will, for some time previous to the institution of the present suit. On the other, it is pleaded and proved that the daughter was induced so to acquiesce by certain promised arrangements on the part of the nephews, under which she, the daughter, was to participate largely in the property of the deceased, notwithstanding the will; which promises not being fulfilled by the nephews, led to the institution of the present suit on her part. This I take to be, at least, the substance of what is pleaded and proved by the several parties respectively on this head; and the effect of the one shewing, upon this view of it, is to my mind pretty much neutralized by that of the other. But be that as it may, the whole **[102]** of this can have little bearing upon the real question at issue—depending, this, not at all upon what took place subsequent to the death of the deceased; but upon his state of mind three years and a half before his death, when this will bears date.

2. As little importance, in my view of it, can be attached to the circumstance that the deceased in February, 1821, was found to have been a lunatic only from the first day of January preceding. This is pleaded and proved by the nephews; and here again (a circumstance which perfectly neutralizes its effect) it is also pleaded and proved on Mrs. Dew's part that the petition for the commission of lunacy was applied for and obtained by Mary Stott, the then wife of the deceased; and that the inquisition taken under that commission was executed without the same, or either of them, being communicated to the daughter, or her husband; who, accordingly, were entirely unacquainted with, and strangers to, the whole proceeding. And even were this not so—could the daughter and her husband be shewn to have been privies to the proceeding—still it could be opposed in no sense to proof now furnished on her part, of the deceased's insanity at the time of the making of this will, that he was found lunatic on the inquisition from a period only subsequent to that time, as we all know.

3. Still less weight, in my view of it, has the circumstance pleaded by the daughter, of a verdict against the nephews in the year 1822, in an action at common law, brought by the daughter in respect to certain freehold property of which the deceased died possessed. It even appears that the deceased's sanity was not put in issue on that occasion by the nephews—the nephews declining, at the expense of costs, going to a **[103]** trial upon the deceased's sanity before a jury, as she, the daughter, invited them to do by means of that action; and by preference submitting that question, in the first instance at least, to the judgment of this Court. They had a perfect right so to act if they thought fit; nor can their choice in this respect be objected to their prejudice. But the deceased's capacity not having been put in issue in that action,

of course nothing is to be inferred from the verdict as to what the finding of the jury would have been had it been put in issue. And lastly, had this even been put in issue, and found against by the jury, still, notwithstanding, on proof of capacity here it would be the duty of this Court to pronounce for the will; and to leave the nephews by this in possession of that property of the deceased (his personal property), upon which, and which only, a sentence of this Court can have any effect—though the verdict, that is, might have put the daughter in undisturbed possession of his real property; (*a*) a verdict, too, founded upon proof made to a jury that the deceased was incapable of devising his real property at the time of his making and executing this identical will.

The Court having thus disposed as well of the principles applicable to this case as of some parts of it which seemed to admit of being summarily dealt with, for reasons already explained, now addresses itself to the case in those other and more important particulars, the evidence as to which requires to be thoroughly sifted, in order to arrive at any thing like a true estimate of the merits of this whole question. **[104]** And in so doing, it purposes to proceed in the following order:—

I. In the first place, to state the general effect at least of the whole evidence: 1st. As to those peculiar feelings and habits, of which the deceased's whole character is pleaded by the nephews, in apology, if I may so term it, for some parts of his conduct, to have been made up. 2dly. As to the character and conduct through life, differently pleaded, and undertaken to be proved, by the parties respectively of the daughter of the deceased. 3dly. As to the uniform treatment of that daughter by the deceased; also differently pleaded and undertaken to be proved on her part, and that of the nephews, the respective parties in this cause. And in commenting, both by the way and in conclusion, upon this evidence, the Court will have ample opportunities of delivering its judgment, whether the daughter's principal case of insanity, quoad hanc, is proved on the one hand; or whether the evidence is such, on the other hand, as to acquit the deceased altogether of delusion or insanity on that score: which is the case that the nephews have principally undertaken to sustain: the Court will then proceed.

II. In the second place, to consider the evidence as to those other less material but still not unimportant particulars, in which the deceased is also pleaded by the daughter (who here, again, is met and encountered by the nephews, either in plea, or through the medium of interrogatories) to have been, and to have conducted himself as, a person of unsound mind—particulars, I mean, in which she, the daughter, had no manner of concern; and which, consequently, have no relation to, or connection with, his treatment of her **[105]** in particular. And the Court's object in considering this other evidence will chiefly be to ascertain, and to determine, the proof of which principal case, that of the daughter, or that of the nephews, both as explained above, this other evidence, on both sides, is best calculated to assist. And the facts of the whole case being ascertained by these means, in the Court's view of them, it will then only remain,

III. Thirdly, that the Court should state its impression as to the legal result upon the question at ultimate issue—the validity, or the contrary, of the contested will.

Under the one or the other of these general heads nearly the whole mass of evidence taken in this cause (which, in point of bulk, I conceive, has no example) will, in turn, present itself to the Court, to be stated and commented upon. In undertaking so to state and comment upon that evidence, the Court is aware that it is pledging itself to the performance of a laborious, if not a difficult, office. But it is a labour this, which it feels itself bound to undergo; it is a difficulty this, which it holds itself obliged to encounter, in order to render its judgment in the case, if not satisfactory to both parties (of which there can be no hope), still intelligible to both; and intelligible, at the same time, to the profession, and, through the profession, to the public: which has a manifest interest that the judgment of the Court in a case, especially a novel case, of this magnitude should be so delivered as not to be easily susceptible of mistake or misrepresentation.

I. First, then, with respect to what is pleaded by the nephews, as in apology, for some parts of the con-**[106]**-duct of the deceased—prefacing this only by a general outline of the admitted history of the deceased.

(*a*) The deceased's real property, it should be said, was of no great value.

(1) The deceased, I have said, died at the age of 72. His origin was obscure, and little appears of his early history. He told the witness, Mr. Paternoster, that he had been apprenticed to an apothecary in Yorkshire; and came to London, at the expiration of his indentures, to "seek his fortune." But the Court suspects, as the witness did, the truth of this statement on his part—it is rather proved (what, indeed, his nephews plead) that the deceased, in early life, had been a gentleman's servant. However, when Mr. Paternoster first knew him, some time in the year 1788, he was a clerk in the Ordnance Office (a situation procured for him by Lord Clive, whose daughter's waiting-maid he had married), and resided at chambers in the Temple. By this (first) wife he had two children—the one, still-born; the other, a daughter, named Charlotte Mary, the present Mrs. Dew, born in November, 1788. The mother died soon after her confinement. The witness Paternoster's acquaintance with the deceased commenced at the house of a Mr. Birch, a surgeon, in Essex-street; with whom the witness resided as a pupil. The deceased, at that time, was intimate with Mr. Birch, and attended his lectures on electricity; being fond of medical studies and pursuits, though not, at that time, professionally engaged in them. He subsequently, however, commenced student, in form, at St. Thomas's hospital, and, after the usual attendances as a pupil at that hospital, was examined, and admitted to practise as a surgeon, by the surgeons' company, in the month of February, 1795. [107] He then established himself in business in Bishopsgate Street, where his principal employment was that of an accoucheur. But in 1798 he removed to Hart Street, Bloomsbury; where he continued to reside till his death; and where his practice was nearly confined to medical electricity. His patients, in this line, were numerous; many of them persons of rank; and by this principally the deceased acquired that considerable property of which, I have said, that he died possessed. He married a second wife in 1814, who died in 1816; and a third in 1818, who survived him, being an annuitant in the sum of 400l., and an executrix, under this contested will. Such is a general outline of the deceased's history. Next, to

His character, as represented by the legatees. Now they describe him, in the second article of their plea, as a man of an "irritable and violent temper; of great pride and conceit; very precise in all his domestic and other arrangements; very impatient of contradiction;" and embued with "high notions of parental authority." His religious persuasions they plead to have been the same with those of "persons who are usually denominated Methodists, Calvinists, or evangelical persons." Finally, they plead that the deceased "frequently expressed himself by reference to scriptural language and imagery; and entertained rigid notions of the total and absolute depravity of human nature, of the necessity of sensible conversion, and of the necessity or expediency of persons confessing to each other the most secret thoughts of the heart."

Such, in substance, are represented by the nephews, in their plea, to have been the peculiar temper and feelings upon certain points of the deceased. In sup- [108] -port of that representation they have produced a variety of witnesses, whose depositions on this head are very various, and some not very accordant. Several of the witnesses are ignorant of any facts to bear out the representation in parts of it—others, as to parts of it, more than bear it out—that is, go beyond the plea. There are few, if any, of the witnesses to whom the deceased seems to have betrayed the whole of his character, even as this is put in plea by the nephews. For instance, Mrs. Desormeaux, what representation does this witness, who has been much relied on in support of the deceased's sanity, give of the character of the deceased? She says in her deposition on the 2d article of the allegation, given in by the nephews, that "the deceased was, as articulate, a man of an irritable and violent temper, exceedingly self-willed, and impatient of contradiction, and had his full share of pride and conceit; he was very precise and exact in his domestic arrangements, and had certainly very high notions of parental authority; if he said to his child that such a thing was to be done, there was no disobeying or contradicting him." "His religion," says the witness, "was that of the Church of England—of his being a Calvinist, she knows no more than that it was Church of England calvinism. If his notions of religion were correct, which she believes them to have been, she concludes that he did believe (but then it is no more than the Church of England believes) that human nature is totally and absolutely depraved; that an entire change of the heart must take place; and that of this change or conversion a man must be sensible—but of his

notions on the subject of persons confessing to each other the secret thoughts of their hearts, &c., she knows nothing."

[109] This in substance is the deposition in chief of Mrs. Desormeaux, on the second article of the nephews' plea; from which, it should seem, that this witness, in spite of her long intimacy with him, had no insight whatever into the deceased's notions on the "necessity of oral confessions of secret sin," and so forth, which still are represented, even in plea, by the nephews as forming a peculiar feature of his character; and which will presently appear to have actually formed, not only a peculiar feature of his character, but one that led to very important results in their bearing on the question of his sanity or insanity. Upon interrogatories, this same witness deposes that "she never heard the deceased swear; that she never saw him fly into violent passions; that he never to her knowledge preached and expounded the Scriptures to his servants, and insisted on their praying aloud and extempore; though, when she has been staying with him, he has had up the servants to morning and evening prayers, when he has read the Scriptures, and has, himself, prayed extempore." As to the rest—"she thinks he never could have been so injudicious." So, again, that the deceased ever represented his daughter as "invested with singular depravity—a peculiar victim of vice and evil—the special property of Satan from her birth," and so forth—she is quite unaware. But the whole of this which the witness Desormeaux so negatives in her answers, speaking to her knowledge and belief, is substantively proved upon the deceased by a multitude of witnesses in the cause, beyond all doubt or contradiction. Again, the witness, Paternoster, whose opinion and belief to the deceased's sanity is also much insisted upon, especially in reference to his being of the medical profession—**[110]** what does he say? He says, in chief speaking to his character, that he, the witness, always considered the deceased a "clever, shrewd fellow"—"irritable, but with a good deal of self-control"—"not of that sensitive turn to fly off at every little thing, though very high and violent when he did fly off"—"positive, overbearing, proud, conceited"—"in his notions of parental authority, approaching to severity"—but he knows nothing of his religious persuasion, or even ever suspected him of being "a Methodist, or Calvinist, or evangelical, as it is called"—so that, of what is pleaded by the nephews as to his character in these respects, the witness has no knowledge. Again, upon interrogatories, this witness knows nothing of his swearing, and putting himself in violent passions, upon trifles; he takes him to have been "not that sort of man, but a man of self-governance and control." He does not know or believe that the deceased ever even threatened to beat or flog his daughter, much less that he ever actually "flogged her with a horsewhip so as to draw blood," &c.; he should think, from what he knew of him, that "however severe the deceased may have been in his general treatment of his daughter, he could never possibly have gone that length." Now here, again, every tittle of what is suggested in the interrogatories, so negatived by this witness (speaking to his knowledge and belief), in those answers of his, to which I have just adverted, is put in plea on the daughter's part; and is substantively proved in the cause, by a host of witnesses, in a manner that must be admitted to leave no question of the facts. Perhaps I should say that the witness, Mr. Paternoster, saw little of the deceased after 1812; he used to laugh at him, he says, for boasting that he **[111]** could "do more with his electricity than anybody else;" and this, principally, he conceives, led about that time to a breach or discontinuance of their former intimacy.

Now I think that the testimony of these (and the observation extends to that of all), the witnesses to this part of the case—I mean to the deceased's character, as pleaded by the nephews, to rebut the daughter's charge of insanity, by giving a different complexion to certain parts of his conduct that might seem to savour of insanity—furnishes a not unimportant inference. It shews that the deceased could smooth down his asperities on certain occasions and in certain companies; and that, by so doing, he could exhibit his character, if not in false colours, still in not quite its true light. Of Mrs. Desormeaux he appears to have stood in a sort of awe—which explains, probably, the check that it clearly seems the deceased could put upon himself in the presence of this witness. She says, "He used to say he did not know how it was, but he could bear her to reprove him, and to say things to him which he could tolerate from no one else." In the instance of Paternoster this reserve may be probably ascribed to his dread of ridicule; he had the art to suppress what he felt that he should only be laughed at for; and so, mutatis mutandis, in the case of other

witnesses. Nor is it at all inconsistent with the notion of his being really insane that he should have been capable of this. I appeal to the experience of persons conversant with madmen whether it is not quite the contrary—whether the kind of tact with which madmen are capable of suppressing all indicatives of their malady (and even, sometimes, how **[112]** artfully soever these are sought to be elicited), under external influence of some or other sort, is not a common feature of the malady. Instances in point, indeed, in this kind have been stated by the Court in a former part of its judgment (see note (*a*), p. 88, ante). Meantime, the self-control of which the deceased was capable in these instances (confining it to these only; as it would be too burdensome to state in similar detail the self-control of which it appears by the evidence that he was capable at times in similar instances) serves well to explain how very reconcileable the opinion and belief entertained and expressed by nearly, if not quite, all the witnesses examined on the part of the nephews, to the deceased's perfect sanity, is with the conclusion at which the Court may ultimately feel itself bound to arrive, that, notwithstanding such their opinion and belief, he was really and truly insane. Each of those witnesses so deposing singly for himself or herself is ignorant of many particulars in the character and conduct of the deceased, which appear in the evidence produced by the nephews themselves, looking to that evidence taken as a whole; and looking, also, to what they, the nephews, have admitted or suggested on this head, either in their exhibits or through the medium of their interrogatories. But the Court's opinion is to be framed on a consideration of all the evidence in the cause—of the evidence taken not only on the nephew's part, but on that of the next of kin—their knowledge of the facts disclosed in which might possibly materially alter that "opinion and belief" to the deceased's perfect sanity, which, as it is, the witnesses produced by the **[113]** nephews, very many of them, have actually expressed. In fact, it plainly results from their depositions that the whole of those witnesses were ignorant to a great extent, and that most of them were even utterly ignorant, of the real character and conduct through life of the party to whose sanity they were vouched. In that ignorance they depose to his sanity; not having seen aught in the deceased to justify a contrary "opinion or belief," they, naturally enough, swear to his having been, in their "opinion and belief," of sound mind. In their having so sworn I see nothing that impeaches either their judgment or their sincerity: but their "opinion and belief" to that effect, under these circumstances, can have little weight with the Court; whose duty it is to frame its judgment from the facts in evidence in the cause, to say nothing, at present, of its being encountered by the adverse "opinion and belief" of the (more numerous) witnesses (of, at least, equal credit and capacity) examined on the part of Mrs. Dew.

(2) The subject of inquiry which next presents itself, and a most important subject of inquiry it is, is the conduct and character of the daughter of the deceased, the complainant in this suit. It is pleaded, on her part, that she, the daughter, "from her earliest youth, had, and constantly shewed, a great filial affection for the deceased; and always behaved to him with great respect and attention—conducted herself with the utmost decorum and propriety on all occasions—was "a person of strictly moral and religious habits—and was so considered and known to be, as well by the friends of the said deceased as other persons of high character and reputation by whom her conduct was **[114]** uniformly approved." Is, or is not, this part of the daughter's plea sustained by evidence? This I now proceed to shew in the first instance; before I come to consider the adverse pleadings and proofs on this head of the residuary legatees.

Charlotte Mary, the daughter of the deceased, and the plaintiff in this cause, was born at a cottage in the neighbourhood of Lady Clive's, at Englefield, in Berkshire; and resided at Lady Clive's (her mother dying in child-bed) till she was about four years old. She was very much during that time with a domestic in the family, Phœbe Wall, who has been examined as a witness in this cause. This witness describes her as "one of the most engaging, interesting, children ever seen"—as "equally lovely in person and amiable in disposition," and as "beloved by every one in the family, high and low." Such is this witness's description of Miss Stott at that age, but the Court, of course, attaches little weight to what the daughter, either in the opinion of this witness, or actually, might have been so early in life.

At about four years of age, in the years 1792 or 1793, the daughter is sent, under the auspices of Lady Clive, to a school at Worcester, where she remains for about four

years, the two first of these under the care of a Mrs. Gwyllim; the rest of the time under that of her successors in the same school. "The child," says Mrs. Gwyllim in her evidence, speaking of Miss Stott, while under her tuition, "was, in all respects, one of the most lovely and endearing children, in person, temper, and manners, that ever was seen. She was then young; but there was every indication of her having a charming temper, and a good understand-**[115]**-ing; and every body loved her." That lady's evidence upon this head is fully confirmed by her daughter, Mrs. Byng.

At the age of between eight and nine years Miss Stott is taken from Worcester, and received by her father at his house in Bishopsgate Street. The first witness, in point of time, to the daughter's conduct, after this, is Mr. Daniel Goff, an intimate friend of the deceased, during nearly the last forty years of his life. The Court will have occasion to advert to the testimony of this witness so frequently, in the sequel, upon other subjects (in which, however, the notions entertained by the witness, on the subject immediately before the Court, namely, on the daughter's character and conduct, fully disclose themselves incidentally) that it will dispense to itself with reciting much of that evidence in this place. At present it will be sufficient to advert briefly to his evidence on the fourth article of Mrs. Dew's first allegation, in which she says that, "upon all occasions, she conducted herself toward her father to the best of his, the witness's, knowledge and belief" [and it will presently appear that the witness had the amplest opportunities of forming a correct knowledge and belief as to the subject upon which he is deposing], "with great respect and submission—she shewed an eager desire to do every thing in her power to soften, win, and please him—she conducted herself, in all that the deponent ever saw" [and here, again, I may say that had she conducted herself differently, the witness must have seen it], "with strict decorum and propriety. The witness has had several children—all are dead—but if blessed with a daughter, he could only have wished her to resemble Mrs. **[116]** Dew—her general temper was very good—her principles, habits, and conduct were strictly moral and religious." This evidence of Mr. Goff, I should say, extends to the whole conduct of Mrs. Dew, during very much of the subsequent remainder of her life; as will appear when the evidence of this witness, as to some other parts of the case, comes, in its turn, to be stated and commented upon by the Court.

Mrs. Ottley's opportunities of estimating the character of Miss Stott were more limited, in point of duration, than those of the last witness. She knew her well, however, for between two and three years—probably commencing when Miss Stott was about twelve years old. On one occasion (presently to be adverted to) she lived with this witness for about three months. What Mrs. Ottley says of her is that "she considered her to be, and found her, very clever, obliging, and amiable—her conduct was uniformly correct—the witness never had, nor knew, nor heard of a complaint against her, but from her unfortunate father—of that father she had the greatest possible awe—but her behaviour to him was, at all times, exceedingly obedient, respectful, and proper. She saw," she says, in answer to an interrogatory, "nothing like a disposition to any thing improper in Miss Stott."

The witness Mrs. Duplay's knowledge (her intimate knowledge, that is) of Miss Stott subsisted for about three years, from 1805 to 1808; commencing, consequently, when Miss Stott was about fifteen years old. "She had," she says, "and used the opportunity of forming, as she believes, a correct opinion of Miss Stott's character and conduct" [what excited the witness's vigilance in this respect, will appear in its **[117]** place]. Far from indicating, says the witness, that depravity and want of principle which she had been led to expect in her, she found it to indicate quite the contrary of all this—"her disposition the witness considered to be amiable, and her conduct was uniformly correct."

Material a point in the case as the daughter's character is, it is still necessary only briefly to advert to what is deposed to, on this head, by the several servants (six in number) who lived in the father's family during the period of Miss Stott's residence under his roof. And this, the rather, as parts of their evidence, on a different head, must presently be stated; from which, however, amply sufficient may be collected as to their view and impression upon the subject immediately before the Court. It may be sufficient to say of these that they all speak of the daughter, whose conduct, as well towards her father, as generally, they had every opportunity of seeing, in the highest possible terms. To the father they describe her as respectful, attentive, obedient; and, either from fear or a sense of duty, submissive to whatever he thought

fit to impose upon her. Generally, they represent her as a charming, well-behaved girl, of whom there could justly be but one opinion—very modest and correct in her deportment; conducting herself, at all times, with the greatest propriety; of a mild and affectionate temper, and of strictly moral and religious habits.

The evidence just adverted to carries down this part of the case to the year 1808: when the daughter, under circumstances to be stated in the sequel, by the recommendation and advice of most respectable persons, especially of the late Sir Thomas and Lady Barnard, **[118]** quits the house of the deceased, and is received into the family of a Miss Brent, an elderly female, who kept a school in Old Palace Yard, Westminster. Miss Brent's evidence, on this head, is in these words: she says that "in September, 1808, she received Miss Stott, as a parlour boarder, from the hands of Sir Thomas and Lady Barnard. She remained with her for twelve months, during which time she was immediately and constantly under the witness's eye; both as a parlour boarder, and as spending her vacations with the witness. During all that time Miss Stott's conduct was unexceptionable. The witness found her a very amiable, and a very good, young woman, and of a most affectionate disposition. She always conducted herself with the most perfect decorum and propriety—she could not be better in any respect—the witness never saw any thing amiss in her—never—she cannot speak too highly of her—she deserves to receive, at the witness's hands, the best possible character. The witness is sure that if Sir Thomas and Lady Barnard were living their testimony would be to the same effect—they both thought most highly, and Lady Barnard was particularly fond, of her."

At Miss Brent's school was a teacher, Miss Atkinson; who afterwards left Miss Brent, and established a school of her own in Manchester Buildings, Westminster. Under her care Miss Stott was subsequently placed, still by Sir Thomas and Lady Barnard, in order to qualify herself as a governess—and with her Miss Stott continued until she actually accepted the situation of a governess in the family of a Mr. and Mrs. Abbott. The evidence of Miss Brent will also be resorted to in a **[119]** subsequent part of this judgment. Meantime, of Miss Stott's character, whilst she knew her, the following is her estimate:—"She was a mild, modest, young woman, amiable and unassuming; everybody loved her but her father—her whole conduct was most correct; it was uniformly so. She would conform to any thing; but her natural qualities were such as entitled her to a high station, or at least qualified her for one. She was religiously disposed; and strictly moral and virtuous."

In the family of Mr. and Mrs. Abbott Miss Stott resided as a governess for five years and a half. The first of these, Mr. Abbott, is now dead; but his widow deposes that "during the whole of that five years and a half Miss Stott uniformly conducted herself with such propriety, that she and her husband treated her, in all respects, as one of their own children, and felt a strong affection for her." "She quitted their family," says the witness, "under circumstances highly creditable to her. The witness's eldest son had formed an attachment to her—the husband of the witness was disposed to treat this as a boyish attachment, which would pass away of itself; but Miss Stott considered it more adviseable that she should leave the family upon this; and she accordingly did so of her own accord. The witness wished never to lose sight of her; and has continued to know her till the present time. Her opinion of Miss Stott, established during the time that she was resident in her family, has been strengthened, if possible, by all that she has since known of her."

On quitting Mrs. Abbott, Miss Stott went, still as a governess, into the family of Mr. Dew, of Guildford **[120]** Street. This about Midsummer, 1815—and she continued as a governess in that family until towards the middle of the year 1818; when her marriage with her present husband, a son of Mr. Dew, took place, with the perfect approbation and concurrence of all his connections—a circumstance furnishing itself, I apprehend, the highest possible testimonial, to the perfect propriety of Miss Stott's demeanour, in all respects, during this period; and one which renders it quite unnecessary that the Court should recite what is expressly deposed to, on this head, by Mr. Dew (the father) himself and the several members of that family.

Lastly, in the evidence of Dr. Wilson, of Mr. Bartlett, and of some others, which I forbear to advert to, more particularly at the present time (as it must be stated, at length, upon another occasion) to avoid repetition only—the Court has, viewing it in connection with what has already been stated upon this head, the amplest evidence of which the nature of the thing is capable that the daughter has really been, what she

is pleaded to have been, a person of unexceptionable character through her whole life—and that her conduct, in every particular, upon this evidence, and so far as hitherto appears, has been such as to deserve that uniform approval which it never failed to elicit.

Now what is there to oppose to this, in the evidence taken on the part of the nephews. Their allegations are: 1st. As in general, that "Miss Stott from her infancy, though possessed of considerable mental ability, was very perverse, sullen, and idle; averse to restraint; disobedient to those under whose control she was placed; and, in particular, disobedient to her father, the deceased in this cause." And the [121] specific charges are: 1st. That in 1799 she was dismissed from a school at Hackney, where her father had placed her in 1797, for misconduct, such (either in kind or degree, for it is not said which) that the school mistress refused to permit her to remain, though at the earnest request of the deceased; who even tendered 100l. per annum (the school terms being under 40l. per annum), provided she would consent to her remaining; 2ndly. That she was again, in 1802 (when about thirteen years and a half old, and growing up into a young woman), dismissed from another school at Hampstead, where she had been placed by her father on her leaving the first, in consequence of her having been detected by the mistress of the school in "libidinous language and practices." Such are the charges against the daughter preferred by the nephews, both general and specific. Next, to the proof of these.

Upon the general charge contained in the 6th article of their plea the only witnesses produced, competent in any sense to speak to the charge, are Mrs. Desormeaux, Mrs. Rivers, and a daughter of the first witness, Miss Sarah Desormeaux.

Mrs. Desormeaux's account is, that "Miss Stott was a clever girl, but indisposed to exert herself—she was of a perverse and obstinate disposition, and occasionally would be sullen—she cannot say very perverse, &c., as articulate; but there certainly was rather more of this, and of unwillingness to submit to restraint, in her, than in some children—she was disposed to shew a disobedience to the directions of her teachers, and particularly to those of her father—but perhaps that was because he expected so much more from her than she was at all equal to—he [122] wished her to be more than female—a perfect pattern of all excellence and all accomplishments." And she concludes her statement on this head with "the regret which the deceased was in the habit of expressing to her at his wishes and expectations of this nature not being gratified."

Now it is quite obvious, without going into particulars (and without any reference whatever to the contrary representations on this head of a host of witnesses examined on Mrs. Dew's part), that Mrs. Desormeaux's evidence in support of these general averments is infinitely short of those averments themselves. [Her representation is even, I think, in one respect, fortunate for Mrs. Dew; for it puts in evidence, beyond all question on the part of her opponents, those extravagant wishes and expectations (also spoken to indeed by very many of the witnesses) entertained by the deceased on the subject of his daughter—as that "she was to be more than female," and so forth—to brooding over his disappointment in respect of which (though the natural or necessary consequence of his entertaining them) I am rather apt to ascribe his delusion on this whole subject (so to call it by anticipation), than to any "insane or irrational antipathy felt by him towards his daughter from her birth;" to which the daughter herself ascribes it; but which, I think, there is much in the evidence throughout to negative. This, however, rather by the way.] But in stating Mrs. Desormeaux's evidence on the subject in question—namely, that of Miss Stott's misconduct, as charged by the legatees generally, I have stated the whole. For of the other two witnesses, the one, Mrs. Rivers, at most only confirms, to some extent in part, what is said by Mrs. Desormeaux on this parti-[123]-cular: while the other (though in fact she knows nothing at all about it) negatives what is said. For all which that other witness, Miss Desormeaux (the daughter of the first witness), says on this sixth article is, "that she was at school with Miss Stott in early life, whom she remembers to have been reckoned a clever girl;" but "as to her being sullen, perverse, &c., or more idle than girls generally are, she can say nothing—she was, herself, too young to judge of her in those respects." As to the testimony of some other witnesses who have been produced and examined (I do not stop to inquire how properly) on this sixth article of the plea—I mean Mr. Charsley and Miss Rawlings—so far are they from being qualified to speak to her temper or talents, that neither the one nor the

other of them ever saw Miss Stott in their lives. All they say on the subject is, that the deceased represented her to them as being what the nephews so generally describe her. But the deceased, it will be seen, was in the habit of going much beyond this in heaping invectives on his child—according to his representations of her she was not merely sullen, perverse, and so on, but she was a fiend, a monster, Satan's special property, and I know not what—nay, Charsley, the nephews' own witness, speaks to the deceased having repeatedly in his presence called her "a very devil." So that the deceased having represented her as sullen, perverse, &c., is no better proof that she actually was sullen, perverse, &c., than his having represented her a monster, the special property of Satan, and a very devil, is a proof that she actually was a monster, the special property of Satan, nay, a very devil. All this, too, is clearly beside the mark—the father's impressions on this head are admitted **[124]**—they even form a leading part of the daughter's case. The only question as to these respects, not their existence, but their source; it is, in other words, whether they are countenanced (to the extent, if not of justification, of excuse) by the conduct of the daughter; or whether they infer the father to have been really insane. The only witness on this sixth article of the nephews' allegation, to whose evidence I have not already referred, is Mr. Paternoster. He, indeed, says that he has occasionally seen Miss Stott, as a girl at her father's; but of her obstinacy, sullenness, and so forth, he, like the others, pretends to no knowledge but from her father's report. So much for the evidence as to that general misconduct imputed to the daughter by the nephews in their plea. Next as to the specific charges.

In order to prove their first specific charge—that of Miss Stott's dismissal from Mrs. Rivers's school at Hackney, for misconduct in 1799—the nephews have produced the best possible witness, Mrs. Rivers herself. And it is due to both the litigants that her evidence on this head should be fully stated. She says that, "at the recommendation of her friend and fellow-witness, Mrs. Desormeaux, she and her sisters, two Miss Rutts, received Miss Stott, then about nine or ten years old, as a boarder in their establishment for young ladies at Hackney, at Midsummer 1797; where she continued nearly two years." To her talents and temper, as evinced during this period, as already said, her evidence is, in substance, pretty confirmatory of that of her friend Mrs. Desormeaux. As to her final dismissal, she deposes in the following words:—"The deponent cannot exactly recollect what was the cause of Miss Stott's removal from her **[125]** school—but she thinks it must have been the wish of deponent and her sisters to remove her, because she recollects it was not the act of her father; for he was much disappointed and vexed at her being removed; and very much wished deponent to take her again; and even offered her the sum of 100l. per annum if she would do so; but deponent and her sisters objected; they had had a good deal of trouble with her, and therefore were unwilling to receive her again, and refused so to do."

Such is her evidence in chief. To an interrogatory addressed to her on the part of Mrs. Dew, she answers as follows:—"She thinks she does recollect the deceased requiring his said daughter to write to him very frequently (not so often as once a week, but very frequently) to let him know what progress she was making; he was very strict and very anxious that she should make a rapid progress; he did not, as interrogate, send a rod to the school; but he brought one himself, and wished the respondent to employ it as an instrument of correction on his said daughter—but the respondent told him the regulations of discipline established in her school did not admit of such a mode of correction, and therefore the rod was locked up in a drawer, till the deceased was prevailed on to take it away. Deceased did, as interrogate, threaten that he would come and punish his said daughter himself—he did come, but he never beat her—respondent would not have allowed it; but he never attempted to beat her. On recollection, she says he may in a moment of haste have hit his daughter a slap with his hand, but certainly nothing more." I should say that this witness had, in answer **[126]** to a former interrogatory, described the deceased's visits to his daughter whilst at her school as "frequent."

Previous to observing upon this evidence, the Court will state that on the other specific charge: and will address its observations at once to the evidence on both charges.

It is pleaded then, to state in full this latter (grosser and more grievous) charge, that Miss Stott, on leaving Mrs. Rivers's at Hackney, was placed by the deceased at a

school at Hampstead, kept by a Mrs. English; where she continued, from sometime in 1800 to sometime in 1802; that during that period she still evinced as great a disinclination to study, sullenness, and obstinacy as while under Mrs. Rivers; and that, at the end of it, she was peremptorily again dismissed in consequence of Mrs. English having detected her in libidinous language and practices." Now here again is produced by the nephews the best possible witness, Mrs. English herself. What she says on this article of the nephews' allegation, the tenth article, is as follows:—

"To the tenth article of the allegation the deponent saith that she cannot, in conscience, depose to the said Charlotte Mary Dew evincing, as articulate, a great disinclination to study, or a great sullenness and obstinacy of disposition. On the contrary, deponent saith, as far as she recollects, the said Charlotte Mary Dew was very willing to study, and not at all obstinate or sullen. To say she was absolutely faultless would certainly not be correct; but, what her faults were, the deponent cannot recollect, except in one little instance, of which she will now speak. She saith that some time in the **[127]** year 1802 deponent received an intimation, and most probably it was from one of the teachers, that the said Charlotte Mary Dew had held some indelicate conversation with one or two girls in the school; and deponent was exceedingly displeased with her for it. She also wrote to her father to inform him of it; and he was equally angry; and by deponent's desire removed his said daughter from the school. But deponent cannot say that such her desire for the removal of the said Charlotte Mary Dew was occasioned so much by the circumstance just adverted to, as by the general trouble that she received from the frequent visits of the father, for the purpose of examining and ascertaining her progress. For although the deponent felt the conduct of the said Charlotte Mary Dew on the said occasion to be of an exceedingly improper kind; yet she would have been induced to have tried the effect of punishment and remonstrance, had not her determination been previously made up to remove the said Charlotte Mary Dew, if possible, for the reason just stated. Deponent further saith that the terms made use of in the said article are far too strong. As far as she recollects, the language used by the said Charlotte Mary Dew was not libidinous, it was only indelicate; and as to deponent's detecting her in any libidinous practices, deponent believes it is quite a mistake; she has no recollection whatever of any such circumstance." Upon interrogatories this witness again says that "Miss Stott never, to her recollection, evinced any perverseness, obstinacy, or sullenness of disposition; on the contrary, that her temper was mild and amiable; that she was generally beloved **[128]** by her schoolfellows and others; and that she did, whilst under her (the witness's) care, make considerable progress in her studies; not only as much as girls of her age usually do, but considerably more."

Now I ask whether a charge of this nature can be, in effect, more thoroughly negatived, than that in question is by this evidence of Mrs. English, who is produced to sustain it? The utmost to which it amounts is, that Miss Stott was reported (I admit credibly reported) to have used some indelicate language in conversation with some of her schoolfellows—but to the rest, whether it respects either language or practice, it is impossible to reprobate and repudiate the charge in stronger terms than the witness does. And so far from what did occur having any apparent connection with her removal from Mrs. English's, she, Mrs. English herself, positively deposes that this was a step she had previously determined upon, not in consequence of any misconduct on Miss Stott's part (of whom, generally speaking, she has given the highest of characters), but in consequence of the father's officious and impertinent interference in matters of school discipline; and the trouble occasioned to her, the schoolmistress, by his too frequent visits and importunities. And I now ask, referring back to the evidence of Mrs. Rivers in support of the first charge, whether the previous removal of Miss Stott from Hackney is not much more probably to be ascribed to a similar disinclination in Mrs. Rivers to put up with the same sort of interference on the father's part, than to any great specific fault or misconduct on that of the child, of which up to this moment she, Mrs. Rivers, has no recollection whatever. Had it been this last, she could **[129]** scarcely have forgotten, she must have remembered it; and there is so much in the evidence both to account for and to justify a wish on her part to get rid of the father that, as the witness could hardly not have felt it, so to this, rather than to any serious disapproval and wish on that account to get rid of the child, her removal from Mrs. Rivers's is, in my judgment, much more probably to be ascribed.

(3) Bearing in mind, then, that the uniform tenor of his daughter's conduct through life is proved to be that which I have described as pleaded on her part; and that no effectual shewing to the contrary, in any sense of that phrase, appears in the evidence taken on the part of the nephews, I proceed, next, to state what appears in evidence of the deceased's conduct through life, as particularly in relation to that daughter, at the same time stating the impression made by this on those who witnessed it, in respect of the deceased's sanity or insanity. To state, indeed, the whole of what appears in evidence on this head would be tedious in the extreme, as it would be intolerably disgustful; still it is necessary that the Court should recite so much of it as may justify the conclusion at which it arrives on this principal part of the case. I may say of it in the outset, speaking generally, that it fully justifies a conclusion drawn by one or more of the witnesses that either the deceased was a "monster," or that in this particular at least he was decidedly "deranged." The Court possibly may have no difficulty in the end in choosing between these conclusions under all the circumstances of the case.

Now to shew how early the deceased appears to have betrayed something of delusion on this particular sub-[130]-ject (in the opinion, at least, of a person very competent to form a correct opinion on the subject), it is only necessary to refer to the evidence of Mrs. Gwyllim. It will be recollected that from the age of about four to six, Miss Stott was placed under this lady's care at Worcester. During that time she only once saw the deceased, when the child had been with her about a year, and of that interview and its consequence she deposes nearly as follows:—She says that, "having been told the deceased was in the house, she took his child to him, and would have placed her hand in his, saying, 'My dear, this is your father,' when the deceased withdrew his hand and suddenly broke out in a manner sufficiently violent to terrify both" (that is, not only the child, but the deponent)—"'I have quarrelled with the people at Oakley Park'" [meaning Lady Clive's family, then resident at Oakley Park, in Gloucestershire], "'they presume to say that my child is supported on charity.' He then inquired what the witness would 'maintain, clothe, and educate the child for—would 20l. a year do?' The witness smiled and said, 'If he would write to her on the subject she would answer his letter.' This was all that passed; he staid but a few minutes, saying, 'Ma'am, I'm in a hurry; I am going home by the coach.' During that time he took no notice whatever of the child" [described, it will be remembered, by this same witness, as at that time one of the most endearing children, in person, manner, and mind, that was ever seen], "or evinced the slightest token of affection for her. He walked up and down the room with a furious look and in a disturbed manner; and his conduct altogether was quite ex-[131]-traordinary; inexplicable," says the witness, "on any other principle than that of insanity. Soon after," she says, "she received a letter from the deceased requiring a description of his daughter, in person and manners. She described her, in reply, as the fact was, healthy in body and amiable in mind; but, in mentioning that the child had chilblains at the time, happened to make use of the word 'gross.' This so offended the deceased that he wrote her a long letter full of abuse, the word 'gross' occurring in it over and over, evidently forced in; telling her that 'her conduct should be watched, while the child remained with her,'" &c.—"a letter, in short," she says, "quite confirmatory of her belief that his mind was disordered."

At the age of between eight and nine Miss Stott is removed from Worcester, and received by her father in Bishopsgate-street. And immediately upon or very soon after this that inveterate delusion of mind (for even here I am really incapable of describing it in any other language), under which the deceased laboured through life in respect to the principles and conduct of his child, every where discovers itself in the evidence. It early appears, for instance, in the evidence of the late Bishop of Durham, who attended the deceased for medical electricity; in what he deposes, that the deceased was in the habit of addressing to him on the subject of his daughter—a subject, he says, which the deceased introduced with great abruptness and indelicacy, when he, the witness, had a short time only been his patient. He deposes on the sixth article of Mrs. Dew's allegation that, "in speaking of his daughter, a theme which was always uppermost in his mind, he expressed himself always with warmth, sometimes with [132] violence, but never with temper. At a time when she must have been very young he spoke of her as very wicked; and charged her with vices of which it was impossible that a girl of her age

could have been guilty. He, the witness, endeavoured to convince him of this; but could make no impression on him, his ideas on the subject of his child were most inveterate and abominable, and such as in the conduct of the daughter, as a child, there could be no just foundation for." The respectable witness declines formally ascribing all this to insanity; he considers it his business, he says, "to speak to effects, not causes," but he admits that "the deceased's conversation, in respect to his daughter, was such as to savour of mental delusion on that head."

To the witness, Mrs. Ottley, another medical patient, it appears that he was in the habit of expressing himself not dissimilarly on the same subject at or about this time. "His description of her," she says, "before she, the witness, knew Miss Stott, appeared to her very unreasonable, improbable, and extravagant, as applied to any child; he described her as disobedient; having a spirit of depravity; deceitful; inattentive to her studies; violent in her temper; obstinate; given to lying; with very much more to her prejudice;" of all which, on becoming afterwards well acquainted with the daughter (as already said), she could find no trace in her. This, and bewailing his own lot, as an unfortunate father, were the burthen of his conversation. There must, she concludes, have been "a perversion of mind in the deceased respecting his daughter, whether it were a delusion she cannot venture to depose."

The witness, Goff, an old and intimate friend of the **[133]** deceased, says on this head, that "from the time when Miss Stott, at the age of eight or nine years, came up to London, it appeared to him that the deceased uniformly so spoke of, and acted towards, her as to convince him, the witness, that he was not in his right mind; no man, he thinks, not labouring under mental delusion, could have so spoken and acted towards a child. With him she was uniformly undutiful, stubborn, idle, refractory; of extreme depravity; in fact an abandoned profligate." How much, or rather how little, the daughter merited all this in the witness's opinion has already, in part, appeared in what has been stated as to his impression and belief of the real character and conduct, in all respects, of Miss Stott. He has seen the deceased, he says, "roaring and raving like a man distracted—calling himself the unhappiest creature in the world to have a daughter so vile, undutiful, and irreclaimable—and this before he even pretended to have any thing specific to lay to her charge." He says that "he often reproved the deceased for his conduct towards his child, but wholly without effect; he seemed to be totally unconscious that his feelings and conduct towards her evinced any thing of severity; according to his account of himself, he was the kindest, the tenderest, the most indulgent of parents; and it was his daughter's misery not to know the blessing she had in him." At length, Miss Stott, at the deceased's suggestion, was taken home by Mr. Goff; with whom she resided at Edmonton for nearly two years; how she conducted herself during which period, in particular, in the estimation of this witness, will presently appear. "In all this time," he says, "the deceased never saw her; he had promised not to **[134]** interfere with her, but she had scarcely left him when he began to harass the witness with letters and interrogatories as to all her conduct, and multiplied directions about her." At the end of this two years the deceased became dissatisfied with Mr. Goff for his too great indulgence to his daughter; and took her away. His avowed object, in placing her with Mr. Goff, I should say, was, that "in his family she might learn obedience, and to effect a change in her temper and habits." The witness was content to take her on these terms—though fully sensible, he says, that "the change required was a change, not in his daughter, but in the deceased himself."

The witness Mrs. Duplay's knowledge of the deceased began in 1803—with his daughter she was not personally acquainted till 1805 or 1806. From the first, she says that "the deceased was in the habit of expressing himself to her, or in her presence, as a parent under the severest affliction, from the peculiar depravity of an only child; this was the constant burthen. On whatever topic the conversation began, whether literary or religious, or any other, in this it constantly ended. In point of general effect, his declarations as to the conduct of his daughter never varied—it was uniform and consistent—she was the property of some Satanic power—a child of the devil—a devil incarnate—destitute of all principle, truth, and goodness." And this delusion in respect to his daughter [for so this witness expressly charges it to have been, as indeed, in effect at least, does every other witness] never abated; on the contrary, she says it went on progressively increasing, and gaining strength. She also, I should say, subsequently became well acquainted with Miss Stott; and, like

every [135] other witness similarly circumstanced in this respect, she, too, deposes that, so far from meriting these gross imputations, in her opinion, who had every opportunity of forming true notions on the subject, "her temper was amiable in every particular, and her conduct uniformly correct."

To repeat what occurs on this head, in the testimony of all the witnesses, would be wholly unnecessary. It may be sufficient to say that it fully bears out the representations of the witnesses whose depositions on this head have already been stated —in particular, it bears out the representation of the last witness, that the delusion (for so the Court must, in common with this and all the witnesses, term it) under which the deceased laboured in this particular, never abated. In confirmation of this the Court has only to refer to the evidence of Mr. Wilson and Mr. Bartlett, to both of whom, during and throughout his intercourse with them (of a nature and on a subject to be spoken of in the sequel) the deceased was in the constant habit of representing his child as a moral monster—of unequalled depravity, vice, obstinacy, and profligacy—the special property of Satan—a very devil—possessed of Satanic art, and capable of deceiving the devil himself. How much the reverse of all this again the daughter really was, in the opinion also of these witnesses, will be said in its place.

Such then were the deceased's notions, generally, on the subject of his daughter —notions which the deceased, at least, very early imbibed, and which he persisted in through his whole life; whether to be traced up, originally, to his hatred of or antipathy to her from her very birth, as she supposes; or whether not rather [136] owing (as I have already said, an attentive consideration of all the evidence inclines me to believe) to some early checks, which his absurd wish to render her "more than human," &c. were of course doomed, and could not fail to experience. My present business, however, is rather with the effect of these than the cause—their effect, I mean, on the actual conduct of the deceased to his daughter, which I now proceed to consider as it stands in the evidence. Of that evidence the Court would willingly dispense to itself with reciting any part, but it is absolutely necessary that parts of it should be recited, in order to render the case itself, and the Court's judgment upon it, fully intelligible.

Of the deceased's general treatment, then, of his daughter, such as I have described her from the evidence, almost from her infancy, as deposed by a variety of witnesses, it would be difficult to speak without indignation, if the Court were not disposed to adopt the conclusion of nearly all the witnesses, that it did and could only proceed from, and be founded in, insanity. His general deportment towards her was such as not only to negative all idea of natural affection, but to betray, unless accounted for by actual delusion, a temper the most truly fiend-like. His manner towards her was not, as the witness Goff says, "such as merely to alienate the affection of any child, and make the father an object of dread and hate instead of love and respect; but it was fiery and terrific; the very mention of her name (in her absence), he says, was like setting fire to gunpowder; the instant she appeared, his eye flashed with rage and scorn; his countenance underwent a total change; and he spurned her from him as a reptile." "His beha-[137]-viour to her," says another witness, Mr. Sheen, "when she was living at home with him in Hart-street, was that of a brute. He, the deponent, often dined with him when she was at home, but never with her—if she was in the room for a little while he could not bear the sight of her and ordered her out; though his look was enough—his countenance changed at her very presence; and his aspect became savage and ferocious." It would be quite unnecessary to prolong this detail; only let it be remembered that what the witnesses are deposing to on this head is to a system—they so represent it—and such their representation is confirmed by the testimony of many witnesses to the same effect. Affection for such a father on the child's part, as one of the witnesses expresses it, was altogether impossible; her manner and deportment could neither be expected nor would have been permitted to express any feeling of that nature towards him. In fact she is represented by nearly all the witnesses as so overpowered with terror in his presence as to be nearly inanimate—so subdued by fear, as the witness Mrs. Duplay terms it, as to be actually "paralysed." Yet no witness pretends to have ever seen anything like a want of duty or respect or attention to the deceased in her manner and deportment towards him—on the contrary, her humility and a wish to oblige and obey him in all things is proved to have manifested itself in her whole conduct to the deceased in everything that she either did or said in his presence.

To this head of general treatment belongs the evidence as to the several occupations forced by the deceased upon his daughter, and to the persons with whom he **[138]** compelled her to associate. It will be remembered that she was to be a perfect phenomenon—the most elegant and accomplished among women—superior to any thing ever seen upon earth—"worthy of himself"—for so the deceased was in the habit of expressing it to the witness Goff by way of climax. In order to accomplish this, tasks were imposed on her, to which apparently even she was quite unequal: and her slow advances in education and not improving her mind with sufficient rapidity to "qualify herself to sit at the head of his table and to be a credit to him" were constantly enumerated by the deceased to the same witness, among other subjects of complaint. Meantime, what were the young lady's occupations, and who were her associates?

The witness Hannah Wright deposes that, "when she was in the service of the deceased, Miss Stott, whom she knew when at home (which was for about half a year) was a tallish fine girl, not less than about fifteen. During that time she never had her meals with her father—never, that she, the deponent, recollects, sat down at table with him. She was compelled to do the most menial offices, as making the beds, sweeping the rooms, scouring down the stairs, &c.; and at a time (in bitter cold weather) when she was suffering so severely from chilblains that her fingers were running down with blood, he insisted on her washing all his linen, which had been usually sent out to be washed when Miss Stott was from home. She (the witness) assisted her in this—but only by stealth." The witness Barnard, who lived with the deceased as footman from October, 1806, to February, 1808, says that "during the whole of that period, when **[139]** Miss Stott was at home with the deceased, she was in the capacity of a servant, not a daughter—she frequently had to scour grates, and do other parts of household work of the lowest and hardest kind. In the summer of 1807 Miss Stott was at Southampton for a month or six weeks, and at Lymington for about as long with her father, in company with the two Miss Terrys, one of whom the deceased afterwards married. There," he says, "as well as at home, whenever deponent saw her, except at meals, she was in some household work, assisting the servant hired to cook—and both there and at home, any person coming into the house, not knowing who she was, must have taken her for a servant." The witness Martha Wright lived with the deceased from April, 1806, to January, 1808; she says, "Miss Stott never dared to be seated in the presence of her father unless he gave her permission—she was chiefly in the kitchen, and had her meals and passed her time there with the witness; though occasionally the deceased had her in the parlour at meal-times—she took her share of the household work as a servant, only that in some respects she was treated worse; as, while the deponent had warm water to scour the stairs, &c., Miss Stott was compelled to use cold—she got up with the servants to wash at three o'clock on washing days; at all times she was up at six." The witness Nicholson says "that during the eleven months that she lived with the deceased in 1809, Miss Stott took half the household work, the same as the deponent; except that the deponent cooked the victuals—but Miss Stott washed the dishes, scoured the house, &c.; and one time, when the de-**[140]**-ponent was ill for a week, she did all the work of the house, except what the footboy did. She never was mistress of a sixpence—her dress was common and mean—her bonnet such as the witness would not have worn; and she was just like a servant, except that she had her meals with the deceased; but" (these, it should seem, so scanty that) "she has often begged the deponent to give her something to eat that might not be missed. The deceased's whole treatment of his daughter," concludes this witness, "was unnatural—she knows not how to describe it justly, but by saying it was diabolical—his looks towards her were frightful and furious, and his whole study apparently to degrade her, and torture her feelings." If remonstrated with, for instance, about keeping his daughter in the kitchen, the deceased's answer was, that "the kitchen was too good for such a wretch"—if requested not to make her wash while her fingers were running down with blood, he would reply with an oath that "washing would cure them," or to that effect. All this, and very much more of the same sort, is in the evidence, though it is impossible to recite it all. It is in evidence, too, that the deceased was in the habit of abusing his daughter in the grossest terms—and that his language on those occasions was filthy and indecent in the highest degree—not fit, as the witness Wright says, to be uttered—whose evidence, on this head, is confirmatory of that of the Bishop of

Durham; that his ideas on the subject of his daughter's propensities (which there is not one syllable in the evidence to countenance throughout) were most abominable.

Meantime, at the actual barbarities inflicted by the deceased on his unhappy child, it is impossible to **[141]** glance without shuddering. For instance, it is in evidence that, at between ten and eleven years old, for some prevarication or lying, as he termed it, in giving an account of her secret thoughts (that is, for not confessing herself guilty of some crime with which he charged her), the deceased stript her naked, tied her to a bed-post, and after flogging her severely with a large rod, intertwisted with brass wire, rubbed her back with brine fetched out of a pickle tub—that he repeatedly, and on the most trivial occasions, struck her with his clenched fist, and cut her with a horsewhip—tore out her hair by the roots, and on one occasion even plucked out a lock of her hair with the skin attached to it; &c. &c. The evidence of the two Wrights, of Nicholson, Barnard, and others; and the deceased's own admissions, or rather boasts, to that effect establish even this part of the daughter's case, incredible as it might seem, beyond any possibility of doubt or question. Nor let it be supposed that these severe and ignominious chastisements were inflicted by the deceased on his daughter in her childhood only. Thus it appears in the evidence of Hannah Wright that in 1806 and 1807 the deceased, on the slightest supposed provocation, would fly upon his daughter, and knock her down with his fist, or strike her with a whip across the shoulders, so as to raise large wheals on her neck and breast—this, when the daughter was sixteen or seventeen, a woman grown. The evidence of Nicholson and others is to the same conduct at a still later period, in 1808 and 1809. And Miss Atkinson deposes that on two occasions at least of going to her father's, whom she went occasionally to visit whilst at Miss Brent's school, Miss Stott returned with her face bruised, and her shoulders black, **[142]** as from violent blows; no doubt of the father's infliction. This in 1809 or 1810, when the daughter was one or two and twenty.

Of the daughter's patience and submissiveness under this course of barbarous usage, generally, quite enough has already been said. It appears, however, from a series of testamentary scripts before the Court, that the father charged her, particularly, in three instances, with having "revolted, and flung herself from under his protection." (*a*) It may be proper, therefore, to **[143]** say something as to the nature

(*a*) The Court here adverted to those two clauses in the will propounded, and several testamentary scripts, which purported to recite the deceased's motives or reasons for bequeathing legacies respectively to Mr. Goff and Miss Iley. That relative to Mr. Goff's legacy, in the will propounded, was in these words—"I give and bequeath unto Daniel Goff, of Newington, in the county of Middlesex, the sum of " (the amount left in blank), "as a token of my esteem for his virtue and integrity, fully evidenced in endeavouring to promote the same good, in conjunction with me, towards my daughter, although he failed." This expression, "the same good," is only intelligible when taken in conjunction with the clause respecting Miss Iley's legacy, a clause which, of course, should have preceded that other, though it follows it (a circumstance after observed upon by the Court) in the executed will. The clause as to Miss Iley's legacy was in these words: "And I make this bequest in her favour, in consideration of her good and faithful endeavours to assist my humble efforts in training up my daughter to habits of honest industry and frugality, and of affording her every advantage to acquire a sound knowledge of herself, and receive a good, moral, and religious education, after she had thrice revolted, and flung herself from my care and protection, and refused to adopt a line of conduct conformable to my domestic arrangements."

The same sentiment, expressed in the same or very similar terms, was found to occur in every one of the several testamentary scripts before the Court. Thus in the script No. 1, following the bequest to Miss Iley, were these words: "And this I do in consideration of her good and faithful endeavours, to assist my humble efforts, in training up my daughter to habits of honest frugality and industry, and in the promotion of her real interest, in affording her every advantage to acquire a sound knowledge of herself, and receive a good education, religious and moral, after she had thrice flung herself from my constant care and protection, and refused to adopt a line of conduct suited to my domestic arrangements." And Mr. Goff's legacy, in script No. 1, was in these words: "I give and bequeath to my friend, Mr. Daniel Goff, &c., the sum of

of these "revolts," as these, it seems, were especially present to the mind of the deceased, when addressed to his testamentary acts.

The nature of the first "revolt" will be best understood from the evidence of Frances Ward, on the eighth article of Mrs. Dew's allegation. In her evidence, on the preceding article, this witness had deposed to the severe mode in which the deceased had been flogging his daughter, to which the Court has just alluded—I mean with the rod intermixed with brass wire, &c. The witness says, indeed, that she did not actually see this flogging inflicted, but that she is equally sure of it as if she had seen it. She, herself, afterwards "gathered up, under and round the bed post of the bed in which Miss Stott slept in the garret, as much as she could hold, in both her hands, of broken birch, as from a rod, with several pieces of broken wire, small brass wire, mixed." And it was to her that the de-**[144]**-ceased applied, through her fellow servant, for brine out of the pickle tub to rub her back with—but to the eighth article. She says that, "having occasion some time after to go up stairs about her work, in the fore part of the day she found Miss Stott crying, and greatly agitated from the apprehension of another severe flogging, for not learning a lesson set her by the deceased, which she complained, and the deponent believes, that it was out of her power to learn." She, the deponent, then saw, she says, "straps and strings fastened to the bed post, for the purpose, as she had no doubt, of tying her up, as she had been tied up on the former occasion." Under the present terror of this, it is that Miss Stott leaves her father's, and takes refuge with Mrs. Ottley. And this, I take it, is the first of those revolts, as he calls them, alluded to by the deceased, in each of the several scripts (as well as in the will propounded), before the Court.

As to the other "revolts," as I make them out, these are still less of a nature (if less can be) to reflect any discredit upon the daughter, or to provoke any feelings of just resentment on the father's part. They are, if I understand them—first—that the daughter, at the recommendation, and under the advice, of most respectable persons, in particular, of the late Sir Thomas and Lady Barnard, again quitted the deceased's house in 1808, wearied out, it should seem, with the treatment that she uniformly experienced from him; and was placed, as a parlour boarder, with a Miss Brent, at Westminster (whose evidence has already been adverted to), in order to qualify herself as a governess—where, however, it should be stated that the deceased, at least after a time, was prevailed upon to pay for her **[145]** board and education—and, secondly, that, after being for some time, at first with Miss Brent and then with Miss Atkinson, she did, still by the advice of Sir Thomas and Lady Barnard, take the situation of a governess in the family of Mr. and Mrs. Abbott. These attempts to render herself independent of him it seems, as especially by the evidence of Miss Atkinson, that the deceased deeply resented. And these with the other are the revolts—the flinging herself three times from under his protection—which appear to have rankled, at all times subsequently, so deeply in the mind of the deceased; and in particular to have been present to him when contemplating his testamentary arrangements. But under the circumstances already stated out of the evidence, I am of opinion that this removing herself from under his roof and dominion was an act of mercy in the daughter, as well to the deceased as to herself—had she continued with him the consequences might, not improbably, have been fatal to both. Who can entertain any doubt of this who reads such passages in the evidence as the following? On one occasion of Miss Atkinson's visiting the deceased, and urging him to be reconciled to his daughter, she says that "he shewed her a long mark on a mahogany table standing in the passage, and said to her in his eager determined manner—Do you see that, ma'am, do you see that? She said, Yes, she did. That, he said, was done with a horsewhip; and the blow ought to have been on his daughter's back, but she escaped from him. It was a long deep mark," says the witness, "and could not have been made by a horsewhip; it could only have been made with some hard instrument, even by the deceased, who was a very powerful **[146]** man." The

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100l., sterling, as a token of my esteem for his virtue and faithfulness, which he exercised, in conjunction with me, to reclaim my daughter." And, in each of the other scripts, Nos. 2, 3, 4, and 5, of the years 1816, 1817, and 1818, the legacies to Goff and Iley were followed by the same assigned reasons. And in that to Iley the daughter was alluded to by the deceased, in each of them, as having "thrice revolted, and flung herself from his, the deceased's, constant care and protection."

deceased shewed the same dent (he calls it) in this mahogany table to Mr. Wilson, stating to this witness also that it was the effect of a blow intended for his daughter. "From the appearance of that dent," says the witness, "the blow by which it was made must have been such as he should suppose might have killed Miss Stott. Something of iron, or harder than wood, must have made it—and the deponent thinks the deceased said he had done it with the poker." I should say that the being who is thus proved to have been in the habit, on the slightest supposed provocation, of springing on this delicate female and knocking her down, &c., with the first instrument that came to hand, is described in the evidence generally as a large powerful man, "with a fist," says one of the witnesses, "like a ploughman's."

It has been attempted in the argument to refer much of the deceased's final implacableness towards his daughter to her engagement in Mr. Dew's family, and to her subsequent connection with that family by marriage. And the nephews in their plea have expressly referred to this last as the proximate cause of that disposition of his property, which the daughter is now seeking to avoid. But in this they are not outborne by the evidence. That implacableness is proved to have existed in as full force long before as it did subsequent to that connection; so as to negative altogether its being solely, or even principally, referable to this. Witness those abortive attempts to reconcile the father and daughter, prior to that connection, spoken to by Mr. Wilson and Mr. Bartlett—whose evidence on this head (or that of one of them, for both witnesses speak on this head to the same general effect), **[147]** both for itself and as highly illustrative of this part of the whole case, it is now necessary to refer to, even at some length. Of the evidence, then, of the first of these, that of Mr. Wilson, the following is the substance:—

He says—His knowledge of the deceased, to some extent, commenced in 1809 or 1810, by his attendance at St. John's chapel, in Bedford Row, of which chapel he, the deponent, was then minister—the deceased's first visit to him was probably in 1813 or 1814—its professed object being to complain to him of the conduct of his man-servant for some trivial offence, he thinks, that of not having blacked his shoes properly—but he says that the deceased had hardly sat down before he began on the subject of his daughter, bursting into tears, and bewailing himself as the most unhappy of parents; and describing his child as the most abandoned of profligates. His description of her in short was such, the deponent says, as to produce an impression on his mind that she was a "common prostitute." He says that he passed over the subject as quietly as possible, with civil expressions of a hope that she might see her errors and reform, &c.; being at length induced to suspect, from the deceased's whole appearance and manner, and evidently exaggerated statements, that the daughter might possibly not be that very abandoned character which he described her. "His general account of his treatment of his daughter at this time was alarming—his manner vehement and ferocious." After this interview the witness says that he saw the deceased only occasionally, till sometime in the year 1816, when his second wife died; he was then, in consequence of a very proper and becoming note from Miss Stott, expressing a wish to that effect, **[148]** induced to attempt to avail himself of the opportunity afforded by his visits to the father about that time (of which she, the daughter, must have heard from some other quarter) to attempt a reconciliation between them. On seeing Miss Stott, then a governess at Mr. Dew's, in consequence of that note, he describes himself as agreeably surprised at finding her a person so totally different from the one he had been led to expect her. He found her "a superior young woman, virtuous, modest, and amiable, and with rather more of the reserve and retiring character of her sex in her than usual"—in short, even in his then judgment (which a more intimate knowledge of her seems less to have shaken than confirmed), "such a daughter as would have been a delight, comfort, and honour to any parent." In bespeaking his interference, he says, she did not appear to indulge any great hope of success; but to think it her duty to omit no opportunity of attempting to conciliate her father, whatever might be the probable result. Now to the actual result of this.

In consequence of this interview with Miss Stott the witness, on the evening of his wife's funeral, requests a private audience with the deceased; and as a minister of the gospel, proposes to him again to receive and be reconciled to his child. He adopts the proposal with the greatest eagerness, saying that it will be his salvation, and so on, and the witness retires, promising to renew the subject at an early opportunity. Soon after, he again sees the deceased on the same subject, at his own house, by

appointment. The deceased again expresses the liveliest satisfaction at the prospect of a renewed intercourse with his daughter, telling the witness that there never was [149] such a kind, indulgent father as he had been; and referring, in proof of this [and, apparently, says the witness, without the slightest notion of any inconsistency in his so doing], to his having scourged her till she bled, and then rubbed her back with cantharides, having plucked out her hair by the roots, and other similar tokens of affection; of which so many have already appeared, that the Court spares itself the pain of reciting any from the testimony of this witness. The witness endeavoured, he says, to convince him of this inconsistency; and that his own admissions proved undue severity, and cruelty, towards his daughter; but his efforts were useless; he immediately exclaimed with vehemence, "No, sir, I never had; I have not now a single unkind thought towards her"—producing at the same time a bundle of papers, as to justify himself by her own written confessions of all sorts of crimes; which the witness, however, refused to look at, saying that confessions of crimes under such circumstances could not be relied on. The deceased, however, says the witness, was in no state to be influenced by such or, indeed, by any suggestions; and the witness told him that he was plainly under a delusion on the subject. He was at this time, he says, under some apprehension of personal violence to himself, so furious was the deceased's manner, and his look so ferocious. "His feeling towards his daughter, when speaking of her having left him, and refused to return, was apparently that of a wild beast, disappointed of its prey." The witness at length, finding reasoning unavailing, proposed, in a tone of authority, an entire amnesty on both sides, as all that should or could be done in the case—that the daughter on her [150] part should acknowledge sorrow for whatever she might have done amiss; and the father tender a free and full forgiveness of her on his part.

On these terms they separate; the deceased assenting, apparently; and the daughter, at an early day after, accompanies the witness to her father's house. The deceased, says the witness, "met him, the witness, as usual; but at the sight of his daughter his countenance underwent a sudden change—his eye lit up with an expression of fury and malignity that was terrific." The witness, "thinking the moment pressing, told him at once that he had brought his daughter to him to confess her faults, and implore his forgiveness and blessing—which she herself, at the same moment, seconded, by throwing herself at his feet, and addressing the same language to him in a beautiful manner," says the witness; "for nothing could exceed the propriety of her whole conduct and demeanour." The witness watched the deceased at this moment: "There was not," he says, "the slightest token in his word or look of what had so passed having any effect on him—his countenance retained the same sternness, severity and fierceness—he was apparently quite insensible that he had any duty to perform." The witness seeing all this, and fearing that the deceased would have struck his daughter—as a last resort requires him, authoritatively, to repeat a form of forgiveness to his child; which he does, after the witness, "but reluctantly and with pauses between each word, like a man acting under restraint; and only considering whether he dared refuse." This is the whole: the deceased, after it is finished, remains just as before; apparently only restrained by the pre-[151]-sence of the witness from falling on his child—and the witness thinks it necessary to remove, and actually removes, her from his presence, under that impression, as quick as possible.

A few days afterwards the witness makes one more (a final) effort on behalf of Miss Stott, by accompanying her to her father's to drink tea with him; pursuant to a previous arrangement to that effect, "suffered only," he says, "by the deceased." His assistant at the chapel, Mr. Bartlett, was also present at this interview. What occurs is a mere repetition of what had occurred at the former interview: the same dutiful observance and meek attempts at conciliation on the child's part—the same sullen ferocity on that of the father — only restrained, says the witness, by his presence and that of Mr. Bartlett, from breaking out in words if not acts of violence. And this interview concludes like the other, without any beneficial effect, in spite of their united efforts being produced on the deceased—the witness again taking Miss Stott away; as he says "he would on no account have risked leaving her in the power of the deceased."

What the witness does after this (apparently all that he could do) is to remonstrate with the deceased on the inconsistency of his conduct to his daughter with his

professions and promises. The deceased answers that he has forgiven her—what can he do more? disclaiming at the same time all unkind feelings towards her; insisting that he is a most affectionate father, &c., as at all prior times. To all that the witness further urges on this head his sole reply is, "Let her come home to me"—[and this, says the witness, was evidently the point to which his mind was turned]—"I **[152]** insist on her coming home to me." The witness tells him that she was prepared to do so under his, the witness's, advice; but that this he could not advise in the deceased's then frame of mind, as not thinking that his daughter's life would be safe in his hands. The witness can get no more out of him; and, finding it a fruitless endeavour to bring him to anything like reason on the subject, finally quits him as, he says, in despair. He subsequently writes him a letter announcing to the deceased his regret at being under the necessity of closing the negociation; a draft of which letter he annexes to his deposition.

Before I conclude with this witness I may say that he had one other interview with the deceased during his last illness; the witness calling upon him in the hope that the deceased might then be in a state to receive more favourable impressions than formerly. This before the deceased was declared a lunatic. But the deceased, on seeing the witness, breaks out into an exclamation that "the devil has sent him—that the witness is the greatest enemy he, the deceased, ever had; that he it is who has fomented and encouraged his daughter's unnaturalness and rebellion, &c.," and so end all transactions between them, pretty much as they began. It is, perhaps, quite unnecessary to add that this witness speaks of the deceased as a madman (in a word) on the subject of his daughter throughout his whole evidence. He concludes it by expressing his firm belief that "the deceased's state of mind, in this particular, was clearly and essentially different from that of a merely wicked man, or of one under the influence of a prejudice, however strong, on the subject of his child. He regards it," he says, "as **[153]** a complete delusion which he had no power of resisting, and which was liable to, and did, go frightful lengths in the absence of temporary external restraints."

I abstain from reciting the nearly similar evidence of Mr. Bartlett as to many of the above particulars, having gone so much at length into that of Mr. Wilson. But I am bound to say that I see nothing in Mr. Bartlett's evidence to discredit him as a witness. I am even bound to say that I see nothing in his conduct, as with relation to this whole cause, looking at all the evidence, but what I consider to be eminently pious, and worthy, and humane. It is true that he may be a biassed witness in favour of the daughter, as strongly intimated by the nephew's counsel in their argument—it was natural, I was going to say creditable, to him that, to a certain extent, he should be a biassed witness. The Court itself has been compelled to exercise great vigilance to guard its own feelings from that bias in her favour, which the case set up by the daughter by its very nature was eminently calculated to produce. And the necessity of protecting itself from the suspicion of having been so biassed in framing its judgment has been one motive with the Court for going, at the length which it has gone, into the evidence in this cause. Admitting him, however, a biassed witness to some extent in favour of the daughter, what obligation, in respect of his testimony, does this impose on the Court? Why, the obligation of looking narrowly into and placing little dependence upon his expressed opinions as a witness—but surely not that (which the counsel for the nephews would represent it) of discrediting his testimony to facts—of deeming his evidence as to facts **[154]** not to be relied on. In justice to Mr. Bartlett, I have said thus much of his evidence; though for the sake of brevity and to avoid repetition I forbear more than a general allusion to his evidence on this head.

In reference to what was said by Mr. Wilson of the deceased insisting that his daughter should "come home," &c., and to its being "the point to which he evidently laboured," I have to observe that this sort of stipulation, on the part of the deceased, plainly impossible to be complied with on the part of Miss Stott, or permitted on that of her friends and advisers, appears by the evidence of several of the witnesses to have formed an insuperable obstacle to her return after she had once quitted her father's under the mediation of Sir Thomas and Lady Barnard; and subsequently when, after completing her education with Miss Brent and Miss Atkinson, she had herself become a governess in the families, successively, of Mrs. Abbott and Mr. Dew. She was to return, if at all, for so the deceased required it, "as a prodigal, and confess her sins

—she was to throw herself entirely upon him, and submit her every thought, word, and action to his direction; she was to see no one, write to no one, but by his express permission." This according to Mr. Bartlett. So in the evidence of Miss Brent. "She was to come to him herself, and alone, crawling upon her knees, like a wretch as she was." So again as expressed by the deceased to the elder Mr. Dew when urging him to receive her; "Why was not she at his threshold on her bended knees confessing her crimes, her matchless crimes?" And so, lastly, in 1817, after the daughter's return from Switzerland, her renewed efforts to obtain his pity and forgiveness are **[155]** met with assurances on his part that "the only plan which can gain her access to his heart and feelings is to throw herself into his arms, determined, like the prodigal, and using his language, to be governed by him entirely," &c.(*a*) Now how impossible it was in the deceased's then frame of mind that Miss Stott should comply with stipulations of this sort; and how impossible it was that her friends should have suffered this if she herself could have complied, it would be quite useless to insist. All this, however, was long anterior to her connection by marriage with Mr. Dew's family; so that to ascribe to this, or to her connection with Mr. Dew's family at all, the deceased's final implacableness towards his daughter is an argument that has no foundation in the evidence. As little foundation, in my judgment, is there for the suggestion that the deceased was solely, or even principally, instigated by the marriage of his daughter with the younger Mr. Dew, virtually to disinherit her and her future offspring, who could by no possibility have been guilty of any offence to him, as he has done by this will. A series of scripts are before the Court not dissimilar in point of general effect; of which some, I think, bear date anterior to Miss Stott's introduction to the family of Mr. Dew in any capacity. True it is that after Miss Stott became governess in the family of Mr. Dew, and more especially after she became a member of that family by her marriage with Mr. George Dew, the deceased himself was in the habit of representing her leaving his house and marrying against his consent, &c., to Mrs. Desormeaux and others, as his motive for **[156]** abandoning her and bequeathing her only a small part of his fortune. But is this representation at all consistent with the whole case as it stands in the evidence—or is that such as to lay the slightest foundation for an inference that, either by staying at home with him, or by marrying into any other family, or by remaining single, the daughter would at all have bettered her prospect either of recovering (if ever she had them) the affections of the father or of inheriting his property. In my judgment the probable result in either case would have been just what the actual result is: and the suggestion to the contrary raised in the plea and laboured in the argument has, I think, no foundation whatever in the evidence. Founding it in the deceased's representations on the subject is begging the question again—the daughter's very case being that in every thing relating to her the deceased was insane, and acting throughout under a gross delusion. So again when the deceased's suggestions to that effect are made the foundation of a charge, also much laboured in the argument, against the elder Mr. Dew—as that he well knew the deceased to be a man of large property; and that marrying his son to Miss Stott was only, forsooth, a politic scheme on his part to secure the reversion of this, somehow or other (for how does not very distinctly appear), to his own family—all this too is equally beside the mark. The deceased did suspect this and a great deal more; he was full of jealousies and suspicions of his daughter, as persons tainted with insanity not unfrequently are of those about and connected with them: his daughter, according to him, was constantly, from her infancy, "plotting with his enemies;" "compromising his character;" **[157]** "depriving him of his friends;" "robbing him of his patients;" "conspiring even to swear away his life;" and I know not what. But founding any argument in proof of his sanity on what the deceased's notions might have been on such subjects—the daughter's case being that the deceased was insane on such subjects, and she herself exhibiting those very notions as proofs, among others, of such his insanity—is really arguing in a circle: the only conclusion it suggests being that at which persons usually arrive who so argue; that is, in effect, no conclusion at all. Upon what other foundation, however, than the deceased's mere suspicions, the charge in question against Mr. Dew (a charge, after all, pretty immaterial to the real question at issue in this cause),

(*a*) Letter from the deceased to his daughter, exhibit 19, annexed to the allegation of Thomas and Valentine Clark.

rests, I am at a loss to discover. His real inducement to sanction that marriage, according to the evidence, I must take to have been a wish to promote his son's happiness, by uniting him with the object of his affections, a female of unquestionable character, as he expresses it; known and approved to him as such by her whole conduct during a previous residence of several years in his family. He must have known, knowing what he did of the deceased, that his daughter's prospect of inheriting, by his will, any considerable portion of his property was extremely problematical; and of any notion on his part at that time of a suit, in the nature of the present, to avoid any will of the deceased made not in favour of his daughter, it would be quite idle to suspect him. It is wholly negatived, too, by what appears in the evidence of his conduct upon, and immediately subsequent to, the death of the deceased. I have only to add that this marriage of Miss Stott with Mr. George Dew seems to [158] have been sanctioned and approved of by all the husband's family. I do this, as something to the contrary is suggested by the nephews in their interrogatories—as if the mother, Mrs. Dew, had grounds of dislike to her future daughter-in-law; and was averse to the connection. But what turns out to have been the fact in this respect? It seems that Mr. Dew had two sons, each of whom was a wooer of Miss Stott, and that as one only of the two could, in the nature of things, be the successful wooer, the other (to his own future regret) was betrayed (by envy and malice, I am sorry to say) into misrepresentations of Miss Stott, by which to a certain extent, for a time at least, the mother, Mrs. Dew, no doubt, was prejudiced. But the whole effect of that prejudice soon subsided; it was at Mrs. Dew's special request and invitation that Miss Stott, after a short absence occasioned by those misrepresentations, returned to Mr. Dew's; and she was married from that house, in the presence of Mrs. Dew herself and of the principal members of Mr. Dew's family, both male and female.

The Court has now gone through the whole of this part of the case—with the exception, however, of what still remains to be said as to certain exhibits in the case connected immediately with this part of it.

It is expressly pleaded by the nephews in support of their charge of such misconduct on the daughter's part, as is to account rationally for whatever severity she might have been treated with by the father, that she, the daughter, "frequently made to her father voluntary promises, as well written and verbal, that she would attend to the rules which her father laid down—would exert herself to correct her vile [159] disposition and bend her stubborn will—would strive, night and day, to regain his lost affections, and to feel in return that affection for him which she never had felt." And in proof were exhibited five several letters from his daughter to the deceased, containing such admissions of misconduct, and accompanied with promises (pleaded never to have been kept) of such reformation and amendment.

In reply to this, it was admitted and pleaded by the daughter that she did make the confessions and promises alluded to, but that such confessions were not voluntary —that they were extorted from her by previous harsh treatment and its threatened repetition; and were written by her when in a state of great mental anguish and anxiety, under either the deceased's own immediate dictation or that of persons to whom he had previously misrepresented her conduct and character. For the promises, she pleads that it was her constant endeavour to fulfil these—but that all her efforts to please him were rendered unavailing by that fatal delusion under which, quoad hanc, she charges the deceased at all times to have laboured. Which, then, of these is the true state of the case; and which representation is the Court bound to adopt upon the evidence?

Now I must say that the mode in which it appears by the evidence that the deceased was in the habit of procuring, or rather extorting, confessions and admissions of this sort from his daughter leaves no doubt whatever in my mind on this part of the case. Almost from her infancy was this unhappy child to account to her scarcely less unfortunate father not only for all her actions, but for all her thoughts —she was to com-[160]-municate to him from time to time the most secret, transitory thought that arose in her mind, &c.—and some supposed prevarications on her part in this latter particular were the pretexts, it seems, on several occasions for the horrid barbarities proved to have been actually inflicted upon her by the father in certain specific instances. And indeed I may almost say that, according to the testimony of nearly all the witnesses (twenty in number) examined on the part of Mrs. Dew, this "withholding of her thoughts from him or prevaricating in her account of

them," as he insisted, were the only specific proofs of rebellion, unnaturalness, depravity, &c. &c., which the deceased, when put to it, was ever able to object to her. But to the mode in which confessions and admissions of the sort in question were actually procured by the deceased. It will be sufficient to refer to the evidence of one or two witnesses on this head; as their testimony is in substance and effect precisely that of all the witnesses to this part of the case.

"The deceased," says the witness, Martha Wright, "did require from his daughter a regular account of her thoughts—she was to write out for him a confession of every thing that she did amiss, and also an account of all that passed in her mind. He told the witness that he did all this in order to shew his daughter the depravity of her heart—and she has frequently heard him saying, 'You know what a depraved, bad girl you are'—to which Miss Stott would answer, 'Yes, papa'—a good deal of that kind passed—he called her a depraved wretch, &c.; but Miss Stott never made any other reply than 'Yes, papa.'" The witness says indeed that she cannot [161] depose to his having "compelled her to write a confession of any crimes or sins of which in his delusion he imagined her to be guilty"—of "every thing she did amiss," as also of "all that passed in her mind," we have seen that he did require his daughter to write confessions, according to the testimony of this witness.

The witness, Nicholson, says that "when the deceased went out, which he always did in the after part of the day, Miss Stott was shut up in his study to write an account of her thoughts; the witness saw many papers which she wrote on such occasions. No sooner did the deceased return than his daughter was to appear before him with this written account; and the witness dreaded his return for his daughter's sake. As sure as he returned the storm began—he stamped on the floor fit to break it through—thumped on the table with his fist, &c., so as to make her, the witness, shake. No one can, from mere description, have an idea of his violence on such occasions. The witness never was present when the deceased actually chastised or struck his daughter; but she many times saw severe marks of violence on her person, which came, she has no doubt, and could only come, from blows inflicted on her by the deceased." I should say that, although this witness lived eleven months in the deceased's service, Miss Stott was at home only about three months of that time. She then quitted him, as already more than once said, under the sanction of Sir Thomas Barnard. She describes him as, on that occasion, like a man raving wild, but whether this were owing to displeasure with his daughter for leaving him; or whether to regret on his own score, [162] "for the loss of his victim," she, the witness, declines saying. The evidence of Mrs. Duplay, and of some others, is precisely corroborative of this of Wright and Nicholson. But there are other witnesses again whose evidence is still more material on this head, as coming, more directly, to written confessions made in the (personal) absence altogether of the father—of the nature of which are the exhibits in question annexed to the allegation of the residuary legatees.

It will be recollected that, on Miss Stott's first escape from her father's, under the present terror of a severe threatened punishment for not doing what, it should seem, she was unequal to perform, she took refuge with a then patient of her father's, who had a daughter about the same age with herself, Mrs. Ottley. She remained at Mrs. Ottley's on that occasion about three months. "During that period," says Mrs. Ottley, "the deceased required her to write letters to him—she was particularly to give him an account of all her thoughts, &c.; he wrote also a great variety of questions for her to answer; the purport of these was, 'Don't you do so and so; or, don't you think so and so?' so as to lead to just such answers as he pleased; proposing the question and at the same time suggesting the reply; and his daughter dared do no other than obey."

Miss Stott was at this time probably twelve or thirteen. Now to the evidence of a witness who carries down this system (for so I am warranted in calling it) to a time when Miss Stott had finally left her father. The witness I refer to is Miss Atkinson, who was a teacher at Miss Brent's school at Westminster; where [163] Miss Stott, after quitting her father, had been placed by Sir Thomas Barnard.

She says, "That while Miss Stott was at Miss Brent's she kept a journal, and wrote letters to her father, the contents of which were the subject of a good deal of conversation between her and the witness. The witness saw several of them. She cannot depose that what Miss Stott then wrote was written by command of her

father, but she verily believes it; as no young woman could otherwise have so written. Her answers were shaped so as to please her father—always in a humiliating strain; confessing her sinfulness, and so on. The witness has also seen letters from him to her in which she was required to confess to him her thoughts, words, and actions—particularly, he required confessions from her that she was vile, wicked, wretched, abandoned, and the like." Miss Stott at that time was one or two-and-twenty.

But to obviate any possible doubt, if any possible doubt can exist, on this part of the case, it is only necessary that the Court should refer, finally, to the evidence of Mr. Goff. This witness's long intimacy with the deceased, and that his daughter was resident in the witness's family, at the age of about fourteen or fifteen, for nearly two years, between 1803 and 1805, has already been stated.

This witness deposes, on the tenth article of Mrs. Dew's responsive allegation, that "he knows less himself, than he has heard from others, of Miss Stott having written to her father in the language articulate"—[i.e. that she was a vile wretch, &c. &c.]. "When about to write to her father" [this witness, I **[164]** should say, had formerly deposed that although the deceased, on placing his daughter with him, had promised not to interfere with her in any way, yet that she was scarcely with him when he began to harass him, the witness, and, I presume, also his daughter, with letters and interrogatories, &c.—but to return—when about to write to her father] "she, Miss Stott, repeatedly asked the witness what she should say, and was willing to write any thing to conciliate him; but the witness never actually interfered or advised her in that respect. Exerting herself to 'correct her vile disposition'—'doing her duty to her father'—'bending her stubborn will'—'striving most assiduously night and day to regain his lost affections'—[though," says the witness, "this she truly did] are expressions which were constantly in the deceased's mouth; and could only have been adopted by his daughter to please him; as every one who had any intercourse with him about his daughter must know. From the closest observation of her conduct, and all the witness ever knew of her—from his knowledge of the deceased's treatment of her, and of her suffering and terror under it; such that the witness is astonished that she did not fall a victim to it, in one way or other—the witness is sure that nothing she wrote in the way of confession, or in terms of acknowledgment of vileness, stubbornness, or the like, ought to be taken to her prejudice; or as being any thing more than expressions, dictated by the deceased, or used by her, as borrowed from him, in the hope of softening and appeasing him; though all her efforts to this (and she did all," says the witness, "that human nature could do), were rendered unavailing by that in the **[165]** deceased's mind which poisoned every thing, and found, even in compliances with what he expressly required to be done, only fresh grounds of hate and animosity." The witness cannot swear, he says, that the deceased required her to write in that "particular strain, or to use those particular expressions; but he certainly did, in his letters, so express himself, though artfully and ambiguously, as to lead to answers in that strain—he used to write that if she had a just sense of her vileness, she would do so and so, or promise so and so," &c.—speaking precisely, in short, as the witnesses Ottley and Miss Atkinson had spoken on this head.

One more instance, connected with the present immediate subject of inquiry, out of the evidence of this witness, and I have done.

The nephews expressly pleaded in the twelfth article of their allegation that, during the residence of Miss Stott in the family of Mr. Goff, she, Miss Stott, succeeded (as she had also succeeded in the instance of other of his friends) in creating, by her artful misrepresentations, a great and unfounded prejudice, in the mind of Mr. Goff, against the deceased; which at length occasioned a total destruction of their long-established friendship—and this, by inducing Mr. Goff (as she had also induced others) to believe that the deceased really treated her with unmerited harshness and severity—in order to which she both wilfully misrepresented the conduct of the deceased to her; and artfully palliated, or altogether concealed, her own delinquencies. They also expressly pleaded that she, Miss Stott, some time after leaving Mr. Goff's, confessed her falsehood and duplicity in these particulars; **[166]** and voluntarily wrote and sent him a letter in which she entreated his forgiveness for such her misconduct while resident in his family. And the letter itself, so pleaded to have been written, is exhibited, in supply of proof, in the usual form. The counter plea to all this, on the part of Mrs. Dew, is, first, a denial of the facts so pleaded: and secondly,

an averment that the letter in question, which she admits to be her's, was written by her under intimidation, and not voluntarily; and by the express order and directions, which she did not dare disobey, of the deceased himself.

Now, upon this twelfth article of their allegation, the single witness produced by the nephews is Mrs. Desormeaux—and it is but due to the nephews that her evidence upon it should be stated; before I proceed to what is deposed by Mr. Goff himself on the daughter's counter plea.

She says, then, on this twelfth article of the allegation, that all she knows of the circumstances therein pleaded is that the deceased in a letter to her written (as it should seem) about that time, mentioned his having placed his daughter at Mr. Goff's, at Edmonton—and she then proceeds in the following words:—She says, "she heard, both from the deceased himself, some years afterwards, and also from Mr. Goff, that such misrepresentations had been made by Miss Stott of her father's conduct towards her; and her own misconduct had been so artfully palliated that the said Mr. Goff believed that her father was treating her with unmerited harshness and severity; and it ended, finally, in a termination of the friendship between Mr. Goff and the deceased." It need scarcely, perhaps, be said that the whole **[167]** stringency of this piece of evidence consists in the words on which the Court has dwelt [and also from Mr. Goff]: for what the deceased himself told this, or any, witness on this or any such subject has, for a reason that has been given over and over, nothing whatever to do with the question.

Now, then, to the evidence of Mr. Goff himself on the counter plea—which, viewing it in connection with his whole deposition, so completely, of itself, in my judgment, disposes of the question [and this, in spite of what Mrs. Desormeaux, whether from forgetfulness, or misconception, or what else, I do not stop to inquire, represents herself as having, sometime or other, heard from Mr. Goff] that the Court may safely venture to leave it without any comment, which could only weaken its effect—and may conclude, or nearly so, with a bare statement of this, its inquiry into this part of the case. That evidence is as follows:—

"He can," the witness says, "and does, positively depose that Miss Stott never did, either by representations of the deceased's conduct towards her, or by palliation, or concealment of her own misconduct, or by any other means, induce the witness, or, to his knowledge or belief, any other friend of the deceased, to believe that she was treated by the deceased with unmerited harshness or severity. She did not, during her residence in his family, attempt to create in his mind, or that of his late wife, any unfounded prejudice against the deceased; on the contrary, she concealed much of what the witness knew, from the deceased himself, of his treatment of her; and made, on all occasions, favourable suggestions for him: she was, to the witness's knowledge, **[168]** treated with unmerited harshness and severity. She merited the reverse of what she experienced—and his behaviour towards and punishments of her, as seen by, and described to the witness by the deceased himself, were such as no misconduct even, on her part, could have justified. The witness has no reason to believe or suspect that Miss Stott ever attempted to impose on him, or any one, on the subject in question; or that she ever said any thing upon the subject that was not strictly true, except when palliating some of her father's enormities. The deceased, indeed, often attempted to persuade the witness that she, the daughter, imposed upon the witness—that in her promises to comply with his, the deceased's, wishes, and to follow the witness's advice, she only deceived the witness—that it was finesse, insincerity, and hypocrisy, and artfulness—an artfulness exceeding all belief on her part; but he, the witness, knew the contrary of all this. He did receive," he says, "a letter from her to the effect of that articulate—he never had a doubt that such letter was not her own—the witness full well knew that it could not be her's; the confessions and declarations contained in that letter are wholly unfounded and untrue. The witness had previously determined not to be again on any terms of intimacy with the deceased, and was resolved to shew him this; not, however, by reason of anything his daughter had ever said, but by reason exclusively of his, the deceased's, own conduct." This, in chief, in answer to an interrogatory addressed to him, on the part of the nephews, on the same subject, he says, "The producent," Miss Stott, that is, "was the innocent occasion of his, the witness's, friendship for the **[169]** deceased being finally broken off: this, however, was not in consequence of any representations made by her, but because the witness was tired out. She did, after she ceased to reside in his family,

confess, first by letter, and afterwards by word of mouth, that not only many, but all, the representations that she had previously made to the witness of her father's conduct towards her were totally false; she did express contrition for having made such representations; she did earnestly solicit the witness to renew that intimacy with the deceased which she, herself, she said, had been the occasion of destroying; she did write and say all this as interrogate; but the witness knew that not one word of this was her own; that the whole of it was put in her mouth and extorted from her by her father."

The Court abstains from making any comment upon this evidence of Mr. Goff, for a reason already suggested. But, previous to finally dismissing this part of the case, some observations may still be proper on such of the exhibits, annexed to the allegation of the residuary legatees, as purport to be letters from the father; those hitherto observed upon purporting only to be letters from the child.

It may be remembered that the Court has already said of these, generally, upon what their ultimate effect upon the question at issue really depends (vide page 99, ante). It depends not, I repeat, upon their furnishing proofs, how ample soever, that the writer was a person capable of reasoning correctly, and deducing right conclusions —it depends on the premises assumed by the writer, on which to found his reasonings, and from which to de-**[170]**-duce his conclusions. Of what nature are these premises? Do they argue him "sui compos" in possession of the "mens sana," on the one hand; or, on the other, are they such as infer him a person of deranged intellect? That is the true question—for the rest we have heard from Mr. Lock (vide page 92, ante), and we all know that madmen may, and not unfrequently do, argue rightly enough; so that the effect of exhibits of this nature, the productions of an alleged madman, on the question of his sanity, I again say, depends, not upon the shrewdness of his inferences, as to be collected from these, but upon the soundness of his principles. If this be, however, the true test, as I take it to be, the exhibits in question, instead of inferring the deceased's sanity, tend themselves to impeach it. For I may now say, after that ample discussion which the evidence on this head has just undergone, that there is scarcely a passage in any one of these exhibits, where mention of the daughter occurs, not bottomed on a visibly disturbed and disordered imagination.

In the first place, I can hardly think that very much of this is not discoverable in the general tone and character of these exhibits; without going into particular passages. Take, for instance, the very first exhibit: what, throughout, is the general tone and character of this? It begins, "Charlotte—I write not to please you, or to satisfy the curious, busy world, but to acquit my conscience of a duty I owe to God, to you, and to myself . . . you have revolted once more from duty, obedience, and true affection —you fly in the face of heaven from the protection of a tender, kind, and too indulgent parent—a parent who has manifested **[171]** his love from the first dawn of your infancy." [I should say that the nature of this particular "revolt" does not appear; nor does it, indeed, appear where Miss Stott was when this letter was written. It was written, however, previous to her leaving Mrs. English's, at Hampstead; being dated the 23d of January, 1822, in the middle of which year, only, she left Mrs. English's; accordingly, it was previous to that misconduct, in consequence of which, as alleged, she actually left Mrs. English's—a circumstance which is to be kept in mind, for a reason that will presently appear. Meantime, of the modes in which this "tender, kind, and but too indulgent parent" was in the habit of "manifesting his love" to his daughter, "from her infancy," sufficient may be judged from what has been recited out of the evidence—but to proceed with the letter.] " . . . You say, in my illness, I told you that you was indifferent to me; this is an untruth which my conduct even at this moment contradicts; for if you could be indifferent to me, the kind hand of mercy would not be held out, in preference to the hand of justice, which ought rather to overtake and punish you for your crimes, your matchless crimes— . . . Can you say I have not just cause to be offended? and who is to redress me? Am I to hold out the olive branch of peace and forgiveness, to a yet hardened, and relentless sinner? Do not deceive yourself—that will not be—the feelings of a tender parent shall bend even his gray hairs to the grave, in support of his duty—his conduct is to be scrutinised before an awful judge—to that judge, he refers his cause, and he fears not of yet meeting a reward. . . . You know the base part you have acted— the numberless **[172]** crimes you have committed, &c. While I live, I will persevere in my plan and observe consistency," &c. Now, I really think that a letter so written,

from such a father to such a child, scarcely fourteen years old, even in the general style of it, which may readily be conceived from the above extracts, savours of delusion: and the same or a similar observation applies, more or less, to nearly every exhibit, the production of the deceased, on the subject of his daughter; or where mention, I might almost say, of the very name of Miss Stott occurs.

Of the true inference furnished, by specific passages of these exhibits, on the question of the deceased's sanity or insanity, one instance must suffice.

The exhibit, No. 24, annexed to the allegation of the residuary legatees, is in the shape of a letter, addressed by the deceased to Mrs. Desormeaux, dated on the 10th of March, 1803. It appears by the letter itself that Miss Stott was then resident at Mr. Goff's—and it also should seem, from this, that the writer was at that time upon distant, and by no means upon familiar, terms with the party written to. It is addressed, in fact, as to an almost total stranger, being in these words:

"Mr. Stott has never failed to make constant inquiries after Mrs. Desormeaux; is extremely happy to hear, through the medium of Mr. Titford, that her health is so well established—it is to be hoped that her temporal (as there can be no doubt that her eternal) peace of mind bears an equal proportion; may each be continued as long as she desires to be useful on earth—the like good will and good wishes are **[173]** extended to her family and connexions throughout. Mr. S. would not have broke silence, which has been deemed necessary, had he not learned that Mrs. D. expressed a satisfaction on her hearing where Miss Stott is placed, and wishing that her education may be carried on under proper masters, appointed to attend her, in her present retirement, for that purpose. Mr. S. is thoroughly convinced of the genuine principle, and goodness of disposition, in Mrs. D., for which he ever has, and always will retain, a proper sense of acknowledgment.

"Miss Stott being dismissed from the school at Hampstead, at which place it is to be lamented that her vicious habit had gained strength equal to her years, Mr. S. placed her for the time being at Mrs. Dutton's farm-house in the country, and advertised for a situation. He was answered by nearly two hundred applications.

"This caused him to travel above one thousand miles round the metropolis, without gaining the wished-for asylum. The circumstance of expense was and is the least consideration; for her board only he now pays fifty guineas.

"To promote the establishment of her mind in a good, solid, and virtuous education, many things must be considered. First, there must be a disposition to learn; a want of this disposition is so manifest she will not take a book of any kind in her hand to study; and she declares to Mr. Goff that no force shall prevail to oblige her. Secondly, where can masters be found, supposing she had a proper disposition, whose integrity may be such as to resist temptation? Mr. Goff asserts he is obliged fre-**[174]**-quently to exert himself to preserve a proper distance; and that she is not fit to be placed in any house where a man resides. She asks for masters, saying she cannot learn without; no doubt they might be useful; but might not the trial be attended with evil instead of good? She works at her needle, will do any thing in the house, even to drudgery; but because the refinement of her excellent mind is held out as a qualification to render her life valuable to herself, her father, and to society; Mr. S. says, because it is so suggested and pressed home, she is determined it shall not be so: such is the perverseness of human nature.

"Mr. S. would be happy to receive Mrs. D.'s sentiments on this most unfortunate subject, in writing, whenever she has a disposition and leisure to oblige him therewith: in the multitude of counsellors there is much wisdom. Mr. S. prays fervently for divine direction, and uses his best endeavours to submit himself patiently; waiting for the great purpose which he is convinced his Heavenly Father has herein in view.

"Mr. S. sends Mrs. D. the result of the proceedings of the Society for bettering the Condition of the Poor; should there be any wanting in her set, he begs to be acquainted therewith that the same may be rendered complete.

"10th March, 1803. Hart-street."

The above is the letter, or exhibit, itself. Now to the evidence of Mr. Goff, who, it will be seen, is **[175]** vouched as the deceased's informant to no insignificant part of the grave charges which he, the deceased, is preferring in this letter against his only child—preferring them, too, for no earthly reason, that I can conceive, to a mere stranger, were the charges themselves ever so true. But to the evidence of Mr. Goff as to the truth of these; on the daughter's plea, formally denying them to be true.

Of the conduct, generally, of Miss Stott, during her residence in his family, according to the opinion of this witness, enough has already appeared. He deposes, in a word, speaking of her conduct chiefly during that period, that she uniformly behaved with the greatest decorum and propriety—that "her general temper was very good—her principles, habits, and conduct strictly moral and virtuous;" in short, that, "if heaven had blessed him with a daughter, he could only have wished her to resemble Miss Stott." But the part of his evidence to which I now more particularly refer, is that which relates to the representations which he is vouched, in this letter to Mrs. Desormeaux, to have actually made to the deceased, on the subject of Miss Stott's aversion to study, and precocious sexual propensities, whilst so resident in his family. What he deposes on this head is as follows:—

"The witness never," he says "stated to the deceased, or to any person, that Miss Stott had declared, either to him or to others, that no force should prevail with her to take a book in her hand to study; or any thing to that or the like effect. The witness never did, on any occasion whatever, assert to the deceased, or to any other person, that he was obliged frequently, or ever, to exert himself to keep Miss **[176]** Stott at a distance; or, that she was unfit to be placed in a house where a man resided; or any thing to that effect—the witness never said any thing of the kind—what the deceased wrote on that head, if he did so write, in the letter referred to, is false; the deceased frequently attempted to make the witness say that such was the fact, but the witness never did—if he had so said, it would have been a gross calumny against her. The witness never saw any thing approaching to indelicacy, or indecorum, in her conduct or conversation; or the slightest departure from what was perfectly correct, and becoming a modest and virtuous young woman."

Such is Mr. Goff's evidence upon the subject of this letter, of which it is impossible to doubt the truth; not only from there being nothing whatever in the cause to impeach his credibility; but, still more, from the circumstance of his evidence, on this particular head, precisely according with his whole evidence to the conduct and character of Miss Stott; and from this, again, as precisely according with that of a host of witnesses, deposing in this cause, on the same subject, to the very same effect. Accordingly, I am bound to conclude that the charges in question made by the deceased in this letter to Mrs. Desormeaux, as, very principally, on Mr. Goff's authority, are charges that, at least, have no such foundation. And I add, upon all the evidence, that they are charges which have no foundation whatever in fact of any description.

Having, however, no foundation in fact, to what can the Court possibly ascribe them but to that gross delusion, on the subject of his child, which prompted this unhappy man, among other fancied enormities laid to **[177]** her charge, to heap upon her, almost in her infancy, aspersions of this odious nature in particular; as plainly results from the testimony of several of the witnesses; of the late Bishop of Durham, and of Wright especially. What the Bishop of Durham says, or rather hints, upon this head, has appeared already (vide p. 132, ante); Wright's evidence is both couched in plainer language, and is, itself, more remarkable. This Wright, I should say (Hannah Wright, for there are two witnesses of this surname, the other being named Martha), was staying with the deceased for several months, in the beginning of 1806, nominally as his housekeeper. But it is in evidence that she received nothing for her services; and, as she expresses it, "was glad to get away" from the deceased; so that I can scarcely regard her as a common domestic. At the time of her examination she describes herself as living in her own house, on her own property, which, she says, is more than adequate to her support. Much of this witness's evidence as to the deceased's general notions respecting, and treatment of, his daughter, the Court has already recited; it forbears to recite that part of it more especially applicable to his notions respecting his daughter, in these particulars; being anxious, of course, to give as little publicity as may be to matter of this description. In the language of the witness they were "filthy, indecent, and not fit to be uttered," though, she concludes (an observation not the less forcible, from the witness's homely expression of it), "Miss Stott was as different a girl as possible, in these respects, from what her father accused her of being."

[178] It being clear, then, I repeat, that the gross imputations sought to be fixed on Miss Stott by the deceased, in this letter to Mrs. Desormeaux, have no foundation in fact; the Court, in my judgment, has no choice but to ascribe them purely to

delusion; to treat them as the mere fictions of a disordered imagination; and to regard them (and, by consequence, the letter itself which records them) as evidence of such—unless, indeed, the Court were to resort to [the only other alternative that I see, that of] supposing that the deceased wrote all this to Mrs. Desormeaux, perfectly conscious, at the same time, that Goff not only affirmed nothing of the sort, but the very contrary; that the passages in question are deliberate assertions of so many wilful falsehoods on his part; invented by the deceased for the sole purpose of blasting and calumniating (and this to an almost stranger, and for no conceivable reason) the conduct and character, in so sensible a particular, of a youthful female, of extraordinary hope and promise; and that youthful female his (the asperser's) only child. But, not to insist on the utter extravagance of such a supposition on the face of it, I must say that the case itself supposed would argue, in the deceased, a peculiar venom and malignity, almost, I think, good in proof of insanity, of themselves.

The Court has now, certainly not without pain to itself, travelled through the whole of the evidence to this principal part of the case before it. In stating, and commenting, as it went along, upon that evidence, the Court's impression as to its bearing upon the true question at issue in the cause has, by a sort of necessity, been so fully disclosed, incidentally, that little upon this head remains to be said. To state, however, that im-[179]-pression in form, it is, that the deceased in this cause is fully proved, generally speaking, to have been in a state of delusion, throughout, as to his child's conduct and character, almost from her earliest infancy: and that the attempt on the part of the residuary legatees to account for the extraordinary treatment, which the child is proved to have uniformly experienced, at the hands of the father—namely, by imputing this to gross misconduct in the child, operating upon a peculiar state of feelings and opinions (short of insanity) in the father—has wholly failed. Admit, for argument's sake, that the evidence is really such as to convict the daughter of some sullenness and perverseness of temper; of some unwillingness or inaptitude to profit by the pains bestowed upon her education—of some substantive facts even of youthful indiscretion. It would be impossible to contend that the evidence does any more than this; taking every thing deposed to, on this head, by the witnesses for the nephews, to be true, in its full extent; and putting every thing said by the witnesses for the daughter, in opposition, absolutely out of the case. [At the same time, I must here observe, by the way, that in really taking all this evidence as against the daughter to be true, in its full extent, I should be doing a piece of extreme injustice; even viewing that evidence, per se, and not as contrasted with any adverse testimony. On the contrary, I am of opinion that it is to be taken as true at all, only with many grains of allowance, for several reasons. For instance, Mrs. Desormeaux, whose representations of Miss Stott's conduct and character are, upon the whole, possibly rather less favourable than those of any other witness, with how many grains of allowance her representations, on this [180] head, are to be taken as true, will appear from this consideration. She, Mrs. Desormeaux, fully believed the deceased all along to have been, not only a very clever and a very religious man; but to have been a perfectly sane man, at all times, and in all respects. She still believes him to have been all this; and she has so sworn in her deposition. This witness's opinions, then, in respect to the daughter, I am bound, in common candour, to take as formed, or coloured to a great extent, from the father's representations. I am bound, I think, to approach her evidence on this head, under this impression, in order to arrive at the true effect of it. And the observation applies, in substance, to the testimony of every witness who has deposed, unfavourably, of the daughter's principles and habits; but to quit this digression.] Admitting then, I repeat, for argument sake, the evidence really to convict the daughter of some sullenness and perverseness; some indocility; some youthful levities or indiscretions; still, even this, possibly, might little advance or relieve the case sought to be made out by the residuary legatees. In most cases of delusion the delusion founds itself, originally, on some slight circumstance, the magnifying of which, beyond all reasonable bounds, is nearly or quite as good in proof of its being a delusion as the taking up some absurd prejudice, which is utterly unfounded, or that rests upon no basis. If one whose eyesight is slightly affected conceives, and in spite of all argument persists in, and acts under, a conception that he is totally blind; this, to my mind, is as perfectly a delusion on the part of that one as if nothing at all were the matter with his eyes. If another, the proprietor of a large domain, on the loss [181] of a comparatively

small portion, is convinced to himself that he has been deprived of the whole of it—if he persists in that conviction, in spite both of argument and of evidence to the contrary—not only so—if he suffers that conviction to poison and preclude his enjoyment of the ample portion that still remains to him, during and throughout all the rest of his life, this, in my judgment, is as essentially a delusion on the part of that other as if he were still in possession of every acre of his original estate. So, if the parent of a child really blameable to a certain extent, in some particulars, takes occasion from this to fancy her a "fiend, a monster, an incarnate devil;" if, moreover, he be found through his whole life acting under and upon that conception—[to the destruction both of his own and of his child's peace and happiness; and to the actual horror of every one really acquainted with the excesses into which that fancy has betrayed him; which is this case]—such a parent is, I should say, as much in a state of morbid delusion, and so of insanity, in regard to that child, as if the child's conduct were wholly irreproachable. Hence, a finding of the daughter guilty, to the utmost arguable extent, upon this evidence would still leave the effect of the whole evidence upon the question of the deceased's sanity pretty much what, in my judgment, it actually is. But it is only for mere argument's sake that any thing of the sort supposed can be admitted: there is nothing whatever in the evidence to found it. On the contrary, it is my judgment, and Mrs. Dew, attacked as she has been, has a right to the benefit of my judgment in this behalf, that she has come out of that fiery ordeal to which she has been subjected in the course of this inquiry untouched **[182]** and untainted. And viewing the whole evidence, as to this part of the case, I am bound to say that even if the case rested here, I should have no difficulty in pronouncing that the deceased's whole conduct towards and in respect to his daughter, as it stands in the evidence, is irreconcileable with the notion of his having been of sound mind in this particular; making every allowance for any peculiar state of feelings and opinions whatever (short of insanity) by which the deceased may have been actuated—and even for any whatever degree of irritation which the daughter's misconduct (admitting it proved to the full arguable extent) can be reasonably held capable of producing upon a mind so constituted.

II. The Court has now arrived at that other, or second, general head, under which it proposed (see page 104, ante) to consider this whole evidence: and, since the evidence on the first of these has been so fully discussed, this, on the other, will not necessarily detain the Court at any considerable length.

Persons partially insane are usually, not to say always, in a high degree eccentric in their general conduct. Hence it is that great general eccentricity, as the common coincident, being proved, this assists materially in the proof of partial insanity, where partial insanity is suspected to exist. For as persons actually insane in some particulars are commonly highly eccentric in many or most; so persons highly eccentric in many or most particulars are, at least not unfrequently, actually insane in some. People who dwell on the confines of two empires are likely enough to be found in, sometimes the one, and sometimes the other—and they are **[183]** the more likely to be so found when the line of demarcation between the two is under an indefinite and uncertain something, a sort of mist, which renders a transition from the one to the other side of it easy and almost imperceptible—which I apprehend to be always the case in respect of that actual (though invisible) line of demarcation (for some such there must needs be) between mere eccentricity, situate on the one side, and downright insanity, being and lying upon the other: in short, it is next to impossible in such a case to be constantly touching upon the line without ever going beyond it. Taking, then, the other evidence in the cause, as to the deceased's conduct and character—that, I mean, as to his conduct and character in points with which the daughter is unconnected, to the evidence upon which last alone the Court's view has hitherto been confined, is that such, let me ask (for the question may not inconveniently be put in this shape), as to assist in, or present any obstacle to, the proof of that partial insanity (that insanity quoad hanc, as to her, the daughter in particular), the setting up of which constitutes her principal case? A brief consideration of this will, I think, justify the conclusion at which the Court is disposed to arrive, that this other evidence is, not only such as materially to assist in the proof of the daughter's principal case, but that it is even sufficient to sustain her secondary or subordinate case, so to call it (if that were necessary), namely, that the deceased was a person non compos mentis, as to parts of his conduct, in matters with which she, the daughter, had no sort of

connection. Whether, indeed, such other instances of mental unsoundness, supposing this evidence, in the judgment of the Court, to furnish any, would be of avail to [184] defeat the operation of this identical will, is another question, and one with which the Court has no immediate concern; though it will endeavour to state its sense of this, generally speaking, by implication at least in the sequel; when it considers the effect of the whole evidence on the point at final issue in the cause; the validity, namely, or the invalidity in law of this particular will. But first to the evidence, briefly, as to certain parts of his conduct, quite irrespective of the daughter, in which the deceased is pleaded by the daughter to have been, and to have conducted himself as, a person of unsound mind; and so as to subject himself to an actual charge of insanity, from those who were eye witnesses to his conduct in such particulars.

It is pleaded, on the daughter's part, going back, this, to a period immediately subsequent to her own birth, that her mother was delivered of her in the month of November, 1788; a few days only after which the deceased ordered that she should be taken from her bed and washed from head to foot with cold water—that the nurse and others about her remonstrated; but, at length, reluctantly obeyed on the deceased peremptorily insisting that such his orders should be carried into effect—and that the consequence (as might have been expected) was, that under and by reason of such extraordinary treatment, the mother became very ill, and died in a week or ten days. The counter-plea, on the part of the nephews, is a denial of the fact pleaded, and an averment that the mother's death was occasioned by a severe cold and inflammatory fever, produced by her having sat up for a considerable time to have her hair dressed; of which it is pleaded that she had a great quantity. Now to the proofs on both sides:

[185] In proof of her averments on this head the daughter has produced the witness, Phœbe Wall, to whose evidence upon another head the Court has already adverted. Her statement as to this, and to the general conduct of the deceased to this his (first) wife (previously also pleaded, on the daughter's part, in the same, the second, article of her first allegation, to have been extremely harsh and cruel, in its general complexion) is as follows:—

Wall (who has been represented in the argument as a mere girl, but who proves, by a reference to dates, to have been a young woman of eighteen at the period of Miss Stott's birth) deposes on this article, "That she first knew the deceased in this cause about forty years ago, when she was very young" (probably, at this commencement of her acquaintance with him, about fourteen years old)—"she at that time was an attendant upon Mrs. Wellings, who was companion to the dowager Lady Clive, then resident at Englefield in Berkshire. He had married his first wife, Mary Simpson, some time before, but privately; for their marriage was not known." [The circumstances, by the way, attending the consummation of this marriage, as detailed by the witness, Mr. Sheen, from the deceased's own communication, are pretty extraordinary; though I forbear to detail them for a reason that may easily be comprehended—but to return to Wall's evidence.] She says, in substance, though in reciting her evidence I do it principally in her own words, that "her personal knowledge of the deceased was confined to those visits which he was in the habit of paying to his wife at Lady Clive's, about three times a year, of three or four days' continuance each, more [186] or less." She says, "While Mr. Stott was on those visits to his wife, as aforesaid, she saw them frequently together, and saw a good deal of his behaviour to his wife: they were together in the upper servants', the housekeeper's, and the steward's rooms; both at Englefield and at Kelvedon in Essex; where Lady Clive removed a few months before Mrs. Stott's confinement. The witness remembers well Mrs. Stott was in tears almost the whole time that her husband was with her—from the time his letter was received, to say he was coming, her life was wretched: his conduct to her was most unfeeling and cruel—so perverse and extraordinary that the witness always believed him to be deranged—and the witness was confirmed in her belief, by what others, her elders, also believed in this respect. Mr. Martin, the very respectable house-steward of Lady Clive and others, always said of him" (a prediction, we have seen, in effect verified in the result) "that 'he would die in a mad-house.' Mrs. Stott was a fine-grown, elegant woman; and of such a very sweet disposition that everybody loved her. Mr. Stott's conduct to her was exceedingly harsh; continually tormenting her, and delighting, as it seemed, to make her miserable—quarrelling with her about the most trifling matters, and without any cause. He

would find occasion to quarrel with her if any little part of her dress was not put on to please him—she would alter it any way he liked—she would do anything to please him, but could never succeed. He would quarrel with her—she answered him meekly and prettily; but the more submissive she was the more he was aggravated; and he put him-[187]-self in such passions as to be quite ungovernable. His conduct was very strange about the letters which his wife wrote to him. She saw Mrs. Stott, on more than one such occasion, when she had received a cruel letter from the deceased, returning all the letters which she had written to him (on one occasion more than twenty, and another parcel on a subsequent occasion), ordering her to write them all over again, because of some little faults which he pointed out; and because the writing was not good enough for him." [Up to this point the evidence of Wall is confirmed by that of a most respectable witness, Mrs. Wellings, her (Wall's) more immediate mistress at Lady Clive's—whose evidence to the temper and conduct of Mrs. Stott, and to her sufferings under, and in consequence of, her husband's unmerited harsh treatment of her is precisely in substance accordant with that of Wall. But to proceed with Wall's evidence.] "The deceased frequently," she says, "made his wife stand in his presence; even when she was pregnant, and her legs swelled so, that it was painful to her to stand: he would make her stand before him, though she scarcely could, and trembled all the while; indeed she trembled at the very sight of him; she was afraid at times of her life; and the witness remembers her even requesting that some of the servants would sleep in the next room to them to be ready to save her; and they did so. His conduct, in all these particulars," she, the witness, says, "could only be ascribed to derangement; and that was the opinion of every one in Lady Clive's family, where he was frequently called or spoken of as 'Mad Stott.'" The above is Wall's statement to this part of the case [188] generally; her account of Mrs. Dew's birth, and what ensued upon it, is, with some curtailment, in the following words:—

"Mrs. Stott was delivered of her daughter, the present Mrs. Dew, at a cottage situate a short distance from Lady Clive's. Mr. Martin, the house-steward, and his wife went immediately to the cottage, and took the witness with them. As soon almost as they arrived, and while below stairs, Mr. Stott brought down the infant, quite naked" (I omit a circumstance as to his own personal appearance on the occasion), "exclaiming, that 'he had done his part.'" [Mr. Stott, it will be recollected, was no medical practitioner at this time, or ought to have been present at, much less to have interfered in, his wife's actual delivery.] "It shocked the witness and others," she says, "to see his conduct; and he boasted of what he had done, and talked and behaved in such a way as to make the witness, and Mr. and Mrs. Martin (who are both dead) consider him deranged at the time. A few days after," she says, "she, the witness, having gone alone to the cottage to see Mrs. Stott, found her just put to bed again, after having been washed in cold water—the witness did not see it done—but she saw the water, and the cloths being then put away. Mrs. Stott told the witness what had been done to her—that Mr. Stott had had her out of bed, and washed her; and that she was afraid she was injured—that she had entreated his forbearance, but to no purpose. On the witness asking the nurse 'why she permitted it,' her answer, she well remembers, was, 'Lord, madam, I was so frightened at the man.'" Mr. Boodle, the surgeon who had [189] delivered her [who had partly delivered her, that must mean; for the circumstance in his appearance, which I have omitted, proves that the deceased himself must have also taken an active part in this], "came in about an hour, and was very angry with the nurse. The nurse, who was a poor trembling woman, excused herself by saying that she was 'so frightened at Mr. Stott.' Mr. Boodle expressed his fears that her husband had killed her. She swelled soon after; and, in a few days died—from cold," says the witness, "which she had taken from that washing, as she, the witness, feels very confident."

Such is Wall's evidence to the conduct of the deceased in this particular—and also to the impression made, at that time, on those who witnessed the deceased's treatment of this, his first, wife, the mother of the present plaintiff, generally; in which she is confirmed to a great extent, as already said, by Mrs. Wellings.

On the nephews' counter plea, contained in the fourth article of their allegation, responsive to that first given in on the part of Mrs. Dew, two witnesses have been produced and examined; Mrs. Desormeaux and Mr. Paternoster.

Mrs. Desormeaux says that she knows nothing of the deceased's treatment of his

first wife, whom she never saw; having only become acquainted with the deceased many years after her death: but the deceased was in the habit of speaking of her in terms of the warmest affection and attachment; and appeared to have felt the loss of her severely; and he always kept a miniature of her hanging over his parlour mantle-piece. "He has," she says, "when speaking of her **[190]** death to the witness, told her that it was occasioned by a violent cold and inflammation, caught during her confinement, by sitting up a long time to have her hair dressed, as she wore her hair very long."

The evidence of Mr. Paternoster on this fourth article of the nephews' allegation is much to the same effect as that of Mrs. Desormeaux. He, too, never saw the first Mrs. Stott—but judges that the deceased was an affectionate husband to her, from the tenor of his own declarations in that respect. "He remembers her death," he says—"that it took place about a twelvemonth after he became acquainted with the deceased; and that she died in child-bed." He goes on to say that "he perfectly recollects the circumstance of the deceased being accused, at the time of his said wife's death, of great want of judgment in some plan which he was said to have recommended for her—he believes it was her washing in cold water soon after her confinement—and that it occasioned a chill which produced inflammation, and terminated fatally; but the deceased, who was aware of the report as well as the witness, positively contradicted it; and said that the fault, if there was any, was her own—for that she would have her hair combed and dressed; and that the length of time occupied by this gave her the cold of which, in the end, she died."

Now so far is the testimony of these witnesses from inducing the Court to suspect (in substance) the truth of Wall's narrative that it even furnishes, I think, a material confirmation of it. It results, from the testimony of the last of the two, Mr. Paternoster, that a charge of this nature (an utterly unfounded charge, I can scarcely suppose) was, at the time, preferred **[191]** against the deceased. And that the deceased should have had art and cunning enough, in his own vindication, to Paternoster, and others probably, to invent this story of the "hair dressing," by way of meeting the charge so preferred, is quite consistent, both with the fact itself, as deposed to by Wall, and with Wall's suggestion (in which the Court is quite disposed to go with her), that the conduct of the deceased in relation to that fact could only be founded in (and consequently is evidence, even at that time, of) a disordered imagination in the deceased. And the story being once invented, the deceased, of course, would persist in it to his friend Mrs. Desormeaux. In short, when I balance the two stories in point of probability, that of Wall, looking to all the evidence in the cause, is so infinitely more probable, than that the mild, persecuted creature that the first Mrs. Stott is described to have been should pertinaciously have insisted (in spite, I must presume, of argument and entreaty to the contrary) on sitting up in bed at the peril of her life, a few days only after her delivery, to "have her hair dressed," which is the deceased's version (and, after all, is only the deceased's version of the story, and so no contradiction in substance of Wall's)—that I have no scruple whatever in subscribing to the substantial correctness of Wall's narrative; and of making the same unfavourable inference to the deceased's sanity at that time made by Wall, herself, and by others, as she deposes, eye-witnesses of the deceased's actual conduct in respect of the matter narrated.

It can never be expected that the Court should travel with this minuteness of detail through the several similar transactions (similar, I mean, in their bearing, in **[192]** my judgment, on the question of the deceased's sanity) that disclose themselves in the course of this bulky evidence. Such, for instance, as the whole transaction between the deceased and Mr. Willatts—whom, though a perfect stranger, the deceased, in the year 1813, accosts, as he is coming out of St. John's chapel, in Bedford Row, and invites to accompany him home—to whom, learning that he is under difficulties, he immediately advances 4500l.: and in the end 12,000l., at first without any security—and whom he insists at times on living with him, declaring that he will make him his heir, and leave him all his property, &c., for the best part of two years; when this strange connection between the deceased and Willatts seems to have ended, almost as unaccountably on the deceased's part as it began. But in satisfying itself with this general reference only to the whole transaction between the deceased and Mr. Willatts; and in omitting, altogether, the evidence to some other similar transactions (as explained above) detailed in the evidence; the Court must be understood as doing

this for brevity's sake only—the true inference to be deduced on the question of the deceased's sanity, from each and every of them, being in its judgment that which the Court has already deduced from the whole conduct of the deceased, as spoken to by the witnesses towards his wife, the first Mrs. Stott. There are still, however, some few particulars so important in this respect as to require being, at least briefly, adverted to—and, however it may be said of them that they are unsatisfactory, on a question of this nature, taken separately; still it can never be denied that, taken collectively, they are forcible to, or even conclusive of, the question. **[193]** The particulars to which I principally allude are those which appear in the evidence, on this part of the case, to the deceased's religious notions, viewed in connexion with his (surely in parts of it) most irreligious and profane conduct—and to his extravagant and I must say insane fancies (for I know not what else to term them) about electricity.

(I.) The deceased is pleaded in particular by the nephews, as already said, to have been imbued with peculiar, but at the same time highly rigid, notions on religious subjects: and certainly, so far at least as respects a mere form of godliness and external observances, their allegations on this head are borne out by several of the witnesses; as by the witness Mrs. Desormeaux, by her daughter, and by some others who have been examined on this part of the nephews' plea—who also indeed fully believed, no doubt, both that the deceased's views on the subject of religion were correct, and that his practice corresponded with his principles and professions in this particular, as they have severally deposed. And several of Mrs. Dew's witnesses, as Mrs. Duplay, Goff, and others admit, that the deceased was strict in religious ordinances (not, indeed, in their view of him in his religious duties)—that he was urgent with others to attend to these—and that he was fond of talking of religion, and of expressing himself in figurative, scriptural language. But how wild, how irrational, how palpably insane on this whole subject, as well the notions as the actual conduct of the deceased really were, clearly results, I think, from the evidence taken on the part of Mrs. Dew—evidence of which it is impossible to suspect the truth, from the numerous witnesses who furnish it, though **[194]** each singly credible; and from those numerous witnesses all deposing, without any semblance of concert, in perfect consistency.

Take, for instance, Hannah Wright's evidence connected with this subject. "The deceased," she says, in her evidence in chief, "used to expound the scriptures in the evening to his servants, and then to pray ex-tempore. This in the front room, up one pair of stairs. And the witness has heard people in the street stopping underneath, and talking and laughing about it, while he raved on, his manner was so violent. He prayed for an hour and a half or more at a time, and made such a noise that the witness could not stand it, and has been obliged to get up and leave the room. The deceased used to say that 'it was his prayers that had such an effect on her, that she was unable to bear them;' which, she says, was true, but not in his sense. He used to speak of his power in prayer as being such as could bring down the very angels among them; with more of the same sort. On one occasion he compelled his housemaid and foot boy, a poor ignorant lad, so to pray, ex-tempore. He used to particularise his servants in his prayers; praying for the witness, by name, as a poor lost creature—and once for the boy, Will, whom he told the Almighty could not clean shoes, and sweep the door, as he ought; praying to God to instruct him in such particulars; and give him courage to go through his work, &c. &c." Upon interrogatories she deposes that "the deceased did express himself with fervour on religious subjects; and was particular in attending, in his way, very strictly, to religious duties and exercises, and he urged others to do the same: **[195]** but it was in his own peculiar way—swearing shockingly [by turns], and talking [at times] in the most filthy and indecent manner." The witness had previously deposed that the deceased "was in the habit of uttering, at times, all manner of oaths, and of talking all manner of stuff about girls and so on, not fit to be repeated, and of calling the witness a 'sanctified bitch' for objecting to it." I have already spoken to the general respectability of this witness, and of the truth of her evidence, confirmed as it is, in most particulars, by that of many others, there can be no doubt. She concludes by stating her impression that "the deceased, if he was not a madman, which she fully believes him to have been, was the most wicked of men."

The evidence of all the other servants (of whom six have been examined) who lived with the deceased at different times for different periods precisely accords with

this of Hannah Wright. Take, for instance, that of Martha Wright, who is described in the evidence as an elderly female, "rather a superior person in her station" (a character which she seems to have merited), what does she say on this head? She says "it was chiefly at family prayer that the deceased was in the habit of abusing his daughter; calling her a depraved wretch, &c., and going on in that way till he worked himself into passions, which it was frightful to behold—he would on such occasions shake his fist at her, stamp with his foot, and strike the table violently, while he was pouring forth his abuse of her. She has heard him damn his daughter, with the Bible before him. He did express himself at times with warmth and fervour on religious subjects; but in a way so strange; **[196]** wandering from one subject to another; going from comment on scripture to what was quite nonsense; and all mixed up with such enthusiasm and strange matter as quite to bewilder the witness. He prayed always ex-tempore; at times so loud and vehement as no doubt to attract attention in the street, though she recollects no actual instance of this. With all this, he swore repeatedly both at his daughter and at others."

Again, on this subject of his swearing the witness Barnard deposes that "he has heard the deceased, in particular when he had the Bible before him, which he was attempting to expound, utter oath upon oath. He would read a passage and then ask Martha (Wright) what she thought of it. Martha would answer well enough," the witness says, "in his judgment: but if the deceased thought otherwise, he would fly into a passion, knock the book about and swear at her; and he turned her out of the room on one such occasion." On the subject of his prayers he says "he prayed ex-tempore, and with great violence and singularity—it could not be called prayer; the witness and his fellow servants have been on their knees for as much as two hours together, while the deceased has been rambling and raving in a manner which," the witness says, "he used to consider as blasphemous."

The depositions of some others, as of Ward, Madden, and of Nicholson, are only a repetition of the same thing in other words; but the evidence of Mr. Willatts may still be referred to as strictly confirmatory of what those others, being all severally servants of the deceased, have said on this head. He says, "Under **[197]** any irritation, though not in his common language, the deceased was in the habit of swearing; and his oaths then were, like his other language and manner, vehement and violent. On one occasion the deceased desired to have his boots; they were brought him by his servant boy, a lad about fourteen; the deceased looked at them and said, 'Take them away again;' the boy did so, and was followed by the deceased down stairs, where the witness presently heard him flogging the boy unmercifully. The cries of the boy were distressing, but the witness was afraid to interfere: as the deceased was more than his match, and his passion at the time was ungovernable. In the evening, at family prayer, which was ex-tempore, as usual, a special petition was introduced, that 'God would change the boy's heart (naming him), and teach him to black boots better.' It was the deceased's practice," continues the witness, "to expound a portion of the scriptures to his servants every evening; or rather to attempt it, as nothing could be more unintelligible and absurd than his expositions—then he always prayed ex-tempore; and in prayer, or what he substituted for prayer, he was loud and vehement and extravagant. His prayers were mere rhapsody, but he had a notion that they were excellent; and frequently expressed his astonishment at their having no greater effect on the witness and others. He had a maid servant, Martha (Wright), whom he called upon to pray at times—on such occasions he himself read a chapter in the Bible, and then she began to pray; stopping, however, in the middle of sentences and praying in such a manner as to turn the whole into mockery. **[198]** On refusing, which she sometimes did, the deceased would fly into a passion, and after upbraiding and swearing at her, pray himself."

On this head may also briefly be referred to the evidence of a woman named Burrows. Burrows was in attendance on the deceased in 1810 with her daughter, whom she took to him to be electrified for the palsy. Observing to the deceased on one such occasion that her husband, who was afflicted with asthma, was very poorly; the deceased told her he would die, but added, "Come up stairs with me and I'll pray for him." The deceased accordingly took her up stairs, and gave her a hassock to kneel on: and then, kneeling himself, made a prayer for her husband. The witness forgets the words, but says that the deceased, she remembers, was "very loud and boisterous, and made a deal of noise; and that she did not consider that

there was any devotion in his prayers." On returning down stairs, as the servant opened the door the deceased observed, "Mrs. Burrows, that damn'd fellow of mine is going away;" and asked her if she could recommend him a servant: the witness was shocked, she says, to hear an oath from a man's lips who had just been praying as the deceased had. On another occasion of the witness remarking to the deceased that "Mr. Wilson had given them a fine lecture on the preceding (Sunday) evening," the deceased assented, adding (with reference, I presume, to that lecture), "Yes, I could get no rest all night [I suppose for thinking of the lecture]: the devil and I were wrestling all night; but, damn him, I conquered him at last." "Long ago as it is," says the witness, "she remembers it well."

[199] As connected with this subject may also briefly be adverted to, in this place, what appears in the evidence in respect of those high notions which the deceased constantly entertained of the propriety, in all particulars, of his own conduct; and of the immaculate purity and perfection of his own character. [The Court is not here speaking of his notions of this sort with regard to his treatment of his daughter—as rather belonging to (and partly, indeed, spoken of under) another head. Of these, however, the Court may again observe by the way on the utter absurdity—finding the deceased, as it does, after, and in the midst even of, conduct towards the daughter, such as that already described, uniformly representing himself as the tenderest and most indulgent of fathers, constantly and vehemently protesting to all persons, and upon all occasions, that "he had never harboured an unkind thought towards her"—"never had spoken an unkind word to her"—and that "it was his daughter's misery and misfortune not to be sensible of the blessing and privilege which heaven had afforded her in the possession of so mild and so affectionate a parent."] But the Court is here principally referring to those extravagant ideas conceived by the deceased of his own purity and perfection generally—the more striking as viewed in contrast with those opinions of the "total and absolute depravity of human nature," &c., which he is pleaded by the nephews to have adopted, in common with other rigid Calvinistical principles. For no part of this doctrine does the deceased seem to have considered applicable in his own particular instance—quite the contrary. He, forsooth, is "perfectly good," "perfectly wise," "perfectly **[200]** happy;" it is impossible for him "either to think or do wrong"—the "bare idea of it is insupportable to him"—"his mind," he tells the witness, Mr. Bartlett, "is as pure as his God's, —he is perfect as the Deity."

(II.) The evidence to the deceased's extravagant and, I again say, insane notions on the subject of electricity may be more briefly disposed of. We have already seen him (page 111, ante) actually quarrelling with his friend Mr. Paternoster for laughing at his boasts of "doing more than anybody else with his electricity:" but the deceased, I take it, was far too deep to betray all his fancies on this head to Mr. Paternoster. Such, for instance, as his notion of the feasibility of delivering pregnant women by electricity—an experiment which we have it from an adverse witness, Mr. Pinhorn, that the deceased proposes to try on a baker's wife in his neighbourhood; promising to take his bread of the husband in return for his consent. But the baker not liking, it seems, as the witness (himself a medical man) expresses it, the "shocking" experiment, the deceased's theory on this head is never, that I see, reduced into actual practice—probably, however, only for want of a subject; as I collect from his coolness towards Mrs. Ottley, deposed to by that witness, for declining to furnish him with a subject in the person of one of her married daughters, then near her confinement. In conclusion on this head, it can only be requisite to refer to Mr. Bartlett's evidence on the eighteenth article of the daughter's first plea. He deposes that "the deceased, in speaking of his professional skill to him, the witness, which he was in the habit of doing, mentioned, **[201]** from time to time, instances of cures that he had performed; some of which were highly improbable, and others quite incredible. Among others, he said that a patient, a young woman, was once brought to him to be electrified for a muscular contraction of her arm, so serious as to render the arm perfectly useless. After electrifying her for some time, the deceased, perceiving, as he told the witness, that she had faith to be healed, commanded her to 'stretch forth her arm;' whereupon he added, 'she stretched it forth, whole even as the other.'" The deceased, the witness says, was perfectly serious and earnest in all this; and he was frequently offended with the witness for not placing implicit reliance in his account of "the unlimited power which he considered himself

to possess, of curing all manner of complaints by means of electricity." This according to Mr. Bartlett; so, again, Willatts deposes that "the deceased frequently declared, and seemed to be and was, he, the witness, is confident, fully assured that in his use of electricity he was endowed with and assisted in his cures by a supernatural power." And several other witnesses depose to the same effect.

There is much more in the evidence to the deceased's conduct, in particulars (still quite irrespective of his daughter), which it is impossible, I think, to account for, but by supposing that the deceased was of unsound mind in and upon such particulars. For instance—his squabbles with draymen for riding on the shafts of their waggons; and with drovers for passing with their cattle down his street: squabbles from which it appears that the deceased was glad at times to make good his retreat as fast as, and how, he could—his **[202]** sallies out, with his horsewhip, upon children at play, in his neighbourhood: occasions upon which, it seems, the parties assailed would greet their assailant with shouts of "Mad Stott!" "Mad Stott!" his alternate fits of silence and loquaciousness; of elation and despondency: at times, we have seen, representing himself as not only perfectly good and wise, but "perfectly happy," proposing himself, even, as a signal instance of this—at other times "walking and moping about the house for days together, with his hands behind him, sobbing and moaning"—in short, in a state of utter dejection. Of some particular transactions, again, referable to this head, let the following be taken as a specimen. The deceased insists on liberally rewarding the witness, Mr. Bartlett (as by purchasing a benefice for him, and so on), for trouble taken, and expense incurred, by Mr. Bartlett, in relation to his daughter—and then, by way of reward, he thrusts a crown piece into his hand, which the witness thinks it safer to take than reject; the deceased's manner at the time, he says, being "actually frantic." Again—he tells the same witness that he has applied to the Lord Chancellor (with whom he pretends an interest, in consequence of some miraculous cure performed on one of his daughters) for a living for him—he sends his maid-servant, in the presence of the witness, with his (verbal) compliments to Lady Eldon, begging to know if the living is ready—["the living for Mr. Stott's friend—the living for Mr. Stott's friend"—repeating it over and over in a manner indescribable, the witness says]—and he becomes extremely indignant at Lady Eldon's returning for answer, in effect, that she knows nothing at all about "the living for Mr. Stott's friend" **[203]**—"never troubling his lordship on such subjects." It would be idle, however, to repeat all of this sort that occurs in the evidence; sufficient having been repeated, in my judgment, to justify the conclusion at which I arrive on this part of the evidence—being, as already said, that it not only materially assists, in proof of the daughter's principal case of insanity, quoad hanc; but that it also proves her secondary or subordinate case, so again to call it—namely, that the deceased was of unsound mind in matters, and upon subjects, with which she, the daughter, was wholly unconnected.

(III.) Was the deceased, however, sane or insane in the act, and so at the time, of making his will (vide page 84, ante)? I couple these considerations, as I am justified in doing, for this plain reason: no man can be deemed sane at the time of his doing an insane act—no man can be deemed of sound mind at the very period of doing that which, being done, argues him of unsound mind—either in reason or in law. Now the answer to this question plainly involves the point at final issue in the present cause—the validity or the contrary in law of the will here propounded. Still, in furnishing that answer, and so, in effect, in disposing of this whole case (which is all that remains to the Court (vide page 105, ante)), brevity and perspicuity are happily not so incompatible but that the one is, I think, attainable, without any sacrifice of the other.

Was the deceased then, I repeat, of sound or of unsound mind when he made and executed the will propounded in this cause? in determining which I am to remember that though the deceased is proved, in my **[204]** judgment, as already said, to have been insane at, and long prior to, that time (throughout nearly his whole life) in many particulars—still that he is also proved (indeed, was never denied) to have been sui juris at all times, and sane upon all ordinary subjects, and in all ordinary respects; at least until a period subsequent, by several years, to the date of this, the contested, will. Keeping all this in mind—upon the accumulated matter in evidence before the Court—have the nephews sustained their plea (vide page 84, ante), that the deceased made and executed this will, being of sound mind at the time, on the one hand—or has the

daughter, on the other hand, proved her case that in the act, and so at the time, of his making this will, the deceased was of unsound mind; or, as the law best expresses it, a person "non compos mentis."

The deceased's state of mind at the time of his making his will is intimately, I think, connected with his state of mind on the subject matter of his will—understanding by this the disposal by will of his property. If the deceased were at all times of unsound mind on the subject matter of his will, he must have been of unsound mind at the time of making his will. To suppose the contrary would be to suppose the deceased both sane and insane at the same time on the same subject; a supposition, I apprehend, equally absurd in a legal (vide page 94, ante) and moral point of view. And,

Subject to these considerations, the question in the end to be determined, the point at final issue, is—not whether the deceased's insanity in certain other particulars, as proved by the daughter, should have the **[205]** effect of defeating a will generally of the deceased, or even this identical will—but it is, whether his insanity on the subject of his daughter, as also proved by the daughter, should have the effect of defeating, not so much any will (a will generally) of the deceased, as this identical will—and to the decision of that question I am to be understood as solely addressing myself in the following observations:—

Now, the daughter being in this case a sole next of kin, the deceased's only child, it is quite impossible, I think, to disconnect the daughter from the subject matter of his will; from the disposal by will, that is, of his property—they are subjects, in effect, identified. Hence, the deceased's insanity on the subject of his daughter, generally speaking, being proved at all times in my judgment; it follows that his insanity, at the times of making his will, is also proved in my judgment—unless the contrary is to be inferred from the will itself. But the inference furnished by the will itself (and it is for this only that I refer to the dispositive part—to the contents—of the will at all) is quite the other way. For the prominent feature of the deceased's insanity, in respect of the daughter, was aversion or antipathy to the daughter—so pleaded and so proved: and the will is a will plainly inofficious, so far as regards the daughter; being a will by which she, in effect, is disinherited—disinherited, too, in favour of parties nearly utter strangers to the deceased (for so it appears); though not remotely connected with him by blood, as being his sister's children. Therefore, it follows that, in my judgment, the deceased is proved upon the whole matter to have been insane at the time of his making this will; which was the daughter's case.

[206] At the same time, the contents of this will, to a great extent, are independent of the daughter's case, though referred to as above by the Court in aid of and by way of explaining that case. By this I mean that the contents of the will in this case are not by any means the substantive ground of the Court's judgment. For the contents of the will in this case are clearly not of a nature, substantively taken, to found a sentence pronouncing that will to be invalid. Accordingly, the Court is referring to them for no such purpose: in other words, it is neither concluding that the deceased in this cause was insane as to his daughter, because he disinherited his daughter; nor anything of the kind. But having concluded the deceased insane as to his daughter, generally speaking (a conclusion at which it has arrived by other means), what the Court has been doing is this. It has been referring, as I apprehend that it was at perfect liberty, and even bound, to refer to the contents of the will, in order, if possible, to ascertain by these whether such insanity was present to the mind of the deceased, and in actual operation, as charged by the daughter, at the time of making his will. And finding it to have been so present—finding it to have been so in operation (*a*)—the contents of the will plainly be-**[207]**-speaking all this—the conclusion is, I think, inevitable that the deceased was of unsound mind at the time

(*a*) The actual presence and operation of this, at the making of the will, being imperceptible to the parties immediately connected with the factum of the will (the witnesses on the condidit) might be partly owing, as observed by the Court, to the following circumstance:—Mr. Bramley, the solicitor who prepared, and one of the subscribed witnesses to, the will deposed that in his several interviews with the deceased, on the subject of his will, "having understood, from various sources, that there was a disagreement between the deceased and his daughter, and knowing the deceased to be a man of peculiar temper, he avoided all needless communication on the subject of his daughter as much as he could; being determined simply to receive,

when he made this will. Had the contents of the will furnished a contrary inference —had the will, so far as respects the daughter, been, in all parts of it, an officious will, the conclusion upon this head, and so upon the whole case, might have been different; the very contents of the will would in that case have inferred [208] that however partially insane (insane on the subject of his daughter) the deceased might have been, generally speaking, still that such partial insanity was not present to his mind; was not in actual operation at the time of his making the will, in which event the will might have been valid. It is clear, however, that in respect of a will not inofficious as to the daughter, no such question as the present in its whole complexion could by possibility have arisen.

In a word, the will propounded in this cause, a will virtually disinheriting the daughter, being (plainly so to be inferred) the direct unqualified offspring of that morbid delusion, proved, I may now say without any qualification or restriction, to have been ever present to the mind of the deceased, as to the character and conduct of his daughter—being, if I may so term it, the very creature of that morbid delusion put into act and energy—I, at least, can arrive at no other conclusion than that the deceased was insane at the time of his making the will propounded in this cause; and consequently that that will itself is null and void in law.

In so concluding, the Court has only again to protest that its feelings in this case have not been suffered to bias its judgment. Had the daughter appeared even more amiable than she does—had the deceased's whole treatment of that daughter been proved even more unnatural than it is—finally, were the daughter's disinherison by the will here propounded even more total and complete than that which the will here propounded purports to effect—still in the absence of full proof that the whole of this on the part of the deceased was founded in and solely imputable to morbid delusion or insanity (present to the mind of the deceased, as [209] well generally, as at the time of his making and executing this identical will) on the subject of his daughter, and so on the subject matter of the will, the Court, however painful to its own feelings, should and would have adopted a different conclusion to that at which it actually arrives. But the whole of this conduct on the part of the deceased (the actual making and executing of this will inclusive) being, I think, fully proved to have been founded in, and solely imputable to, that morbid delusion just described—without an effectual shewing to the contrary in any intelligible sense of that phrase: under these circumstances I discharge my official duty, not consult my private wishes and feelings (though they happen to concur with this), in pronouncing, as I now do, that the will here propounded, in my judgment, is null and void; and that the party deceased in this cause, to my conviction, is dead intestate in law.

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and obey, the directions of the deceased relative to her; so that in fact very little was said on that subject." And both this witness and the other subscribed witness examined in this cause, Mr. Hammond, deposed that "at the actual execution of the will the daughter was not in any way mentioned or alluded to, either by the deceased, or by any other person." Now, the deceased's infirmity chiefly consisting in delusion on the subject of his daughter, he was clearly the less likely to betray it, on the occasions in question, from that topic being studiously avoided—the vibration, if any, would, of course, be less sensible from the chord not being struck. Both the above witnesses deposed that they were utter strangers to the deceased having felt or practised any such antipathy for or conduct towards the daughter as that of which the evidence convicted him—or that they even suspected the deceased and his daughter of being on terms of any other than ordinary disagreement.

It was also observed by the Court, as a circumstance, that there was a something "sounding to folly" upon the face of the will itself—alluding, this, to the expressed reasons for the (intended) legacy to Goff, and for that to Miss Iley; the former only intelligible by reference to the latter [see note (*a*), page 142]. The deceased's attention was called to this by the solicitor, previous to the completion of the instrument: and a blank had been left for the very purpose of enabling him to avoid this absurdity or incongruity by slightly varying the phrase in which his reasons for the legacy (intended) to Mr. Goff were expressed. But the deceased, as deposed by Mr. Bramley, declined acceding to his suggestion upon this head—only observing in answer that "the words must remain as they were." The clause in question was then inserted verbatim from a former script—in which, however, the clause as to Miss Iley's legacy had preceded it.

[210] BRETT *v.* BRETT. Arches Court, Trinity Term, 4th Session, 1826.—The statute 25 Geo. II. c. 6, is limited in point of true construction to wills and codicils of real estate; though it extends in terms to all wills and codicils whatsoever. Hence, a legacy, &c., to a subscribing witness to a mere will or codicil of personalty is a good legacy, and as such recoverable at law; notwithstanding that statute.(*a*)—To arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute—it is to be viewed in connexion with its whole context; understanding by this, as well the "title" and "preamble," as the "purview," or enacting part, of the statute.

[Followed, *Emanuel* v. *Constable*, 1827, 3 Russ. 436.]

(On petition.)

A decree in this cause issued on the 4th of April, 1826, calling upon Rosamond Brett—administratrix, with the will annexed, of Elizabeth Crossman, deceased, by virtue of letters of administration (with the said will annexed) thentofore granted to her by the Prerogative Court of Canterbury, as the daughter and a next of kin of the deceased (the residue of whose personal estate was undisposed of by her will)—to answer to John Brett, a legatee of the said deceased, in the sum of 250l., in a cause of "subtraction of legacy."

A proctor appeared to this decree for the party cited, alleging (on petition) that John Brett, the legatee promoting the suit, was a subscribing witness to the will—submitting that by reason of this, and of the statute 25 Geo. 2, c. 6, his legacy, being the very legacy sought to be recovered in this suit, was null and void—and praying that his party, the party cited, might be dismissed accordingly from any further observance of justice in the suit.

In objection to this prayer it was denied by the **[211]** proctor for the party promoting the suit that the legacy sued for was null and void by the said statute; admitting the legatee to be a subscribing witness to the will. And in support of that denial it was submitted that "the aforesaid statute was made to remove doubts that had arisen, who should be deemed legal witnesses within the intention of an act passed in the twenty-ninth year of the reign of Charles the Second, for the prevention of frauds and perjuries; and that, by the fifth section of such last-mentioned act, it is declared that such act relates to the devises and bequests of lands or tenements, devisable, either by force of the statute of wills or by that statute; or by force of the custom of Kent, or of the custom of any borough, or any other particular custom; and does not contain any enactment or declaration in respect to wills or testaments of or concerning personal estate only." Upon these grounds it was prayed that the Court would reject the prayer of the party cited; and direct or permit the suit to proceed.

There were no affidavits exhibited on either side—there being no fact or facts in dispute between the parties. The question of law as to the true construction of the statute of George the Second now, after argument, stood for the judgment of the Court.

On the part of the administratrix it was argued, as on that of the plaintiff in the case of *Lees* v. *Summersgill* (17 Vesey, p. 510), and principally on the same grounds, that a legacy to a subscribing witness to a will, though of personalty only, was void under the **[212]** statute of Geo. II.: and that what inference soever might be furnished from its preamble in favour of confining the operation of that statute to wills of real estate, still the words of the enacting clause were too clear and peremptory, comprehending all wills whatsoever to admit of any such limited construction—it being a known rule of interpreting acts of parliament that the preamble, though it may assist the construction of ambiguous words, cannot control a clear and express enactment. And the case of *Lees and Summersgill* itself was, of course, relied on, as a case in point—in which Sir William Grant, the then Master of the Rolls, had decided, upon argument, and after time taken for deliberation, that the statute extended to all wills and codicils whatsoever.

On the contrary, it was contended for the legatee, as for the defendant in the case of *Lees and Summersgill*, that the statute had no reference to a mere will of personal

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(*a*) Vide note (*a*), page 226.

estate—its sole object clearly being devises within the Statute of Frauds. And the decision in *Lees* v. *Summersgill* was suggested (in answer to that case) to have been principally owing to misinformation, conveyed to the Master of the Rolls, as to the construction of the act, here, in Doctors' Commons—where the act was said (but erroneously) to have been "uniformly understood not to affect wills of personal estate." And in support of this part of the argument the practice here of rejecting the evidence of a subscribing witness, being also a legatee, on the score of interest, was relied on; as was also the judgment of the late Dean of the Arches, Sir William Wynne, in the case of *Linton and Blackburn* v. *Law*—a note of **[213]** which case (printed in the margin) (*a*) was read in the course of the argument to the Court; and which was maintained to be precisely in point for limiting the operation of the act to wills of real estate.

[214] *Judgment—Sir John Nicholl.* Rosamond Brett, administratrix, with the will annexed, of Elizabeth Crossman, is cited by John Brett, **[215]** a legatee in the will, in a cause of "subtraction of legacy." She appears to the citation, but prays to be dismissed—insisting that the legacy is void, on the face of the will, inasmuch as the legatee is a subscribing witness. **[216]** The legatee in reply admits that he is a sub-

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(*a*) *Linton and Blackburn* v. *Law.* Easter Term, 1st Session, 1798.

Isabella Berriman, widow, was the deceased: she died August, 1796, having made a will, and thereof appointed William Linton and Israel Blackburn executors. The will, which disposed of personal property only, was witnessed by two persons, one of whom was the said William Linton.

A caveat having been entered on the part of Esther Law, widow, the sister of the deceased, against probate of the said will being granted, the same was warned on behalf of the executors; and, on the first session of Michaelmas Term, 1796, probate was prayed to be granted to them jointly; and the cause proceeded until the by-day in that term; when the proctor of the said William Linton exhibited a proxy of renunciation from his party, and prayed him to be dismissed, for the purpose of becoming a witness. This was objected to by the proctor for Mrs. Law, and the Judge assigned to hear the petition of both proctors thereon.

The objection of the proctor of Mrs. Law to Linton being dismissed was as follows:—"That both the executors had been sworn to the performance of the will—that, shortly after the death of the testator, the said William Linton, as one of the executors, took upon himself the active management of the deceased's affairs, possessed himself of the whole effects, gave orders for the interment, and applied to John Henfree, an auctioneer, for the purpose of selling, by public auction, the deceased's goods; and the said John Henfree did, on the 22d November, 1796, and whilst the validity of the will was contesting, agreeable to the orders of the said William Linton, advertise in the public ledger for the sale of, and afterwards sold the same, and paid the proceeds into the hands of the said William Linton: and he, the said William Linton, among other things, afterwards paid on account of the deceased's estate, 7l. or thereabouts, to ——— Errington, for the use of ——— Connolie, the landlord of the deceased's house; and that he, the said William Linton, had also, by a proxy, dated 19th November, 1796, authorised his proctor to propound the will on his behalf, as one of the said executors—and that, on the 23d November, the will was propounded on his behalf; and a common condidit given in, and admitted accordingly." It was therefore submitted that "the said William Linton having so intermeddled, he could not, by law and practice, be at liberty to withdraw himself from the said cause for the purpose of being examined as a witness."

On the part of William Linton it was not denied that he had so intermeddled; but it was stated that "on the 7th day of September, the said William Linton attended, with the said Israel Blackburn, at Doctors' Commons, and was, through error, sworn as a joint executor, under the supposition that he was legally so appointed therein; that no caveat having at that time been entered, the said William Linton, in conjunction with the said Israel Blackburn, did incautiously, and in his own wrong, intermeddle in the goods, chattels, and credits of the said deceased; and that, on inquiring into the necessary evidence to be produced and examined on the condidit, to prove the due execution of the said will, it was discovered that the said William Linton was a subscribing witness to the said will; and thereupon the proctor of the

scribing witness, but denies that his legacy is void on that score; as the will neither disposes nor purports to dispose of real property. The question before the Court is, accordingly, a mere question of law; for the parties are agreed as to the facts of the case. And the shape in which that question presents itself is this—Is the statute of Geo. II., in point of true construction, limited in its operation to wills and codicils of real estate; or does it extend to and affect all wills and codicils whatsoever.

The key to the opening of every law is the reason and spirit of the law—it is the "animus imponentis," the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connexion with its whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute; rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and

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said William Linton, on the by-day after Michaelmas Term, 1796, prayed him, the said William Linton, to be dismissed from this suit, in order to his becoming a witness; submitting that the appointment of the said William Linton to be an executor to the said will, was and is null and void, to all intents and purposes, in law, by reason that he is a subscribing witness thereto. And the said proctor then declared that he proceeded no further in the said suit on behalf of the said William Linton; and prayed him to be dismissed."

The petition came on to be heard; when Dr. Nicholl, counsel for Linton, in support of his case, stated the act of the 25th Geo. II. cap. 6.

Court—Sir William Wynne. It has been urged that the appointment of William Linton to be an executor is void in law; and, in support of this, the act of the 25th Geo. II. has been relied on—this objection is new—that statute relates merely to real estate, and does not apply to personal property; and so the title purports—if it had been intended to extend to personal estate it would have been mentioned. The act runs thus, "Whereas some doubts have arisen on the act for preventing of frauds and perjuries who shall be deemed legal witnesses within the intent of the said act;" and it goes on to enact "that if any person shall attest the execution of any will or codicil made after June 24, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far as affects such person attesting the execution, be utterly void," &c. Now the Statute of Frauds and Perjuries (29 Car. 2) does not in any manner apply to personal estate. Again, by the said act 25th Geo. II. sec. 10, it is recited that "whereas in some of the British colonies or plantations in America the act of the 29th Car. II. has been received for law; or acts of assembly have been made, whereby the attestation and subscription of witnesses to devises of lands, tenements, and hereditaments have been required: therefore, to prevent doubts which may arise in relation to such attestation, it is enacted that this act shall extend to such of the said colonies and plantations where the said act of the 29th Car. II. is, by act of assembly, made, or usage received, as law; or where, by act of assembly or usage, the attestation and subscription of a witness or witnesses are made necessary to such devise; and shall have the same force and effect in the construction of, or for the avoiding of doubts upon, the said act of assembly and laws of the said colonies and plantations, as the same ought to have in the construction of, or for the avoiding of doubts upon, the said act of the 29th Car. II. in England." If, therefore, there had been any doubt upon the meaning of the preceding part of the act, the 10th section (which relates to colonies) does that doubt away; for that clearly relates to wills of land only. Besides, the practice of the Court hath been, ever since the passing of that act, for executors or legatees, who have been subscribing witnesses, to release for the purpose of becoming competent witnesses: and if they have been examined, without releasing, their depositions have constantly been refused to be read; which proves that the appointment or legacy in wills of personal property only is not void; nor has ever been considered so to be.

And the prayer that Linton might be dismissed, in order to be examined as a witness, was accordingly rejected.

most [217] satisfactory manner, the object or intention of the legislature in making and passing the statute itself.

The particular phrase, "any will or codicil," occurring in the statute, upon which the present question depends, viewed thus in connexion with its whole context in the statute, is not even difficult of interpretation, in my view of it. It is not, I think, to be taken in the general sense, which the phrase of itself, "any will or codicil," imports —on the contrary, it is to be taken in that limited sense of "any will or codicil of real estate," which the context satisfies me is the true interpretation or construction of the phrase.

The professed object of the statute is to obviate doubts relating to the attestation of wills of real estate. This is manifest, first and foremost, from the title of the act, which is in these words, "An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils of real estate in that part of Great Britain called England; and in his Majesty's plantations and colonies in America." Now, as to this title of the act. It has been said this act was penned by Lord Hardwick: but Lord Hardwick could never have used the phrase "any will or codicil" in the sense of "any will or codicil of real estate;" as Lord Hardwick must have known that there were wills and codicils of personalty as well: to which, equally with the other, it is sought to be inferred from this that the phrase "any will or codicil" ought, in point of true construction, to be extended. I am not aware that the Court is at liberty to go into any such extrinsic consideration as this of who framed or brought in the bill—that the Court is at liberty to travel, in any respect, out of the act itself, for [218] the true interpretation or construction of the act. But if it be, the Court may inquire, how could Lord Hardwick so misnomer the act, as it obviously is misnomered, if the act was meant, and must be taken, to affect wills of personal estate? The title of the act, if this be the true construction, should, at least, not to say must, have been different. But the title of an act of parliament, I may observe, is settled with some solemnity; and this, too, after it becomes an act—that is, after the question put, whether the bill shall pass? and that question carried in the affirmative. This seems to imply that in whatever sense the phrase "any will or codicil" was understood by the framer of the bill, the sense in which it was understood by the legislature, and in which the Court, consequently, is bound to construe it, is that of "any will or codicil of real estate." At all events, it seems to me full as unaccountable that this act should be so entitled if meant to affect personal estate, as that Lord Hardwick should have used the phrase "any will or codicil" in the sense of "any will or codicil of real estate"—limited, as the phrase is, to that sense by its whole context.

So much for the title of the act. Next, as to the preamble, which is in these words: "Whereas by an act made in the 29th year of his late Majesty, King Charles II., entitled, an act for prevention of frauds and perjuries, it is, amongst other things, enacted, that from and after the 24th day of June, in the year of our Lord 1677, all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills or by that statute, or by force of the custom of Kent, or the custom of any borough, [219] or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction; and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect, which hath been found to be a wise and good provision: but whereas doubts have arisen who are to be deemed legal witnesses within the intent of the said act; therefore, for avoiding the same, be it enacted," &c.

Such is the preamble; in which the self-same object, differently expressed, is specified, as in the title of the act. As expressed in the preamble, it is to remove doubts "who are to be deemed legal witnesses within the Statute of Frauds." As expressed in the title, it is to remove doubts "relating to the attestation of wills and codicils of real estate." But the title and preamble strictly correspond notwithstanding; as the only wills and codicils to the validity of which the attestation of subscribed witnesses is essential by the Statute of Frauds are "wills and codicils of real estate."

Its professed object, then, being devises within the Statute of Frauds, both according to the title and the preamble of this statute, I now come to the first and principal enacting clause (being that in which the phrase to be construed "any will or codicil"

occurs) and which is in these words: Therefore, for avoiding such doubts, be it enacted, &c., that "if any person shall attest the execution of any will or codicil which shall be made after the 24th day of June, in the year of our Lord 1752, to whom any beneficial **[220]** devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, other than and except charges on lands, tenements or hereditaments, for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil within the intent of the said act: notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil."

Now it seems to me that the phrase "any will or codicil" in this enacting clause is so limited by the avowed object, as expressed in the title and preamble of the act, to devises—wills or codicils of real estate—that it ought not to be construed to affect mere testaments—wills or codicils of personal estate only. The Statute of Frauds required the attestation of three, at least, competent witnesses to every devise: so that if of three subscribed witnesses to a devise, one, for instance, was a legatee, this rendering him, of course, on the score of interest, an incompetent witness, by a necessary consequence vacated the whole devise. The sole object of the act in question, I think, is to remedy this evil—and this sole object it effects, I conceive, by annulling the legacy of every subscribed witness to a devise (and to a devise only), in order to restore the competency—preferring the sacrifice of a particular legacy, or of particular legacies, to that of the whole devise; of the whole will, so far as it relates to real property, inevitable under the Statute of Frauds, in the **[221]** event of the incompetency of any one of the three (there being only three) subscribed witnesses to the devise. And this being so, the statute of Geo. II. has, I should say, no reference whatever to a mere will of personalty, in true construction—that being an instrument not requiring the attestation of any subscribed witness (either by the Statute of Frauds or otherwise, as will appear in the sequel), in order to give it legal force and validity.

And this interpretation or construction of the first and principal clause or section of the act is fortified and confirmed to my mind by what occurs in the tenth section. I omit or pass over those sections intermediate between the first and the tenth, as not bearing upon the question, possibly, either way—only observing, however, that the second section plainly relates merely to wills of realty. But to the tenth section. Now, the tenth section provides that this act is to extend to such only of the British colonies as have received for law the "Statute of Frauds," or have made "acts of assembly," requiring, as the "Statute of Frauds" does, the attestation of subscribed witnesses to devises or wills of lands. Hence, if this act applies, in true construction, to wills of personalty, a legacy to one who is a subscribed witness to a will of personalty is void in such of the colonies as have adopted the Statute of Frauds, or have made a similar law of their own; but it is a good legacy in the other colonies. This could never, I think, be intended.

If the question then before the Court were "res integra," I should say that this act has no reference to a mere will of personalty, possibly with little hesitation. But the contrary having been held at the Rolls, **[222]** in a case similar to the present, that of *Lees* v. *Summersgill*, it is a conclusion this at which I venture to arrive, not without the greatest hesitation. Nor might the Court even feel itself at liberty to differ in its construction of this act, from the very eminent person who decided the case of *Lees* v. *Summersgill*, but for the following reason:—He, it clearly appears, either mistook, or was misled as to, the understanding and practice of these Courts, or and in respect to this particular statute: and to such misapprehension on his part, of misinformation on that of others, the decision in *Lees* v. *Summersgill* itself was, I am convinced, very considerably, if not principally, owing.

It has been suggested at the bar in that case, as the "understanding at Doctors' Commons," that the statute did not affect wills of personal estate. This suggestion I take to have been correct. But the Master of the Rolls, in his judgment, as reported, states himself to have found, upon inquiry, that the understanding at Doctors' Commons was not as suggested—on the contrary, that the statute was rather understood at Doctors' Commons to extend to all wills whatsoever. But that the statute

was ever really so understood to extend in these Courts, I can find no trace or vestige. I think, therefore, either that the Master of the Rolls was misinformed in this particular; or which, perhaps, is more probable, that, somehow or other, he misapprehended what information he obtained on the subject, so as to take it in a contrary sense to that meant by his informant. For I am warranted, both by adjudged cases, and by the daily practice here, in saying that this act has been constantly understood in these Courts as affecting wills of real property only.

[223] And, first, as to adjudged cases, that of *Linton and Blackburn* v. *Law*, cited in the argument, is precise to this understanding of the statute. My own note of that case is pretty similar in substance to that which has been read in the argument. It is fuller, however, in the following particular; in which it corresponds with a very accurate note of the case, with which I have been favoured by Dr. Arnold. It states my predecessor to have fortified the argument in favour of his construction of the act, derived from the practice of subscribing witnesses, who are also legatees, uniformly releasing in order to their being examined, by a reference to several adjudged cases; in which his predecessors, to say the least, had recognized that practice, not as a mere practice, adopted ex majori cautela, or with any other view, but as a matter of strict legal necessity. By reference to the case of *Blaquiere* v. *Robinson*, in 1768, before Sir George Hay, where a legatee in a small piece of plate, also a subscribing witness, who had been examined, without his legacy being adverted to, was before the Court, praying to release and be re-examined—to which prayer, however, it being made after publication had passed in the cause, the Court refused to accede, and rejected the testimony of the witness; which it is obvious that it could only have done on the principle of the statute not affecting wills of personalty, so as to render the legacy in question, being a legacy to a subscribing witness, a void legacy. By reference, also, to the case of *Finch* v. *Nichol*, in 1753, before Sir George Lee; and that of *Franks* v. *Simonds*, in 1760, in Sir Edward Simpson's time; in each of which the Court permitted a party to release, and be re-examined, under **[224]** circumstances precisely similar to those in the case of *Blaquiere* v. *Robinson*—save only in that of publication not having passed, as it had in the case of *Blaquiere* v. *Robinson*, at the time when the Court was prayed to accept the party's release, and permit his re-examination. All these cases, however, plainly evidence the same understanding and construction of the statute—and hence I am warranted by adjudged cases in saying that the practice here has been to confine this statute, in its application, to wills and codicils of realty, as suggested at the bar in the case of *Lees* v. *Summersgill;* and not, as intimated by the Master of the Rolls, in the judgment in that case, to extend the statute in its application to all wills and codicils.

Nor does the ordinary practice of the office, in a certain particular, which I am about to state, evidence this understanding of the statute less plainly than the, as ordinary, practice of making subscribing witnesses, who are also legatees, release, in order to their being examined in support of the will. I mean the following practice.

A mere testament, I have said, requires no subscribing witness in order to give it full force and effect, either by the Statute of Frauds, or by any other law: it being only required to probate in common form of a will so not attested by any subscribing witness that an affidavit should be made by two persons to the signature of that will being of the hand-writing of the deceased. If, however, as often happens, the will be attested by one subscribing witness, the affidavit of one person to hand-writing is then only required; and not the affidavit of two persons, as in the case of a will wholly unattested. All, then, which subscribing wit-**[225]**-nesses effect, in respect of a will of mere personalty (so far as regards, for I am only speaking as to, probate of that will in common form), is to dispense with the necessity of any affidavit to hand-writing—in which particular only their attestation of the will is any other than mere surplusage.

Wills of personalty, however, we all know, are frequently attested by witnesses; and by witnesses, too, who are also legatees. Now what, let me ask, is the daily practice of the office in granting probate in common form of a will so circumstanced? Is it to consider the legacy void?—by no means—it is to consider the attestation void—to regard the party sustaining, primâ facie, the double character of subscribing witness and legatee, not in the light of no legatee in law, but in that of no subscribing witness. Accordingly, if of two subscribing witnesses to a will one, for instance, is a legatee, the affidavit of one person is required to probate of the will in common

form, as if the will were subscribed by a single witness: if, again, both subscribing witnesses are legatees as well, an affidavit of two persons to hand-writing is then required; just as it would be if the will were wholly unattested. Surely all this is quite at variance with the notion of the statute in question having ever been understood here to affect wills of personalty.

Upon this shewing, it is clear that the judgment in *Lees* v. *Summersgill* proceeded upon a mistaken notion of the "understanding and practice" of these Courts as to the matter in question; a notion, however, but for which I repeat my conviction, that the statute in question might very probably have been differently construed in that case. And as for this reason, on the **[226]** one hand, I hold myself at liberty; so, on the other hand, I feel myself bound to pronounce that it is competent to the legatee to proceed in this suit, notwithstanding the objection taken by the administratrix. And this I do in consideration, not merely of the actual hardship (just, however, to advert to this) which a strict interpretation of the statute would too frequently inflict in individual cases; but in consideration of my strong view and impression of the legal propriety of expounding the statute liberally and beneficially on the grounds already suggested: especially, too, considering the authority derived to this mode of expounding it from the practice here, in the two particulars to which I have adverted—a practice sanctioned in one at least of the two by adjudged cases: to which, sitting here, it is even possibly matter of legal obligation that I should conform, in my construction of the act; although, under circumstances, it may have elsewhere received a different construction.(*a*)

TRAVERS AND EDGELL *v.* MILLER. Prerogative Court, Trinity Term, 3rd Session, 1826.—An allegation pleaded that a testator, in executing certain papers [marked A] as and for his will [such papers consisting of 33 sheets, numbered from 1 to 19, and from 21 to 34], verily believed a paper [marked B] itself, or a transcript or copy thereof, to be in its place [as the 20th (missing) sheet, supplied from the draft will] in and among such papers; and that if a transcript or copy of B were not in its place in and among papers A, when so executed by the testator, its omission was purely by mistake or accident; or lastly, that if a copy or transcript of B were in its place in and among papers A, when executed by the testator as and for his will, it had since been detached from the same (and lost or mislaid) unknown to, and contrary to the meaning and intention of, the testator; for that the testator meant and intended to give, will, bequeath, &c. in all things as in papers A and B (propounded as together containing his will) together contained. —The Court, deeming this allegation proved, pronounced for papers A and B (B inserted as or in supply of the 20th sheet of A) as together containing the will of the testator—on what principles, vide case of *Bayldon* v. *Bayldon*, post.

The facts of this case briefly stated were as follows:—Sir John Edward Riggs Miller, Baronet, the deceased **[227]** in the cause, gave instructions to his solicitor, Mr. Palmer, of Gray's-Inn, for his will, in the month of January, 1818. Pursuant to such instructions a draft will was prepared and submitted to the inspection of the testator, at that time in London; who caused certain alterations to be made in it: and of this draft-will so altered a copy-will was subsequently made, and forwarded to the deceased in the country, consisting of 34 sheets, numbered respectively from 1 to 34.

In the latter end of February, 1818, the testator wrote to Mr. Palmer on the subject of further alterations, requesting that Mr. Palmer would instruct him by letter what words to insert, and where to insert these in the said copy-will, previous to its being executed, in order to give such proposed alterations effect. In reply, however, Mr. Palmer, not feeling himself competent to advise the testator safely as to the proposed alterations without the copy-will itself, wrote to request that this might be returned to him; which it accordingly was, then consisting, with the rest of the 20th sheet (being a paper before the Court, marked letter B), such 20th sheet having been partially altered by the testator himself, in pencil, previous to its being sent to Mr. Palmer.

In the month of April following, the testator himself came to town, and had a further personal consultation on the subject of his will with Mr. Palmer, to whom

(*a*) Appealed, on the part of the administratrix, to the High Court of Delegates; where the question is now pending.

he then gave instructions for perfecting the copy-will, by filling up blanks and otherwise; which having been **[228]** perfected in conformity with the instructions of the testator, several of the sheets were detached, and sent by Mr. Palmer to a law-stationer to be re-copied, he, Mr. Palmer, retaining the other sheets. Among the sheets so detached was the 20th sheet, but whether this 20th sheet was actually sent to the law-stationer to be re-copied (as it was meant and intended to be), or whether through error it was not so sent; or being sent, was either in fact not re-copied or not returned as re-copied by the law-stationer, no where appeared in the cause. The other detached sheets, however, were re-copied and returned, together with the originals; and a new or second copy-will was now made up, composed of the sheets so re-copied (whether, indeed, of the 20th, with the others, or not, no where appearing as above) and of the rest of the sheets which Mr. Palmer had retained in the meantime. And this new or second copy-will was forwarded to the testator at his residence, in the neighbourhood of Banbury, on the 1st of May, 1818.

This copy-will the testator retained in his possession as such till the 30th of July, 1818, when he took the same to his solicitor's at Banbury, and made it (or at least so purported) a will [namely, by executing it in the presence of three witnesses], whether consisting, however, of 34 sheets at that time, or of 33 only, there being no 20th sheet, still not appearing. But of the will (so to style it) sent by the testator shortly after to his banker's, in London, sealed up, for safe custody, there was no 20th sheet: it being composed of 33 sheets only, numbered from 1 to 19, and from 21 to 34; papers before the Court marked letter A. A discovery of this, immediately subsequent to the death of **[229]** the testator in the month of August, 1825, produced an application from the executors, Mr. Travers and Mr. Edgell, to Mr. Palmer; who, upon search among the testamentary papers of the deceased in his possession, found paper B among other loose sheets, formerly detached by him from the other sheets of the copy-will in order to their being re-copied by the law-stationer, as already stated, and delivered the same to the executors.

Under these circumstances, papers A and B were propounded by the executors as together containing the last will of the testator. And in order to their being pronounced for as such, it was expressly pleaded on the part of the executors that "the testator, in executing papers A as and for his will, verily believed paper B (itself, or a copy or transcript thereof) to be in its place, in and among such papers;" and that "if, in fact, a copy or transcript of paper B were not so in its place, in and among such papers, when executed by the said testator, its omission was purely by mistake and accident:" or, lastly, that "if a copy or transcript of paper B were in and among papers A when executed by the testator, as and for his will, it had since been detached from the same, and lost or mislaid, unknown to, or contrary to the meaning and intention of, the testator;" for that he, the testator, meant and intended to give, will, bequeath, devise, dispose of, and do in all things, as contained in papers A and B, together."

Such was the case—as to the papers themselves—of papers A, the 19th and 21st sheets, ended and commenced, severally, as follows:—"And in case there should not be any son, or daughter, of the body **[230]** of the said Eliza Miller, lawfully issuing, who shall attain"—[end of sheet 19]—"Moore Travers and Edgell Wyatt Edgell, and the survivor of them, and the heirs and assigns of such survivor, do, and shall, receive and take the rents, issues, and profits, thereof," &c. &c. [Commencement of sheet 21.] Paper B commenced in these words: "the age of 21 years, or die under that age, leaving issue male of his or her body, living at his or her death," &c.—and ended—"Upon trust that they the said John."

Hence it clearly appeared from the context, and not merely from the numbering of the sheets, that paper B, or a copy of it, was necessarily an intended component part of the will A, the true inference being (so contended on the part of the executors), that either its omission, at the time of the will A being executed by the testator, was purely unintentional, or that that will as executed contained a copy or transcript of paper B, as the twentieth sheet; but that this had somehow or other been accidentally detached from the rest (and afterwards lost or mislaid), unknown to the testator, in the interval between the execution of the will and its transmission by the testator to his banker's in London, for safe custody. And,

The Court so deeming; and that the facts of the case, as above pleaded on the part of the executors, were duly proved, pronounced for papers A and B (B inserted

as, or in supply of, the twentieth sheet of A), as together containing the will of the testator.(*a*)[1]

[231] IN THE GOODS OF RICHARD BICKNELL, Deceased. Prerogative Court, Trinity Term, 3rd Session, 1826.—Probate of a will, altered in various respects by the testator subsequent to the execution thereof, decreed to the executors after the same had been restored to the state in which it was at the time of its being executed; it appearing by affidavits that the testator had so altered his will whilst of unsound mind; and there being also a proxy of consent to this from all the parties whose interests were affected by such alterations.

(On motion.)

Richard Bicknell died in the month of May, 1825, having first, whilst of sound mind, duly made and executed his will, bearing date the 28th of February, 1824; whereby he appointed two persons executors and residuary legatees in trust; and bequeathed the residue of his personal estate and effects, after the death of his wife (who had no interest in the residue), to his brothers and sisters, four in number; and to a relation, Sarah Bicknell, in equal proportions.

The deceased, after the execution of his said will, became of unsound mind; and whilst so of unsound mind made certain erasures, obliterations, alterations, and interlineations in his will. For instance he altered the word "five" to "two," thereby diminishing a certain bequest to his wife in the second sheet; he struck through the name of Sarah Bicknell, as one of his residuary legatees, in the third sheet; he obliterated various legacies in the fourth sheet, &c.

It appearing by affidavits that the whole of the above several alterations are made by the deceased whilst of unsound mind; and there being a proxy of consent from all the residuary legatees (the only persons whose interests were affected) that the will should be restored to the state in which it was at the time of its being executed—

The Court was pleased on motion of counsel to decree all **[232]** the words erased or obliterated in the will subsequent to the execution thereof to be re-inserted; and all the words interlined and written therein, after the same being executed, to be struck through; and to decree probate of the will, so restored to its original state, to the executors.

BAYLDON *v.* BAYLDON AND OTHERS. Prerogative Court, Trinity Term, 4th Session, 1826.—Where a will has nothing doubtful or incongruous on the face of it; suggesting itself the probability of some casual error to account for this in the body of the will; extrinsic evidence to the testator having meant other than the will expresses, is inadmissible; for the Court, after and notwithstanding such evidence, would still be bound to pronounce for the will in its actual state.—But there being some absurdity or ambiguity on the face of the will; probably owing, and so probably to be ascribed, to some casual error in the body of the will: the fact of some casual error in the body of the will may then be pleaded, in order to its being proved by extrinsic evidence. And in the event of such evidence being satisfactory both to the fact of some casual error, and to the error suggested being precisely that error; the Court is bound to pronounce for the will, not in its actual state, but with that error first reformed or corrected in manner suggested. —An allegation pleading the casual omission by the testator in his will of a legacy of 5000l. to a nephew, admitted to proof on this principle.

(On the admission of an allegation.)

Sir George Wood, Knight, formerly one of the Barons of his Majesty's Court of Exchequer, the deceased in this cause, died in the month of July, 1824—shortly after which probate of his will, bearing date 29th of November, 1823 (together with four codicils, bearing date respectively the 14th of October, 1814;(*a*)[2] the 8th of December, 1823; the 19th of May, 1824; and the 16th of July, 1824), was taken by Thomas and William Bayldon, the executors named in the second codicil.

[233] In consequence of the (alleged accidental) omission of a legacy of 5000l.,

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(*a*)[1] For the principles upon which this judgment proceeded, see the judgment in the case of *Bayldon* v. *Bayldon*. Post, p. 232.

(*a*)[2] The will expressly provided that this (originally a codicil to a former will) should still be and remain in force.

three per cent. consolidated bank annuities, to his nephew Richard Bayldon, occurring in the said will; a decree by letters of request, issued under seal of this Court, at the instance of the said Richard Bayldon, calling upon the executors to bring in the probate so already taken, and to shew cause why the same should not be revoked—and why a new probate should not be granted, in which the omitted legacy should be inserted. The residuary legatees were also cited by this decree to "see proceedings in the cause."

An appearance was given to this decree by one proctor for the executors and one of the residuary legatees—and by another proctor for certain other of the residuary legatees. Several of the residuary legatees had still, however, not appeared in the cause—and the cause, so far as regarded them, was a proceeding in pœnam.

The residuary legatee who appeared by the same proctor with the executors had made an affidavit of scripts, annexed to which were three scripts, marked A, B, and C—the first, a draft of the will; the second, an abstract of the will; the third, a statement of relatives liable to payment of a legacy duty under the will—all purporting to be (as the will itself in these respects) in the hand-writing of, and made by, the deceased.

The question before the Court was the admission of an allegation filed on behalf, and setting up the case, of the party promoting the suit. It was opposed by the executors; contending that the facts pleaded were insufficient, if proved, to justify the Court in supplying **[234]** the omitted legacy from the draft will, as prayed by the party promoting the suit.

This allegation pleaded in substance,

1. The death of the party deceased in the month of July, 1824; and that he died possessed of a considerable real estate, and of personal property to the amount in value of 140,000l.

2. That the said deceased, with a view to making his last will and testament, drew up with his own hand as a draft of such will the script marked letter A, containing, among other, the following bequests:—"I give and bequeath the sum of 60,000l., three per cent. consolidated bank annuities, in manner following:—that is to say, 10,000l. thereof to Louisa Bayldon; 5000l. thereof to my brother John's daughter; 5000l. thereof to nephew Daniel Bayldon; 5000l. thereof to niece Frances, or Fanny Cook; 5000l. thereof to nephew Richard Bayldon; 5000l. thereof to niece Caroline Baker; 5000l. thereof to niece Elizabeth Bayldon; 5000l. thereof to the children of my niece Susanna Allen, now dead, as representing their mother, to take only as one person, equally among them; 6000l. thereof to niece Abigail Stocks; 5000l. thereof to my nephew Joseph Stocks; and 4000l., residue thereof, to my niece Elizabeth Hawkins."

3. That the said deceased, having fair copied the script A, executed the same, as and for his last will, in the presence of three credible witnesses, on the 29th of November, 1823; but in such fair copy did unintentionally, and by mistake, omit the words and figures following:—"5000l. thereof to nephew Richard Bayldon:" and that in executing his said will he, the said deceased, verily believed the said words and figures to be **[235]** contained in, and to form part of, the same; also that after so executing his will he, the deceased, with his own hand, added the date of the execution thereof, and the names of the witnesses, to the draft marked letter A.

4. The fourth article of the allegation referred, in supply of proof, to the script marked letter B, purporting to be, and contain, an abstract, drawn up with his own hand, of the contents of the said will of him, the deceased; in which the said deceased, in enumerating the persons among whom he had divided the aforesaid sum of 60,000l., three per cent. consolidated bank annuities, named and stated the said Richard Bayldon as a legatee, in the sum of 5000l. part thereof, in the words and figures following:—"Richard Bayldon (my nephew) 5000l."

5. The fifth article referred, in further supply of proof, to the script marked letter C, purporting to be a statement, also in his own hand, of the relatives of him, the deceased, who would be liable to payment of the legacy duty under his will, revised and completed (so alleged) by the deceased, after the execution of his said will, wherein he again referred to and recognised the said Richard Bayldon as a legatee, by the letters and figures, "Rd. B. 5000l."

6. The sixth article pleaded the deposits of these scripts by the said deceased, together with his executed will, in a tin box in his library in Bedford-square—and that the same were in the same plight and condition as when found, where the deceased had so deposited them, shortly after his death.

7, 8. The seventh article expressly pleaded the three several scripts, A, B, C, to be all of the proper hand-writing of the deceased: and the eighth, that the de-[236]-ceased, at the time of writing them, was of perfectly sound and disposing mind and memory.

9. That the deceased at all times entertained and expressed a great regard and affection for his said nephew, Richard Bayldon; whose advancement in the army he exerted himself to procure upon all occasions—and that such his regard and affection for his said nephew continued unimpaired until the time of his death.

10. The tenth article pleaded the probate taken, by his executors, of the deceased's said will; without the figures and words "5000l. thereof to nephew Richard Bayldon."

11. And the eleventh was the usual concluding article.

Judgment—Sir John Nicholl. Viewing the facts pleaded in this allegation in connexion with the several testamentary scripts before the Court, I have no doubt whatever as to the testator's intention (taking it generally) in this case. I have no doubt whatever that he intended a legacy to his nephew, Mr. Richard Bayldon—that he conceived that legacy to form a part of his will—and that the omission of it in the executed paper was a mere oversight and purely unintentional. The testator is pleaded and must be taken to have been, and no doubt was, of sound mind. At the same time, I am to recollect that he was far advanced in life. And that this aged testator, in fair copying a draft will, occupying many sheets of paper, should have omitted the legacy in question [an omission, too, occurring where and as it does, in a series of consecutive legacies to eleven per-[237]-sons, several of the same sir-name], casually and by accident, as suggested, is a suggestion that could scarcely be deemed very revolting in point of probability under any circumstances. But the question being whether this, the nephew's suggestion, be more probable; or, which is the other alternative, that the testator [taking the facts to be true pleaded in this allegation, and coupling these with what appears on the face of the several exhibits, A, B, and C, in other words, upon the extrinsic evidence now proposed to be offered on the part of the nephew] should have omitted the legacy in question on purpose or designedly in his will; the balance of probability, I repeat, this being the question, is so infinitely in favour of the nephew's suggestion, as quite to satisfy my mind, generally speaking, that the omission was purely accidental.

As to the fact, then, there can be no doubt. But is it competent to the Court in point of law to let in extrinsic evidence in proof of that fact; it being through the medium of such evidence only that the fact is capable of being proved? It is to this question that I have principally to address myself—and it is a question to be determined subject to and upon the following considerations:—

Where a will has nothing doubtful or incongruous on the face of it—suggesting, itself, the probability of some casual error to account for this, in the body of the will, extrinsic evidence to the testator having meant other than the will itself expresses, is inadmissible—as the Court after and notwithstanding such evidence would still be bound to pronounce for the will in its actual state. Upon this principle the Court proceeded, in [238] respect of Lady Bath's will; (*a*) in which, there being a residuary clause, disposing of the residue in a manner neither doubtful nor incongruous on the face of the will, it was attempted to substitute in the probate for this a residuary clause, open to a different construction, found in the "instructions"—an attempt which failed, principally on the ground suggested in the judgment of this Court; confirmed on appeal by that of the High Court of Delegates.

But there being, on the contrary, some absurdity or ambiguity on the face of the will, probably owing, and so probably to be ascribed, to some casual error (that is, to something either omitted or inserted contrary to the testator's true mind and intention) in the body of the will; the fact of some casual error in the body of the will is capable, in such case, of being pleaded, in order to its being proved by extrinsic evidence. And being so proved, the Court is at liberty, and is even bound, to pronounce for the will, not in its actual state, but with such error first reformed or corrected (either by the insertion, that is, of something omitted, or by the omission of something inserted, or as the case may be, in the will, contrary to the true mind and intention of the testator)—provided that, as well the precise nature of that error, as the fact of some casual error, suggested, is proved in the case to a moral certainty by such evidence. Upon this principle, a general residuary clause, held to have been casually

(*a*) *Fawcett* v. *Jones and Codrington*, Prer. 18 , Delegates, 1810.

omitted by the testator, was transferred from the "instructions" to the "will" itself, of which pro-**[239]**-bate was ultimately granted by the Court of Delegates, in the case of *Blackwood* v. *Damer*: (*a*) and in the present term only a judgment of this Court was founded on the self same principle; its judgment, I mean, in the case of *Travers and Edgell* v. *Miller* (see page 226, ante).

In the case then before the Court, in the first place, is there any thing doubtful or incongruous on the face of the will to be accounted for by, and so itself founding the suggestion of, some casual error in the body of the will?

And, secondly, if this be so, would the evidence **[240]** taken upon this allegation (being proved) plainly satisfy the Court, both as to the actual existence of some casual error, and to the error suggested being precisely that error—in order, this, that in proceeding to correct or reform it, in manner as suggested (the end or object of its being pleaded), the Court may feel convinced, to a moral certainty, that it is doing precisely what the testator, but for a mere oversight, would himself have done: in other words, that it is making the will in this respect precisely what the testator himself conceived it to have been, and died under the impression and belief that it actually was? If both these questions are to be answered in the affirmative, this allegation is admissible.

Now, as to the first of these points, there can be no doubt that there is an apparent ambiguity founding the suggestion, and so inferring the probability, of a casual omission in the will, on the face of the will itself. The testator is bequeathing the total sum of 60,000l. consols to certain of his relatives, in certain aliquot parts or portions, in the following way:—"10,000l., part thereof, to Louisa Bayldon; 5000l. thereof to brother John's daughter; 5000l. thereof to nephew Daniel Bayldon," and so on. Having so disposed, specifically, in the will as it stands, of 51,000l., he concludes—"and 4000l., residue thereof, to my niece Elizabeth Hawkins." But the residue of this 60,000l. in the will, as it stands, consists, not of 4000l., but of 9000l. Consequently, a specific bequest or specific bequests, to some person or to some persons, of the sum of 5000l., is or are apparently omitted in this will, through error or mistake on the face of it.

Secondly, would the evidence taken upon this alle-**[241]**-gation, if proved, enable the Court to fill up or supply that omission, in precise conformity with the testator's mind and intention, by pronouncing for his will, with a legacy of 5000l. to his nephew, Mr. Richard Bayldon, previously inserted? It would, I think, enable the Court to do this to a moral certainty. For,

In the first place, the Court will have for its guidance, in so supplying that omission, a draft of the will (script A), all in the hand-writing of the testator, in which occurs this very legacy of 5000l. to his nephew, Richard Bayldon. True it is that a testator may alter his mind; so that a draft-will may differ from an executed one in fifty respects, without it being necessary to resort to mistake or accident in order to account for this. The testator, accordingly, in fair copying his draft-will, might well have omitted the legacy in question to his nephew, Richard Bayldon, designedly. But is this at all consistent with the bequest of 4000l., residue of 60,000l., to his niece,

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(*a*) Of that case the editor has reason to believe that the following is a correct outline:—

Blackwood v. *Damer*. Delegates, February 14th, 1783.

Mr. Jansen wrote, with his own hand, instructions for a will, in which he left the residue of his property to his youngest daughter, afterwards married to the Honourable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; and the will had also some other variations. The draft was read over to the testator, and left in his custody two days, when he executed it in due form. There were legacies to the executors in the will.

It was in evidence that the testator always afterwards expressed himself as having left the residue of his property to his youngest daughter.

The attorney positively deposed that the omission of the residuary clause was a mere casual omission on his part; the other variations, he supposed, he had verbal instructions from the testator to make.

The Court below had pronounced for the instructions as part of the will.

The Court of Delegates decreed that the residuary clause should stand as part of the will; but no other part of the instructions. Present, Mr. Justice Willes, Mr. Baron Eyre, Mr. Justice Nares, and Dr. Macham.

Elizabeth Hawkins? when in the will only 51,000l. of that 60,000l. is specifically bequeathed; leaving a residue of 9000l. Nor is this all; he writes, with his own hand, at the foot of the draft, after the will was executed, the day upon which it was executed, and the names of the subscribing witnesses; recognizing by this, as I must presume, the correctness in all respects of the draft, or rather its accordance, in all respects, with the executed will. If the matter rested here, there could be no doubt, I think, as well of the precise nature of this omission, as of its being purely unintentional.

The Court will also have for its guidance the script B, an abstract of the contents of his will; in which abstract, again, occurs the name of Mr. Richard Bayldon **[242]** as a legatee in the sum of 5000l.; this also in the hand-writing of the testator.

Lastly, it will have before it the script C, in the testator's hand-writing again, headed, "a statement of relatives liable to payment of a legacy duty under my will;" where again it has, "Rd. B. 5000l.," plainly written under the impression of this nephew being a legatee to that amount in the will.

Added to this the allegation being proved, there will be evidence before the Court of the testator's unimpaired regard and affection for this nephew; so as to render his exclusion from the will, as a specific legatee, in this sum of 5000l., under the circumstances, quite improbable. And this, the rather, as he still is a general (residuary) legatee in the will as it stands. For the residuary legatees in the will are the same eleven persons [reckoning Mrs. Allen's children one person, from the circumstance of their taking one share only] as are the specific legatees in the sum of 60,000l. in the draft will. Hence, though, in the actual will, there are only ten specific legatees in this sum of 60,000l., the name of Mr. Richard Bayldon as a legatee in 5000l., "part thereof," being omitted—that such omission is by a mere oversight on the part of the testator, and that it was never intended, can, under all the circumstances, in my judgment, admit of no doubt or question whatever.

Upon these considerations the Court admits this allegation to proof—pledging itself in the end, in the event of its being proved, to decree probate of this will, with the legacy in question, of 5000l. to Mr. Richard Bayldon, first inserted.

Allegation admitted.

[243] BRAHAM *v.* BURCHELL. Prerogative Court, Trinity Term, By-Day, 1826.—A., as executor of B., cited to bring in the probate, taken in common form, of her will, seven years before by A.; and to prove the will per testes; at the instance of C., as the representative of D., the mother and sole next of kin of B.—A., who appeared under protest, dismissed with costs, the Court holding that it was only competent to C. to do in the premises what D., if living, could have done; that D., if living, could not have cited A. in effect as cited by C.; finally, that the grounds suggested, in objection to the protest [being the same meant in the end to be relied on, in opposition to the will], were unavailing in objection to the protest [and would in the end be equally so, in opposition to the will].—Every legatee who puts in suit the validity of a will must bring into and leave in the registry of the Court the amount of his legacy, if paid, to abide the event of that suit.—A married woman who possesses a separate property may dispose of that separate property by will independent of her husband and just as if she were a feme sole; whether such separate property were vested in the hands of trustees to her separate use or not.—Where a wife assuming a right to dispose of property by will, but which right is questionable, actually disposes of such property by will, a Court of Probate on proof of the mere factum of the will should pronounce for it; leaving the wife's assumed right of disposal to be questioned, if at all, in another Court.—If a feme covert make a will, being at that time intestable in law; still, if surviving, she republishes that will subsequent to the death of the husband, it is a good will in law.—The mere conservation of a will for many years may under circumstances amount to a republication of that will, so far as regards personal property.

(On protest.)

Anna Selina Storace, the deceased in this cause, died in the month of August, 1817, without a father; leaving behind her Elizabeth Storace, her natural and lawful mother and only next of kin; the only person who would have been entitled to her personal estate and effects in case she had died intestate. The deceased, however,

left a will, bearing date the 10th day of August, 1797. And in the month of October 1817, probate of that will was granted to Joseph Burchell, Esquire (party in this cause), the surviving executor in common form; the personal property of the deceased being sworn by the executor not to amount in value to the sum of 50,000l.

In the month of June, 1824, a decree issued, at the instance of William Spencer Harris Braham (the other party in the cause), as the residuary legatee named in the will and administrator, with the same annexed, of the effects of Elizabeth Storace, the deceased's mother; citing the executor to bring in the probate of the deceased's will, and to prove the will by witnesses; otherwise to shew cause why the said probate should not be revoked and the will declared null and void in law; and why letters of administration of the effects of the deceased, as dying intestate, a widow, without child or **[244]** father, should not be granted to the said William Spencer Harris Braham as the representative of Elizabeth Storace, the mother and sole next of kin of the deceased.

Mr. Burchell appeared to this decree under protest—and the present question arose as to the merits of that protest, subsequently extended into an act of Court; written to by both parties and sustained in the usual manner by exhibits and affidavits.

In support of the protest it was in substance alleged, in the act of Court, on behalf of the executor,

That the deceased, Anna Selina Storace, spinster (falsely described in the citation Anna Selina Fischer, otherwise Fisher, widow), died in 1817, leaving a mother and only next of kin; that the deceased duly made and executed her last will and testament, bearing date the 10th of August, 1797; that a few days before her death she, the deceased, recognized her said will, saying that "she had made her will, and that it was to her satisfaction;" that shortly after her death the said will was found in her bureau, among other papers of moment and concern, by Elizabeth Storace, her mother, and delivered to the said Joseph Burchell, the surviving executor named in the same; that the said Joseph Burchell delayed for some time taking probate of the said will and until he was urged to the same by the said Elizabeth Storace; who, on the 3d of October, 1817, made an affidavit in support of the will, in which she described her daughter to have died a spinster; whereupon probate issued of the said will to the said Joseph Burchell on the 11th of October, 1817; that the will being so proved, partly by the means of, was also in all respects fully acquiesced in by, the **[245]** said Elizabeth Storace, the said mother of the deceased; and that the said Elizabeth Storace assisted in a variety of ways (specified in the act) in carrying into execution the said will at all times and upon all occasions, until her own decease in the month of May, 1821; that a legacy of 2000l. bequeathed by the deceased in her said will to Mr. John Braham, the reputed father (by the said deceased) of William Spencer Harris Braham, had been vested by the said John Braham in the names of trustees, for the benefit of his said son; and that his said son was in the receipt of the interest of the said legacy, and had been, from shortly after the said deceased's death in 1817; that the said William Spencer Harris Braham had himself from time to time settled accounts and received balances with and from the said Joseph Burchell, as executor of the deceased's said will; and finally, that the said deceased's effects had been fully administered pursuant to the provisions of the said will (under the sanction and by order of the Court of Chancery) at the time of the issue of the decree, suggesting the invalidity of the said will in June, 1824. Upon these grounds it was prayed that the Court would pronounce for the protest and dismiss the executor.

In opposition to this prayer it was alleged in substance, on behalf of the party promoting the suit;

That the deceased was lawfully married to Johann Abraham, otherwise Abraham Fischer, otherwise Fisher, at Vienna, in the month of March, 1784; that Fisher and the said deceased cohabited at Vienna for about a twelvemonth (and had issue a son, who died in his infancy), when they finally separated, and the said deceased thereupon resumed her maiden name of **[246]** Storace and continued the use of it to the time of her death; that Fisher died at Sligo in Ireland in the year 1805; that from 1796 to 1812 the said deceased cohabited with Mr. John Braham, by whom she had several children; among others, William Spencer Harris Braham, the only survivor, born in the year 1802; that the said deceased at no time shortly before her death adverted,

in any manner, to her will of 1797, but to a subsequent will made shortly before her death, whereby she had bequeathed the bulk of her property to her son, the said William Spencer Harris Braham; that the said deceased always entertained and expressed the greatest affection for her said son, and frequently within twelve months of her death declared that she had "made her will," and that her said son was chiefly interested therein; that on the Thursday following the death of the said deceased (who died on a Sunday), the said Elizabeth Storace, mother of the deceased, burnt and destroyed many of her papers, and among others (probably) her said last will; that the will of August, 1797, was not found by the said Elizabeth Storace, the deceased's mother, among the deceased's papers of moment and concern; but by a friend of the said deceased, a Miss Walthew, in a bundle among old tax receipts and papers of a similar description; that upon the said deceased's death Elizabeth Storace, who was then upwards of eighty years old, adopted the said Joseph Burchell and his son Mr. John Burchell (a solicitor) as her legal advisers in all matters of business; and that she, the said Elizabeth Storace, in forwarding the probate, and subsequently in assisting in the execution of the said will of August, 1797, acted under the undue influence **[247]** and control of the said Mr. Burchell; and in ignorance or under misapprehension of her own legal rights as sole next of kin of the deceased, in the event of the said deceased's actual or legal intestacy: lastly, that the said William Spencer Harris Braham only became aware of the legal rights of the said Elizabeth Storace (and consequently only became aware of his own legal rights as the representative of the said Elizabeth Storace) in that event, shortly before the issue of the citation in this cause. For these reasons it was prayed that the Court would overrule the executor's protest and assign him to appear absolutely.(*a*)

A rejoinder to this on the part of the executor,

Denied that any lawful marriage ever took place be-**[248]**-tween the deceased and Fisher—and alleged that the executor never represented to the mother of the deceased that the said marriage was invalid; but, on the contrary, that he, the executor, who had no knowledge on the subject one way or the other, was himself so assured by the mother, who was resident with her daughter at Vienna at the time, and was privy to all the circumstances of the said marriage—that the said deceased never made and executed any other will than that of August, 1797, and never adverted to any other will as made and executed by her; although she, the deceased, did contemplate making a provision by will for her son; and did, in contemplation thereof, shortly before her death procure his baptismal certificate as for the purpose of enabling her to describe him correctly in her then intended will—at the same time that she, the deceased, on many occasions expressed to Mr. Burchell and others her wish to induce or compel Mr. Braham to provide for her said son; adding at such times her full conviction that "if she were to leave him a fortune, his father would do nothing for him"—that as under these circumstances the said deceased might possibly have made a subsequent will unknown to those about her, her said executor, previous to applying for probate of the will of August, 1797, offered by public advertisements a reward of

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(*a*) It was considered advisable on the part of the executor to object to the relevancy of this reply, as containing matter not in any way responsive to the protest; and the validity of that objection was formally submitted to the Court, and argued by counsel (a rather unusual proceeding) on the first session of Michaelmas Term, 1825: but the Court overruled the objection, deeming the reply not so clearly irrelevant as absolutely on the face of it to exempt the executor from the obligation of rejoining; leaving it, however, to the executor either to rejoin or to conclude the act as it stood at his own option. But until the act was concluded the Court declined expressing any opinion as to the relevancy, either wholly or in part, of the reply, save only that it was not so irrelevant as to justify the Court in taking the step prayed by the executor of expunging it wholly or in part, or deeming it expunged, from the act. Had the executor not rejoined upon any matter in the reply, ultimately held not irrelevant by the Court, he of course would have been the sufferer by this.

The Court in overruling this objection reserved the question of the costs occasioned by it. But in the end, in dismissing the protest with costs, it excepted those occasioned by the hearing on the objection to the relevancy of the reply taken by the executor, as stated above; as conceiving it a step in the cause not called for or warranted by the circumstances.

500l. for the actual production of any subsequent will of the deceased; but that no such subsequent will or draft or trace or vestige of any subsequent will was produced in consequence of such advertisements and offered reward—that the papers burnt and destroyed by the mother, shortly after the death of the deceased, were papers of no moment; and that no subsequent **[249]** will of the deceased was probably burnt or destroyed among these, as suggested on the other side—that the will of 1797 was found by the mother, as she herself had deposed; and not by the said Maria Walthew, as now sought to be represented—that the mother of the deceased, a shrewd woman, and conversant with business and accounts, was fully apprised of her own sole heirship in the event of her daughter's intestacy; and was also fully apprised that such her daughter's intestacy might not improbably be set up, provided her marriage with Fisher could be proved to have been a lawful marriage—lastly, that the parties benefited by the will were strangers to the executor and his family; who were on terms of intimacy with and warmly attached to the mother and son of the deceased; so that the said executor would not by choice have postponed the interest of these last to that of the legatees in the will, by taking probate of the will; in preference to advising the mother to apply for administration as in a case of intestacy.

In support of the protest affidavits are exhibited of Mr. Burchell, the executor; of his son, Mr. John Burchell; and of three others; fully sustaining the facts stated, in the act of Court, on the part of the executor, both in chief and in the rejoinder.

In support of the reply were also exhibited, on the part of Mr. Braham, several affidavits (twelve in number), principally to the following effect.

Mr. Braham stated his belief of the facts alleged on his behalf; and certificates of the alleged marriage of the deceased with Fischer, or Fisher, at Vienna, in 1784, were exhibited annexed to his affidavit.

Mr. Douglas Kinnaird deposed to having understood, **[250]** from the deceased, that her son would enjoy the bulk of her property—and that he, Mr. Kinnaird, was to be one of her executors, and trustee for her said son, jointly with Mr. Soane.

Louisa Cook deposed that Elizabeth Storace, the mother of the deceased, told her, the deponent, on several occasions, that "she thought her said daughter must have made a will subsequent to the will proved;" and that the will proved was found in her presence, by Maria Walthew, among a bundle of old papers—also, that in her search for a will she had found the envelope of a will, but there being no will enclosed had burnt the said envelope. She also deposed to the perfect confidence of the mother in Mr. Burchell, and to the mother saying that she had submitted to the old will, under his advice, as an inevitable evil, since no other will could be found; though she was satisfied the deceased had made another will.

Mr. Michael Kelly stated that he knew the deceased at Vienna in 1784, when and where Elizabeth Storace, the mother of the deceased, was resident with her said daughter—that he well remembered Fisher's alleged marriage with the deceased; at which he had no doubt that he was, though he had no distinct recollection of having been, present, as alleged. He also spoke to the cohabitation for a twelvemonth, and to the then separation of the parties; and to Fisher's death at Sligo, as alleged in the act.

Maria Walthew deposed to the deceased having often in conversation recognized her marriage with Fisher as a valid marriage—and that the same was often spoken of and adverted to as such, both by the deceased herself and by her mother, Elizabeth Storace—**[251]** also to the will in question having been found by her, the deponent, in an envelope, with the seal broken, in a bundle of old papers, on the Thursday following the deceased's death; after a search had been made on the Tuesday following (the deceased having died on a Sunday) among her papers for a will without effect—that after such search, and previous to the will being found, Elizabeth Storace informed her, the deponent, that "as no will was found she was sole heir to the deceased's property."

Tomaso Rovedino deposed to a conversation having taken place in June, 1817, between him and the deceased, in which she said that she intended to make Mr. Soane and Mr. Kinnaird her executors, and trustees for her son—that a few days after, having met the deponent, she talked to him as if then engaged in making her will—and on the 5th of the following July intimated that she had finished the same.

Lucy Brettell; Diana Barber, the deceased's servant; Maria Paddock, another servant of the deceased; and Mary Church, her nurse, deposed severally to circum-

stances inferring strongly the probability of a will made by the deceased at a late period of her life in favour of her son, William Spencer Harris Braham.

And most of the above several deponents spoke to the deceased's regard and affection for her said son, in the strongest and most explicit terms.

Lastly—Mr. Peter Ogier stated in his affidavit that a few months after the deceased's death, having heard that a will of the deceased, made by her during her coverture, had been acted upon; and having doubts as to the validity of such will, he, the deponent, called upon the mother of the deceased, who then admitted to **[252]** him that the said will had been made during her daughter's coverture, but said that under advice that she, the mother, could not oppose the said will, she had consented, reluctantly, to probate being taken of the same.

Judgment—Sir John Nicholl. The circumstances of this case are as follows:—

Anna Selina Storace, the deceased in the cause, died on the 17th of August, 1817. Her will, the subject of the suit, bears date on the 10th of August, 1797. It is a will all in her own hand-writing; it is duly executed; and it is attested by two persons, the clerks of Mr. Buxton, a solicitor in Great Marlborough-street, who appears to have furnished the deceased with a draft of the will.

By this will she directs, in the first place, that the sum of 5000l. East India Stock, standing in the names of trustees, but which she describes as "her property," shall, from and immediately after her decease, be transferred to and vested in other trustees, Mr. Prince Hoare and Mr. Joseph Burchell (party in the cause), upon trust to pay and apply the interest and annual produce to her mother, Elizabeth Storace, for life; and then to her nephew, Brinsley John Storace, until he attains the age of twenty-five; and upon his attaining that age, to pay and transfer the principal sum to her said nephew, absolutely: but in the event of her said nephew dying under twenty-five, she gives and bequeaths the said 5000l. to the children of her cousin, Emely Toosey, in equal proportions, upon their attaining their ages of twenty-five respectively. She limits or appoints the use of her household furniture, plate, linen, &c., to her mother for life; and then over; the **[253]** same in all respects as the sum of 5000l., East India Stock. She bequeaths the sum of 700l. to two aunts, of the name of Trusler; the sum of 500l. to her brother's widow, Mary Storace, together with all her wearing-apparel, her harp, and her music; the sum of 500l. to Mr. Rauzzini, of Bath; the sum of 50l. to each of her trustees, Mr. Hoare and Mr. Burchell; to Mr. John Braham the sum of 2000l.; to the old and new Musical Funds the sum of 1000l. each; and the rest and residue, after a few other legacies of small amount, to the children of her said cousin, Emely Toosey, and to Miss Emma White, in equal proportions. And she appoints Mr. Joseph Burchell and Mrs. Mary Storace, her brother's widow (but who died in her life time), executor and executrix of her said will.

This will, such as I have described it, both in form and substance, was found in her bureau, shortly after the death of the deceased, among other papers of moment and concern, by Elizabeth Storace, her mother, and sole next of kin. But there being some reason to believe or suspect that the deceased had made another later will, Mr. Burchell, the surviving executor, delays, from time to time, applying for probate of this, until every diligence had been used for the purpose of ascertaining whether the deceased really left any testamentary instrument of a subsequent date. Among other means used for the discovery of such an instrument, three several advertisements were inserted in as many daily journals, offering a reward of 500l. for the production of any will of the deceased, subsequent to that of August, 1797. Still, however, no will of a later date is produced; nor even do those advertisements produce information from any quarter tending **[254]** to shew that the deceased in this cause ever put pen to paper, either to frame or to execute any other will than that already described of August, 1797. At length, in the month of October, 1817, probate is taken of this will by Mr. Burchell, the executor, in common form, upon an affidavit of the mother, as to the finding and plight and condition of the will; such an affidavit being necessary to probate of the will passing in common form, in consequence of an erasure in the body of the will; in which, as originally executed, Mr. Buxton, her then solicitor, was also named an executor.

It is alleged and sworn that the executor, Mr. Burchell, in so taking probate of the will, was urged and pressed to this by the mother, and sole next of kin of the deceased; that is, by the person entitled both to represent the deceased, and to the

whole of her property, in the event of her actual or legal intestacy. This, at least, is certain, that she was not only privy, but a party, to the probate. She makes the affidavit to which I have just adverted, in order to its being proved, and so in support of the will. In that affidavit I observe that the deceased is described "Anna Selina Storace, spinster."

Probate is taken, then, of this will of August, 1797, clearly with the knowledge and consent of the mother, the only person who had any apparent either right or interest to contest its validity. She survives (the mother) till the month of May, 1821; and it is admitted that, during that whole interval, she is both acquiescent in the will, and even actively co-operating in giving effect to, and carrying into execution, the provisions and bequests contained in it, in every possible variety of ways. For instance, she is in the receipt of **[255]** the income derived to her from the will, and gives discharges for the same, from time to time, to the executor, up to the period of her own decease. She furnishes the executor with the names and descriptions, and assists him in the discovery, of the persons entitled to the residue, the bulk, of the deceased's property, under the will. In the year 1818 the executor, finding that several of the residuary legatees are minors and orphans, declines proceeding to a full distribution of the property, under the will, without the sanction of the Court of Chancery. A suit, an amicable suit, is accordingly commenced in Chancery in the month of May, 1818, and continues till the month of August, 1822. The mother is constantly consulted and advised with, as to that suit, by the executor; and is sworn on many occasions to have assisted in respect to the same at all times until she herself died in May, 1821.

During this suit in Chancery the executors' accounts are passed in the Court of Chancery; and the whole of the deceased's property remaining unapplied is paid by the executor into the registry of that Court. And it appears that in the month of June, 1824, at the issuing of this decree, the deceased's property had been all but fully administered, pursuant to the provisions of this will; as all the several legatees and all the residuary legatees, excepting one, who was still a minor at that time, had received their legacies and shares of the residue under this will at that time by order of the Court of Chancery.

The executor, of course, conceives upon this that he is functus officio—that he is entitled to his full discharge, and that he is not liable to any further call. But in **[256]** the month of June, 1824, a decree issues citing him to bring in the probate and support the validity of this will of August, 1797, then for the first time questioned by evidence, at the instance of Mr. William Spencer Harris Braham (the other party in the cause), a reputed or natural son of the deceased, by Mr. John Braham, himself a legatee in the will in the sum of 2000l.; with whom the deceased appears to have cohabited for a number of years.

It is obvious from this that the present plaintiff is not proceeding as such in his own right. He is proceeding as administrator, with the will annexed, of Elizabeth Storace, the mother of the deceased; who, principally, it should seem, under the advice or at the recommendation of Mr. Burchell, his opponent in this cause, made a will bequeathing him her whole property. Accordingly, it is in her right, and as her representative only, that he claims to controvert this will.

Now could the mother of the deceased, had she been living, after an interval of seven years have cited the executor, according to the terms of this decree, under the circumstances already described? This is clearly a proper subject of inquiry, for it can only be upon some special shewing that her representative is entitled to go a step in this matter beyond what she herself, the party whom he represents, could have gone.

In the first place, in doing this, she must have deposited, in the first instance, the actual amount of what, in the interval of seven years she had received or derived from or under the will. Every legatee who puts in suit the validity of a will in this Court must bring into and leave in the registry of this Court the **[257]** amount of his legacy, if paid, to abide the event of that suit.(*a*) The mother of the deceased must have conformed to this rule; nor is her grandson and representative exempt from a similar obligation. Accordingly, if Mr. Braham can be permitted and is willing to

(*a*) See case of *Bell* v. *Armstrong*, 1 Add. 374; and the cases there cited of *Pyefinch* v. *Palmore*, and others.

proceed in this suit, he must clearly deposit, in limine, the actual amount of monies received by his testatrix under the will of the deceased. He must also, possibly, deposit, in limine, what interest has accrued upon the legacy of 2000l. bequeathed, as I have said, to his father, Mr. John Braham, since the death of the deceased. For it appears that Mr. John Braham, the father, on the death of the deceased, directed that legacy to be invested in the names of trustees for the benefit of his son, the present plaintiff; and that he, the present plaintiff, has since received, and still receives, the produce or interest of that legacy. He has, consequently, himself benefited, derivatively at least, under this will to the extent of the interest which has accrued upon the sum of 2000l. for the last nine years. At the same time these, to be sure, are mere outlying considerations. Neither, possibly, might the mother of the deceased have been, nor may her grandson and representative now be, deterred from putting it in suit by the obligation of making certain deposits previous to contesting this will.

Could, then, the mother of the deceased, having fulfilled this condition, have instituted a proceeding similar to the present in the month of June, 1824? On the contrary, would not she have been barred (and by **[258]** consequence is not her representative barred, unless upon some special shewing), as by acquiescence in the will or otherwise, from putting this will in suit at that time? In order to determine this, it becomes necessary to consider what the alleged or suggested grounds of the invalidity of the will really are. And in considering this I shall be necessarily led to say with how little probability of success in my judgment, so far as appears, the validity of this will either now is, or at any time was, capable of being contested by any party. For I may say, once for all, that the case now suggested, as in objection to the protest, is obviously the same in substance upon which, being pleaded and proved, it is ultimately meant to be relied in opposition to the will.

It is suggested then, as in objection to the protest, and it is ultimately, as just said, meant to be pleaded and proved as in opposition to the will, that the will in question was a will made by the deceased in and during her coverture—and that not having recognised or republished it in and during her widowhood, it is by consequence a will that is merely null and void in law. And in order to defeat, I presume, the effect of certain declarations proved to have been made by the deceased—as that "she was testate," and that "her will was to her satisfaction;" which might otherwise be contended to have amounted to a republication of the will in question, it is suggested that these were not declarations meant by the deceased to apply to this but to some other will; which it is accordingly suggested that the deceased made shortly before her death, and in which she bequeathed the bulk of her property to her son, the present plaintiff. Now to con-**[259]**-sider the case so set up in both parts of it: and first, as to the suggestion of this being a will made during coverture.

I. It is alleged in the act on petition on the part of Mr. Braham, the plaintiff, that the deceased in this cause, at that time Anna Selina Storace, spinster, was lawfully married to Johann Abraham, otherwise Abraham Fischer, otherwise Fisher, at Vienna, on the 29th of March, 1784; and that he, Fischer or Fisher, died at Sligo, in Ireland, where he had for some time previously resided, not until the year 1805; consequently not until seven or eight years, as appears by the date, subsequent to the making and execution of this will.

The facts so alleged are supported by a variety of affidavits, which it is to be observed are only good in support of this case as a suggested case; that is, as laying grounds for the Court to over-rule the protest of the executor, and put him on proof of the will. They are facts to be regularly pleaded and proved, not to be merely alleged in an act on petition and sustained by voluntary affidavits in order to be of any final avail in the cause, the executor being put on proof of the will. But to what does the proof of the facts so furnished by these affidavits, and by the "certificate of marriage" annexed to one of them amount, in support of this case, as a suggested case?

It amounts to strong proof of a fact of marriage between Fisher and the deceased at the time alleged. But I see no reason to believe from it, under all the circumstances, that a valid marriage was ever contracted by and between these parties, either then or at any other time. On the contrary, there is much in the case as to which there is no dispute; there are many **[260]** facts as to which the parties are agreed—which look directly the other way. This is evidenced, I think, to some extent, by the previous and by all the subsequent history and conduct of the parties.

The deceased at and previous to the time of this marriage was, and had been, an actress, performing at the principal theatre in Vienna; and Fischer, or Fisher, was a composer of music attached to that establishment. The marriage is alleged to have been celebrated in the evangelic reformed church in that city; and "certificates" of that marriage are exhibited, it should seem, duly verified. One of the two persons present as "witnesses" of the marriage (so certified) appears by these to have been Mr. Michael Kelly, the composer, whose affidavit is before the Court; in which he says that he perfectly recollects the occasion of the marriage certified, which he has no doubt whatever took place as certified; and that he was, though he has no distinct recollection of having been, present at the ceremony; he perfectly remembers, he says, having had a suit of clothes made on the occasion of the marriage. This is strong evidence, I repeat, of the suggested fact of marriage; but looking, not invidiously, to the known lax habits too often indulged in by theatrical performers, especially on foreign boards, it is by no means improbable, a priori, that it was a mere fact of marriage within the knowledge of both parties—serviceable to both parties as for obviating scandal or otherwise at the time; but imposing upon either party no lasting obligation. And this view of the case, which, it will presently appear, is confirmed by the whole subsequent history of the parties, derives a still further confirmation from what occurs on the death of the deceased—**[261]** when the mother, living, for so it appears, with the deceased at the time, and so privy, I must presume, to all the circumstances of the marriage, makes an affidavit in which she deposes to her daughter having died a spinster—so deposing in support of a will which she is apprised at the time, as I shall shew in the sequel, that her daughter's lawful marriage with Fisher would probably invalidate; when she, as the sole next of kin of the deceased, would become absolutely entitled to the representation of the deceased, and to the whole of her property.

But the subsequent history of the parties infers this to have been a mere fact of marriage, I think, almost conclusively. The parties cohabit during about twelve months only, in the course of which they have a son, who dies in his infancy. They then separate, and such their cohabitation is never renewed. The deceased returns to this country, where she resumes her maiden name; the use of which she continues uninterruptedly to the time of her death. Nor is it merely by passing under her maiden name that the deceased herself thus repudiates her marriage. She acts as a feme sole during the whole remainder of her life in all respects; her conduct in every particular of which plainly infers that she at least deemed her marriage with Fisher invalid in law.

But the whole subsequent conduct of Fisher himself furnishes the same inference still more strongly. He lived till 1805 in straitened circumstances; earning a precarious livelihood by teaching music at and in the neighbourhood of Sligo in Ireland. Meantime, Storace's fame as an actress could be no secret to him; any more than it could be that she had acquired a large **[262]** fortune, or at least was in the receipt of a large income. There is no vestige, however, with all this, of any attempt on his part either to possess himself of her fortune or even to participate in her income. There was much besides equally notorious in the history of the deceased, under which Fisher, if the lawful husband of the deceased, could scarcely have acquiesced as he did. The deceased in 1796 forms a connexion with Mr. Braham, by whom she becomes the mother of several children, though Mr. Spencer Harris Braham is the only survivor of these; a connexion which subsists up to the year 1812. Fisher must have known all along of that connexion; he must have been aware from time to time of the birth of a spurious issue, the fruit of that connexion, which still, in the eye of the law, were his issue, if he, in truth, were the lawful husband of the deceased. And it is utterly inconsistent, I think, with a knowledge or belief of this on his part, that he should be perfectly quiescent in the deceased's connexion with Mr. Braham for the nine years during which he survived its commencement; neither instituting any complaint nor soliciting any, either protection or redress.

Upon the whole, then, it seems to the Court that the deceased was not, upon this shewing, as suggested, a feme covert in law at the time of the making and execution of this will. But even if she were, I am by no means satisfied that this, as assumed on the part of Mr. Braham, would, per se, under any circumstances, have rendered this will absolutely null and void in law. If ever there was a case in which the circumstance of its being the will of a married woman ought not, in point of equity, to have

the effect of wholly invalidating [263] a will, it is the case before the Court. For what is the will in this case? It is the will of a married woman (assuming the deceased to have been such in law at the date of the will) made a dozen years after her final separation from her husband, and disposing of the fruits of her own sole industry—of monies, that is, which she herself had acquired whilst acting throughout in her single capacity, and passing all along by her maiden name. Now could Fisher, if the survivor even, by proving himself ever so incontestably to have been the lawful husband of the deceased, have defeated this will to the extent of rendering it a mere nullity in law and so to be treated by this Court? I entertain, perhaps, strong doubts of this. A married woman who possesses separate property may dispose of that separate property by will independent of her husband, and just as if she were a feme sole. The property so acquired by the deceased, as I have described, which the husband had never in her lifetime reduced into his own possession, and over which he had never attempted to exercise any marital right, might well be the separate property of the deceased; over which, accordingly, she had a perfect jus disponendi, though, at the time of exercising it, a lawful wife. Part of the property of which this will purports to dispose I observe to have been vested in the hands of trustees, to the use of the deceased—a circumstance not quite immaterial; though a wife, it is now held, may dispose of her separate property by will, whether vested in the hands of trustees to her separate use or not. Upon this view of the case I am by no means clear that, even if Fisher had survived the deceased, and had proved himself ever so incontestably, I repeat, to have been her lawful hus-[264]-band, it might still not have been incumbent on this Court (whose principal concern is with the "factum" of an instrument of this nature) to have decreed probate of this will (of course, in that event, a limited probate) to Mr. Burchell, the executor; leaving the wife's assumed right of disposal to be questioned, if at all, in another Court; the jus disponendi, the right of disposal, in these cases, being a question into which this Court is not in the habit of looking too nicely; as it is a question upon which, in effect, it is not competent to this Court ultimately to adjudicate.

But Fisher, assuming him still to have been the lawful husband, was not the survivor—he died in the lifetime of the deceased. And we all know that if a wife makes a will, being intestable at the time of the will making; still if, surviving, she approves and confirms (in a word, republishes) that will after the death of the husband, it is a good will. Now that the deceased, if there be no other will in question, did approve and confirm (in effect, republish) this will, is indisputable. The mere conservation for so many years of this will, in connexion with its place of deposit, may so evidence adherence to, and approval of, this will as to amount to a republication of it, for any thing that I am prepared to say to the contrary. But however this be, her repeated and even solemn declarations,(*a*) to [265] which I have already adverted, if applicable to, are clearly a virtual republication of, this will—so that in the absence of any other will to which the Court can safely apply those declarations, this is a will equally good and valid in law, to all intents and purposes whatsoever, whether the testatrix were a feme covert at the time of making it or a feme sole.

II. Can the Court, then, safely apply these declarations to any other will than this of August, 1797? And this leads me briefly to consider that other part of the case now set up, which consists of a suggestion that the declarations in question were not meant by the deceased to apply to this will of 1797 (and consequently that the Court ought not so to apply them; which, if it ought, as already said, there is an end of the plaintiff's case, whether the deceased were a married woman in 1797 or a spinster), but to that other will which she is suggested to have made towards the end of her life, and by which she bequeathed the bulk of her fortune to her son, the party promoting this suit.

(*a*) The Court here adverted, in particular, to an affidavit of Dr. Hooper, the deceased's medical attendant during her last illness (exhibited on behalf of the executor), in which he deposed that "a few days previous to the death of the deceased, he, the deponent, being of opinion that she could not recover from her said illness, inquired of the said deceased, in the presence of Miss Walthew and, he thinks, of the mother of the deceased, 'if she had arranged her worldly affairs?' to which she immediately replied, 'I have made my will'—that the deponent thereupon asked her, 'whether her will was to her satisfaction?' when she answered 'Yes,' or to that very effect."

In proof of this part of the suggested case, as of that other of which the Court has already disposed, there are exhibited, on the part of Mr. Braham, a variety of affidavits. But to what extent are these affidavits good? Merely to this extent. They render it, a priori, highly probable that the deceased should have executed a later will of this tenor—they even shew that the deceased contemplated the execution of some such will. But they fail even to render it probable, as contrasted with the adverse **[266]** evidence and looking to all the circumstances of the case, that the deceased ever did actually execute any subsequent will. On the one hand, the deceased's declarations on that head, as spoken to in these affidavits (although mere declarations, especially stated in voluntary affidavits, are little relied on by the Court in matters of this nature) are good in proof that the deceased had a strong regard and affection for her son—["as strong a regard and affection," several of the affidavits express it, "as a mother could have for a son"] and contemplated making a provision for him as such. This, too, is confirmed by what Mr. Joseph Burchell, the executor, has deposed, namely, that within a few months of her decease she, the deceased, required of him or of his son, Mr. John Burchell, her solicitor, the legal names and description of her said son, for the very purpose of inserting them correctly in, of course, her then intended will. This is precise to the fact of intention; though it is equally so to the fact of intention not then carried into effect—a few months only, this, before the death of the deceased. But on the other hand, I am to recollect that there are circumstances in the case which account for the deceased not making this contemplated disposition of her property, at least not improbably. For it is in evidence that the deceased was extremely irritated at all times with Mr. John Braham, the father of this son; who had abandoned her in 1812, after a cohabitation of sixteen years, and married another female; that she had even consulted and advised with the Burchells as to whether the father were not compellable by law to provide wholly or in part for that son—observing that "he ought so to do, more especially as he was possessed **[267]** of a large fortune and in the receipt of an ample income;" and adding that "if she, the deceased, were to give or leave her son a fortune, it would only furnish the father with a pretext or excuse for doing nothing for him; and be the means of his saving his money to enrich his children by the female for whom she had been abandoned." All this is stated by Mr. Burchell and his son in their affidavits —affidavits full as credible as any exhibited in the cause. And that the deceased might probably act upon this view of the subject is confirmed, to some extent, by the contents of this will of August, 1797, itself—in which, notwithstanding her subsisting connexion with Mr. Braham, and that she was bearing children to him (though whether any child was actually born in August, 1797, does not quite appear), she is content with a legacy to him of 2000*l.*—leaving him, it is to be inferred, to provide for the children of that connexion, and disposing of the bulk of her property, the produce of her own talents and industry, to her own relations. And when, upon the death of the deceased, and after the extraordinary pains taken and means used for the discovery of a subsequent will that I have already described, no subsequent will is produced, nor any thing tending to shew that the deceased ever actually made such a will, I must say that the balance of probability is, in my judgment, very much against the case set up (this part of it), that the deceased, whatever at times she might have meant or intended in that respect, ever actually made and executed any will revocatory of this of August, 1797.

But did the proof of the suggested case (this part of it) go much further; did it render, not merely the in-**[268]**-tention to execute, but the actual execution of, a later will by her ever so probable; could the Court, let me ask, upon that mere probability, however founded, pronounce against the force and effect of this, the only subsisting will? Surely not. What could even proof made of a subsequent will do? Only this—render it questionable whether this will of August, 1797 (the prior will in that event), were an operative will. For even if the deceased were proved to have made a latter will, revocatory of the former will, still, no such latter will being forthcoming on the death of the deceased, the legal inference would be that she herself had destroyed it; for there is no proof whatever of the suggestion that it was destroyed by the mother, inadvertently, after the death of the deceased. Now if the deceased herself destroyed the latter revocatory will, the former will might well revive; so that even proof made (of which there is none) of the actual execution of a latter will by the

deceased would only render the force and validity of this prior will questionable; it would, by no means, infer it null and void in law.

Upon the whole, I am clearly of opinion that it would not have been competent to the mother of the deceased, had she been living, to have put the executor on proof of this will, after an interval of seven years, upon any such grounds as are now suggested. The mother was the deceased's sole next of kin. At the time when probate was taken by the executor she apparently entertained no doubts of the validity, although she might, and no doubt did, regret the existence of this will: but even supposing that she did entertain any such doubts, she was at liberty to waive those doubts; and her conduct throughout, already [269] described, to the period of her own decease, nearly amounts, I think, to a full waiver of them. She urges the executor to take probate; she is a party to its being taken; she acquiesces in the will, and is even active in giving it effect in a variety of ways. The executor, it has been said in argument, should have proved this will, per testes, at the time: but against whom was he to have done this, and to what effect? The mother, the sole next of kin, and who alone had a right to oppose, was before the Court, sustaining the will; and what could a mere examination of the subscribed witnesses to the factum of the will have done in support of it? they would doubtless have proved the mere factum of the will; but this, the mere factum of the will, as it ever was, so it still is, unquestioned by any party.

Could, however, her representative do, in June, 1824, what the mother of the deceased herself, if then living, can not have done? If he could, as already said, this can only be upon some special shewing. His legal advisers were aware of this; and accordingly they have suggested, in effect, in order to meet this legal exigency, that the mother of the deceased, at the time of her daughter's death, was an old woman, upwards of eighty years of age, who placed implicit confidence in the Mr. Burchells (father and son); and that her conduct throughout in the matter of her daughter's will was solely owing, and ought only to be ascribed, to her ignorance or misapprehension of her own legal rights, in the event of her daughter's intestacy in law; which ignorance or misapprehension on her part is also suggested to have been owing to the misrepresentations, [270] at the time of the two Mr. Burchells, made in order to induce her not to contest the will.

Of these two suggestions, the first is not only without proof; it is against proof: it is in proof that the mother acted with the full knowledge and apprehension of her own legal rights, in the event of her daughter's intestacy; and that she was a sensible woman, well acquainted with money matters and accounts, and perfectly conversant with matters of business, in which (that is, in such of them as any way interested or concerned herself) she always took an active part, even up to the time of her own decease in 1821, four years subsequent to that of her daughter in 1817. A series of her letters is before the Court, written in all those years, fully inferring this; and evidencing that she was not a likely person to place implicit reliance on any advice operating to her own wrong, or in her own prejudice. As to that other suggestion, of any such advice having been given her by the executor at the time to induce her not to contest the will, it is a suggestion equally against proof as the first, and it is one still more destitute of probability. I am satisfied that the mother was not only fully apprised of what her rights, as sole next of kin, would have been if her daughter could be shewn to have died intestate; but that she was fully apprised of these by Mr. Burchell, the executor, himself, and by his son, Mr. John Burchell, her solicitor, as he had been that of the deceased; and that it was distinctly pointed out to her at the time, by both the Mr. Burchells, that if the will of her daughter was made during her coverture, it might be invalid, when she would become entitled as her sole next of kin to the [271] whole of her property. So far again as respects the probability of the suggestion, the probability is, that Mr. Burchell, instead of acting the part imputed to him, would have done the very contrary. He had no interest in sustaining the will; to the parties principally benefited by and under it he was an utter stranger, even by name. On the other hand, he was on terms of great intimacy with the mother of the deceased, and well knew, and apparently was warmly attached to the plaintiff, her grandson. Under these circumstances I am bound to conclude that his wishes and feelings would have led him to impeach this will, had any grounds of legal impeachment suggested themselves to his mind at the time; instead, as imputed to

him, of going out of his way, and betraying the confidence reposed in him, in order to give it force and validity.

Finally, could the mother of the deceased, and can her representative, if permitted so to do, embark in this suit with any probable hope of success? The observations that have already fallen from the Court furnish an obvious answer to this inquiry. The utmost to which the case now suggested could extend, were nearly every part of it put in plea and formally proved,(*a*)[1] would be to make it questionable whether the will of 1797 revived or not, on the destruction, by the deceased, of the subsequent revocatory will; assuming it to be proved, that is, that the deceased actually made **[272]** and executed a subsequent revocatory will; for the suggested inadvertent destruction of such subsequent will, by the mother, after the death of the deceased, is a mere suggestion, and one that is plainly incapable of proof. And I am satisfied that, under these circumstance, I am providing best for the interest of all parties, as well as doing the executor a mere act of justice, in admitting his protest, and dismissing the present suit. But I am also satisfied that I should be doing him imperfect justice in not dismissing the suit with costs; (*a*)[2] especially considering that he, the executor, is in possession of no funds whatever of the deceased; so that, if left by the Court to pay his own costs, he must do this de bonis propriis; and that his opponent has acquired, derivatively at least, a considerable property under the very will now sought to be controverted.

THOMPSON *v.* DIXON. Prerogative Court, Trinity Term, 1826.—An executor who has renounced, in order to his becoming a witness in a suit commenced touching the validity of the will, may, at the termination of such suit, retract his renunciation, and take probate of the will.

(On motion.)

Fanny Mortiboys, the party deceased, died in the month of January, 1826, leaving a will, of which she appointed William Welch Lea and Edward Thompson executors, who were duly sworn, as executors, on the 15th day of March following; but a caveat having been entered, and an appearance subsequently given on behalf of Mary Dixon, widow, a second cousin once removed, and (pretended) next of kin of the deceased, **[273]** William Welch Lea, one of the executors, duly renounced the probate and execution of the will—in order, this, to his being, in future, examined as a witness in support of the will in the suit so commenced touching its validity.

In consequence, however, of the termination of that suit by the proctor for the said Mary Dixon, declaring that he "proceeded no further" in the suit, the executor, William Welch Lea, had retracted his renunciation of the probate and execution of the will, whereupon

The Court was prayed, and was now pleased, on motion of counsel, to decree probate of the said will to the said William Welch Lea, jointly with the other executor; the said William Welch Lea being first resworn as executor.

Motion granted.

IN THE GOODS OF WILLIAM THORNTON, Deceased. Prerogative Court, Trinity Term, 1826.—One of several executors who has renounced may, after the deaths of his co-executors who have proved the will, retract his renunciation and take probate, as a matter of course. But the same right does not accrue to an executor who has renounced, after administration, with the will annexed, granted; from the possible inconvenience that might accrue, in other quarters, if the chain of executorship, once broken, were thus suffered to revive.—Nor may administration, with the will annexed, be then granted to such executor; a residuary legatee, if any, being preferably entitled—if there be no residuary legatee, a next of kin.

(On motion.)

William Thornton, the party deceased in this cause, died in the year 1822; having made his will, and thereof appointed George Dodd and Charles Parsons executors.

(*a*)[1] That is, were the whole of that case pleaded and proved, except that part of it which suggested that the (latter) will was inadvertently burnt by the mother, after the death of the deceased; which was a mere suggestion, and one plainly incapable of being proved.

(*a*)[2] With a certain exception, however, as to a part of the costs, for which, see note (*a*), p. 247.

In the month of October, 1822, administration, with the will annexed, issued to Mar-[274]-garet Thornton, widow, as the residuary legatee for life named in the will, on the renunciation of the said executors; and she was lately dead, leaving effects of the deceased unadministered. Mr. Parsons, one of the executors, upon this, retracted his renunciation; and the Court was now moved by counsel to admit this retractation, and to decree probate of the will of the deceased to Mr. Parsons, as one of his executors.

In support of the motion it was submitted that an executor, after a renunciation and probate or administration granted, had still a right to probate whenever a vacancy occurred in the representation of the deceased. After a probate granted, this was said to be recognised by the practice of the office, which was in the constant habit of permitting one of several executors who had renounced, after the death of his co-executors who had proved the will, to retract that renunciation, and to take probate as a matter of course. It was now contended, on the authority of a passage in Mr. Toller's Law of Executors,(*a*) that the same right accrued to an executor after administration, with a will annexed, granted, although the office, it was said, had objected to this on the ground of the possible inconvenience that might accrue, in other quarters, from chains of execu-[275]-torship once broken, being thus suffered to revive. Should this deceased, for instance, it was objected by the office, have been the surviving executor of other testators, and should administrations have been granted of their effects, on the renunciation of his executors, if the chain of executorship were to revive, as now proposed, there would be double and conflicting representations of such testators; the one by grant of administration, as above; the other, by the revived chain of executorship.

The Court was of opinion upon this state of facts that the objection raised by the office was a valid objection—and there being, so far as appeared, no instance of, or precedent for, a grant of this description in the office, declined acceding to the motion.

It was then prayed that administration with the will annexed might issue to Mr. Parsons, the executor; by which means the objection raised by the office would be obviated. This would preclude, it was said, a revived chain of executorship, and, consequently, the occurrence of the inconvenience suggested by the office; and still give the representation to the executor, who was submitted to be entitled to it. But,

Per Curiam. Parsons is not the residuary legatee—the wife was residuary legatee for life only; and there is no residuary legatee substituted. Under these circumstances, as the next of kin are before the Court, praying the administration, they have clearly, I think, a preferable title to it.

Motion refused.

[276] Cox *v.* Cox. Consistory Court, Trinity Term, 4th Session, 1826.—An allotment of alimony pendente lite reduced, on proof that the husband was no longer in a condition to aliment the wife pendente lite, at the rate originally assigned.—This, on motion, founded upon the mere affidavit of the husband—the husband's prayer being, in effect, unopposed by the wife.

(On motion.)

This was a cause or business of restitution of conjugal rights, promoted by Frances Charlotte Cox, wife of Robert Albion Cox, Esquire, against the said Robert Albion Cox.

The citation was returned on the first session of Hilary Term, 1825; and a libel in common form, brought in on the third session of that term, was admitted without opposition; the husband's proctor, at the same time, confessing the marriage, as pleaded.

On the same day the proctor for the wife brought in an allegation of faculties;

(*a*) See Toller's Law of Executors, vol. i. c. 3, s. 1, where, after speaking of the renunciation of an executor, and grant of administration with the will annexed, he continues, "After such administration, the executor cannot retract his refusal during the lifetime of the administrator; but he may do so after the administrator's death."

See, too, Roberts on Wills, vol. ii. part 6, c. 2, s. 1, who says on the same point, "After administration granted he," the executor, "cannot assume the execution during the life of the administrator, but after his death he may retract his renunciation, however formally made."

which was afterwards admitted, also without opposition: and on the husband's answers to that allegation of faculties, admitting a (then present) income of 1680l. per annum, the Court, on the second session of Trinity Term in that year, allotted as alimony to the wife, pending the suit, the sum of 300l. per annum; to commence from the return of the citation, and to be paid quarterly.

The present was an application to the Court to reduce the alimony so allotted to the wife pending the suit; founded upon an affidavit of the husband that, "subsequent to his answers to the allegation of faculties, given in the cause, and the allotment of alimony thereon his salary, as one of the commissioners for **[277]** settling Spanish claims" (admitted in the answers at 1500l.), "had been reduced to 1000l. per annum, which reduction had commenced from the 5th day of April preceding;" and also that "his receipts as collector of the orphan dues, within the port of London" (returned in the answers at 150l. per annum), "had produced in the last year the sum of 80l. only." And this sum of 1080l. per annum, together with an average sum of 30l. per annum, payable to the husband for his attendance as a member of the court of assistants of the Goldsmiths' Company, was sworn by the husband to constitute his only then present income.

Upon this state of facts, uncontradicted on the part of the wife,

The Court was pleased to reduce the wife's alimony, pending suit, to the sum of 220l. per annum; to commence payable at that rate from and after the next quarterly payment, made under the original decree.(*a*)[1]

KING *v.* SANSOM, OTHERWISE KING. Consistory Court, Trinity Term, 1826.—A marriage by license null and void, by reason of minority and want of legal consent, under 26 Geo. II. c. 33, held to be rendered a good and valid marriage by the retrospective operation of 3 Geo. IV. c. 75—it being held that the parties, though not actually cohabiting up to the time of the passing of 3 Geo. IV. c. 75, did still "continue to live and reside together as husband and wife," in legal construction, within its true intent and meaning, up to that time, sufficiently to render the retrospective provisions of 3 Geo. IV. c. 75, applicable to such their marriage.

Judgment—Sir Christopher Robinson. This is a suit of nullity of marriage, promoted and brought by Charles King against "Mary Sansom, **[278]** falsely calling herself Mary King, and wife of the said Charles King," so described, at least, in the proceedings in the cause.

It is pleaded in the libel, and proved on the part of the husband, the promoter of the cause, that the marriage sought to be annulled was a marriage had by license, without the knowledge, privity, or consent of the father of the husband—the husband being a minor at that time, of little more than nineteen years of age; though, in order to the obtaining of his marriage license, he swore himself to have attained his majority. Consequently, under the statute 26 Geo. II. c. 33, the marriage in question, a marriage had in the year 1812, is clearly null and void in law; and the husband, de facto, is entitled to the sentence, declaring and pronouncing it so to be, which he now prays.

But a subsequent statute (*a*)[2] has by retrospective provisions ratified and confirmed marriages so null and void in their original construction as above, under certain circumstances—being—"where the parties had continued to live together, as husband and wife, till the death of one of them, or till the passing of the act;" or "had only discontinued their cohabitation for the purpose, or during the pending, of some proceeding touching the validity of their marriage." Is, or is not, the marriage in question rendered good and valid, **[279]** by the retrospective provisions of this subsequent statute?

The parties to this marriage are both still living; and it is pleaded and proved that at the time of the passing of this subsequent statute they, the parties, had not

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(*a*)[1] In this stage of the cause it soon after finally determined by the death of the defendant, the husband. An allegation had previously been filed, on behalf of the husband, pleading adultery committed by the wife, and praying a divorce.

(*a*)[2] Stat. 3 Geo. IV. c. 75; a statute still operative upon the marriage in question, by virtue of the saving, in 4 Geo. IV. c. 76 (the subsisting marriage act), sec. 1.

discontinued their cohabitation only for the purpose or during the pending of some proceeding touching the validity of their marriage. Accordingly, the question which arises upon this act as to the present validity or the contrary of the marriage in question is, and can only be, whether at that time, within the true intent and meaning of the act, the parties had discontinued their cohabitation at all? It is, in other words, whether they had or had not "continued to live together as husband and wife," in legal construction, within the true intent and meaning of the act, up to the time of the passing of 3 Geo. IV. c. 75, in July, 1822.

Now, in order to negative this; and consequently to sustain the nullity of the marriage in question, under the statute of 26 Geo. II. c. 33, notwithstanding the retrospective provisions of the statute of 3 Geo. IV. c. 75, it is pleaded and proved on the part of the husband that, "about ten months after the solemnization of the said marriage, an agreement was entered into between Charles King, the elder, Charles King, the younger, Mary Sansom, spinster, and John Sansom, father of the said Mary Sansom" [that is, between the parties in the cause and their fathers severally and respectively], "that they, the said Charles King, the younger, and the said Mary Sansom should live separate and apart from each other; and that the said Charles King, the elder, and Charles King, the younger, should execute a certain bond to the said **[280]** John Sansom, which said bond was duly executed by the said Charles King, the elder, and Charles King, the younger, on the 7th day of September, 1813—it being recited in that bond that 'Charles King, the younger, and Mary, his present wife, had agreed to live separate and apart from each other; and that the said Charles King, the younger, had proposed and agreed to pay and allow unto the said John Sansom, for the use and benefit of his said wife, and towards her separate maintenance, the sum of 5l. per annum; and that the said Charles King, the elder, had agreed to join his said son in a bond for the due and regular payment thereof,' and the bond itself conditioning accordingly." And it is also pleaded and proved (proved, possibly, to the utmost feasible extent) on the part of the husband, that "they, the said Charles King, the younger, and Mary Sansom, falsely calling herself King" (so pleaded), "had never" (actually) "lived and cohabited together as husband and wife, subsequent to the execution of the said bond in September, 1813." And it is upon this shewing that the Court is prayed to pronounce the marriage in question null and void, under the statute of George II., notwithstanding the retrospective provisions, to which I have adverted in the more recent act of his present Majesty.

But it appears to me that the parties in this cause did "continue to live together as husband and wife" until the passing of this more recent act, if not actually, or, in fact, still in legal construction, within the true intent and meaning of that act, so as to render this a good and valid marriage by its retrospective operation. Married persons separating, by mere voluntary agree-**[281]**-ment, without any legal sanction, are still, in the eye of the law, in a state of matrimonial cohabitation, how locally situate soever; and upon what terms soever of matrimonial intercourse. The actual separation of the parties in this case was without any reference apparently to doubts entertained by both or either as to the legal validity of their marriage. On the contrary, they separate by virtue, to some extent, of a deed, in which the party proceeded against is expressly recognised as the wife of the party proceeding in this suit—and by which a separate maintenance is provided for her expressly in that character. It is, in short, just such a mere separation as might have taken place between the parties, had their marriage not been faulty in its original construction—had the husband, for instance, been a major at that time; or, being a minor, had his father's consent been obtained; or had this, lastly, been a marriage had or celebrated in virtue of banns duly published. Accordingly their separation is one to which the law as administered in these Courts can be no party; it is a separation, in short, to which it can give no heed, and can shew no countenance. Under these circumstances, admitting it to be proved that these parties were not actually cohabiting up to the time of the passing of 3 Geo. IV. c. 75; still, in my judgment, they did "continue to live together as husband and wife," in legal construction within its true intent and meaning up to that time, sufficiently to bring the marriage within the retrospective provisions of that act. And the retrospective provisions of that act, if applicable to, clearly rendering this a good and valid marriage, I am bound, as deeming them so applicable, to withhold the declaratory sentence of its nul-**[282]**-lity now prayed by

the husband; and I pronounce accordingly, by dismissing the wife from any further observance of justice in this suit.(*a*)[1]

STAYTE, OTHERWISE FARQUHARSON *v.* FARQUHARSON. Consistory Court, Trinity Term, By-Day, 1826.—A marriage had in virtue of false banns (the wife de facto personating, at the time of the marriage, the female as for whose marrage with the husband de facto, the banns had been published) pronounced null and void under the statute 26 Geo. II. c. 33, a statute still in force as to the particular marriage under 3 Geo. IV. c. 75, and 4 Geo. IV. c. 76.

This was a cause of nullity of marriage by reason of undue publication of banns, promoted by Elizabeth Stayte, spinster, falsely called Elizabeth, otherwise Mary, Farquharson, and wife of James Farquharson, against the said James Farquharson.

The libel pleaded in the several articles in substance—

1. The marriage act, 26 Geo. II. c. 33, and that the said act had not, as to the marriage in question, been repealed, but that the same was still in force.(*a*)[2]

2. That Elizabeth Stayte, spinster, party in the cause, was the daughter of Edward Stayte and Elizabeth, his wife, of Woodstock in the county of Oxford; and was baptized in the parish church of Woodstock on the 1st September, 1802, by the name of "Elizabeth" only: **[283]** and that an entry of such baptism was then and there duly made, a copy of which entry was in article.

3. Exhibited in supply of proof in the usual form.

4. That in the beginning of the year 1821 the said James Farquharson, being then a minor, paid his courtship and addresses to one Mary Hides, who consented to be married to him; and that banns of marriage were accordingly published, in the parish church of St. George, Hanover-square, on three successive Sundays in the month of April, in that year, between the said James Farquharson and the said Mary Hides; (*a*)[3] but that, notwithstanding, such intended marriage did not ultimately take place.

5. That at or about the time last-mentioned the said James Farquharson became also acquainted with the said Elizabeth Stayte, then also a minor, and paid his courtship and addresses to the said Elizabeth Stayte, who also consented to be married to him; and that the said James Farquharson, in order the more effectually to conceal such their intended marriage from their respective parents, prevailed on the said Elizabeth Stayte to marry him by the assumed names of Mary Hides, under and in virtue of the banns so published as aforesaid, as for the marriage of the said James Farquharson with the said Mary Hides.

6. The sixth article pleaded the said fact of marriage on the 21st of October, 1821; and the entry of the same in the marriage register-book of St. George, Hanover-square: in which book on which occasion she, the said Elizabeth Stayte, signed the names of **[284]** Mary Hides—that the said marriage was had without the consent of the parents of the said Elizabeth Stayte; and without license or banns, other than those published, as for the marriage of the said James Farquharson and Mary Hides as aforesaid.

7. The seventh article exhibited in supply of proof a true copy of the original entry of the said marriage, with the usual averments, as to the identity of the parties, &c.

8. The eighth, that the names James Farquharson and Mary Hides in the said entry were in the hand-writing of the parties in the cause respectively.

9. And the ninth, that Elizabeth Stayte from the time of her birth, constantly and

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(*a*)[1] Appealed on the part of the husband to the Court of Arches, where the cause is now depending.

(*a*)[2] See, with respect to the law applicable to the particular marriage in question, vol. 1, page 94, note (*a*). And as to the subsisting law with respect to marriages by banns generally, see 4 Geo. IV. c. 76, § 2, 3, 4, 5, 6, 7, 8, 9, 12, 13. And by that act, § 22, the marriages of persons who shall knowingly and wilfully intermarry, without due publication of banns (unless by license), are null and void, to all intents and purposes whatsoever. See also 5 Geo. IV. c. 32.

(*a*)[3] The original register-book of banns kept in and for the parish of St. George, Hanover-square, for the year 1821, in verification of this averment as produced at the hearing of the cause.

invariably passed, and was called and known, by those names only and not by any other.

10 and 11. The tenth and eleventh were articles pleading only the jurisdiction of the Court; and praying that the marriage so had between the parties might be pronounced null and void.

Upon this libel and exhibits eight witnesses were examined: and

The Court, being satisfied upon their evidence that the facts of the case were proved as pleaded; and that the law was as pleaded in the first article—namely, that the statute of 26 Geo. II. c. 33, was still unrepealed as to the marriage in question (see 1 Add. 94, note (*a*))—pronounced the said marriage, as had without any due publication of banns, null and void, and condemned Mr. Farquharson in costs.

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOHN HAGGARD, LL.D. Vol. I. Containing Cases from Michaelmas Term, 1827, to Trinity Term, 1828, inclusive; and some Cases of an earlier date in the Supplement. London, 1829.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

THE COUNTESS OF PORTSMOUTH *v.* THE EARL OF PORTSMOUTH, BY HIS COMMITTEE.

Arches Court, Michaelmas Term, 2nd Session, 1827.—Practice—If due diligence has been used the Court will grant an extension of the term probatory, in order that material witnesses may be examined.

[See further, p. 356, post.]

On the extension of the term probatory.

This was originally a suit of nullity of marriage instituted in the Consistory Court of London, on the part of the Earl of Portsmouth, acting by his committee; and in an early stage of the proceedings came up by appeal to the Court of Arches, where, on the third session of Hilary Term, 1827, it was retained.

On the third session of Trinity Term an allegation, on behalf of Lady Portsmouth, which consisted of thirty-one articles (besides the concluding article), with five and thirty exhibits, was admitted [2] without opposition. On the first session of the present term the answers to this allegation were brought in; and on the same day Jenner, as counsel for Lady Portsmouth (after reading the affidavit of the proctor as to his inability during the long vacation to examine all the witnesses upon his allegation, on account of their great number, and the absence of many of them from London), applied for an extension of the term probatory; and the Court then ordered "the assignation to prove" to be continued; but directed that an affidavit should be exhibited, stating the names of those witnesses whom it was proposed to examine, and, further, that they were material witnesses. In compliance with this order Lady Portsmouth had made an affidavit, which set forth "that, notwithstanding the utmost diligence and activity had been used by her proctor, there still remained several important witnesses [stating some names and addresses] who were likely to be able to depose to the capacity of the said Earl of Portsmouth, and that material evidence might be expected from them."

When this affidavit had been read, Lushington, on the part of Lord Portsmouth, said that the affidavit did not, apparently, contain an enumeration of all the witnesses whom it was intended to produce: however, he would not object to the sufficiency of the affidavit, nor to the extension of the term probatory, on a clear understanding that the names and descriptions of any further witnesses, proposed to be examined, should be communicated in a day or two.

To this arrangement Lady Portsmouth's counsel acceded.

[3] Per Curiam. The Court is extremely anxious not to preclude Lady Ports-

mouth from an examination of the witnesses she may think of importance to her cause. The circumstances of the case are very special; and it is quite proper that the party should have a full opportunity of defending the legality of her marriage. As the proposal of Lord Portsmouth's counsel has been acquiesced in, the Court will grant an extension of the term probatory till the first of January, 1828; but it must expect that the defence will be conducted with due diligence.

In reference to this and similar applications, arising upon the orders of Court issued on the first session of Easter Term, 1827, the Court observed that the consent of the adverse proctor would not alone be sufficient to induce the Judge to continue a term probatory as matter of course, though it would have great weight with him as shewing "reasonable cause;" but the circumstances must be stated to the Court for its approbation, and this for the sake of the suitor, lest too much facility of accommodation should be given. This regulation would also, practically, be found convenient to the proctors as a justification for declining to accede, without strong grounds, to a postponement.

The Court took this opportunity of reading certain orders passed in 1684; and, after stating their history, pointed out the strictness with which the expediting of causes was enforced.

For the orders then read—vide Appendix, A.

[4] NORRIS *v.* HEMINGWAY. Arches Court, Michaelmas Term, 2nd Session, 1827.—Payment of a legacy decreed to a married woman, "whose receipt was to be a discharge to the executor, notwithstanding coverture;" her husband (a bankrupt) and his provisional assignee being first cited.

On motion.

James Elliott, by his last will and testament duly executed in writing, among other legacies, bequeathed the sum of 100l. to Sarah, wife of Thomas Norris; and directed "that the receipts of the several female legatees should be a sufficient discharge notwithstanding any present or future coverture." On the 31st of August, 1826, probate of this will was granted by the Prerogative Court of Canterbury to John Hemingway, the sole executor; and on the 14th of September, 1827, a citation issued under seal of this Court—the Court of Arches, at the suit of the said Sarah Norris, calling upon the executor to answer to her in a cause of subtraction of legacy.(*a*)[1]

To this citation a proctor appeared and alleged, on the part of the executor, that Thomas Norris, the husband, had, since the death of the testator, assigned his estate and effects to a provisional assignee, appointed by the Court for the relief of Insol-**[5]**-vent Debtors,(*a*)[2] and to whom, as he (the executor) was advised, the interest in the said legacy had passed. The proctor then brought into the registry of this Court 90l., as the amount of the legacy minus the duty, and the executor was dismissed, without opposition, from the effect of the citation.

On this day Lushington, for the legatee, after referring to the case of *Lee* v. *Prieaux*,(*b*) where the husband was also a bankrupt; and where Lord Alvanley (Master of the Rolls) held that in the bequest of a legacy to a feme covert the words, "her receipt to be a sufficient discharge to the executors," was equivalent with saying "to her sole and separate use;" moved that the money in this case should be paid out of the registry to Mrs. Norris upon her own receipt.

Per Curiam. The Court said—though, according to the adjudged cases, little

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(*a*)[1] The following account of the Court of Arches is taken from the Report of His Majesty's Commissioners for inquiring into Courts of Justice. [1823.] "The Court of Arches is chiefly a court of appeal from the courts of the several bishops or ordinaries within the province of Canterbury, and its appellant jurisdiction extends to all causes or suits relative to wills, intestacies, tithes, church-rates, marriages, and other matters cognizable in these courts. It has an original jurisdiction in suits for subtraction of legacy, where the will is proved in the Prerogative Court of Canterbury." [Oughton, tit. 15, ss. 1, 2, 9, and per Holt, C. J., 1st Lord Raymond, 453.] "It also entertains suits on letters of request from inferior jurisdictions within the province."

(*a*)[2] See 1 Geo. IV. c. 119, s. 4, and 7 Geo. IV. c. 57.

(*b*) 3 Bro. C. C. 381. The cases upon this point are collected in Mr. Jacob's edition of "Roper on the Law of Husband and Wife." Vol. ii. c. 18, s. 3.

doubt could be entertained that this was a bequest to the separate use of the wife, yet, as the husband was insolvent, and the interests of creditors might be affected. It should direct, in the first instance, the husband and the provisional assignee to be cited to shew cause why the legacy should not be paid to the legatee.

A decree with intimation was accordingly served, personally, on the husband and the provisional assignee; but they offered no opposition. On the fourth session, therefore, the Court directed the legacy to be paid to Mrs. Norris.

[6] RICHARDSON *v.* RICHARDSON. Arches Court, Michaelmas Term, 3rd Session, 1827.—1. In a cause of divorce, articles to account for the husband's delay in instituting the suit are admissible, but need not be examined to unless the defence renders it necessary to justify his conduct.—2. If adultery, continued for many years, attended with pregnancy and birth of a child, during the husband's absence from Great Britain, be pleaded, it is useless to prove more than a few facts—such as the birth of a child, identity, and non-access.

On admission of the libel.

This cause was brought by letters of request from the Commissary of Surrey, and was a proceeding for divorce by reason of adultery charged against the wife. The question now before the Court was the admissibility of the libel, which entered into a detailed account of the marriage, separation, and subsequent history. It consisted of twenty-eight articles.

The first article pleaded that on the 25th of March, 1802, Robert Richardson and Marianne Romney were married at Calcutta, in the East Indies, according to the rites and ceremonies of the Church of England, and an entry of their marriage was made in the register.

The second, that copies of the registers, duly authenticated, are annually sent over by the Governor General in Council, and deposited among the archives of the India House.

The third, that the exhibit, No. 1, is a true copy of the entry of their marriage, extracted from the said archives.

The fourth, that the parties cohabited in India till December, 1812, and had seven children, four of whom are living. That Mrs. Richardson then came to England on account of her children's health, and accompanied by them; that Mr. Richardson was and has ever since been necessarily detained in India; that, *notwithstanding she had* [7] *been extravagant in India,*(*a*) he made a liberal provision for her and her children.

The fifth, that he consigned her to the care of his brother-in-law, the Honorable and Reverend Edward Turnour, and to his step-mother, the Dowager Lady Winterton, who, as well as his other relations, received and treated her kindly.

The sixth, that shortly after her arrival in England *she entered into a dissipated mode of living, and incurred debts to a considerable amount, and* evinced great and unbecoming levity; that, after remonstrating, the Dowager Lady Winterton, and Mr. Richardson's relations and friends, withdrew from her their countenance, and declined all personal intercourse.

The seventh, that in the beginning of June, 1814, Lady Winterton wrote an account of what had passed to Richardson, and inclosed a letter she had received from Mrs. Richardson in answer to her remonstrances.

The eighth exhibited those letters.

The ninth, that Richardson, on receiving these letters, sent over a power of attorney, authorizing his brother (who was then in England), and two friends, Cartwright and Brown, to remove his children from Mrs. Richardson, to conclude an agreement for a separate maintenance, to execute the necessary deeds, and also to institute a suit for divorce; and directed that his wife should be allowed a sum not exceeding 300l. a year.

The tenth exhibited letters to Lady Winterton, communicating such his resolutions.

The eleventh, that the children were removed, [8] and articles of separation entered into; and that an annuity of 300l. a year was settled upon her.

The twelfth article exhibited the deed of separation.

(*a*) The sentences, printed in italics, were struck out by order of the Court.

The thirteenth, that soon after the execution of the deed Mrs. Richardson removed from Hampstead, and that his relations had no further intercourse with her; that the annuity was regularly paid to Robert Barker, one of her trustees, on his producing a receipt, signed by her, in proof that she was alive. That Francis Richardson, the brother, who had returned from India in June, 1817, having in the middle of the year 1819 heard that she had been living and was carrying on an adulterous intercourse with one Verity, applied to Barker to be informed of her residence, which was unknown to, and concealed from, the husband's relations; that on Barker's declining to inform him he stopped the annuity, but shortly after received two letters from her, the last dated from Brighton; that then the annuity was again paid to her trustee; that Francis Richardson made inquiries at Brighton, where, and with whom, she was living, but could not discover.

The fourteenth, that Francis Richardson in 1819 communicated, by letter, to his brother the reports he had heard of his wife's conduct, and his endeavours to discover her, with a view to institute proceedings for a divorce; that Robert Richardson supposing, erroneously, that proceedings would be, or had been, instituted against her under the power of attorney, gave no directions; but, at length, having learned that his personal authority was necessary, he executed a proxy, and transmitted it to Francis Richardson; that it arrived in England about the middle of June, 1825, when, Mr. Cartwright being **[9]** dead, and Francis Richardson on the Continent, and Mr. Richardson's relations unwilling to render public Mrs. Richardson's misconduct, some delay took place; but upon the continued adultery, as was subsequently pleaded, having been ascertained, Francis Richardson felt himself compelled to proceed.

The remaining articles pleaded adultery from 1816 to the time of giving in the libel, with three different persons in succession, her pregnancy by one of them, the birth of a child in 1824, her declarations as to who was the father, and cohabitation with the other two as their wife, and adoption of their name; identity, diversity, and the usual formal articles.

Dodson and Pickard in opposition to the libel. The certificate of the marriage is a copy of a copy: this is not a proper mode of pleading, but we do not press the objection. The principal objections are, first, that the husband, having so long forborne bringing the suit, is barred. In 1814 he was informed of her levity; the deed of separation gives her licence to live with whom she pleaded, and that the husband will not disturb her. [Court. As a feme sole, not in a state of adultery. Deeds of this description have always been so construed; and this deed is in the usual terms.] In 1819 the husband was positively informed she was living in open adultery; he knew no suit was begun, for the annuity continued to be paid; and the proxy, i.e. his personal authority, confirmed what was done under the power of attorney. [Court. But does not that confirmation lead to the inference that he, bonâ fide, conceived proceedings had been instituted?] The other objection is, that pleading the extravagance of **[10]** the wife is irrelevant, and will lead to useless contradictions.

Jenner and Lushington, contrà, were stopped by the Court.

Judgment—Sir John Nicholl. The first three articles only go to establish the marriage; and though a formal objection was taken to the mode of pleading the register, it was not pressed, and I, therefore, need not consider it. The eleven next articles enter at considerable length into the history of the parties, not, as I conceive, for the purpose of proving adultery, or of criminating the wife, but to account for the conduct of the husband, and to remove any unfavourable impression that might arise—if the delay in bringing the suit were not explained. In this view the general substance is admissible; and furnishes a sufficient reason why the husband should not be precluded, on the ground of laches, or acquiescence in his wrong, from proceeding in this suit. This is the answer to the first objection; at the same time the Court will not expect these articles to be examined to, unless the wife should set up such a defence as may render it necessary to prove all the preliminary history, in order to the husband's justification. The other objection to the irrelevancy of the parts that plead the extravagance of the wife is, I think, quite sound; and I shall direct the libel to be reformed in this respect, as the introduction of any such matter will lead to useless expence, and load the cause with pleading and evidence that cannot have any real bearing on the point at issue.

The remaining articles minutely detail Mrs. Rich-**[11]**-ardson's various adulterous connexions. It cannot be essential, and, consequently, it would not be proper, to

examine them all. If there is full proof of a few of the facts, particularly of the birth of the child, of her identity, and of her husband's absence in India, as pleaded; this is all that can be essential. To trace her to all the different parts of the kingdom where the adultery is laid would lead to an expence quite enormous, and which would be oppressive even to the wife, who will, almost necessarily, have some extra costs to pay; but it would be still more oppressive to the husband, on whom the ordinary costs of both parties fall, if these Courts were to require such a superabundance of proof. I have thrown out these suggestions in the hope of preventing expences that may well be spared, and, at present, have only to admit the libel with the slight alteration that I have mentioned.

Libel to be reformed.

On the by-day after Hilary Term, 1828, the Court pronounced that this libel was fully proved: and on an affidavit that Mr. Richardson was residing in the East Indies, and not expected to return; the Court permitted the bond, enjoined by the 107th canon, to be entered into by his brother; and then signed the sentence of separation.

[12] JENKINS *v.* BARRETT. Arches Court, Michaelmas Term, 3rd Session, 1827.—On appeal in a criminal suit, an extension of the term probatory being prayed by the promoter, a delay of nine months without making substantial progress in the cause, or examining a single witness (after the suit had been already depending in the Court of Appeal two years), is a sufficient ground to dismiss the defendant, and condemn the promoter in payment of a sum nomine expensarum. —In a suit for brawling, under 5 & 6 Edw. VI. c. 4, s. 1, the words of brawling must be set forth in the articles. The words "other enormous ecclesiastical offences" in a citation are surplusage, and will not support a charge of smiting under 5 & 6 Edw. VI. c. 4, s. 2.—5 & 6 Edw. VI. c. 4, was not intended to abridge the ecclesiastical jurisdiction in cases of brawling.

An appeal from the Consistory Court of St. David's.

This was a cause, originally depending in the Episcopal Consistorial Court of St. David's, held at Carmarthen, wherein the office of the Judge was voluntarily promoted by John Barrett, churchwarden of the parish of Llangain, in the county of Carmarthen, and diocese of St. David's, against Esau Jenkins of the said parish, farmer, citing him to appear and "to answer certain articles touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, and more especially for quarrelling, chiding, and brawling in the church and church-yard of Llangain, and for other enormous crimes and offences of ecclesiastical cognizance."

Such was the tenor of the citation; but the heading of the articles (from the admission of which articles the cause was appealed), after reciting the charges contained in the citation, thus proceeded: "and for clenching your fist in the said church, and putting yourself in a fighting and threatening posture there, and thereby impeding and preventing the Reverend Daniel Rowlands, clerk, then the officiating minister of the parish of Llangain aforesaid, from performing certain ceremonies, rites, and official duties within the said church." The articles pleaded, first, the 5 & 6 Edw. VI. c. 4, s. 1, against quarrelling, chiding or brawling in a church or church-yard; secondly, that by the same statute (s. 2) "it is further enacted that if any person **[13]** shall smite, or lay violent hands upon any other, either in any church or church-yard, then, ipso facto, every person so offending shall be deemed excommunicate." (*a*) They then charged, thirdly, "that you the said Esau Jenkins did, upon the 13th of July, 1824, brawl, chide, and quarrel in the parish church of Llangain, and did in an angry and passionate manner (brawling, chiding, and quarrelling in the said church) come on violently towards the said Daniel Rowlands, who was in the reading-desk, and had his surplice on, and was ready to perform the solemnization of matrimony between one David Davies of the parish of Llangonnock, in the county and diocese aforesaid, a bachelor, and Mary Jenkins of the parish of Llangain, a single woman, who were standing before him for that purpose, and you the said Esau Jenkins, with your hat on, clenched your fist, and put yourself in a fighting and threatening manner and posture [and declared that the said Daniel Rowlands should not proceed with such ceremony, that the said Mary Jenkins was your daughter, that she was yours, and

(*a*) This article was rejected by the Court of Appeal.

that she should not be married until she had been baptized in the usual form, as practised among the sect of Christians called Anabaptists, to which you yourself belonged]; (*b*) that in consequence thereof, he the said Daniel Rowlands was obliged to take off his surplice, and go out of the church, without solemnizing the said marriage."

Fourthly, "that you, the said Esau Jenkins, did on the said 13th of July, 1824, in the parish church of Llangain, come violently, with your hat **[14]** on, towards the said Daniel Rowlands, who had on his surplice, and was preparing and going to officiate and perform the ceremony of baptism on one Mary Jenkins, your daughter (who was then of full age), by her desire, and at her request, when you said 'that she should not be baptized, and that you would prevent it to the utmost of your power;' and jumped on towards the font or christening place in a very violent and outrageous manner, appearing determined to prevent the ceremony by force, and you repeatedly, and continuing your hat on, declared to the said Daniel Rowlands that he should not baptize your daughter, and bring such a slur or disgrace on the religion of Baptists, which you professed; that you did then use several other brawling, chiding, and abusive words and expressions to and against the said Daniel Rowlands, and did create and occasion great noise and confusion amongst the congregation and people then assembled in the said church and church-yard, for the purpose of witnessing the solemnization of the said marriage." The articles concluded by praying "that the said Esau Jenkins be duly corrected and punished according to the exigency of the law and be condemned in costs."

At the hearing of the appeal, on the third session of Hilary Term, 1826, the admissibility of the articles was debated.

Lushington in support of the appeal, and in objection to the articles. The articles and citation do not agree. The citation is for brawling, and other enormous ecclesiastical offences: no offence can be **[15]** so generally set out—it cannot cover the charge, now laid in the articles under the statute, for smiting, which is the greater offence. In the third article not a single species of brawling is alleged. The whole case should have been set forth in the citation; the articles are not in a specific shape—they must be reformed. The offences as charged, if properly laid, are of ecclesiastical cognizance; but it is apparent that the case is not fully stated.

Dodson contrà. The objection as to an omission of specific words in the third article does not extend to the whole of that article; and if it is an objection, it is not applicable to the fourth.

Per Curiam. In this case I am bound to pronounce for the appeal, as some parts of the articles are not admissible. The charge of "smiting" could not be supported under those general words, "other enormous ecclesiastical offences," which are mere surplusage. Besides, a threatening posture, though an assault at common law, even without a blow, is not held here to be "smiting" within the statute. This must, then, be considered a proceeding for "brawling" only; therefore the second article should not have been admitted. The third article must be reformed: it should recite some words of quarrelling; for though the statute was not intended to abridge the ecclesiastical jurisdiction,(*a*) yet as **[16]** it provides for brawling by "words only;" and as this is a proceeding under the statute, some word should be alleged. The

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(*b*) Inserted on the articles being reformed.

(*a*) Vide 2 Add. 144, and 1 Consistory Reports, 181. In the case of *Dawe and Nockolds* v. *Williams*, 2 Add. 130, prohibition was applied for to the Court of King's Bench, on the ground that suits for "brawling" could not be entertained by "letters of request." Abbott, C. J., in discharging the rule nisi for the prohibition, said—"Taking this offence to have been created by the 5 & 6 Ed. VI. c. 4, I should think that the authority hereby given to the ordinary is to be exercised in the same manner as any other authority given to that officer. Now one mode of exercising his authority is by letters of request to the archbishop or his substitutes. But in *Wenmouth* v. *Collins* (2 Ld. Raym. 850), Lord Holt appears to have been of opinion that the offence of brawling was not created by the statute which has been referred to, and I think that his opinion was correct. If that be so, all difficulty is removed, and there can be no doubt that the Court of Arches may derive jurisdiction from letters of request. This rule must therefore be discharged with costs." *Ex parte Williams*, 4 B. & C. 315.

fourth article details sufficiently what passed; and that the young woman was of age, and might contract marriage with whom she pleased, and exercise her judgment in the choice of a religion, without the interference of her father.

I shall expect all proper diligence in the future stages of this cause.(*b*) If the facts are truly laid in these articles, the defendant will act more wisely in giving an affirmative issue, and paying the expences; or, at least, something nomine expensarum. It cannot be held that this conduct is justifiable; for though, entertaining a conscientious difference of opinion, he may claim the utmost toleration, yet he must exercise some himself; he must allow a choice in marriage and religion to his daughter, who is now beyond that age when by law she is subject to a father's control; nor can he be per-**[17]**-mitted to enter the church, and interfere in the ministration of its ceremonies. If the party is aware that the charge can be substantiated, I recommend an early adjustment of this cause. The articles, when reformed as I have directed, will be admissible.

To these articles a responsive plea was admitted, in the Court of Arches, without opposition; which, after specifically denying the charges, pleaded: "That Jenkins and his daughter were Protestant dissenters of the Baptist denomination, who believe that the sacrament of baptism should only be administered to certain adults, and by immersion; that the same was known to the said Reverend Daniel Rowlands, whom [on the day and time alleged] they found in his surplice, in a seat under the pulpit of the church; that upon their entering the church he immediately asked Mary Jenkins whether she had been baptized; that upon her replying she had not, he declared he would not solemnize the marriage unless she would first consent to be baptized; and upon her declining so to be baptized, he took off his surplice; that at length she said she was willing to be baptized, provided he would immerse her in water, being the mode of baptism approved of by Baptists; that her said father then also declared that the baptism of his daughter should be by immersion, and not by sprinkling; that he made such observation firmly and aloud; but temperately and respectfully, and not in a passionate manner."

After this allegation had been admitted a decree for answers was served upon Barrett on the **[18]** 19th of July, 1827; but no appearance had been given thereto, nor had any evidence been taken on either side; when on this day the proctor for the respondent (the promoter of the suit) applied to the Court for an extension of the term probatory, to enable him to examine witnesses upon the articles; and in support of his application exhibited an affidavit.

Dodson for the respondent.

Lushington contrà.

Judgment—Sir John Nicholl. The duty of the Court in this case is quite obvious. The suit originally commenced in the Consistory Court of St. David's against the defendant (the present appellant) "for quarrelling, chiding, and brawling in the parish church of Llangain"—an offence undoubtedly proper to be repressed, particularly under the circumstances charged in the articles, which, if true, will constitute brawling of an aggravated character. It is a suit brought by a churchwarden—the officer of the parish, and of the ordinary, specially appointed to preserve decorum in the church; a very proper person to institute these proceedings, if he has stepped forward from a sincere and unmixed desire of enforcing the observance of order. Primâ facie, then, the articles are exhibited for a proper purpose, and by a proper person. But these considerations rendered it more essential that the cause should be diligently prosecuted, not only for the correction of the individual offender, but as an example to deter others from similar acts of indecency. The process of the Court might otherwise lose much of its effect from the tardiness of its **[19]** censures; or, what is still more to be guarded against, might be abused, and become an instrument of oppression and persecution.

What, then, has been the course of these proceedings? They have already depended three years, and yet have hardly got beyond their earliest stage. The

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(*b*) The Court, in the course of the argument, said: The appeal was entered two years ago. How has this delay arisen? Has it ever been asserted that a treaty of agreement was on foot? There must have been such faults on both sides that I am not prepared to say that it would not be the best way to dismiss the suit at once. Either party could have urged it on.

citation was extracted on the 23d of October, 1824, and was returned into Court on the 15th of November: in the month of February, 1825, the articles were admitted: an appeal was instituted; and in April, 1825, the inhibition was served: the process was not brought into this Court till the 10th of December, and even then a proxy for the respondent was not exhibited; and the appeal—from a grievance only—was not heard till Hilary Term, 1827. The case was then for the first time brought to the notice of this Court, when the delay was so manifest—though it did not appear to which party most blame was imputable—that the Court could not fail to observe upon it, and signified at that time that it should expect the cause to proceed with all due diligence (see p. 16, supra). The Court pronounced for the appeal, and directed the articles to be reformed—this was on the third session of Hilary Term; and yet the articles, notwithstanding the previous delay and the urgent recommendation of the Court, were not admitted on being reformed till the second session of Trinity Term; and it was not till the fourth session that the party stood assigned to prove. Not one witness has since been examined; so that the whole of Easter and Trinity Terms, and the long vacation, that is to say nine months, have elapsed, and **[20]** the cause has not, substantially, advanced one single step.

With whom, or where, has been this delay? Primâ facie, with the promoter of the suit; for if the charge were true, and it were sincerely wished to punish the offence, and thus by a timely example prevent a repetition of it, it was incumbent on him immediately to have proceeded and proved his case. On the fourth session of Trinity Term the defendant gave a responsive allegation; but to this he was not obliged, as no witnesses had been examined on the articles. In the Court of Arches, then, the defendant has, at least, shewn due diligence: there was no call upon him to enter into his defence till there was some evidence offered in proof of the charge; but answers were called for; the decree was promptly served, and up to this moment the answers have not been brought in. Is any satisfactory reason assigned for all this delay? The proctor for the promoter has relied on a long affidavit, and some letters which are annexed to it; but his own statement is, that not any steps were taken by him till after the admission of the defensive allegation, and then only to the extent of a mere enquiry—whether an arrangement of the suit could not be effected. The first letter adverted to in the affidavit is from the proctor in London to his client's proctor in Wales; this was written on the 15th of September: the first original letter produced is dated Carmarthen, 1st of October: it is addressed to the respondent's proctor by the proctor for the defendant in the Court below, and commences in these terms: "I believe both these individuals are heartily tired of this suit, and that it will be to the advantage of all parties to drop **[21]** further proceedings, each paying his own costs. As the question whether a clergyman is bound to marry a dissenter, baptized or unbaptized, cannot be tried in this suit, the bishop (now of Sarum) and the dissenters can have no interest or motive in proceeding further." So that it turns out this suit was not brought by the parish-officer simply to preserve decorum and decency in the church; but that there were other parties (who are not before this Court) and other motives; and that the proceedings are instituted on purpose to try, incidentally and collaterally, another question; to the merits of which question, however, I shall not advert in any degree.(*a*)

It is not necessary for me to notice any other circumstances than what have happened in this Court; it is sufficient for me that there has been such gross delay in not hitherto examining any witnesses in support of the articles, and that in a cause requiring at all times due diligence; but, particularly, under the recommendation and express direction of the Court, that I am bound in justice to dismiss the defendant. These proceedings have been now hanging over the head of this man for three years: the process of the Court, I repeat, might thus be made available for vexatious purposes. It therefore appears to me desirable to put an end to this suit, which is an object, it is said, that both parties are anxious to attain; but I do not think that I shall satisfy the demands of justice by simply dismissing it. The **[22]** defendant may have been in some degree in pari delicto; but was justified in appealing, and, as far as the proceedings have taken place under my cognizance, and since the admonition

(*a*) Reference being made by counsel to the case of *Kemp* v. *Wickes*, 3 Phill. 264, the Court observed that the decision in that case was confined to burials, to which also the rubric only applied.

of the Court, his cause has been conducted with promptitude and attention, and without any appearance of unnecessary delay. I therefore dismiss the suit, and condemn the promoter in the sum of 30l. nomine expensarum.

BARRETT *v.* BARRETT. Arches Court, Michaelmas Term, 4th Session, 1827.—A party being before the Court in a suit for divorce by reason of cruelty, acts of adultery subsequent to the citation may be pleaded.

This suit was originally brought in the Commissary Court of Surrey; and was promoted by Rowena Barrett against her husband, George Barrett, for a divorce by reason of his cruelty.

The citation was returned on the second session of Michaelmas Term, 1826. Upon the admission of the libel the cause was appealed; and on the by-day after Trinity Term, 1827, this Court pronounced against the appeal; but at the petition of both proctors retained the cause. On the first session of the present term the proctor for the husband confessed the marriage, but otherwise gave a negative issue. The proctor for the wife was assigned to prove the libel.

Lushington now moved on affidavit to permit additional articles to the libel or an allegation to be given in pleading acts of adultery by the husband, subsequent to the commencement of the suit.

Arnold opposed the motion.

[23] Per Curiam. As the wife will be clearly entitled to a separation on account of the adultery, if proved, the only question is whether a new citation is necessary. I think it is unnecessary, since the husband is already before the Court; and since it cannot be objected that any distinction exists between the proceeding on one ground or the other. It would, therefore, save useless expence to receive the allegation, notwithstanding the original citation was only for cruelty.

Motion granted.

HAMERTON *v.* HAMERTON. Arches Court, Michaelmas Term, By-Day, 1827.—1. When alimony, pendente lite, is decreed to commence from the return of the citation, all sums paid subsequent to that return are to be allowed as part payment. 2. When no sufficient cause is shewn for neglecting to comply with a monition personally served, a party may at once be pronounced contumacious: but aliter, for a mere informality, if he has virtually obeyed, or is ready to obey, the monition.

[Referred to, *Mackonochie* v. *Lord Penzance*, 1881, 6 A. C. 434.]

An appeal from the Consistory Court of Gloucester.

This was originally a proceeding in the Episcopal Consistorial Court of Gloucester, in a cause of divorce, by reason of adultery, brought by William Medows Hamerton, against Isabella Frances Hamerton, his wife. The citation in the Court below was returned on the 26th of April, 1827. On the 2d of August the libel and the allegation of faculties were admitted; upon which alimony of 300l. per annum, to be paid monthly, pendente lite, and to commence from the return of the citation, was decreed. A monition issued at the same time for payment. On the 3d of August this monition was executed by a personal service on Major Hamerton, the promoter of the suit; and on the 27th of September it was **[24]** returned as duly certified, when, no appearance being given to it, the contumacy of the husband was accused, and a certificate thereof instantly granted.(*a*) Receipts for various sums, as paid to the wife by the husband, were afterwards during the sitting of the Court produced and rejected.

On this an appeal was presented to the Court of Arches; and the præsertim of the appeal was "for refusing to allow any or either of the sum or sums of sixty pounds, sixty pounds, and seven pounds ten shillings, paid by the said William Medows Hamerton to the said Frances Isabella, his wife, or to her agent, since the institution of this suit, to be taken in part of alimony decreed in the cause; and for pronouncing at the same Court the said William Medows Hamerton to be in contempt for not appearing to a certain monition issued against him for the payment of the same." (*b*)

(*a*) See 53 Geo. III. c. 127.

(*b*) [Nov. 3, 1827, Arches, M. T. 1st Session.] Notwithstanding this appeal, and the inhibition served on the Judge, the registrar, and the adverse proctor, the

Lushington and Dodson for the appellant.

Jenner and Addams contrà.

[25] *Judgment—Sir John Nicholl.* It is difficult to ascertain from the process what was done, or intended to be done, in this cause by the Court at Gloucester—whether the monition was obeyed or evaded and resisted. The monition itself is thus worded—"That William Medows Hamerton do pay or cause to be paid to Isabella Frances **[26]** Hamerton, or to her proctor, for her use, an alimony pendente lite of twenty-five pounds per month, the same to be computed from the twenty-sixth day of April now last past, and so from thenceforward every month during the continuance of this suit, under pain of the law, and contempt thereof." This monition, therefore, does not require a personal appearance: nor does it direct the payment of the alimony into Court—but to the party or her proctor. As far as I can discover, the party on whom this monition was served did not intend to be contumacious, but proposed to shew that he had complied with the orders of the Court. Three months had elapsed from the return of the citation to the date of the monition: at which time 75l. only were due to the wife for alimony; but taking the period to the return of the monition, only five months had passed, and consequently 125l. would, on that calculation, be the utmost extent of her claim. Now, on the 27th of September, the day on which the monition was returned, what does the husband's proctor do? He refers to certain receipts purporting to be for various sums paid to the use of the wife, amounting together to 127l. 10s., and "also a proportionate part of 70l. as part of alimony decreed." What then is meant by this? The dates of the receipts are not given; no affidavits are offered to shew that these payments had been actually made since the return of the citation—the receipts themselves were not exhibited, or at least they are not transmitted in the process to this Court. It seems, however, from the præsertim of the appeal, that it was intended to establish that certain payments had been made to the wife since **[27]** the institution of the suit, and, therefore, that the party was not in contempt. But it is difficult, from the documents before me, to

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Court below was proceeding to follow up the decree of contumacy by certifying the contempt of Major Hamerton to the Court of Chancery; when Lushington applied to this Court for its interference.

Addams contrà, stated that these steps had been taken in error; but that Major Hamerton was in no danger of arrest.

The Court said that the measure complained of was certainly very irregular; but as the inhibition had not been returned, this Court had nothing before it upon which to act: it had, however, no doubt that on this expression of its opinion the proceedings would be stayed.

On the same day in the Vice-Chancellor's Court, Mr. Koe applied for an order to restrain the cursitor of the Court from issuing out a writ de contumace capiendo against Major Hamerton, on the ground that he had appealed from the Ecclesiastical Court of Gloucester, but before the inhibition could be served the Court of Gloucester had granted a significavit; and upon the production of that instrument a writ for the arrest of Major Hamerton would issue as of course. Under these circumstances Mr. Koe trusted his Honour would interfere to protect this gentleman from arrest on a process that was not bailable. He had used every diligence in procuring the inhibition, so that no blame was attributable to him on that head. [The Vice-Chancellor asked why the Court of Arches did not interpose its authority for the purpose of enforcing its own order?] Mr. Koe replied that the Ecclesiastical Court could not now protect Major Hamerton, as the affair had passed into the hands of the officer of the Court of Chancery.

The Vice-Chancellor, on referring to the Act of Parliament (53 Geo. III. c. 127), found that the officer was "authorised and required to grant the writ upon the production of the monition." His Honour, therefore, felt that he could not be justified in making an order in opposition to a positive Act of Parliament. The case was a novel one, and might, in his opinion, be mentioned to the Lord Chancellor.

The Lord Chancellor on the same day refused to entertain the application until notice should be served on the wife; and being informed that she was in France said, notice to her solicitor would be deemed good service. Further steps were, however, unnecessary, as no attempt was made to sue out the writ, after the opinion expressed by the Court of Arches.

pronounce confidently with what object these receipts were brought to the notice of the Court, or whether the Judge did right or wrong in the steps he then took. If there were no affidavit to shew that the receipts were for payments made subsequent, à fortiori, if by the dates it appeared that they were prior, to the return of the citation; if no later payment were attempted to be proved, and no reasonable cause assigned for the neglect—in that case, as the monition had, on the 3d of August, been personally served on the husband, I am of opinion that the Court was justified in enforcing its decree by pronouncing him contumacious. If, on the other hand, the receipts were dated after the citation, and the mere want of affidavits to authenticate them was the principal informality to complain of, the Court should have allowed a short time to the party to verify their contents before it certified him to be in contempt.

But in every point of view there is sufficient to induce me to arrive at this conclusion, that it will be beneficial for all parties not to remit the cause. I wish it, however, to be distinctly understood, that if these payments were made after the return of the citation, they must be deducted as so much on account of the alimony that has been allotted to the wife; but if before, then they are not to be deducted, and the husband must forthwith pay the balance that is now due, and proceed immediately to the examination of his witnesses upon the libel. I pronounce for the appeal and retain the cause.

[28] WYLLIE *v.* MOTT & FRENCH. Arches Court, Michaelmas Term, By-Day, 1827.—In a libel for perturbation of seat a title must not be pleaded as founded on purchase, sale, letting or bequest, all which are illegal and void. The suit may rest on a possessory title and acquiescence of former churchwardens and on the fitness of the party—from the number of family, amount of property, &c. —Pews in a church belong to the parish for the use of the inhabitants, and cannot be sold nor let without a special Act of Parliament.—Churchwardens must exercise a just discretion in the allotment of pews, subject to the correction of the ordinary.—A party not giving in his answers on the day of the return of the decree personally served, will be pronounced contumacious; similiter a witness not appearing to a compulsory.—The occupier of a pew ceasing to be an inhabitant of the parish cannot let the pew with, and thus annex it to, his house, but it reverts to the disposal of the churchwardens.—A pew can only be appropriated to a house by faculty or by prescription.—In a suit for perturbation of seat, if it appears that the churchwardens have acted properly in displacing the plaintiff, the Court will dismiss them; but will not proceed to confirm the possession of the person seated by them, as it does not form part of the question before the Court, and may be injurious to the parish by taking the pew more out of the power of the churchwardens.

On admission of the libel.

This cause was brought by letters of request from the Commissary of Surrey, and was promoted by Alexander Wyllie, alleging himself to be a parishioner and inhabitant of the parish of Thames Ditton, against John Mott and Robert French, churchwardens of the said parish, citing them to shew cause why he should not be reinstated in the possession and occupation of a certain pew in the parish church. An appearance having been given for the churchwardens, a libel was brought in; and on the fourth session of Hilary Term was debated.

Jenner in opposition to its admission. The title to a pew resting on a sale is bad: Even a faculty to a person and his heirs for ever is illegal; but no faculty is pleaded here. A removal by the churchwardens is justifiable, in order to put an end to such a claim.

Lushington contrà. The principle is not contended for that pews can be let or sold, but the practice very generally prevails. In some London parishes the pews are let by the churchwardens. [Court. It is done under a special Act of Parliament in St. George's, Hanover Square; is not that the case in the parishes alluded to?] It is apprehended not. When the gallery was erected, certainly it was not legal to sell the pews. Mr. Wyllie does not assert a permanent right. The parish having received the money cannot now turn **[29]** him out, unless great public inconvenience results. He was originally seated by consent of the churchwardens for the time being, and has long retained the pew, and is a proper person to occupy it. This is a sufficient possessory title against a disturber. Both parties are in eodem delicto. *Astley* v. *Biddle* (3 Phill. 517. 1 Hagg. Con. Reports, 318, note) was a case exactly similar. Though the title was bad the party was allowed to continue.

Judgment—Sir John Nicholl. This is a suit instituted by Alexander Wyllie, a parishioner and inhabitant of the parish of Thames Ditton, against John Mott and Robert French, churchwardens, for disturbing him in a seat which he occupied in that church; or, as it is technically called, for perturbation of seat. The libel sets forth all the history and circumstances of the case, and, among other matters, the history of the building of a gallery, with additional pews in that church; the allotment of those pews in consequence of a purchase and sale; and subsequent transfers by bequests and letting; all which modes of acquiring seats must be, and have been, acknowledged by the counsel to give no legal title. Seats in the church belong to the parish, for the use of the inhabitants, and by law cannot be sold nor let, without a special Act of Parliament for the purpose. The question then is whether the party, by amending his plea, can set forth such a title as would justify the interposition of the Court in his favour; that is, whether the libel may be so reformed as to rest the claim on the ground of possession alone, or must be rejected altogether.

[30] The first article pleads that the church of Thames Ditton being insufficient for the accommodation of the parishioners, it was agreed at a vestry held on the 13th of July, 1809, to build a gallery; that a faculty was obtained and the gallery erected. This is introductory and not improper.

The second article states that the churchwardens and vestry sold the seats; that the pew No. 4 was sold to Mrs. Moss for 17l. 10s., and a receipt given by the vestry clerk; that No. 5 was sold to Lady Sullivan, and a receipt also given, and it exhibits the former receipt dated in March, 1811. This is alleging what, from the beginning to the end, was an illegal transaction, and can furnish no ground of title: the money paid can only be considered as voluntary contributions and subscriptions towards the building: it may be a reason, in the discretion of the churchwardens, for seating these persons, and such seating may give a possessory right—sufficient against a mere disturber; but if the Court were to admit any part of this article it would lend a countenance to a proceeding contrary to law. The sale and purchase do not improve—they rather operate against the claim; because if a party seeks to found his title on an illegal origin, it goes far to justify his removal. I reject the whole of the second article.

The third article pleads that, on payment of the sum of 17l. 10s., Mrs. Moss was placed in pew No. 4; that her daughter, Mrs. Wyllie, sat in the pew, and inhabited another house in the parish, to which Mrs. Moss in 1820 removed, and where she continued to reside with Wyllie and his family till her death in September, 1826; **[31]** that Wyllie and his family occupied this pew till June, 1822. This article must be reformed—leaving it to state that Mrs. Moss was put into possession of this pew by the churchwardens, and omitting every thing that relates to the money paid on that account—a circumstance that cannot assist the case.

The fourth article—open to the same observation, is to the following effect:—That in June, 1822, on Lady Sullivan quitting the parish, Wyllie, with the consent of the churchwardens, removed to No. 5, agreeing to pay 5l. a year; and that Mr. Lowden, with the consent of the churchwardens, was placed in No. 4, agreeing to pay Mrs. Moss 3l. a year; that Wyllie sat in No. 5, paying Lady Sullivan 5l. a year, till September, 1826, when Mott and French, the churchwardens, gave him notice that they had appropriated the pew to Thomas Morgan, Esq., and dispossessed him. That Lowden continued in possession of No. 4, paying Mrs. Moss 3l. a year till her death, but now refuses to pay. It may be pleaded that on Lady Sullivan quitting the parish, Wyllie was seated in No. 5, with the consent of the churchwardens; but all that refers to the agreements and payments must be struck out as irrelevant and illegal. With this reform, the article will shew something of a possessory title, viz. original occupation with the consent—and possession for four years without objection, and consequently with the presumed concurrence—of the churchwardens.

The fifth article alleges that Mrs. Moss, by will, left a pew, No. 4, to Wyllie, and appointed him and David Willis her executors; and a copy **[32]** of the will is exhibited. This, again, I must reject: it is perfectly irrelevant: it forms no semblance of a title; on the contrary, it bears rather against *Wyllie's case*, making it rely for support on that which the Court can never admit to be averred as a proper or legal foundation. Mrs. Moss could not transfer a right which, at best, was only personal.

The sixth article pleads that Wyllie's family consists of himself, his wife, and ten children; that he has a house and forty-one acres of land, both freehold; and that he

rents thirty-three acres; that he is rated at 119l. a year; and since he was dispossessed of No. 5, has not had any accommodation for himself and family to attend divine service at this church. This may be admitted, as shewing that he was a fit person to occupy the pew; and that he had no other sittings for his family; for if the churchwardens, for the purpose of asserting their right, and putting a stop to the illegal practice of letting pews, had placed him in another equally good and commodious, that might not have been improper.

This libel, then, is admissible if confined to the facts of the erection of the gallery; to the seating of Mrs. Moss and of Wyllie by the churchwardens, at first, in No. 4; to Wyllie's removal to No. 5, with the consent of the churchwardens, on its becoming vacant by Lady Sullivan's leaving the parish, or giving up possession of the pew; to Wyllie's quiet occupation from 1822 to 1826, and his fitness to retain it. It will then rest with the churchwardens to justify the removal and displacing of him.

In respect to the payment of rent by Wyllie to **[33]** Lady Sullivan, and by Lowden to Wyllie, it stands on no legal foundation. They have paid it in their own wrong, and it is their own fault if they pay any more. It is an illegal practice which this Court can never sanction nor approve. The gallery and pews belong to the parish, and are for the use of the inhabitants; and the churchwardens must exercise a just discretion in allotting them. If they exercise that discretion improperly, the ordinary will set them right, after having heard all parties.

I reject the second and fifth articles, and direct the third and fourth to be reformed.

The libel, thus reformed, was admitted; and on the first session of Michaelmas Term the term probatory was prayed to be extended, on the ground that the answers were not brought in,(*a*) though the decree had been personally served upon the defendants in July last: it was **[34]** further stated that a compulsory was, on this day, returned against a witness on the libel, and that he had not appeared.

Per Curiam. The Court—upon the proctor for the defendants engaging that the answers should be brought in on the second session—extended the time; but observed that it was not sufficient for the proctor to appear to the decree for answers; but that the answers themselves ought to have been brought in; a practice which would be expected in future. The Court also did not pronounce the witness, upon whom the compulsory had been served, contumacious, but continued the certificate to the next session; stating, however, that henceforward it should pronounce a party contumacious on the return of the compulsory.

This cause now came before the Court on a question of the admissibility of an allegation given in on the part of the churchwardens, in substance, as follows:—

1. The first article, in contradiction to the third position of the libel, alleges that Mrs. Moss, from the time she quitted her house, only resided occasionally with Wyllie; and for two years before her death resided almost constantly, and boarded, with her son George Moss, at Thames Ditton.

2. The second recites the fourth article of the libel, and denies that Wyllie was put into possession of the pew on account of the increase of his family; but alleges that without the consent **[35]** of the churchwardens, he rented it of Lady Sullivan for 5l. a year, when she quitted the parish in 1822, on condition that he should quit it on notice from Lady Sullivan, or her son, Sir Charles Sullivan, who was expected to purchase or rent the house she had occupied; that while this house was untenanted, Wyllie was not disturbed in the occupation of the pew; that in May, 1826, he quitted the house, and let it to Mrs. Turquand, and gave her possession of the pew, and neither he nor his family sat there afterwards; that he had a lodging for three months; but

(*a*) In another case in the Prerogative Court no witness had been produced on an allegation admitted in Easter Term; and no attempt had been made to serve the decree for answers till two or three days before the first session of this term, when the decree was returned with a certificate that the party could not be found: the Court, referring to the delay of four months before any steps had been taken to enforce the giving in of the answers, refused an application for the extension of the term probatory, or to issue a decree viis et modis against the party. It, however, recommended the adverse proctor to bring in the answers, or if they were only material, as authenticating exhibits, to admit, in acts of Court, the validity of such exhibits. If this was not done; and, at the hearing, the answers should appear important, the Court might then rescind the conclusion of the cause.

in October removed entirely to London, and ceased to be a parishioner and inhabitant of the parish of Thames Ditton.

3. The third pleads that Wyllie occupies a house in Conduit Street, where he, his wife, and greater part of his family have almost constantly resided since he quitted Thames Ditton, and that they attend divine service at the parish church of St. George, Hanover Square, or some other church or chapel in the neighbourhood.

4. That the pew No. 4 was allotted to Mrs. Moss, as occupier of a certain house; that Wyllie, who married her daughter, continued to occupy it till 1822, when he gave it up to Silvester Lowden, Esq., who occupied Mrs. Moss' house: that the pews Nos. 4 and 5 are nearly of the same size; but that No. 5 will hold one person more, viz. seven or eight persons.

5. That when the pew No. 5 was built in pursuance of a faculty in April, 1811, it was allotted to Lady Sullivan, as occupier of one of the largest houses in the parish, and has always been considered as allotted to the occupier of that house: that at **[36]** Lady-day, 1826, the house and grounds were let for fourteen years to Thomas Morgan, Esq.; that he, shortly after, took possession of it; that he has a wife, three children, and a governess in this house, and that he and his family are in the constant habit of attending Thames Ditton church.

6. That Morgan, understanding the pew No. 5 belonged to him as occupier of this house in July, 1826, intended to take possession of it; that he found it occupied by Mrs. Turquand and her family; that he then applied to the incumbent and churchwardens to be seated, and with their knowledge, consent, and approbation, and with that of the principal inhabitants, on the 1st of October, 1826, took, and has ever since remained in undisturbed, possession of the pew.

7. That Morgan has a young and increasing family, and that his premises are assessed to the poor rates at 140l. per annum.

8. That Wyllie, since quitting the parish in 1826, has only occasionally visited it, principally for the purpose of collecting his rents, and then slept at the house of one of his friends; and that at the time of issuing the decree in this cause he was not, and is not, a parishioner and inhabitant of Thames Ditton.

9. That, on account of the increased population, in 1820 two additional pews were built—one was allotted to Mr. Fowell Buxton, the other was offered to Wyllie for his tenants or himself, but he refused it; that the population is sixteen hundred, and the church will not, conveniently, accommodate more than three hundred and fifty; that Mrs. Turquand, subsequent to Morgan's **[37]** sitting in No. 5, has frequently occupied one of the pews built in 1820.

10. That the prayer of Wyllie may be rejected; that Morgan may be confirmed in the possession and occupation of No. 5; and that Wyllie may be condemned in costs.

Judgment—Sir John Nicholl. On the facts disclosed in the libel, and in the present allegation, it is not a very difficult undertaking for the Court to conjecture, with some degree of probability at least, the real state of this question: and as it were much to be regretted that, through ignorance or obstinacy, the parties should persist in a useless contest, the Court, in the hope of relieving them from litigating, will, at this stage, take a short view of the facts, and of the law applicable to those facts.

The suit is brought by Mr. Wyllie against the churchwardens of Thames Ditton for perturbation of seat, and contains a prayer that he may be reinstated in the occupation of a certain pew in the parish church. In the libel he attempted to found a possessory title on purchase, hiring, and private bargain—as if pews in a parish church were the subjects of private property, and did not belong to the parish for the use and occupation of the parishioners at large. The Court, holding that, by the established principles of law, no title to pews could rest on such a foundation,(*a*) directed the libel to be reformed, by striking out all that applied to any such origin of Wyllie's right. The **[38]** libel thus reformed grounded the claim on a possessory title, and alleged in substance: that on a certain pew, No. 5, becoming vacant in 1822, by the former possessor quitting the parish, Wyllie was put in possession, or at least suffered to take it with the consent of the churchwardens; that he was continued in possession till 1826, when he was displaced by the present churchwardens, though he

(*a*) Vide *Pettman* v. *Bridger*, 1 Phill. 316; *Fuller* v. *Lane*, 2 Add. 419; *Walter* v. *Gunner and Drury*, 1 Consistory Reports, 317, 318; *Byerley* v. *Windus*, 5 B. & C. 1.

and his family were proper occupants. The Court, on that occasion, expressed its opinion that, as the ordinary has the superintendence of churchwardens, if they had exercised their subordinate discretion improperly in removing Mr. Wyllie, the Court ought to control them, and direct Mr. Wyllie to be reinstated in the pew (vide supra, p. 33).

The object of this allegation now offered is to shew that the churchwardens have acted discreetly and properly in the seating of the present occupant; and, coupling it with what is stated in the libel, there is a strong appearance that Wyllie has no possessory claim. The history given on both sides admits that about 1811 the gallery was built in pursuance of a faculty obtained for that purpose; that pews were then allotted by the churchwardens; and that No. 5, the pew in question, was assigned to Lady Sullivan, the occupier of one of the largest houses in the parish. What bargain was made between her and the churchwardens is not material; for, undoubtedly, by law, she could not purchase the pew. In like manner the pew, No. 4, was allotted to Mrs. Moss, the mother-in-law of Mr. Wyllie, and he occupied it by her sufferance; but in 1822, on Lady Sullivan quitting the parish, Mr. Wyllie removed to No. 5, **[39]** and paid to Lady Sullivan a yearly rent of 5l. for the occupation of it, under a mistaken idea that she could dispose of this pew as her property; Mrs. Moss then let No. 4, at 3l. a-year, to Mr. Lowden, a parishioner, and, on her death in 1826, bequeathed it to Wyllie. It is now further pleaded that, in May, 1826, Wyllie let his house, and after having lived on for some time in lodgings, that he left the parish in October of that year; but, considering the pew as his private property, he transferred it, with his house, to his tenant, Mrs. Turquand. So that not only he received rent from Mr. Lowden for No. 4, but he appropriated No. 5 to his own house. At Lady Day, 1826, Mr. Morgan became the occupier of Lady Sullivan's house, and, in consequence of an incorrect notion prevailing in the parish that the pew No. 5 had been appropriated to that house, he applied to be seated in it, and required that the transfer to Mrs. Turquand should not be recognized. The churchwardens accordingly removed Mrs. Turquand, and Mr. Morgan and his family were put into possession.

The subject seems to have been misunderstood on all sides; the correct view of it was, that in 1822, when Lady Sullivan ceased to be a parishioner, the pew reverted to the parish, and was at the disposal of the churchwardens; for it never was legally appropriated to the house. In like manner also, if the facts be accurately stated in this allegation, all claim on the part of Wyllie expired in 1826, when he quitted the parish; he could have no power to seat his tenant, Mrs. Turquand, in it, and thus annex it to his house; for this could only be done by a faculty, or by prescription which presupposes a faculty; for, if he **[40]** let his house from year to year, and were permitted to transfer the possession of this pew to each succeeding tenant, this would, in effect, be annexation. It never was allotted, even nominally, to this house: when his personal title ceased, the pew reverted to the parish, and the churchwardens had a right to place in it whatever family they judged most fitting. In the exercise of that right they have seated Mr. Morgan, a person of respectability, who has a large and increasing family, who inhabits one of the principal houses, and who pays highly to the parish rates. This may be properly pleaded in defence of their conduct; but at the same time, whether they have exercised a sound discretion in their selection of the actual occupant, is no part of the question to be decided in the present suit. The only question here is whether they have unjustifiably disturbed Mr. Wyllie. If Wyllie, having a numerous family, and contributing largely to the rates, had, though originally acquiring it without due authority, continued in undisputed possession of this pew, under long acquiescence of former churchwardens, and of the parishioners, from 1822 till September, 1826; if there were no reason to believe that he was about to quit the parish; and if these churchwardens, under a notion that a pew had been allotted to the house Mr. Morgan rents, had then attempted to remove Wyllie, there would, in my judgment, have been no sufficient ground for the proceeding, and the case would have borne a very different aspect. But if what is now disclosed be true —if Wyllie has left his house and the parish, and has attempted to hand over the pew to his tenant, without the sanction of the church-**[41]**-wardens, he may act wisely in abandoning this suit.

I would notice one other circumstance—the prayer of this allegation, "That the Court would confirm Morgan in the possession of the pew." In the first place, this

suit was not instituted for any such purpose.(*a*) It is a suit of perturbation brought by Wyllie: if he were not improperly disturbed, the defendants will be dismissed; but there will be no further question. In the next place, the Court would not go out of its way to confirm the possession; for this might be attended with injurious consequences to the parish. By such a step, particularly after it has been pleaded in the fifth article of this allegation, "that the pew No. 5 has always been considered as allotted to the occupier of Lady Sullivan's house," the Court would countenance the idea, which rather ought to be checked, that the pew is specially appropriated to this house. If the population be increasing, and the church-room already insufficient, as pleaded, no seat ought to be put out of the power of the churchwardens. This pew will accommodate seven or eight persons. Mr. Morgan's family may be reduced to one or two—though resident in this house, it might, for the necessary accommodation of the parish, be proper either to remove him, or, at least, to seat some other persons jointly with him. This, it is true, is not to be done except in a case of strong necessity; but the power of doing so, in order to provide for the convenient attendance of the other parishioners at divine worship, ought not to be **[42]** excluded. Upon the whole, I admit the allegation, but not without hopes that the suit will not proceed.

On the third session of Hilary Term, 1828, the proctor of Mr. Wyllie declared that he proceeded no further: when—

Lushington prayed that he might be dismissed.

Jenner prayed costs: the churchwardens had only come forward to perform their duty as the officers of the parish; and, having been successful, were entitled to the protection of the Court. The colour originally given to the case was shewn to be false by the counterpleading, and had led the churchwardens into unnecessary expence.

Per Curiam. The Court said that if Wyllie had stopped after the expression of its opinion when the libel was admitted, it might have been disposed to have dismissed him without any costs: that although it thought he might well have stopped earlier, it could not saddle him with the whole of the costs, on a supposition that the parish would not do its duty to its own officers by payment of their expences: the Court would, therefore, dismiss Wyllie, condemning him in 20l., nomine expensarum.

[43] THE OFFICE OF THE JUDGE PROMOTED BY OLIVER AND TOLL *v.* HOBART. Arches Court, Michaelmas Term, By-Day, 1827.—In criminal suits articles must be so specific as to afford a fair opportunity of defence.

An appeal from the Episcopal Consistorial Court of Exeter.

On the 21st of June, 1827, a citation issued calling upon the Reverend Henry Charles Hobart, rector of Beerferrers, in the county of Devon, "to answer to certain articles to be administered to him touching and concerning the reformation of his manners and excesses, and more especially for adultery, fornication, or incontinency, and other crimes and offences by virtue of our office, at the promotion of Joseph Burgess Oliver and John Toll, late churchwardens of Beerferrers."

Upon the return of this citation an appearance was given for the party cited; and on the same day articles were exhibited: they were ten in number; and the first pleaded that by the ecclesiastical laws, canons, and constitutions of the Church of England, all clerks in holy orders are liable [for offences of the nature set forth in the citation] to be suspended from the exercise of their clerical functions, and be deprived of their ecclesiastical benefices.

The sixth charged: "That, for fifteen years last past, or for the greatest part of that time, you, the said Henry Charles Hobart, have lived in the parsonage house at Beerferrers, separate from your wife, in a state of illicit intercourse with Mary Merrifield, residing as a maid-servant in your house and family; and **[44]** that constantly during the said period you have committed the crime of fornication with the said Mary Merrifield; that about fourteen or fifteen years ago you were seen in bed together with the said Mary Merrifield; that you have at all times during the said period openly conducted yourself with the greatest familiarity towards the said Mary Merrifield, and have treated her as your mistress and not as your servant; and that, about nine or ten years ago, you were in the constant habit of sleeping at night with the said Mary Merrifield in the same bed in your parsonage house at Beerferrers, and were frequently in the bed-room together with the said Mary Merrifield in the day

(*a*) Vide *Woollocombe* v. *Ouldridge*, 3 Add. 8.

time when the door was locked; and that you were at that time in the habit of frequently kissing the said Mary Merrifield, and treated her in every respect as your mistress; and that you frequently, about the same time, used to sit in one chair with the said Mary Merrifield in the parlour: and that, at divers times within the last eight years, you have been seen in the bed-room of the said Mary Merrifield with your arm round her neck, sometimes leaning your head on her bosom, and in other indecent situations with her; and that within the last eight years you frequently occupied the same bed at night with the said Mary Merrifield in your parsonage house at Beerferrers; and more particularly that, on one night about seven or eight years ago, one Jane Dingle, who was then living with you as a servant, came to the door of your bed-room for the purpose of procuring some lozenges for Elizabeth Merrifield, sister of the said Mary Merrifield, who was ill in the house; and **[45]** that you being then in bed with the said Mary Merrifield, a conversation took place between you and her as to who should get out of bed for such purpose; and that, shortly afterwards, the door was partly opened either by you or the said Mary Merrifield, and the lozenges given out to the said Jane Dingle; and that within the last two years you have been frequently seen walking together with the said Mary Merrifield arm in arm; and at one time within the said period you were seen sitting together with the said Mary Merrifield on a seat in the garden of your parsonage house, with one arm about her neck, and the other hand up her petticoats: and that you have continually for the period of the last fifteen years, and down to within eight months last past continued to be guilty of divers acts of adultery, fornication, and incontinence with the said Mary Merrifield; and that you have within the said period of fifteen years, and more particularly within eight months last past, been guilty of divers other acts of indecency of behaviour with the said Mary Merrifield."

The concluding article prayed, "That the said Henry Charles Hobart be duly and canonically corrected and punished according to the exigency of the law, and be condemned in costs."

Two additional articles and an exhibit were subsequently given in, setting forth that the rectory of Beerferrers having become void by the cession of the said Henry Charles Hobart, he was, on or about the twenty-second day of April, 1822, duly and lawfully admitted and instituted into the same.

On the 7th of September, 1827, the Judge of the Court below "pronounced the articles to be **[46]** inadmissible—rejected the same, and condemned the promovents in costs." From this decree an appeal was prosecuted; and on this day Lushington and Blake were heard in support of it; and Jenner and Addams for the respondent.

Per Curiam. If these facts had been properly laid—the suit being against a clergyman for a suspension from his office, and for a deprivation of his benefice—the Court would have been of opinion that the suit might have proceeded, notwithstanding eight months had elapsed after most of the charges were laid; for the case is not within the statute of 27 Geo. III. c. 44, as was decided by this Court in the cause of *Burgoyne* v. *Free*,(*a*) confirmed by the opinion of the Court of King's Bench; when, on an application for a prohibition, the question was fully argued and deliberately determined: and though it is true that the subject has been carried up to the House of Lords on a writ of error, yet, till the judgment of the Court of King's Bench has been reversed by that tribunal, the Court is to presume that it was correct, and must act upon it when similar charges are brought to its notice.

[47] The suit itself was instituted partly, if not principally, for the relief of the parishioners from such a nuisance and scandal: but, on the other hand, as they have long acquiesced, and as the suit is criminal and contains charges so heavy against a clergyman, it is due to him, in point of justice, that the charges should be laid so

(*a*) 2 Add. 414. 5 B. & C. 400, 765.

Note.—In *Burgoyne* v. *Free*, on the writ of consultation being duly notified to the Court of Arches, the Judge admitted the articles reformed in such a manner as to be applicable only for the purpose of founding a sentence of suspension or deprivation. Upon their admission, an appeal was prosecuted to the High Court of Delegates; and that Court being informed that the question of prohibition had been carried up to the House of Lords by writ of error, declined at that time to enter upon the cause, expressing a hope that the attention of the Supreme Court might speedily be called to so important a point.

specifically as to enable him to defend himself, and to prove them unfounded if they really are so. In respect even to the more recent charges, there is now no offer made to supply the want of specification. Upon the whole, therefore, the Court is of opinion that the Judge at Exeter did right in rejecting the articles and dismissing the defendant with costs. It, accordingly, affirms the decree; condemns the appellants in costs, and remits the cause.(*a*)[1]

Note.—A doubt having been expressed in the case of *Saunder* v. *Davies* (1 Addams, 296) whether, under the 122d canon (of 1603), entitled, "No sentence of deprivation or deposition to be pronounced against a minister but by the bishop," the Judge of the Arches Court had a power of pronouncing a sentence of deprivation; it has been thought advisable to print in an appendix two cases where the exercise of such authority by that Judge was sanctioned by the High Court of Delegates. One of them is the case of *Rich* v. *Gerard and Loder*, referred to in the case above cited. Vide Appendix B.

[48] MAGNAY & OTHERS *v.* THE RECTOR, CHURCHWARDENS, AND PARISHIONERS OF THE UNITED PARISHES OF ST. MICHAEL, PATERNOSTER ROYAL, AND OF ST. MARTIN VINTRY. Peculiars Court of Canterbury,(*a*)[2] Michaelmas Term, 2nd Session, 1827.—A faculty for the appropriation of a vault "to the use of a family, so long as they continue parishioners and inhabitants of the parish," will be granted, if it may be done without probable inconvenience to the parish.

On motion.

This was a business of granting a licence or faculty to the executors named in the last will and testament of Christopher Magnay, deceased, late alderman for the ward of Vintry, and late a parishioner and inhabitant of the parish of St. Martin Vintry, London, "For setting apart, appropriating, and confirming a certain vault (with the entrance thereto), many years ago made or built of brick under the north aisle, and extending **[49]** under a pew, and next to the chancel of the parish church of St. Michael, Paternoster Royal, as and for a burial-place for the interment of the bodies of the said Christopher Magnay, and of his family for ever, exclusive of all others; and also for the removal of the corpses of the said Christopher Magnay, Jane Magnay, his former wife, and of his two sons respectively deceased, from the general vault in the said parish church where the same now remain, into the said private vault, the same having never been hitherto appropriated."

A decree, with the usual intimation, had issued under seal of the Court, citing the rector, churchwardens, and parishioners of the said two united parishes of St. Michael, Paternoster Royal, and St. Martin Vintry, in special, and all others in general, to appear, and shew cause why such licence or faculty should not be granted. This decree was publicly read in the parish church of St. Michael, Paternoster Royal, and was returned into Court, duly certified as to the execution thereof, on the first session of this term.

A certificate, under the hands and seals of the rector and churchwardens of the said united parishes, consenting to the appropriation of the vault, had also been filed in the registry: and an affidavit of the parish clerk was exhibited, setting forth that four persons only had been interred in the vault for which a faculty was prayed, three of whom were neither parishioners nor inhabitants of either of the said united parishes; and that the vault had never been appropriated: which was confirmed by a search made among the records in the registry of the peculiars.

(*a*)[1] If the suit could have gone on and the articles been admitted, it might perhaps have been deemed proper to direct that the prayer should be specifically framed "for suspension and deprivation," in conformity with the pleading of the first article.

(*a*)[2] "The Peculiars of His Grace the Archbishop of Canterbury comprise a number of parishes, most of which are situated in London and the neighbouring counties. They are divided into districts, the principal of which are the Deanery of the Arches in London, the Deanery of Shoreham in Kent, and the Deanery of Croydon in Surrey. The Judge is properly Dean of the Arches, an appellation not unfrequently though inaccurately applied to the official principal of the Arches Court of Canterbury. These two offices have been generally, though they are not necessarily, held by the same person." Extracted from the Report of the Commissioners—vide note (*a*) p. 4, supra.

Haggard moved for the faculty.

[50] Per Curiam. The Court observed that the circumstances under which the present application was made afforded a presumption that there was sufficient burial room in the parish to allow of this appropriation.(*a*)[1] In the city, generally, there was no want of burial accommodation, particularly in the case of united parishes, and the fact of this parish receiving strangers into its vaults led also strongly to such a conclusion. The faculty, however, must be limited in the same manner as faculties for pews, "to the use of the family as long as they continue parishioners and inhabitants;" and, in this instance, it must also contain a clause that the bodies already deposited in the vault shall not be removed.

Faculty decreed.

[51] MORRELL *v.* MORRELL. Prerogative Court, Michaelmas Term, 1st Session, 1827.—The Court will grant administration with a nuncupative will annexed, as contained in an affidavit of three witnesses, holding that 29 Car. II. c. 3, s. 23, applies to merchant seamen.

On motion.

Charles Morrell, while second mate on board a merchant-ship homeward bound from Jamaica, died at sea on the morning of the 25th of February, 1827, after an illness of three weeks.

The deceased, on the evening preceding his death, being then confined to his hammock, requested the attendance of the master and steward of the vessel, as also of a surgeon in the Royal Navy (a passenger on board), and then in their presence and hearing addressed them (as set forth in their affidavit sworn on the 6th of April) to the following effect:—"That he wished to make his will; and that it was his desire that all the property he should die possessed of should go to his mother, to act respecting it as she might think proper." The affidavit further stated "that from the weather being then so tempestuous, and from the rolling of the ship, it was scarcely possible for any one to have written a paper of any length at that time; and the master being constantly engaged on deck, the preparation of a will for the deceased to execute was postponed, and he died without having made any will other than that which he had thus ex-[52]-pressed." The personal estate of the deceased, consisting of a balance of wages, his watch, and wearing apparel, was sworn to be under the value of 20l.

The deceased left behind him his mother and two brothers—both minors—the only parties entitled in distribution to his personal estate in case he had died intestate. In the month of August a decree, with intimation, issued at the instance of the mother; and having been personally served on the two minors in the presence of their aunt (after their mother, their next of kin), and on the said aunt at whose house they then were:—(*a*)[2]

Lushington now moved that letters of administration, with the will nuncupative annexed of Charles Morrell, the deceased, be granted to Sarah Morrell, widow, the natural and lawful mother, next of kin, and universal legatee therein named. It seemed to him that this will did not fall within the restriction imposed on nuncupative wills by the statute of frauds, though some doubt had been entertained whether the 23d section applied to seamen on board merchant ships.(*b*)

Per Curiam. The Court was of opinion that this will, being made at sea, would come under the exception in the 23d section of the statute of frauds; but said that in this case there was what was nearly tan-[53]-tamount to a rogatio testium, as appeared from the full statement of facts given in the affidavit of three disinterested and respectable persons. The property was very small and the disposition natural. The Court, therefore, decreed administration with the will, as contained in the affidavit, to the mother as sole legatee—no executor having been named.

Motion granted.

(*a*)[1] See the case of *Rosher* v. *The Vicar, Churchwardens, Parishioners, &c. of Northfleet*, 3 Add. 14.

(*a*)[2] Vide *Cooper* v. *Green*, 3 Add. 454.

(*b*) Provided always, that notwithstanding this Act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate as he or they might have done before the making of this Act. 29 Car. II. c. 3, s. 23.

YOUNG, OTHERWISE MEARING *v.* BROWN. Prerogative Court, Michaelmas Term, 1st Session, 1827.—An administrator, pendente lite, will be appointed, such appointment being necessary from the nature of the deceased's property, and from the conduct of one of the parties in the suit: and the nominee of the other party, on whose conduct there is no imputation, may be selected if shewn to be impartial, competent, and responsible.

On motion.

Phillimore moved for an administration pending suit on the affidavit of Mr. Young, one of the parties: "That the deceased, James Brown Unwin, was, at his death, possessed of certain freehold and leasehold houses (at Bethnal Green, and in Quaker Street, Spitalfields), some of which are tenanted by persons accustomed to pay their rents weekly, and that unless they are so collected there is great danger they may be irrecoverable. That Brown, the other party, since the commencement of this suit, has received some of the rents, and distrained for others; and having removed some of the household furniture and goods belonging to the deceased from his late dwelling-house, retains them in his possession." Young further made oath, "That he verily believes it is for the interest of this estate that there should be an administrator pending the suit; and that William Gale, of Bethnal Green Road, who was the chief collector of the deceased's rents during his life, should be so appointed."

[54] Per Curiam. This is an application for a grant of administration pendente lite; and the first question is, whether any necessity exists for the grant. The estate consists principally of houses of which the rents must be collected weekly, otherwise there will be great danger of loss. This fact, as well as Brown's conduct, in collecting the rents, shews a necessity for the grant. The Court, then, is satisfied that an administration pending suit is proper in this case; and the next question is, to whom it shall make the grant. The Court never selects either of the parties, but generally an indifferent nominee.(*a*) Young is executor of a latter will; there is no imputation on his conduct; but from the proceedings it appears that Brown took probate, and, in some degree, privately, of an earlier will; and he has since got possession of some of the effects—conduct which was improper, and which is not denied. Who, then, does Young propose? Mr. Gale, who filled the office of receiver during the life-time of the deceased: he knows the property, no objection is offered to his responsibility and impartiality, nor any dissent expressed to his appointment. Let the decree issue to him.

Motion granted.

On a prayer to condemn Brown in the costs the Court declined so to do. It thought the application premature, as the motion had been entirely ex parte; besides, no objection had been made to the person proposed, by Young, as administrator.

[55] LAW *v.* CAMPBELL. Prerogative Court, Michaelmas Term, 1st Session, 1827.—The Court will grant administration, with the will annexed, to one of two universal legatees, a decree with intimation having issued in the name of the other, who was since dead.

On motion.

James Law, late a lieutenant in His Majesty's 46th regiment, died on the 20th of October, 1823, in the East Indies, leaving Lieutenant Campbell, on duty in that country, sole executor of his will. The deceased appointed his uncles, Henry and Edward Law, universal legatees. In July, 1827, a decree, with the usual intimation, issued at the instance of Henry Law, and was served on Lieutenant Campbell's agents and also upon the Royal Exchange: no appearance being given, a decree for the administration, with the will annexed, passed on the caveat-day in October to the said Henry Law: but this decree having become ineffective by his death, Addams moved the Court to rescind it and to grant the administration, upon the original process, to Edward Law, the surviving universal legatee. He cited the case of *Maidman* v. *All Persons in General*, 1 Phill. 51, as analogous.

Per Curiam. By granting this motion the Court only waves the mere form of citing the next of kin; and it does not, under the circumstances, and the property being small, consider a new process necessary. The administration may pass.

Motion granted.

(*a*) Vide *Northey* v. *Cock*, 1 Add. 330.

[56] CONSTABLE *v.* STEIBEL & EMANUEL. Prerogative Court, Michaelmas Term, 1st Session, 1827.—Hand-writing and finding are sufficient to support a codicil confirming a legacy under a will; which codicil came out of the custody of and was propounded by the person solely benefited under it; who had been sworn executor of the will and one codicil four months before producing this paper, and the validity of whose legacy under the will was at the time a question depending in the Court of Chancery.—In Courts of Probate it is almost a settled principle not to pronounce for disputed papers on evidence of hand-writing alone. —Evidence to the genuineness not of a mere signature, but of a holograph of some length, is more cogent and weighty than evidence of a contrary tendency.

Edward Emanuel, the deceased in this cause, a bachelor of the age of 25 years, died at Paris on the 18th of March, 1825, of a wound inflicted by himself on the 16th of the same month. By his will, written with his own hand, and dated the 6th of July, 1824, he gave, among other legacies, the sum of 2000l. to Robert Constable; and appointed him, Sigismund Steibel, Samuel Steibel, and Henry Emanuel, his brother, executors. The latter he also made residuary legatee. The deceased likewise prepared and wrote a codicil bearing date the 12th or 13th of March, 1825. Of this will and codicil Robert Constable and Samuel Steibel were sworn executors on the 12th of July following, but the probate did not issue until the 9th of September. In November of the same year a bill in Chancery was filed against the acting executors (by Joel Emanuel, the father of the residuary legatee, who was a minor) to compel them to account for the 2000l. bequeathed to Constable, on the ground that the legacy was void in consequence of his being a subscribing witness to the will. Subsequent to the filing of this bill Constable produced a paper in the following terms:—

"13th March, 1825.

"I request Mr. Constable to pay my debts in France. His salary and 35l. to be paid independant of the 2000l. I bequeath him. "EDWARD EMANUEL."

[57] In December, 1825, a decree issued from the Prerogative Court of Canterbury at the instance of Constable, citing his co-acting executor to take probate of this paper as a codicil to the deceased's will; and in Hilary Term, 1826, a further decree to see proceedings issued against Henry Emanuel, one other of the executors and the residuary legatee. An appearance was given by separate proctors for both the parties cited: the paper was then propounded, on behalf of Constable, as a further codicil to the will of the deceased and asserted to be all in his own hand-writing: allegations were admitted in support of and opposition to this paper; and upon the evidence taken on both sides—

Lushington and Addams for Constable, contended that the weight of evidence was in favour of the genuineness of the hand-writing; that the account of the finding was natural and satisfactory; that the contents were probable; and that fabrication was highly improbable.

Jenner and Pickard for the residuary legatee, argued that the time of producing the paper and its date—on the very day on which the deceased and Constable had a serious quarrel—were very suspicious; that the finding was not inconsistent with fraud, as the box had been for some time in Constable's power; that the evidence to the hand-writing was contradictory and inconclusive: that the Court therefore would pronounce that Constable, on whom the onus probandi lay, had failed in proof.

Dodson on behalf of Steibel, submitted to the judgment of the Court.

[58] *Judgment—Sir John Nicholl.* This case lies in a narrow compass and is not attended with any particular difficulty. It has lost much of the importance which it possessed in its earlier stages, since I understand a Court of Equity has put the same construction on the statute, the 25th Geo. II. c. 5, as this Court had previously done; having decided that, in a will disposing only of personalty, a legacy to an attesting witness is not void by that statute.(*a*)

The question arises on a paper propounded as a second codicil to the will of Edward Emanuel. The will and first codicil are not contested; they are all in the deceased's hand-writing; the will is dated on the 6th of July, 1824, just before he

(*a*) See the case of *Brett* v. *Brett*, 3 Add. 210. On the 21st of May, 1827, that decision was affirmed by the High Court of Delegates, after hearing counsel for the appellant only.

went abroad; by this will he gives a legacy of 2000l. to Robert Constable, who had been a classical tutor in the deceased's family; and he appoints him an executor in conjunction with Samuel and Sigismund Steibel and his own brother Henry, to whom he also bequeaths the residue. In July, 1825, probate was taken of this will and the first codicil by Robert Constable and Samuel Steibel, a power being reserved to the two other executors. The effects were sworn under 14,000l.; and I am informed that they do not exceed 13,000l. This probate did not pass the seal till the September following. In the month of November of the same year, proceedings were instituted in the Court of Chancery by the father of the residuary legatee, **[59]** to obtain a decision of that Court as to the effect of the statute, the 25th Geo. II., upon the legacy to Mr. Constable, and, as I have already observed, it was there held that the statute does not apply to wills of personalty only.(*a*) In the mean time the codicil in dispute was propounded by Constable, who stated that it was all in the hand-writing of the deceased: it is in these words:—

"13th March, 1825.

"I request Mr. Constable to pay my debts in France. His salary and 35l. to be paid independant of the 2000l. I bequeath him. "EDWARD EMANUEL."

The last clause of this paper is now of no importance: and to the salary Constable would of course be entitled, unless there was something to shew that it had been paid. The only effect, then, of this codicil is to recognize the debt for the money alleged to have been advanced. Now that such a sum was due is not at all improbable; because it appears from the evidence that the deceased was obliged on the morning he left Montmorency to borrow twenty francs; and, from the papers in the cause, it seems that he must have been occasionally in want of money, although he had a letter of credit upon the cashier of Rothschild's banking-house at Paris. This sum of 35l. is, however, the whole matter in dispute; and the question is whether this paper is genuine or fabricated—whether it is the hand-writing of the deceased or a forgery. It is true that the burthen of proof, to shew that the paper is genuine, lies upon Constable, the party setting it up; and though the acknowledgment of a debt of 35l. ad-**[60]**-vanced as a loan would be no sufficient object to induce the fabrication of such a document, yet, as it also recognises the legacy of 2000l. under the will, that recognition might have been supposed of far greater importance. Is Mr. Constable, then, guilty of a forgery of this instrument, and to be condemned in the costs of these proceedings? for that is almost the only question to which this case is reduced: the Court would certainly require pretty strong proof before it would arrive at that conclusion.

The first evidence in support of the genuineness of the paper refers to the hand-writing. Here are several witnesses (so many, indeed, that it will be unnecessary to advert to the evidence of Hamilton) intimately acquainted with the hand-writing of the deceased, who depose that, in their opinion, the paper was written by the deceased; and this affirmative evidence is not to a mere subscription, which may be more easily and exactly imitated, but to a holograph of three lines: the witnesses, therefore, are more able to pronounce decidedly upon such a paper than if called upon to speak to a few letters composing a signature. This evidence then is, if evidence of hand-writing can be, of considerable weight. But the inclination, amounting almost to a settled principle, of this Court—founded perhaps on the facility with which hand-writing may be imitated—has been not to pronounce for a disputed paper on proof of hand-writing alone, but to require some corroborating circumstances. These are peculiarly necessary in the present case, where there is much conflicting evidence on this point; for there are a great number of witnesses, also well acquainted with **[61]** the hand-writing of the deceased, who speak to their belief that the paper is a forgery, being, in their opinion, unlike his ordinary character. These witnesses are not to be laid entirely out of consideration; but I never can think that evidence of dissimilitude is equally cogent and weighty with evidence of similitude, and for this reason—that it requires great skill so to imitate hand-writing, especially for several lines, as to deceive persons well acquainted with the original character; and who are not very likely to form an erroneous opinion if, on carefully inspecting such a paper, they are satisfied that it is genuine. On the other hand, dissimilitude may be occasioned by a variety of circumstances—by the state of the health and spirits of the

(*a*) *Emanuel* v. *Constable*, Rolls, 26 June, 1827.

writer, by his materials, by his position, by his hurry or care—circumstances which deserve still more consideration when witnesses rest their opinion on a fancied dissimilarity of individual letters. But the reasons given by this class of witnesses frequently shake their testimony; and we also know that when persons come prepared to speak in favour of a preconceived opinion, their evidence must be received with some degree of caution. Here, when the witnesses descend into particulars, their reasons are so trivial, so unsupported by the exhibits in the cause, and so discrepant from each other, that I think if they had not been swayed by prepossessions, they would hardly have ventured to arrive at the conclusion that the paper in question was not of the hand-writing of the deceased.

A comparison of hand-writing is also resorted to; and for that purpose two engravers, on the part of the residuary legatees, are produced; but it is **[62]** well known that men of this employment, from their habit of attending to the exact form of every letter, when engaged to make fac similes, are so alive to the least dissimilitude, that any little difference would strike them as of importance. Here, moreover, they do not agree. One engraver is confident that the codicil is not of the hand-writing of the deceased; while the other says that he cannot venture to form an opinion, and that there is not such a difference as would justify him in asserting that the paper in question was not written by the same person who wrote the will. Consistently with the cautious reserve of this last witness, a gentleman from the bank deposes, that he sees nothing of a feigned hand in the instrument; but that, on the contrary, the likeness is so exact that it would have passed a power of attorney. These are among the persons generally produced in this Court to speak to feigned hand-writing. I have also looked into the answers of the parties opposing this paper; and I do not find that they much vary the result of this portion of the evidence. Mr. Emanuel, the guardian of the minor and father of the deceased, has so strong an impression, that he swears to his belief that no part of the codicil is in the deceased's hand-writing; but Mr. Steibel, one of the acting executors, will not go so far, "he cannot form a belief or disbelief whether the subscription to the codicil is of the proper subscription of the deceased." There is no testimony that carries this branch of the case further; and if I were bound to pause here, and to form an opinion whether this paper is in the hand-writing of the deceased, I would say that the evidence in favour of it so **[63]** far preponderates that I should be disposed to pronounce the codicil genuine.

But there is another point for my consideration, viz. the history of the paper itself and of the finding. How was it produced? The first witness on this part of the case is Sophia Killen, a young girl, servant to Constable, the party in the cause. Constable's sister is also stated to have been present at the finding; but she is dead. Killen's account is to this effect—that when Constable returned from France he brought two trunks and a box. The box was corded and deposited in a back garret where she slept; that one day in the beginning of August, 1825, she brought it down, by Constable's directions, into the parlour; it was then uncorded [there was at this time no question about the will] and opened; and was found to contain some articles of dress, a map, a dressing-box, and three books; that Constable took the books, from one of which the paper in dispute dropped; that he took it up and said, "How particular poor Emanuel was" [a very natural observation for him to have made]; that he gave it to his sister, who apparently read, and afterwards laid it upon the table.

This is the substance of the evidence that applies to the finding of this paper; and it has been asked, Why did not Constable produce it at the time of this alleged discovery? but it was not found till after Steibel and himself had been sworn executors; and he does not seem to have been aware that it was a document of any importance. His legacy under the will was not then contested; he could, therefore, have had no inducement at that time to fabricate such an instrument; and if it be **[64]** a fabrication, and the finding were precontrived, it was a very cunningly devised method. This, however, is not, to my mind, the legal result of this part of the evidence. It is not at all improbable that he wrote it previous to the quarrel which is spoken to on the Sunday morning; for it is in evidence that he was, on that day, in a state of considerable excitement, and the contents of the paper itself point to an apparent contemplation of the fatal act by which he terminated his existence. The French ladies, at whose house the deceased was lodging, describe his agitation of mind on the day preceding his sudden departure for Paris; that he did not eat his

dinner; that he exhibited much restlessness; and on the following morning came down stairs very early, looked pale, and was hurried in his manner; that he borrowed twenty francs of the daughter of the landlady, and then quitted the house. It appears, too, that Constable was surprised at this conduct, and in the course of the same morning went to Paris in search of him—but without success; that he returned to Montmorency, and remained there two or three days, when having defrayed every expence, and repaid the twenty francs borrowed by Emanuel, he went back to Paris, where he discovered what had happened. After this he remained at Paris above a month, during which time Madame le Duc, in whose charge he had left a box at Montmorency, forwarded it to him; and there is nothing in her evidence, nor in the evidence of her daughter, which would justify the conclusion that there were no books in the box at the time it was packed up and sent to Paris.

If this paper, then, was not written by the de-[65]-ceased, when was it fabricated? It is perfectly improbable that it was fabricated at Paris; besides, the case set up on the part of Mr. Emanuel is—that the paper was fabricated, and prepared to meet the question raised on the will; and unless I can induce myself to believe that Killen, the maidservant, has perjured herself, it seems impossible for me to pronounce that it was forged subsequent to the agitation of that question. And looking at the whole history of the transaction, there appears no improbability that the deceased should write this paper, when he intended to commit the act that led to his death: the fair inference is, I think, the other way.

Then it is said it was not likely that Constable should have lent him 35l.; but why should he not have been competent to have advanced this sum? It is not probable that he should have quitted England without any funds of his own; and the deceased would rather, in my opinion, resort occasionally to his friend and guardian, or companion (whichever he might be), than constantly apply to the clerk at Rothschild's: nor is it extraordinary that he should remember the debt arising from this loan, and provide for the payment. The declaration to the surgeon, Mr. King, that he had been scandalized by his bosom friend—made subsequent to that act which, of itself, affords the strongest presumption of a diseased mind, can be but of little weight; and the hurried exclamation of Constable to Madame Delamere, when in a state of great anxiety, only shews that he but too truly foreboded the consequences of the morbid irritability of his friend. Besides, any reference to their dispute by one or the other at that time can [66] have no bearing on the case, if, as I think not improbable, the paper was written previous to the quarrel.

It is unnecessary to enter further into a detail of this case. After the course this suit has taken the Court could hardly pronounce against this paper, but on a conviction that it was a fraudulent and fabricated instrument. At that conclusion I cannot arrive: on the contrary, from a consideration of all the evidence, I believe it to be genuine; and I pronounce for it, accordingly, as a codicil to the last will of the deceased.

The question of costs is, in this instance, a matter of very little importance—they must necessarily fall on the estate.

Lushington then prayed—that, as Emanuel, the residuary legatee, had also a specific legacy, and this question was raised solely for his benefit, should the residue be deficient, the costs incurred by the two executors, Constable and Steibel, in this suit, should first be paid; and that in case the residue was not adequate to the discharge of all the costs, the expences, on the part of the residary legatee, should be borne by himself. But the Court observed that the residuary legatee was a minor; and as the paper was not produced till late, there seemed to be no reason to make any distinction.

The Court pronounced for the validity of the codicil; and decreed the costs of all the parties to be paid out of the estate.

[67] In the Goods of Archibald Bathgate. Prerogative Court, Michaelmas Term, 2nd Session, 1827.—Written and verbal instructions being given from which a will was prepared, the execution of which was prevented by unforeseen circumstances and by death: the Court—the widow consenting—will grant probate of the will so prepared (though never seen by nor read over to the deceased) in preference to granting administration with the instructions annexed to the widow;

the deceased's intention being clearly to secure the interests of his children by the interposition of executors.

On motion.

The deceased was master of the ship "Robert;" and died on the 18th of June last, at Montserrat, in the West Indies. He left a widow and four children—minors; and a property of about 1500l. independent of a real estate in Scotland of 25l. per annum. On the 2d of December, 1826, he gave instructions in his own hand-writing to his solicitor from which to prepare a will; and added some verbal directions as to the executors. Before these instructions could be fully carried into effect it became necessary to make some inquiries respecting the real property; and the deceased, who was just going to sail, desired that the will might be sent to meet him at Portsmouth to be executed. The will and also a draft of a disposition of the real property were forwarded to Portsmouth, but the ship did not touch there, and the deceased never returned to this country.

Per Curiam. The question is what paper should be proved—whether the instructions in the hand-writing of the deceased should be annexed to an administration to the widow; or whether probate of the will—written and prepared in his life-time quite ready for execution, which was prevented only by accident—should be granted to the executors. There are many instances where papers not seen by nor read over to the deceased have been pro-[68]-nounced for in this Court;(*a*)[1] but here the executors do not appear: and though the Court would not refuse to grant an administration to the widow with the instructions annexed, yet, as she only takes a life interest in the property, or even less, for her widowhood, with remainder to the children, if the executors, who are also trustees, would, with the consent of the widow, take probate in common form, it would much more completely carry into effect the intentions of the deceased. The obvious wish of the testator was, by the interposition of executors and trustees, to secure the interests of the children; and the Court is also bound to protect their interests.

Lushington said there was no objection on the part of the widow to the suggestion of the Court; and on a subsequent day the executors proved the will.

MYNN *v.* ROBINSON AND OTHERS, BY THEIR GUARDIAN. Prerogative Court, Michaelmas Term, 2nd Session, 1827.—On affidavit that an attesting witness has been diligently sought and cannot be found, an executor may pray publication: but the other party has a right to a monition against the witness to attend for cross-examination if they can discover him.—Deeds should not be annexed to an allegation; but be deposited in the registry, and the material parts only recited in the plea.

On motion.

This was a cause of proving in solemn form of law the last will and testament of Catherine Mynn, late of Westbourne Green, Middlesex, bearing date the 2d of June, 1827; promoted by John Mynn, the husband, and sole executor, against William R. Robinson, the nephew, and an executor named in a will bearing date the 23rd of November, 1826. On the by-day after Trinity Term, 1827, the adverse proctor declared "he proceeded no further" [69] for W. R. Robinson; and then appeared for Thomas Maltby and alleged him to be the maternal uncle and guardian lawfully assigned to four infants, the younger children of W. R. Robinson; and, as such, contingent legatees in reversion in the will dated the 23d of November.

On an extra-day after Trinity Term last an allegation propounding the will of the 2d of June was debated; when the Court directed the second article annexing a long marriage settlement to be reformed; and said that in this and all future cases it would be sufficient to bring deeds into the registry; to recite in the plea the material parts, and to refer to the deeds as deposited in the archives of the Court.(*a*)[2]

(*a*)[1] Vide *Sikes* v. *Snaith*, 3 Phill. 355, and the cases cited.

(*a*)[2] The Court, in order to shew that this mode of pleading was adopted in the Courts of Common Law, read the following passages from Selwyn's Nisi Prius, p. 506-7:—"In framing the declaration it is not necessary to set forth the provisions of the deed in letters and words. It will be sufficient to state the substance and legal effect. Neither is it necessary to set forth all the provisions of the deed; stating such parts as are necessary to entitle the plaintiff to recover, will be sufficient." And

On the caveat-day, in August, this allegation [70] was admitted as reformed: and on this day the drawer of the will and two of the three attesting witnesses having been previously examined; and after reading an affidavit that as soon as the plea propounding the will had been admitted, the third subscribing witness had been diligently sought for, but that he could not be found, and that it was believed he had quitted the kingdom: Burnaby and Dodson prayed publication, and observed that the husband was willing to rest his case on the proofs already adduced.

On the other side, Jenner and Lushington objected that the witness had not been advertised for; and that the affidavit did not enter into a proper detail of the diligence that had been used, nor of the inquiries made for his discovery.

Per Curiam. The Court was, however, of opinion that the affidavit was quite sufficient to account for the non-production of this attesting witness; and that the executor had therefore a right to pray publication and put the opposers to plead in case they should think fit; and if by greater diligence their inquiries were more successful, and they should find the witness, they would be entitled to a monition against him to undergo an examination on interrogatories.

On the by-day, the Court being informed by the counsel for the minors that Robert Hone, the witness in question, was present and ready to be examined, directed him to be produced; when he was sworn by the Judge himself and ordered to be examined instanter.

[71] HILLAM *v.* WALKER. Prerogative Court, Michaelmas Term, 2nd Session, 1827.—The Court having decided that a legatee in a separate paper is not executrix according to the tenor, she cannot oppose the validity of a former will; if she is paid her costs, and if the executor of that will is ready to take probate of the paper by which she is benefited and to pay her full bequest.—When a party is out of the kingdom the Court will direct him to give security for costs.—The principle on which costs are given out of the estate is that the party was led into the suit by the state of the deceased's testamentary papers.

On motion.

Sidney Walker, late a lieutenant in the East India Company's 4th regiment, died on the 16th of March, 1826, on his passage to England, a bachelor, leaving a father, who had been resident at Naples for twenty-five years, during which period he and the deceased had not seen each other. In 1818, while Lieutenant Walker was in England, he became attached to and entered into an engagement of marriage with Miss Hillam; but owing to his pecuniary circumstances the solemnization thereof was deferred, and he returned to India. Previous, however, to such return, in one of his letters to Miss Hillam, dated Manchester, 5th of August, 1821, he enclosed a paper sealed up, with directions that it should not be opened till after his death. This paper was of the following tenor:—

Manchester, 4th August, 1821. Sunday.

It is my wish when I die that you should have 500l. of my property that I get from Mr. Vaughan, and that my relations the Grants in America should have the same sum absolutely and my clothes and if any more comes to me independent of my share of my Grandmother's property left to us independent of my Mother (which is divided or intended by me amongst my Father and Mother Brothers and Sister) you should have a proportion of it equal to the proportion of 500l. [72] to the amount of Mr. Vaughan's property (my share) in expectancy or possession after paying my just debts—to agents in India besides another to the creditors of Mr. James Inglis—of perhaps 100l. or more that is left to you, to your Father and Mother after you, afterwards I hope you will

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in a note the author remarks: "This rule ought to be strictly adhered to, as well to prevent the extension of the record to an unreasonable length, as to avoid the danger resulting to the party setting forth the deed, from variances and formal objections. In *Dundas* v. *Lord Weymouth*, Cowp. 665, the Court said they would animadvert upon any future instance of putting parties to the enormous expence of setting out deeds at length or superfluous parts of them. And in *Price* v. *Fletcher*, Cowp. 727, where the plaintiff, in an action for breach of covenant for quiet enjoyment under a lease, had set out the whole lease verbatim, it was referred to the Master to strike out the superfluous matter in the declaration with costs." See 1 Williams' Saunders, 233, n. (2).

give it back to my family, my Mother particularly. If you like to make enquiry for the Tidney in India well and good Yrs. S. WALKER.

This you can show if any demur should be made by my relations and tell them, it is intended you should have that proportion of my property as it at present is and you can have it now or interest at 8 per cent. till it is sold—Keep the snuff-box.(*a*)[1]

This paper was propounded by Miss Hillam, who gave in an allegation in support of it. In the mean time an appearance had been given for Richard Walker, the father and only next of kin. But the Court having directed at the instance of Miss Hillam, on account of his absence from England, that he should give security for costs in the sum of 50l.,(*b*) the appearance for him was withdrawn; and a fresh one given for his son, Henry Walker—acting as his attorney—and then resident in England. An authentic copy of a will executed in India, and bearing date on the 13th of April, 1817, together with a schedule of debts, dated May 13th of the same year, was brought in by the proctor for Henry Walker, who declared that he opposed **[73]** Miss Hillam's allegation. From the admission of this allegation in Easter Term an appeal was entered, an inhibition taken out and afterwards relaxed; and the cause remitted; and on this day the proctor for Henry Walker declared that he did not further oppose the paper propounded by Miss Hillam; but intervened for Edward Stanhope Walker, a brother of the deceased, and an executor named in the will of 1817, and prayed probate of that will, and of Miss Hillam's paper as a codicil. This was objected to as it was contended that she was entitled to probate of the letter she had propounded as executrix according to the tenor; and it was stated that she had lately discovered a further paper which confirmed that construction.

Per Curiam. The Court is of opinion that Miss Hillam is not executrix according to the tenor; and is therefore not entitled to probate: but that as the validity of the paper she propounded is now admitted, she is entitled to her full costs out of the estate. It has, however, been suggested that she has now discovered other papers which may give her a greater interest; but if that were not the case, and if she were paid all the benefit given her under the paper already propounded together with her costs, she could have no interest in contending—whether the will now produced be valid—or the deceased be intestate. The case must at all events stand over till the papers referred to by Miss Hillam's counsel are produced; and, moreover, as it appears that the will of 1817 now before the Court was executed in India—in duplicate, and that the deceased brought one part of it with him to England which is not at present forthcoming—and which the law, **[74]** therefore, presumes he has revoked; there are sufficient grounds for the Court to pause, and to refuse probate till the next of kin has been cited.

[Hilary Term, By-Day, 1828].—Before the allegation propounding the second paper was brought in two codicils, dated the 12th and 14th of May, 1824—were transmitted from India, by which the deceased referred to the will of 1817, and gave Miss Hillam the same benefit as by the paper she had already set up.(*a*)[2] In consequence she withdrew from the suit; and the Court was now moved to decree her costs out of the estate.

Lushington and Nicholl in support of the motion.

Phillimore and Addams contrà.

Per Curiam. Miss Hillam propounded a paper that the deceased had left in this

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(*a*)[1] This letter was directed to Miss Hillam, and endorsed "not to be opened." There were several alterations and interlineations; but as nothing turned on the appearance of the paper it has been printed without noticing them.

(*b*) See Tidd's Practice, vol. i. p. 551-2.

(*a*)[2] "I have made a will in 1817 previously to going home to England in which I bequeathed &c. . . . I now wish that 500l. or 800l. if the Tottenham property is equal to 5000l. a share, be given out of my property, by my Father, Mother, Brother and Sister to Harriet Hillam of Penton Place, and to her mother Mrs. Hillam of Penton Place in the event of Harriet Hillam's death. This may be a last request, and I trust it may be granted. "S. WALKER."

Signed and written off the island of Cheduba on the evening of the 12th of May, 1824.

In a continuation of this codicil he writes: "My will of 1817 is I believe, in a square patana at W. Cleighs at Calcutta."

The codicil of the 14th of May does not bear on the present question.

country—and which was established as far as it went. Afterwards other papers were sent over from India, under which she **[75]** had the same interest: she then withdrew. So far, therefore, from having acted vexatiously, she rather has been harassed by the next of kin—who on the eve of the long vacation entered an appeal —which he subsequently abandoned. But I act on the principle which always guides this Court in decreeing costs out of the estate, viz. that the party was led into the contest by the state in which the deceased left his papers. Miss Hillam then is clearly entitled to her costs: and on the whole I see no objection to the costs of all parties being paid out of the estate.

REAY *v.* COWCHER. Prerogative Court, Michaelmas Term, 2nd Session, 1827.—Where the widow in opposition to a will sets up habitual intoxication, weakened capacity and custody, she may also plead insane dislike on the part of her husband to account for their living apart, though the delusion may not be sufficient, per se to invalidate the will.

[See further, 2 Hagg. Ecc. 249.]

On the admission of an allegation.

Peter Cowcher, the deceased in this cause, died on the first of December, 1826, leaving behind him Elizabeth Cowcher, his widow, a son, Robert Cowcher, and a daughter, Mary, the wife of Stephen Salmon. On his death a will dated the 6th of March, 1824—a codicil dated 21st of October, 1826, and another codicil without date were found: the will in two envelopes in a tin box, and the two codicils folded together and locked up (with a third paper) in a private drawer of his writing table.

The will was to the following effect:—

To his wife an annuity of 10l., to his daughter Mary Salmon an annuity of 80l. for her sole use; and **[76]** after her death, his executrices to appropriate such part of the annuity as they may think fit for the education of her children: to his son Robert Cowcher 80l. per annum—with the same provision for children; and in both cases— if no children—the legacies to become part of his personal estate: To Mrs. Elizabeth Reay his household furniture, linen, plate, china, books, his interest in the lease of a house at Brixton Hill; and also two houses in London: the residue after payment of debts to his executrices in trust to appropriate the balance of their accounts in purchase of government securities, and the principal and interest to his grand-children, share and share alike, at the age of twenty-two years. The testator then appoints Mrs. Elizabeth Reay and her sister Mrs. Jane Reay executrices, and requests them to accept two and a half per cent. on the balance of their annual accounts, with mourning, and a ring to each; and gives them power to grant leases, &c. The will was signed, sealed, and executed in the presence of three witnesses. It was fairly written though there were a few errors of orthography.

The codicils were as follows:—

I Peter Cowcher of Brixton Hill in the parish of Streatham ~~of Streatham~~ in the County of Surrey—require that this may be Entered as a Codicile of my former will that is respecting the Legacys—that apply to My Daughter Mary Salmon and my Son
in lieu of which
Robert Cowcher—so as to be Paid an Annual Annuity by my Executerixs— ∧ I will and Bequeath—unto Mrs Mary Salmon & her Children without any Claim of her Husband—a House situated in Davies St Berkeley Square—Inhabited **[77]** by Mr Higham Surgeon & Clr—& unto my Son Robert Cowcher & His Children a House situated—in Davies St Berkeley Square Inhabited by Mr Barrows—Surgeon & Clr this being the only Legacies that I intend to leave them—the rest and residue
to to to
of my property ackording my Will ~~will~~ go the Persons there specified with this
my Daughter Mary and my Son Roberts ~~and their~~
Exception that Instead of leaving ~~their~~ ∧ Children as Residentiery ~~Leg residentuary~~
Mrs E Reay my Executrix—to
Legatirees—I will and Bequeath as my Residentuary Legaty ~~Mr. Charles Kenrick~~
Dispose of the Residue as she thinks proper
~~Douglas now of Cambridge Colledge~~—& should Mrs Elizabeth Cowcher my Wife— or Mrs Mary Salmon my Daughter—or Mr Robert Cowcher my Son—Institue any Legal proceeding against this my Will and Codicile—I only request my Executrix's may cut them off with one Shilling Each.

Octr. 21st, 1826. P. C.

In addition to the Enclosed, I have to request of my Executrix's—that should any my unforeseen demands be made upon estate—that I—Invest them with full powers to sell to the Best advantage—my leasehold house in Alfred Place to answer my Just Debts that may be claimed on my estate

The will and the two codicils were propounded in an allegation, given in on behalf of Elizabeth Reay, spinster, one of the executrices, which pleaded the factum, &c. of the will and codicils—the capacity of the deceased till immediately before his death, that the papers were all [78] in his hand-writing, that they were found on the day of his death, by Elizabeth Reay and Robert Cowcher, his son, and that they were in the same plight and condition as when found.

These testamentary papers were opposed by Mrs. Cowcher, the widow, who had given in a responsive allegation, consisting of sixteen articles.

The nine first articles and the eleventh pleaded certain circumstances in the conduct of the deceased, and declarations for the purpose of shewing that he had taken an insane dislike to his wife, which at length reached such a height, that in 1820, believing her life in danger she separated from him; and that this dislike extended to his children, and to all persons who communicated with his wife or with them. These articles embraced a period of time from 1799 to 1825.

The tenth pleaded the deceased's cohabitation with Elizabeth Reay from 1820.

The twelfth and thirteenth, habitual intoxication; impaired faculties, health and spirits; controul of Reay; continuance of delusion.

The fourteenth, that the deceased in October, 1826, was prevailed upon by the threats and entreaties of Reay, to write the codicil of that date, that Charles Kenrick Douglas, a friend of Reay's, but unknown to the deceased, was first appointed residuary legatee—that Keay afterwards prevailed upon deceased to substitute her name.

Fifteenth, that during the deceased's illness, his children requesting to be informed of his health, Reay made her sister write, saying that he was improving; that they called, but Reay would not allow any separate communication, she or her sister remaining all the time by the deceased's bed-side, [79] and when he attempted to introduce the subject of his property, interrupted him and would not suffer him to express his wishes.

Sixteenth, that at his death he was possessed of property yielding an annual income of 1200l.

The admission of the allegation was now opposed.

Jenner and Dodson for the executrix.

Lushington contrà.

Judgment—Sir John Nicholl. It is admitted that this allegation is so far properly drawn, that the objections lie rather to the general substance than to the particular form of the articles. The allegation propounding the papers merely pleaded the factum of the several instruments, the hand-writing and capacity; but did not enter into any history of the deceased's connexions or affairs. The case now set up is of a mixed nature, viz. insanity and dislike, habitual intoxication, weakened capacity, fraud, controul and custody. The nine first articles and also the eleventh, which plead delusion respecting his wife and children, who he fancied were engaged in a conspiracy against him, are said to be irrelevant. To this it is answered that the articles are historical, and intended to account for the fact that the deceased lived separate and apart from his wife, which would probably make its appearance in some later stage of the proceedings; and might be injurious to the widow's case if it were not shewn to arise from an insane delusion: now in this point of view these articles may be of importance; though the facts here pleaded certainly would not alone have been of sufficient [80] weight and stringency to invalidate the will, if he had died as soon as it had been executed; particularly as the will by itself is not inconsistent with the probable disposition of his property.

The remaining part of the case—both as it respects the later history of the deceased's life, and as it respects the nature and appearance of the instruments—is far stronger. The disposition made by the codicils, and the condition of the deceased at the period of their execution, have a more direct and immediate bearing on the question, but the previous history may not be irrelevant, as by accounting for the conduct of both parties it will assist the Court in arriving at the true conclusion. My only doubt is whether it might not be compressed into one or two articles; but

as short articles are sometimes more convenient, I shall leave that point to the consideration and discretion of the counsel: and, on the whole, I am of opinion that this allegation contains a case which is fit to go to proof.

Allegation admitted.

IN THE GOODS OF HENRY SAMPSON FRY. Prerogative Court, Michaelmas Term, 3rd Session, 1827.—Directing certain persons to pay debts, funeral expences, and expences of probate, is an appointment of such persons executors.

On motion.

The deceased by his last will and testament, executed in the presence of three witnesses, devised his real estates—subject in exoneration of his personal property to the payment of certain bond debts—to his son Joseph James Fry, his daughter Susanna Fry, and his friend Hawley Clutterbuck and their heirs, upon trust to receive the rents and profits, to appropriate a **[81]** portion thereof, annually in the purchase of stock, to pay his debts, funeral expences, and the expences of proving his will. They were also empowered to sell the estates. He gave his personal property to be equally divided between his said children, and appointed his daughter residuary legatee; but did not name any executor. He bequeathed a legacy of 20l. to Clutterbuck in case he acted as one of his trustees; and directed that he should continue to collect the rents at an allowance of five per cent. upon the net proceeds.

Phillimore moved that probate of this will be granted to Joseph James Fry and Hawley Clutterbuck, as two of the executors according to the tenor. The personal estate, it was understood, did not exceed 450l.

Per Curiam. The Court said that paying debts and funeral expences, and expences of proving a will, was performing the office of executor. The appointment of trustees was for the management and disposal of the real estate, and for no other purpose. There can be no doubt that the parties, for whom probate is now prayed, are executors according to the tenor.

Motion granted.

IN THE GOODS OF ANN JONES. Prerogative Court, Michaelmas Term, 3rd Session, 1827.—A party may commence a suit in formâ pauperis.

Per Curiam. Elizabeth Wagner is desirous of instituting a suit to call in probate of the will of Ann Jones; certainly it is more usual not to admit a party in formâ pauperis till after proceedings have been commenced. But, in point of reason and justice, **[82]** an application of this kind should be granted as well before (*a*) as after, assistance may be required to extract a citation. I shall, therefore, assign the present applicant, on her taking the usual oath, an advocate and proctor; she will, however, be liable to be dispaupered in case, upon the appearance of the party to be cited, it should be shewn that she is not entitled to this privilege; as in all these cases a party is admitted de bene esse.

JAMESON AND OTHERS *v.* COOKE AND OTHERS. Prerogative Court, Michaelmas Term, 3rd Session, 1827.—To entitle an unfinished paper to proof, it is necessary —1st, to connect it most clearly with the deceased; 2dly, to shew fixed and final intention; 3dly, completion prevented.

On the admission of an allegation.

This was a business of proving in solemn form of law an alleged codicil or addition to the last will and testament of Lydia Ellison, late of the city of York, widow, promoted by Mary Ann Cooke, Edward Ball, Mary Watkinson, and Isabella Warne, four of the five legatees therein named, and four of the parties cited to propound the same, against William Jameson, the surviving executor of the said will, and Isabella Nunn, the other legatee named in the codicil, and also against the Reverend John Steward, two of the next of kin of the deceased.

The allegation, propounding the paper in substance, was as follows:—

That Lydia Ellison died at York on the 29th of April, 1826, leaving a personal estate of about **[83]** 8000l. That for thirty years she had a great affection for, and intimacy with, Mrs. Cooke and Mrs. Warne; and also had a great regard for Mrs. Watkinson and Mr. Ball. That in September, 1796, she made her will; and, after devising her real

(*a*) See Tidd's Practice, vol. i. p. 112.

estates, gave a legacy of 100l. each to Cooke and Warne, and the proceeds of a sale of her estate at Saffron Walden to them jointly with Mrs. Nunn; that upon the death of the residuary legatee she sold some of her real property, so that her personalty was much increased: and intending to dispose of this, she, on the 3d of August, 1824, wrote the paper propounded; and that in reference thereto, in October, 1825, while on a visit at Ball's, she made to Mrs. Gattie—one of his intimate friends—a testamentary declaration in his favour; that she engaged him and his family to visit her at York the following spring, and then to go to Harrogate; that on a Monday, 24th of April, just previous to their coming, she received an injury by a fall, which her medical attendants did not think dangerous; but in a day or two she became lethargic and insensible, and died on the Saturday; and that, while sensible, she did not consider herself in any danger. That Mr. Weatherby, her confidential solicitor, resided at Newmarket, and that she did not see him after the date of the codicil. That the will was found in a chest of drawers in the deceased's bed-room with the envelope unsealed—and no other paper with it. That on the 23d of September, 1826, Jameson received an anonymous letter by the general post, with the codicil enclosed—stating that it was found in the deceased's house, and was taken away with two sovereigns. That the deceased was pe-[84]-nurious and suspicious—wore a pocket in front of her stays, and in it she declared she kept her private papers, having nobody she could trust; that Jane Cusworth was her only servant, and Ann Shouter was hired to assist in nursing; that, one morning, Shouter was observed with her hand in the drawers, and said she was looking for a night-cap; that, soon after, she urged Cusworth to go down to breakfast, who, on her return, found her with the deceased's keys, and she desired Cusworth to lock up the said pocket, which she did, and delivered the keys to Mrs. Robinson; that, on Saturday, 22d of April, the deceased received four sovereigns and silver in change for a 5l. note; that she had only spent 5s.; but, on searching her pocket after her death, there were only two sovereigns; and her purse could no where be found.

Dodson and Salusbury for the executor.

Addams and Blake for the two next of kin.

Lushington and Haggard in support of the allegation.

Judgment—Sir John Nicholl. This is a proceeding for the purpose of establishing a paper of a testamentary character, as a codicil to the will of Mrs. Lydia Ellison. It is brought forward by four of the legatees; and it is opposed by the executor named in the will, and by two of the next of kin. An allegation in support of the instrument has now been debated: I have considered the circumstances it sets forth, together with the paper itself: and the paper is so imperfect, and has to encounter such difficulties, that it is quite impossible in my judgment to overcome them, so as to give it effect as a tes-[85]-tamentary instrument; even assuming—what the Court is bound to assume in the present stage of the cause—that every thing pleaded in this allegation is correct, and could be proved. The paper propounded is of this tenor:—

with

~~Mr Weatherby I was Sir~~ I give my house at York ~~to be~~ my money in the funds between Mrs Cooke at Great Baddow Mr Edward Ball Upper Stamford Street London Mrs Watkinson Burwell, Mrs Warn, Mrs Nunn if living ~~and I give at twenty~~

York August 3 1824.

~~Estate at Mildenhall I~~

It is in pencil, not signed, but is written on a scrap of an old letter, dated Hull, 18th February, 1819, and still bearing on it the word "Madam." In the first place, then, it would hardly be possible to prove such a paper genuine. The executor in his affidavit of scripts admits, as was remarked, that it is in the hand-writing of the deceased; but the Court could not safely trust to evidence of hand-writing for the purpose of establishing such a document. It is sent to the executor four or five months after the death of Mrs. Ellison, in an anonymous letter, purporting to come from a person who is supposed to have stolen some money out of the deceased's pocket; and to have taken this paper at the same time. Why she should have taken this paper there is no suggestion; for it is alleged that she left two sovereigns, and, I presume, some other articles. It is just possible to conceive that she fabricated the instrument in order to make her peace. The hand-writing of the letter is as good as that of the [86] paper, and is not unlike it. There is, then, no sufficient finding.

These difficulties relate to the proof of its genuineness; but, in the second place,

there are still more conclusive difficulties as to its validity. Even if the paper were admitted to be genuine, and to have been found in the deceased's pocket immediately on her death, still, on the face of it, it would be inoperative, supposing it only to apply to personal property. Beyond all question, it is imperfect and unfinished; by calling it imperfect and unfinished, I mean that it is not reduced to that form in which the deceased purposed to leave it as an operative testamentary paper; nay, it was scarce begun. It was not, at first, intended to be dispositive; it was the inception of a letter, or rather of a draft of a letter, to her attorney, Mr. Weatherby, at Newmarket, while she was living at York. She seems afterwards to have changed her mind; and the paper then goes on as if it were heads for a disposition of part of her personal property —her house at York, and her money in the funds. There is then the commencement of a further bequest, "and I give at twenty;" but this is struck through: then there is a memorandum as to part of her real property, but that also is struck through, "Estate at Mildenhall I." The paper is a crude memorandum respecting some testamentary disposition, set down in pencil, as a passing thought, either on writing to her solicitor, or as heads for some subsequent paper. The presumptions are all strongly against it. The burthen of proof presses heavily on those who would establish it to make out that it does contain that disposition which was manifestly her [87] intention. The affection and regard pleaded for the parties benefited shew that such a disposition was not improbable; but this goes but a little way of itself, though it may assist other circumstances.

It is said, however, that there are two further circumstances: first, the declaration respecting Ball—"He shall not want money long, I have taken care of that;" but to rely on this, and to apply it to such a paper as the present would be dangerous in the extreme. The other circumstance is the accident, and that her death was unexpected: but this paper is dated twenty months before that event, viz. in August, 1824. Now, to support any unfinished paper, there must be shewn continued and final intention to the time of death, and the finishing prevented. To meet this difficulty, it is observed that the deceased never saw Weatherby afterwards; but if she had intended to have made any such alteration in her will (which was executed thirty years before), she might have communicated with him by letter. She had abundant opportunity of taking further steps, if she had made up her testamentary intentions.

I shall, in my opinion, better consult the interest of the parties in rejecting this plea: without doubt the paper is of no validity, unless the rules and principles of this Court are to be overthrown; and it would be attended with some risk of injury to those principles to allow this allegation even to go to proof, when the circumstances, if all quite true, are utterly insufficient to support the paper.

The Court rejected the allegation, but ordered the expences of all parties to be paid out of the estate.

Allegation rejected.

[88] SMITH *v.* BLAKE. Prerogative Court, Michaelmas Term, 3rd Session, 1827.—The Court before granting a prayer to rescind the conclusion, in order to the admission of an allegation, requires an affidavit setting forth facts material as well as "noviter perventa;" and it generally also requires that the allegation pleading those facts shall be tendered at the time of making the prayer.

Dame Elizabeth Blake died on the 23d March, 1827, a widow, leaving Sir Francis Blake, Baronet; Lieutenant-General Robert Dudley Blake; William Blake, and Eleanor Ann Stag, her only children. Her personalty amounted to 17,000l.; and by her will, executed in writing, but without date, she had appointed Hugh Smith, Esq., and the Reverend Hugh Smith, executors. On the 3d of April probate was prayed by the Reverend Hugh Smith; and the grant thereof was opposed by Lieutenant-General Blake, as a legatee named in a former will, dated the 27th of February, 1826. An allegation had been given in on the part of the executor to which three witnesses had been examined; but no interrogatories were addressed to them; and the cause had been set down for sentence on this day, as unopposed, when an application was made to the Court, on an affidavit of General Blake, to rescind the conclusion for the purpose of bringing in an allegation.

Judgment—Sir John Nicholl. This is an application of a special nature to prevent the Court from proceeding to the immediate hearing of the cause. The cause having been assigned for sentence, the papers were all laid before me, ready for judgment, as in an unopposed suit.

The question arises on the will of the dowager Lady Blake. It appears that, though she had made a former will, she wrote instructions, and sent them [89] to her confidential friend, Mr. Hugh Smith; and that she afterwards sent him further instructions, both which he transmitted to his solicitor, Mr. Harrison, who embodied them into a will; that at an interview on the 11th of January last, the will so prepared by him was read over, and, after some slight alterations, fully approved by her, except that as to two inferior legacies she entertained some doubts. She, however, kept the paper, saying she could execute it afterwards; and she did execute it. These facts, as well as capacity and volition, are fully proved. On looking over all the papers and letters I do not see the least ground for any suspicion of fraud or imposition; and I should have been much surprised if, when the cause had been brought to me, it had not been marked as unopposed.

On this day, at this late stage, comes General Blake, and prays me to take the extraordinary step of rescinding the conclusion and allowing him to plead; I say the extraordinary step, because, though the Court is perfectly competent to adopt such a course; yet the application is very rarely made, and still more rarely granted: if ever granted, it is only when all proper activity and diligence have been exerted, and on good and sufficient cause shewn by affidavit, setting forth that material facts had newly come to the party's knowledge. I hardly remember a case wherein a prayer of this peculiar nature has been granted without the facts on which such prayer was made being specifically and particularly stated; and without the allegation being absolutely tendered at the same time, so that the Court might see whether it could safely go to proof. Cer-[90]-tainly this has been required and done in many cases. Now, under what circumstances is the present application made? General Blake has been a party through the whole of this suit; but it seems, from some reason or other, his proctor, previous to the month of August, declined to proceed further for him; a few days elapsed before he was informed of this; he then entered into a treaty with one of the legatees for a compromise; but how long that went on I do not know, or how it can affect the present question I do not see. Mr. Smith, the executor, was not party to the compromise; he was bound to go on, and protect the other persons interested under the will; and not merely to acquiesce in the arrangements made between General Blake and one of the legatees.

What, then, is stated in General Blake's affidavit? that he has collected new facts since the 15th of October, but he should have done this when he undertook to oppose the will; it goes on, that he believes them to be very material, but it does not say that he has laid them before his counsel, and that they so consider them (and even this would not be sufficient, as the Court ought to be able to form its own opinion and decide whether the facts are so far material as to justify it in again opening the cause, or of such a nature as to permit that step to be safely taken): nor are the witnesses, proposed to be examined, enumerated. On such an affidavit is the Court now called upon to take this extremely dangerous and extraordinary step—contrary, in my opinion, to justice, and to those forms according to which this Court is bound to proceed. I can see no grounds for delaying my sentence; and I therefore pronounce for the vali-[91]-dity of the will, which the evidence fully supports; and I decree probate thereof to the executor.

The proctor for General Blake—being called upon by the Judge, preparatory to signing the sentence, declined to make any prayer: the Court stated that he might "pray justice" without prejudice to his right of appeal, and that it might be so taken down by the registrar. This was accordingly done; and probate was directed not to go under seal for fifteen days.

IN THE GOODS OF ALEXANDER RUSSELL. Prerogative Court, Michaelmas Term, 4th Session, 1827.—An original will, disposing of real estate in Scotland, may (certain conditions being complied with) be delivered out of the registry in order to be proved and recorded at Edinburgh.

On motion.

Alexander Russell, formerly of Edinburgh, but late of London, a surgeon in the East India Company's service, died in May, 1825. In June, 1826, probate was granted by the Prerogative Court of Canterbury to David Colvin, one of the executors named in the last will and testament, or deed of disposition, made by the deceased, and dated at Edinburgh the 2d of January, 1819, with three codicils. All the papers were in his own hand-writing.

The testator died possessed of heritable or real estate, and other property, in North Britain; and by his will, disposed of all his property, both real and personal, to his executors, administrators, and intromitters upon trust. An affidavit now set forth that, for the purpose of recovering such heritable estate, and of carrying the will or deed **[92]** into effect in North Britain, it was necessary that the original will or deed of disposition should be recorded and filed in the register books of council and session at Edinburgh; and that the same should there remain on record.

Lushington now moved that the will should be delivered out of the registry of this Court, and an authentic copy left therein, on bond being given that the will should be safely deposited in the registry at Edinburgh, and that a certificate thereof should be transmitted to this Court.

The Court, having ascertained that there was no suit depending here respecting the validity of the will, and having directed that the transmission of the certificate should be strictly enforced by the bond, granted the motion.

Motion granted.

COLVIN *v.* H. M. PROCURATOR-GENERAL. Prerogative Court, Michaelmas Term, 4th Session, 1827.—Administration of the goods of an intestate bastard, drowned together with his wife and only child, will be granted to a creditor—the King's proctor having been cited, but not the representatives of the wife, on presumption that the husband survived; and the debt being large and the property small.

On motion.

John Edward Conway, otherwise Eugene Vendernesse, late a captain in the military service of the East India Company, died in the month of September, 1823, intestate, and a bastard. The deceased, who had been recently married, was drowned by the upsetting of a boat, with his wife and child [if any] in the river Ganges, as he was proceeding from Calcutta to join his re-**[93]**-giment. At the time of his death he was indebted to the house of Colvin and Co., agents at Calcutta, on bond dated 27th of July, 1823, for the payment of 1982l. sterling. The property of the deceased in this country did not exceed 250l. On an affidavit of James Colvin, one of the partners in the house of Colvin and Co., a decree with intimation issued against the King's proctor, and no appearance being given by him,

Dodson moved for a grant of administration of the goods (within the province of Canterbury) of the deceased to the said James Colvin, as a creditor, on giving the usual security.

Per Curiam. The Court said that, in strictness, the representatives of the wife ought to have been cited; but as the primâ facie presumption of law was, that the husband survived,(*a*) and as the property was small, and the debt large, the decree might pass.

Motion granted.

IN THE GOODS OF THE ELECTOR OF HESSE. Prerogative Court, Michaelmas Term, 4th Session, 1827.—The Court will grant to the agent of a foreign prince an administration limited to substantiate proceedings in Chancery; but will not extend it to the receipt of a debt, without a power of attorney from the proper authorities.

On motion.

On the by-day of Trinity Term last, Lushington applied for an administration to be granted to Nathan Myer Rothschild, as agent of the present Elector of Hesse, for the recovery and receipt in **[94]** the Court of Chancery of a debt due to the late Elector from the estate of his late Royal Highness the Duke of York. The application was founded on an affidavit of Mr. Rothschild, which stated that he had received instructions from the present Elector to recover the debt.

The Court granted the administration limited to substantiate proceedings in Chancery; but declined to extend it to the receipt of the debt, without some fuller authority from the Elector of Hesse, or from his Minister of State.

A power of attorney from the Minister of State, executed by the directions of the Elector of Hesse, being now produced,

Per Curiam. The Court on motion of counsel revoked the former administration,

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(*a*) Vide *Taylor* v. *Diplock*, 2 Phill. 267.

and decreed a new administration limited to further proceedings in Chancery, and to the receipt of the said debt.

Limited administration granted.

INGRAM *v.* WYATT. Prerogative Court, Michaelmas Term, 1st Session, 1827.—Interrogatories not being ready, and twenty-four hours having elapsed after notice to the adverse proctor of the production of a witness; the witness has not, under all circumstances, a right to be dismissed.

[See further, p. 384, post.]

An allegation in this case had been admitted, on behalf of Henry Wyatt, in May last. Six witnesses were examined by commission, during the long vacation, and a seventh came up to London on Monday, November the 5th, from a distance of 160 miles, to be examined on the same articles. On that day, at half-past three o'clock, notice that this witness would be ready to undergo his cross-examination in twenty-four hours was served on **[95]** the adverse proctor, who now stated that he had immediately procured instructions, and prepared a draft of some interrogatories, but was unable to get them settled, by counsel, till after the witness was repeated to his examination-in-chief on Tuesday night; which being done, he immediately left town, refusing to remain to be cross-examined.

The Court was of opinion that, under the circumstances, further time ought to have been allowed for preparing and administering the interrogatories; and said it would grant a monition against the witness to attend and undergo his cross-examination, and should condemn the party, whose witness he was, in the costs of reproducing him, unless a satisfactory affidavit was brought in to explain why he was not examined on the commission, and why he left town before he was cross-examined.

The proctor for Mr. Wyatt stated that the witness had not been produced under the commission, because his residence could not be discovered; and that even now he did not know where he was to be found, nor how his attendance could be enforced.

The Court said that such being the case, and the grant of a monition therefore of no avail, its present impression was that, unless the witness was again brought up before the second session at the expence of the party who originally produced him, his deposition should be sealed up in the registry, and not be used at the hearing; for it would be no injustice to the party to reject the evidence if the other side were precluded from the benefit of cross-examination. Perhaps the address might be learnt from the examiner; or the **[96]** registrar might be authorized to look into the deposition for that purpose.

The Court extended the term probatory to the second session, in order that the witness William Lewes might in the meantime be produced for cross-examination; and if not produced the Court directed that his deposition should be sealed up.

2nd Session.—Under suspicious circumstances, the deposition of a witness—not cross-examined—may be sealed up; but on a subsequent satisfactory explanation may be delivered out subject to all objections at the hearing.

On this day a declaration of the proctor himself and also an affidavit of Henry Wyatt, his party, were brought in; and the Judge was prayed to rescind the order, or assignation, of the last court-day.

Jenner in support of the application.

Lushington contrà.

Per Curiam. The Court no doubt has the power of rescinding its former order, if, on a different representation of the facts, it should appear that justice would not be done by carrying it into effect: but, on the view that the Court had of the circumstances on the last session, it was perfectly justified in making that order. I must premise that no imputation lies on the proctor—no person is more correct in his practice, nor is there any one that stands higher in his profession—but the facts were such as created suspicion. The allegation was admitted in May last: a commission for the examination of witnesses had been extracted in the long vacation, and under it six witnesses were examined to certain articles: on the fifth of November only notice was given to the adverse proctor that another witness was to be produced that **[97]** day; and at the expiration of thirty hours he was repeated and could not be prevailed on to stay till interrogatories were prepared. The general rule is that twenty-four hours' notice shall be given for the preparation of interrogatories; but it

does not follow that, on special occasions, the time may not be extended or abridged.(*a*) In the present instance the hurried departure of the witness—coupled with previous circumstances—had the appearance of a contrivance that he should come up and be examined, and his deposition be forced on the Court, without its effect being weakened by the answers extracted by interrogatories. Till the party had exonerated himself from such suspicion—strengthened, at the time, by the fact that the proctor did not even then know the residence of the witness, and not only could not find him, but had no means of ascertaining where he was—the Court deemed it right to make the order now prayed to be rescinded. I thought, on the facts then before me, it would be extremely dangerous that such a deposition should be read, unless the party would reproduce the witness for cross-examination; and therefore ordered the evidence to be sealed up. Now, the affidavit of the party—for it is unnecessary to recur to the proctor's statement after what I have **[98]** said—is, that he is in no degree acquainted with the residence or address of William Lewes:—

"He took no measures whatever, either directly or indirectly, to delay, prevent, or hinder the said William Lewes from being examined on the interrogatories of the adverse party in this cause; that he has had no communication with him, either by person or by letter, relative thereto; that at the time of the examination of the said William Lewes upon his allegation he, the appearer, was at his residence in the county of Warwick; that he had no knowledge of the said witness having been examined and repeated to his deposition until he received a letter from his proctor desiring him to come to London immediately, to assist in endeavouring to discover where the said William Lewes is, for the purpose of procuring his attendance to be examined upon interrogatories."

The party has thus exonerated himself from the suspicion of contrivance; yet I cannot help agreeing with the counsel's observation, that under the circumstances it would have been proper and expedient (because liberal conduct between the practitioners is always expedient) to have given, if possible, earlier notice to the adverse proctor, that the witness was expected, in order that he might be prepared with interrogatories for a particular and full cross-examination. Yet I am willing to admit that there is considerable weight in the excuse now offered, viz. that it might have been dangerous to the witness' security if it were known that he intended to come to, or remain in, London. Delicacy to him may be a sufficient excuse. Of that the proctor must himself judge—I impute no blame; but, if it were not for these reasons, I should have thought an antecedent notice requisite. On **[99]** the other hand, what has been the conduct of the adverse proctor? As the allegation had been admitted long before—as, already, several witnesses had been examined—and of course interrogatories addressed to them, I can see no reason why some general interrogatories might not have been administered at the expiration of twenty-four hours; and notice have been given to the examiner, and to Wyatt's proctor, that an extension of time for drawing up further and special interrogatories would be asked. It was not necessary that he should wait till such special interrogatories were ready, before even the common form interrogatories were addressed to the witness. The Court can only add that it could have wished that, on one side, it had been practical to give earlier notice, and, on the other side, that some of the interrogatories already settled had been administered, and further time then prayed.

But what is the Court at present to do? Neither the proctor for Mrs. Ingram nor Wyatt's proctor now know where to find the witness: the name even of the friend at the Horse Guards,(*a*)[2] through **[100]** whom inquiry may be made for him, is not given.

(*a*)[1] Oughton, tit. 80, §§ 9, 10, 11, and the notes to those sections.

It was stated by an examiner, in reply to a question from the Court, that though a witness was not repeated till after he had been examined on interrogatories, yet he signed his deposition as soon as his examination-in-chief was finished, and was not again allowed to see it. The Court said that course was quite satisfactory; and it would also be desirable, if any material alterations were made at the request of the witness, it should appear, from the papers, that such was the case.

(*a*)[2] It appeared, from the proctor's statement, that on the 12th of October, 1827, a letter from the brother of William Lewes communicated that William Lewes was travelling he knew not where; but that a letter addressed to a friend at the Horse Guard would reach him. To a letter thus forwarded, an answer arrived on the 20th, dates

How then could the compulsory process be served? As some steps have been taken for the purpose of producing this witness; and as he may possibly attend before the next Court; as the facts, also, which have been disclosed have removed all suspicion of contrivance from the party—I shall so far rescind my former order as to direct the deposition to be delivered out, and to be used subject—at the hearing—to all observations on its admissibility as evidence. I shall also direct publication to pass on the next court-day, with liberty to cross-examine this witness, William Lewes, if he shall in the meantime appear according to the notice which I learn from the statement has been forwarded to him. If he is so cross-examined, his deposition will of course be admitted; if he shall not appear, it will be for the Court to decide whether the deposition shall be read at all; and, if read, the Court—having all these circumstances now disclosed to its view—will be able to form a fair estimate to what degree of credit and weight his evidence may be entitled.

4th Session.—After publication, the Court will not allow witnesses to be re-examined in the ordinary mode—on a suggestion that the examiner, from a misconstruction of the plea, has improperly rejected evidence: but, if essential to justice, it may direct a vivâ voce re-examination in open Court.

On the fourth session (publication having passed on the preceding session) the Court was moved to rescind the conclusion of the cause, for the purpose of permitting the re-examination of Joseph Snow and Edward Townsend Higgins, two witnesses already examined on certain additional articles to an allegation given in, on the part of Mrs. Barbara Ingram, and admitted on the 14th of July, 1827.

[101] Per Curiam. This is an application on behalf of Mrs. Ingram to rescind the conclusion of the cause, and to allow two witnesses to be re-examined, on the suggestion that the examiner had misconstrued the allegation. It is not necessary to call upon the examiner to make any statement, as the facts appear on the face of the proceedings. An application that a witness, after publication, shall be re-examined, stands on very different grounds from a similar application before publication, and is open to far stronger objections. The Court would require very stringent matter before it set up such a precedent; for under any circumstances, and in any mode, it would be a most dangerous experiment, leading to subornation and improper extortion of evidence; more particularly in a suit that has already been depending nearly three years, that has run to great length both in plea and proof; and where the parties in the country appear to be in such a state of hostility as to vie in protracting the cause to the utmost possible limit.

It is said that the examiner has misunderstood the allegation. It pleads in substance:—

That since the accession of John Clopton, the deceased, to his brother's property in May, 1818, and prior to the execution of the will,(*a*) Henry Wyatt—the party in the cause—was in the autumn of 1818, and in the following winter, and also at various times in 1819 and in 1820, in the habit of conversing with different persons on the subject of his first acquaintance with the deceased, and of the **[102]** finding him upon the death of his brother, Edward Clopton; and often described his then state and condition; that at such times Henry Wyatt—in the presence of Joseph Snow and Edward Townsend Higgins—stated, that on going to London with his father to inform John Clopton of the death of his brother Edward, and of his accession to the Clopton estates; he—the said John Clopton—was then found in a garret in extreme filth; and that he was made fit to attend his brother's funeral by being dressed in a suit of clothes and a wig which had been worn by his late brother.

After further pleading that Wyatt's father (who wrote the instructions for the will) had, during the same years, and in the presence of Higgins, made similar admissions as to the state and condition of the deceased; the article concludes:—

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the 16th, but without a post-mark, in which the witness promised to attend, ten days' notice being given him by the same means. His attendance was desired on November 5th, and on that day between 12 and 1 o'clock he arrived, and wished to leave London the same evening, but was detained. The proctor also, immediately after the last Court, had written to him through his friend at the Horse Guards, urging his attendance; and to Wyatt to assist in discovering him.

(*a*) The will propounded was dated on the 21st of August, 1821; and a codicil, also propounded, bore date the 3d of August, 1822.

"That they, the said Henry and Richard Wyatt, in the course of such their aforesaid conversations, gave such representations of the general conduct, habits, and manner of the said deceased, as left no doubt in the minds of the persons to whom they were so given, that the said John Clopton was a person of weak and imbecile mind, and was so considered and treated by the said Henry Wyatt himself, and by his father."

In strict interpretation, the words taken separately have been rightly construed, though from the context it would appear that probably they were not intended to be thus limited: but the pleading should have been so constructed as to be unequivocal; which might have been effected by adding a few words. The ambiguity, I have no doubt, would have been avoided if the proctor had not, at the time of bringing in his allegation, been required—**[103]** under the special circumstances of the case, immediately—in Court, to insert in his plea the names of the witnesses in whose presence it was intended to prove that the conversation passed. This slight and formal error might thus easily have arisen. But, perhaps, considering the whole article together, the true meaning, even now, is not that which has been attributed to it; and if the construction of an article be doubtful—an examiner would act more prudently in taking the evidence down, and leaving it to the Court to reject it afterwards—if extra-articulate.

I cannot, however, see what possible advantage can arise from a re-examination to declarations made eight years ago. Higgins says he cannot at this distance of time remember what passed:—

"To the best of his recollection, and as he has no doubt, he never heard Henry Wyatt say any thing about the deceased in this cause in the presence of Joseph Snow: he remembers that on some occasions, when Richard Wyatt was dining with the deponent, he spoke of the deceased; but, after all due consideration and reflection, he is unable to call to mind, with any accuracy or certainty, what Richard Wyatt so said. He has no recollection at all of any particular time when Richard Wyatt said any thing to him on the subject of the deceased, and his recollection of what Richard Wyatt may have said, and did say, to him at any time is so very imperfect and indistinct that he cannot undertake to depose thereto, either to particular expressions or the general nature and effect thereof."

There could, then, be no use in again examining him; and it has been remarked that, from his own **[104]** observation, he has spoken strongly in support of sanity: on the 15th interrogatory he says, "he did consider and treat the deceased as a person competent to do acts of business, and to enter into legal engagements affecting his property;" and the question is not—in what state the deceased was at the time of his brother's death, but at the time of making his will.

Snow admits conversations were held:—

"While on a visit to Henry Wyatt in the early part of the year 1820, the said Henry Wyatt did occasionally, when sitting with the deponent after dinner, speak to him on the subject of his first acquaintance with John Clopton, and of the state in which he found him after the death of his brother Edward; but Edward Townsend Higgins was not present on any such occasion."

It is not probable that Wyatt would make declarations asserting his own fraud and the deceased's incapacity; and the party's answers to this allegation have been brought in. To re-examine, then, to recollections of conversations taking place in the ordinary intercourse of society—and passing eight years ago, would be quite nugatory. It is scarcely possible to suppose that it could bring out material evidence: with the mass of depositions already before it, it is not to be expected that such matter could have any influence on the decision of the Court. At all events, the present application is of so very extraordinary and dangerous a nature that it certainly would not be consistent with due precaution to grant it in its present shape. The case, however, I presume, is just ready for hearing, though I know not whether it is intended to give in an exceptive allegation. **[105]** Should, therefore, the Court—against whom the cause is never concluded (*a*)—find at the hearing that the facts are so very nicely balanced that its decision may turn upon such evidence of loose declarations made after dinner, it will not be precluded from admitting them if necessary and essential to justice. But in that case I should, probably, adopt a course, not very usual, but

(*a*) Vide Oughton, tit. 117, § 3 (*m*).

not altogether unprecedented, of issuing a monition to the witness to appear and undergo a vivâ voce examination in open Court, when his answers might be taken down by the registrar. That would be the only safe way, and which the Court is fully competent to adopt.

At present I reject the motion, reserving the question as to the costs of making it to the final hearing, when I shall see the whole case.

Motion refused.

KENNY *v.* JACKSON. Prerogative Court, Michaelmas Term, 4th Session, 1827.—An inventory and account may be demanded of an executor by a residuary legatee who has given a release.

On motion.

Ann Whitehead, after bequeathing by her will and codicil certain legacies, amongst others, to Barnard and Mary Kenny, directed the residue of her effects to be divided between Barnard and Mary Kenny, and appointed the Reverend Thomas Jackson and Algernon Wallington executors.

On the 22d of March, 1822, this will and codicil were proved under 16,000l. in the Prerogative Court by Mr. Jackson, the other executor having **[106]** renounced. A citation had since been served at the instance of Barnard Kenny, one of the residuary legatees, upon Mr. Jackson, for an inventory and account; who prayed to be dismissed on exhibiting a release, signed by the two Kennys, as well for their legacies as for the residue. The release was dated on the 11th of December, 1823, at which time it was stated Barnard Kenny was a minor. The amount of the residue did not appear.

Lushington in support of the motion.

Dodson contrà.

Per Curiam. It is, I consider, a matter of duty for an executor to deliver an inventory and account when properly called upon for that purpose; and, in order to exonerate himself from all liability, it is always most prudent to exhibit it before a final settlement. This Court will not enter into the question how this release was obtained, nor whether it is valid. It cannot judge of nor notice such instruments. Barnard Kenny, when he executed the release, was certainly a very young man—even if he had attained his majority, and having now, as one of the residuary legatees, demanded an inventory and account, they must be produced without delay; they may, perhaps, be the means of discovering an unfair settlement; while, on the other hand, if the executor has been vexatiously cited in this matter, he may be able to obtain relief in another Court; but in this Court the release cannot avail him—it is no bar to the present claim.

Inventory and account ordered.

[107] COLVIN *v.* FRASER. Prerogative Court, Michaelmas Term, 4th Session, 1827. —A next of kin, contesting a will propounded by an executor, may take out a decree citing all persons interested under the will "to see proceedings."

On motion.

John Farquhar, late of Fonthill Abbey, died on the 6th of July, 1826; and, on the 15th of December following, letters of administration were granted to John Farquhar Fraser, his nephew, and one of the next of kin, on the suggestion that the deceased had died intestate. That administration had since been called in upon a decree to shew cause "why a probate of the will and codicil of the deceased, or of an authenticated copy thereof, under seal of the Supreme Court of Judicature at Fort William in Bengal, should not be granted to David Colvin, one of the executors therein named." The will and codicil were respectively dated on the 7th of March, 1814.

Phillimore and Lushington for the next of kin, now moved the Court to direct decrees (by letters of request, if necessary) to see proceedings, to be issued against the several surviving executors and all parties interested under the said will and codicil.

Dodson for the executor, submitted that the course proposed to be pursued was novel, and would be attended with great expence and delay from the very numerous legatees whom it would be necessary to serve in Scotland; and that it would lead to no beneficial result, inasmuch as all the parties under the will would be bound by the acts of the surviving executor.

[108] *Judgment—Sir John Nicholl.* This is an application at the instance of a next of kin—himself called upon to see a will and codicil propounded—for a decree against all persons interested under the papers, either as legatees or otherwise, to "see proceedings," as it is technically expressed. Certainly, in the usual course of practice, such decrees issue only against the next of kin of a testator, and at the promotion of the executor, or of the person propounding a will. But in the case of *Calder* v. *Calder*, which occurred here in 1792, the party obtained a decree against all persons in general to appear and propound a will—that case arose upon a change of circumstances in the testator, occasioned by his marriage and the birth of a child. The application, then, is not unprecedented; and the present case is under very special circumstances. A will which was executed in the East Indies, so far back as the year 1814, is now attempted to be set up, and the ground of opposition is, as I understand, that it has been revoked. And although it is true that the act of the executor—being the appointee of the deceased—would, to a certain extent, bind all persons interested under the will; yet some party might, perhaps, at a future time allege collusion. It is, therefore, highly expedient, in a case of this nature, to pursue the course which is proposed; particularly as the grant of the decree cannot occasion any prejudice to the adverse party; for the inconvenience, if any, will fall upon the next of kin who make the application.

The Court directs the decree to issue; and re-[109]-commends that, as some of the legatees may happen to be dead, care should be taken to cite their representatives: the decree should be framed in the largest terms—against all persons in general.

Motion granted.

BURROWS *v.* BURROWS. Prerogative Court, Michaelmas Term, 4th Session, 1827.—

Instructions for a will containing the fixed and final intentions of the deceased are valid if the formal execution is prevented by death: and, if there is no evidence of insanity at the time of giving the instructions, the commission of suicide, three days afterwards, will not invalidate the paper by raising an inference of previous derangement.

Bentley Burrows died on the second of April, 1827, leaving behind him a widow, the party in this cause, a mother, three brothers, two sisters, and eight nephews and nieces, the children of a deceased brother and sister. His property was of the value of 2860l.

The widow propounded as his last will an unexecuted paper in the form of instructions; which was opposed by Thomas Bentley, one of the brothers, who prayed the Court to pronounce that the deceased was dead intestate.

Lushington and Dodson for the widow.

Addams and Salusbury contrà.

Judgment—Sir John Nicholl. Two points have arisen in the course of the argument. The first, whether this unexecuted paper is sufficiently sustained by circumstances to be the last intention of the deceased. The second, whether its validity is not affected by his insanity. In respect to the first point, it is a principle well known here that if unexecuted instructions are proved to embody the fixed and final intention, which instructions the deceased was prevented reducing into a more regular shape only "by the act of God," or by some unexpected circumstance, that [110] then they will have the same force as a complete and formal will.

On Friday, the 30th of March, 1827, the deceased went to his solicitor, Mr. Scott (whom he had before employed), for the purpose of giving instructions; this evidences the animus testandi, and that it originated with the deceased himself: he gave those instructions fully, except as to the names of the executors; his primary object was to bequeath every thing to his wife for her life; on that point he manifested no hesitation, but he doubted about the mode of dividing the remaining interest among his large family. Mr. Scott, on the first article of the allegation, thus relates what passed:—

"On returning to his offices about 11 or 12 o'clock in the forenoon of Friday, the 30th of March, he found the deceased waiting there to see him; that, after some conversation, the deceased said he wished to know his, the deponent's, charge for making a will. The deponent replied that it depended on the trouble taken, and that it might be very little or it might be much. The deceased then observed, 'Well, then, we'll say no more about that. I wish to make my will,' or to that effect; and then pro-

ceeded to give him instructions, making observations thereon as he proceeded: the deponent thinks that the deceased first remarked 'that he had deferred making his will for some time, but was then determined to do it.'"

This, then, was no hasty thought, but a premeditated and decided purpose.

"That he had so many nephews and nieces that it puzzled him how to leave his property so as to satisfy all parties."

It does not necessarily follow, I think, from this **[111]** that he intended to leave something to each of them—that itself might produce dissatisfaction, nor can any inference be deduced from it that he might not intentionally omit his brother Thomas or the children of his brother William; for Algar, to the third interrogatory, answers:—

"The respondent never heard the deceased express any regard or affection for his brother Thomas or for any of the children of his deceased brother William. She never saw any of them in company with the deceased at his house, but has often seen his other relations there."

Trigg's evidence, on this interrogatory, is to the same effect.

"The respondent never heard the deceased express, at any time, any particular regard or affection for any of his brothers or sisters, or for any of their children. He never saw the deceased in company with any of them, except his brother David and Thomas Carter, and to them he behaved in a very friendly manner."

But, even supposing these omissions to have proceeded from want of recollection, that would not be of sufficient importance to render these instructions a nullity.

Scott proceeds with his account:—

"The deponent proposed that the deceased should tell him what his property was, and begin with the freehold. The deceased assented; but observed, at the same time, that his wife was to have all for life. He then proceeded to take down the devise for life of the freehold property to the deceased's wife, and, on inquiring of the deceased to whom the freehold was to go at his wife's death, the deceased mentioned the names of several of his brothers and sisters."

[112] The deceased then minutely and regularly described the particulars and what disposition he wished to be made of the leasehold property, then of the funded, and then of the residue.

At length the instructions were concluded; they were read over and approved by the deceased, who directed that a draft should be prepared: no doubt, therefore, can exist that they were final, as far as respected the disposition of his property, and that they only wanted the names of the executors to render them complete. The same day, Triggs, an intimate friend, called upon and sat with him the whole evening, and in the course of conversation the deceased observed to him:—

"He had been giving instructions that day to Mr. Scott, his solicitor, about his will, and asked the favor of deponent to be his executor; he told him he would. The next morning he received a message from the deceased that he wished to see him again, who then described to him the instructions he had given to Mr. Scott, and requested the deponent to look over the deeds relating to his property, which he produced from an iron chest; and deponent looked them over, and found them correct."

This witness does not suggest that any change of intention was expressed on the part of the deceased during this interview; he only seems to have doubted whether his property was correctly described, and, being convinced of that fact, he was satisfied.

The draft was directed to be ready on Monday, the 2d of April. About four o'clock in the morning of that day, that is, before the time appointed for the deceased again to go to his solicitor, he died; and thereby was prevented from carrying **[113]** his intentions into effect. These facts, then, are sufficient to render the instructions valid, and entitle them to be considered as his will. After they had been read over and approved, and the draft ordered, there is no reason to presume a change of intention; the act was in progress, the formal execution alone prevented. As an unexecuted paper, therefore, it is sufficiently supported, unless its validity is affected by extrinsic circumstances.

This leads me to the second point—whether its validity is affected by insanity on the part of the deceased—that is, whether he was incompetent to do a testamentary act, as it is admitted that he died by his own hand. Now sanity must be presumed

till the contrary is shewn. Before actual derangement takes place, its approach is generally notified by agitation and nervous excitement. Algar, a young girl, to whom I have already referred, gives the following evidence :—

"Deponent thought the deceased not quite so well in his mind shortly before Mr. Triggs came on the Saturday morning, but he appeared to have recovered again by the time Mr. Triggs had arrived. About eight o'clock that morning the deceased was walking about the room apparently agitated, and talking wildly ; but he came down stairs shortly afterwards to breakfast, and then appeared more composed. He was silent at the latter time. Except, as just deposed, the deceased, at both the times of Mr. Triggs calling upon him, well knew and understood what he said and did, and what was said to him."

It would be going too far to say that this is proof of actual derangement—even for the short time that this agitation continued—and this, too, **[114]** was subsequent to the giving of the instructions. On Friday and Saturday he conversed with his friend Triggs : he repeated, as I have before said, the instructions ; he asked him to be his executor ; and Triggs saw no appearance of insanity, for he thus deposes to the third article :—

"Deponent went to the deceased about nine o'clock on Saturday morning, the 31st of March, and remained with him on that occasion about an hour and a half or two hours : that upon both occasions of his seeing and conversing with the deceased he, the deceased, was of sound mind, memory, and understanding. He conversed quite rationally and sensibly, as much so as he ever did in his life, and perfectly knew and understood what he said and did, and what was said to him. He was as collected as ever the deponent saw him in all his life."

Mr. Scott, the solicitor, speaks to the deceased's capacity, at the time of taking these instructions, in his deposition on the second article :—

"The deponent considers the deceased to have been of sound mind, memory, and understanding during the transaction. There was nothing in his manner or deportment which led the deponent to doubt his competency to give the instructions for his will which he did give. His manner was rather hurried and somewhat agitated ; or, rather, what is more generally termed, flurried, which the deponent attributed to the occasion, and to his being, what is termed, a nervous man. Sometimes, when about to answer the deponent's inquiries, he appeared a little embarrassed. There was, however, nothing irrational in his conversation or deportment ; but he discoursed rationally and sen-**[115]**-sibly, and appeared to the deponent well to know and understand what he said and did, and what was said to him. The deponent considers him to have been fully capable of giving instructions for, and of making and executing, his will."

On the evidence then to which I have referred, and with no attempt to shew any thing to the contrary, it is impossible to hold that this act should be invalidated on account of insanity ; and I, therefore, pronounce for these instructions as containing the will of the deceased.

An application for costs out of the estate was not objected to, and was granted.

HUBLE *v.* CLARK, FORMERLY HORNER. Prerogative Court, Michaelmas Term, 4th Session, 1827.—When a testamentary paper is asserted to have existed since the death of the alleged testatrix, and to have been subsequently destroyed ; these allegations must be proved by the clearest and most stringent evidence.

The nature of the case set up in this suit is sufficiently explained in the following affidavit of Mrs. Clark, the party in the cause :—

"That she was a niece of the deceased, and resided in her house and attended upon her ; that a few days after her death, but previous to her funeral, Huble, the deceased's son, came to the house, and went into her bed-room, where he remained a considerable time ; that on coming out of the room he informed the appearer that the deceased had told him 'that she had placed in a drawer or box in her bed-room a paper or papers containing bequests or legacies of certain articles to her, the appearer, and another niece, to a nephew, and also to a sister of the deceased ; that he had searched in the room, and could not find either the paper or some money of which his mother had informed **[116]** him.' That she, being much surprised at this communication, and anxious to find the paper, immediately after Huble had left the house requested Mrs. Prior, who also resided in the house, to make a further search in the

same room; and that they found in a box (where the deceased kept her dresses) under the bed a paper in her own hand-writing, in which she gave to her sister, Elizabeth White, 100l.; to her, the appearer, and Maria Brown, another niece, 60l. each; and to her nephew, Samuel Horner, 40l.; that the paper was wrapped up together with four separate rolls of notes of 10l. each respectively, corresponding to the bequests, and amounting in all to 260l.; that she, the appearer, replaced the whole in the box in the same state in which she had found them. That, in a day or two, Huble again made a further search in the bed-room, after which she asked him 'if he had found what he was looking for'—when he replied, 'Not exactly, but I dare say it will be all right;' and shortly afterwards he went away, apparently satisfied. That after the funeral, Huble, the appearer, and others of the relations of the deceased, met together, and Huble then informed them of his having found the testamentary paper with the several bequests, but stated the amounts respectively to be considerably under what she well knew to be the actual sums, in consequence whereof she immediately disclosed that, together with Mrs. Prior, she had previously found and perused the paper, and examined the bank-notes, as before set forth, and then enumerated the bequests in contradiction to Huble's statement; that Fawcett, his solicitor, was present, and admitted Huble was in possession of the tes-**[117]**-tamentary paper, and, taking a card from his pocket, read therefrom the several bequests agreeably to the statement made by Huble, whereupon she demanded of Fawcett the production of the paper, who replied that he had left the same at home, but that it should be produced; that she has never since seen it; but believes it now remains in the hands, custody, possession, power, or control of Huble or of Fawcett."

This affidavit was sworn on the 23d of November, 1826; and on the same day (being the 3d Session of Michaelmas Term) it was brought into the registry, and the Court, on the application of a proctor on behalf of Mrs. Clark, decreed a monition against Huble and Fawcett, to bring in the paper; who, in their respective affidavits, made oath "that no paper or testamentary disposition of the party deceased had, at any time whatever, come to the possession or knowledge of either of them." (*a*)

Lushington for Mrs. Clark.

Dodson contrà.

Judgment—Sir John Nicholl. This is a case of no very common occurrence. A testamentary schedule has been propounded—which has not been produced, but is alleged to have been in existence at the time of the deceased's **[118]** death. It has been propounded on behalf, and as contained in the affidavit, of Mrs. Clark—a legatee under it, and a niece of Sarah Huble—the party deceased; whose son and only child, William Huble, has opposed it. She died on the 22d of September, 1825; but no steps were taken to institute this suit till Michaelmas Term, 1826.

The first article of Mrs. Clark's allegation thus states the history of the deceased. That she was a widow, leaving an only child, who would solely have been entitled to her estate if she had died intestate.

The second article thus proceeds, "That Sarah Huble, having an intention to bequeath certain legacies to her sister, Elizabeth White, to her two nieces, Elizabeth Horner and Maria Brown, and to her nephew, Samuel Horner, wrote on a slip of paper, 'Sister White 100l., Elizabeth Horner 60l., Maria Brown 60l., Samuel Horner 40l.'; and she wrapped the same in paper with four rolls of Bank of England notes, of the value of ten pounds each respectively, corresponding in their amounts to the four legacies, and making in the whole the sum of 260l.; and deposited them, so wrapped up, in a box (under her bed) in which she kept her dresses."

If this allegation be proved, such a paper, accompanied by the bank-notes, would be of testamentary validity. But it would require the most stringent evidence to establish a paper which is not forthcoming, which is not supposed to have been lost, nor suggested to have been destroyed by accident, but of which Mrs. Clark directly charges a fraudulent suppression by the son. Unfortunately, on one side or on the other, there must have been **[119]** fraud and falsehood; but at all events, when a

(*a*) By-day, M. T. In the case of *Colvin* v. *Fraser*, on an objection to an affidavit of Harry Phillips "that no testamentary paper of the deceased (Mr. Farquhar) had, at any time, come to his hands or possession, or now is under his power or control;"

The Court pronounced the affidavit insufficient, as it did not proceed to state that no such paper had come "to his knowledge."

party imputes such iniquitous conduct, he must be prepared to support his case by clear and indisputable evidence. Three witnesses have been examined on either plea, and the answers of both parties have been taken, but have not been read. It is most material, however, to inquire what has been asserted, what admitted, what denied, and what proved.

The third article of Mrs. Clark's plea goes on to allege—"That Elizabeth Horner lived in the same house with the deceased, and attended upon her for some time previous to her death; that after the deceased's death, but prior to her funeral, Huble went into the deceased's bed-room, where he remained a considerable time; and, on coming out, informed Elizabeth Horner that the deceased had stated to him that she had placed in a drawer, or box, in the bed-room papers containing certain legacies for her and for another niece and nephew, and also for a sister of the deceased; but that he had searched in the room, and could not find either the paper, or the money, which his mother had informed him of, and he then left the house."

Of this most important declaration of Huble there is no proof whatever: only one witness has been examined to the article, Mrs. Prior, the mistress of the house where the deceased lodged; and she thus concludes her deposition on this article—

"That she knows not what conversation took place between Huble and his cousin, the said Elizabeth Clark."

She, therefore, does not prove the declaration. The answers have not been read; the Court then presumes that they deny it; and Huble's allegation positively contradicts the fact.

[120] The fourth and fifth articles plead the finding and hand-writing. The fourth is to this effect—"That Horner, being much surprised at Huble's communication to her, proceeded with Mrs. Prior, who resided in the house, to the deceased's bed-room; that after searching some time they found the testamentary paper, with the bank notes [as described in the second article]; that they perused the paper, and counted the notes, and replaced them in the box in the same state in which they were found."

Now this is a very material part of the case; and, on these articles, again, Mrs. Prior is the only witness. She is far advanced in life, being seventy-six years of age; her eye-sight is bad; on looking at the signature to her deposition it appears as if she could hardly see to write her own name, for it is scarcely legible. She admits, in answer to the eighth interrogatory, that there had been some differences between her and Huble about the rent and some articles of furniture; that though she was not angry with him, there had certainly been some differences of opinion—not amounting to a quarrel. She deposes very minutely and circumstantially—though the particulars to which she speaks had passed a year and a half before her examination. She had also made a voluntary affidavit in this cause—perhaps, under circumstances, rendering this not an improper step,(*a*) yet it might have left some impressions on her mind which it would be difficult for her to shake off. However, in my view of the case, there is no absolute necessity to impute to her any **[121]** falsehood; because, supposing all that she says to be true, it furnishes no proof that the paper is genuine; nor does she connect it fully with the deceased.

The parties in the cause, the sister and nieces, were in undisturbed possession of the deceased's apartments, keys, and repositories for some days before the son's return on the Saturday evening, from York. It appears that, on his arrival, he made a search in his mother's drawers, and not finding what he expected, he was either disappointed or dissatisfied. Fawcett, Huble's solicitor, thus answers to the sixth interrogatory: "That Huble informed respondent of his having searched in a drawer of the bureau in the deceased's bed-chamber, where she usually kept her money, and of his having found about fifteen pounds therein, and he expressed great dissatisfaction at only finding such sum, as he said that, upon leaving town four or five days before his mother's death, he had asked her to lend him five pounds, and that she had sent him for her bag to the bureau, and he had there seen a roll of ten pounds and five pounds, bank notes, which he thought, from their appearance, exceeded 100l. in value: that, on a further search, he had found a further sum of

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(*a*) The affidavit, sworn before a surrogate of this Court, was taken, under the advice of counsel, on account of the age and extreme bodily infirmity of Mrs. Prior.

money in a box under her bed, of the amount, to the best of respondent's recollection, of 200l. or thereabouts."

It is not impossible that the money might have been previously subducted by those who had the keys; and, on the expression of this dissatisfaction, have been restored to the box with some scraps of paper, which were both written and placed there by other hands than the deceased's, and for this **[122]** there was abundant opportunity. What was the course of events? No sooner was the son's back turned, than the parties called up Mrs. Prior to be present at the search; and the object of their inquiry was discovered under the bed in a box in which were the deceased's best clothes and some of her nieces' clothes also. And to the hand-writing, this old woman, of low education, who had never seen the deceased write, who can scarcely write legibly herself, and who never had the paper in her own hand, is the only witness. She grounds her opinion on the similarity of the hand-writing of this paper to the washing bills written by the deceased, which she had seen; and she also assigns another reason—that the sum mentioned in the paper corresponded with the amount of the money found in bank notes; but this latter coincidence would have equally appeared if the paper had been supposititious.

If the case rested here, and there had been nothing further to verify the existence and the authenticity of this alleged instrument, I should have felt it my duty to have pronounced that there was a failure in proof. Upon such evidence alone of hand-writing and finding, the Court could not, with any safety, conclude that a document of this nature, and proceeding from the deceased, had ever existed since her death. But still it may be supported by other evidence; and, if it could be shewn, as alleged, that either the son, or his solicitor, had distinctly admitted that there had been such a paper, or any paper in the hand-writing of the deceased, the whole character of the case would be changed. For then, a paper being admitted to have existed, and being traced **[123]** to the hands of the son, if he did not produce, but suppressed, it, under a pretence that it was lost or mislaid, the Court would presume every thing against him as to the contents. It would listen to no suggestion of a smaller sum, but would adhere to the highest amount, as spoken to in the deposition of Mrs. Prior.

But how does the evidence stand? It is alleged in the sixth article—

"That in a day or two after the search made by Huble in the deceased's bed-room (but before the funeral), he made, or pretended to make, a further search for the paper and money which she had informed him of; that, on his coming from the room, Horner asked him whether he had found what he was looking for, to which he replied, 'Not exactly, but I dare say it will be all right;' and he shortly afterwards went away, apparently satisfied. It then expressly pleads 'that at such time Huble found the said testamentary paper with the bank notes, took possession of the whole, and carried them away.'"

First, there is not one single witness examined on this article; and, secondly, as the answers have not been read, I presume they deny it. The story itself is not very consistent with probability: as the son had been before disappointed when he returned, why did they not announce that the money and paper were discovered? If even they had felt conscious of some indelicacy in examining the deceased's box during his absence, the successful issue of their search would have been, in some degree, their justification. Finding this considerable sum, and a paper pointing out how it was to be disposed of, they would surely **[124]** have communicated it to Huble. If the whole of this story had been true, that, without doubt, would have been the most natural course, and thus all the difficulty would have been removed, and their legacies secure. But they do nothing of the kind: they suffer Huble to make another search by himself; he does not tell them the result, and they allow him to go away without any acknowledgment of having themselves found the money or the paper; and without requiring or giving any explanation. This surely is quite unaccountable, and adds to the incredibility of the story.

The other circumstances make the case still more suspicious. It is pleaded in the seventh article: "That immediately after the funeral, Huble, Horner, and other relations, and Fawcett, the solicitor, met at the deceased's house; that Huble then distinctly communicated to them the fact of his having found the testamentary paper containing the several bequests, but which he, at the same time, stated to be, to Elizabeth White 80l., to Elizabeth Horner and Maria Brown 40l. each, and to Samuel Horner 20l.; whereupon Elizabeth Horner immediately disclosed to Huble the fact

of her having, together with Mrs. Prior, searched for, and found and perused, the said paper, and examined the bank notes wrapped up therewith, and stated the actual amount of the several bequests, in contradiction to Huble; that Fawcett then distinctly admitted that the paper was in his possession, and taking a card from his pocket read therefrom the said several bequests, corresponding, in amount, to those mentioned by Huble; that Elizabeth Horner then demanded the **[125]** paper of Fawcett, who replied that he had left the same at home, but that it should be produced."

Upon this article, again, there is not a tittle of proof—not a single witness has been adduced to speak to it—the answers have not been read. But there is not only an absence of proof respecting these admissions, but they are absolutely disproved. Fawcett and two other persons, Phillips, a relation, and Rudland, who were present at the funeral, and remained to dinner, negative the article. The two latter deny that any such conversation passed in their hearing; and Fawcett, who is vouched as distinctly admitting the existence of the paper, does distinctly, upon oath, deny not only the admission, but the fact that any such paper was ever produced to him; or that Huble ever acknowledged to him its existence. Mrs. Prior's answer to the eighth interrogatory also proves that Mrs. Clark complained, as soon as the funeral was over, that Huble had declared that there was not a scrap of paper left by his mother. This shews, from the mouth of an adverse witness, that whenever the assertion was made, there was also a most clear and positive disavowal on his part. So stands the evidence in respect of what is pleaded to have passed after the funeral.

The eighth article goes on to plead further admissions of Fawcett, on several subsequent occasions, as to the existence of the paper, and that it had been in his possession; and that on one occasion he read from a memorandum the amount of the legacies, but making the amounts respectively considerably less than those actually **[126]** bequeathed by the deceased; that he said he was authorized by Huble to offer payment of those sums respectively to the legatees, which they refused; and it being stated that they would not be satisfied with less than the full amount of the bequests intended for them, Fawcett remarked, "Then there is one hundred pounds at issue," or expressed himself to that effect. To these, two witnesses are produced, Stead and Black, who, impressed by their friends, the two nieces, with an idea that the paper gave higher sums, called on Fawcett in order to remonstrate against the smaller; but neither witness ventures to assert that Fawcett distinctly admitted that there was any paper—it is highly improbable that he should have made such an acknowledgment, and they might easily have misapprehended the extent of what he said. He swears, positively, that no such paper was ever referred to; but he admits that the deceased had left her son instructions to give these persons something; but trusted the amount to his discretion; and that the son wrote their names down with blanks for the sums; and, afterwards, on consultation with the witness, as to what would be reasonable, he agreed to give the sister 80l., and the nephews and two nieces 20l. each; that the witness copied these sums on a card—and that is the only paper, and the only sums, which ever existed.

The whole evidence beyond the hand-writing, and finding, bears strongly against the paper: not only is it not proved, but the charge of suppression and the alleged admissions are, to a great extent, disproved, and are most solemnly denied. I am bound, therefore, to pronounce that **[127]** Mrs. Clark has failed in proof of the testamentary schedule.

The question of costs still remains behind—perhaps where a party undertakes to propound such a paper and fails, and still more when she charges fraudulent suppression, on the part of a son, it would usually be a case for costs. I shall, however, abstain from giving them in the present instance—considering the near connexion of the parties; and that the deceased certainly intended to give these relations something, though she left the amount to her son's discretion. He probably, by withholding his purposed bounty, has the power in his own hands of protecting himself against the expences of this suit; but I am by no means convinced that strict justice would not require that Mrs. Clark should be condemned in costs.

Administration decreed to the son.

MEEK AND DONALD *v.* CURTIS. Prerogative Court, Michaelmas Term, By-Day, 1827.—A next of kin declaring "he proceeds no further" in contesting a will; the Court will dismiss, and not condemn, him in costs, because it is pleaded "that

he attempted to suborn an attesting witness:" nor allow affidavits in proof of the attempt.

On motion.

Charles Curtis died on the 7th of October, 1827. His will, duly executed, was opposed by John Curtis, the deceased's brother and next of kin, who, on the fourth session of this term, declared that he would proceed no further. The present application was to condemn him in the costs incurred by his opposition, on the grounds pleaded in the fourth article of the allegation propounding the will: viz. "That John Curtis, in **[128]** order to invalidate the last will of the deceased, hired or employed to prevail upon or induce (whose name is subscribed as a witness to the said will) to swear and depose in this cause contrary to the truth and fact; that he offered him 100l. if he would swear the deceased was of unsound mind at the time of executing his will; and that he subsequently renewed his endeavours; and that finding his efforts to suborn him ineffectual, he, the said John Curtis, did, on the 12th of November, attend at the house of the said witness—when he recognized and repeated such promises; and offered to the witness, as a further inducement, a sum of 150l., in addition to the 100l. already proposed, if he would swear in manner hereinbefore pleaded."

Lushington in support of the motion, prayed costs against the next of kin.

Dodson contrà, that he might be dismissed, each party paying his own costs: the charge imputed in the allegation is not proved.

Per Curiam. How can the Court assume the guilt of this person? The charge, as far as this Court is, at present, cognizant of it, rests solely in plea; for no evidence has been taken upon it: it is a very heavy accusation, and may be a fit subject for a prosecution, should the executors incline to resort to another tribunal. It does not necessarily follow that the party withdraws his opposition on any apprehension arising from this charge—there may be other grounds to induce him to retire from the cause. If, indeed, the plea had been established by proof, then he would have become liable to the costs; on the whole, the Court recommends the **[129]** executors to take probate, and go to another jurisdiction.

The proctor for the executors then applied to be heard, on this question of costs, by act on petition with affidavits; but the Court, after observing that such a mode of proof was unsatisfactory, rejected the application.

Hilary Term, 1st Session.—A married woman, living apart from her husband, being joined in the probate of a will (authorising her "to act as executrix, in all respects, without her husband") but not having intermeddled: the Court, on the bank refusing to transfer stock without the husband, will revoke such probate, and grant it to the remaining executors.

On the 22d of December probate of this will, the subject of the previous question, was taken by Richard Meek, Samuel Donald, and Elizabeth Benland (wife of Benjamin Benland), the executors; but, on an application being made by them, at the Bank of England, to have some stock, standing in the deceased's name in their books, transferred, the bank required Benjamin Benland to join in the transfer, notwithstanding the will bequeathed to Mrs. Benland the property "for her sole use and benefit, independent of her husband;" and a clause authorized her "to act as an executrix, in all respects, without her husband." Under these circumstances, an affidavit, as sworn by the executors, was now exhibited, stating these facts; and further, that Mrs. Benland had been separated from her husband for six years; that she had not intermeddled in the deceased's effects; that no suit, either in law or equity, had been commenced against or by the executors, in respect to the said estate; and that it was necessary, for duly carrying into effect the testator's will, that a transfer of his stock should be made.

Upon these facts, the Court, on motion of coun-**[130]**-sel, revoked the probate already granted; and decreed a new probate to Richard Meek and Samuel Donald, with a power reserved to Mrs. Benland.

MANLY *v.* LAKIN. Prerogative Court, Michaelmas Term, By-Day, 1827.—Letters containing final testamentary intentions are valid as a will, the deceased considering no further act necessary; nor will they be invalidated by the deceased not having subsequently disposed (as she then purposed) of a small part of her property.

On the admission of an allegation.

Mary Manly, the deceased in this cause, died on the 27th of July, 1827, leaving two letters respectively marked A and B, which were propounded, as together containing her will, by her brother James Manly; and opposed by Sarah Lakin (formerly Mason), and by her three brothers, the children of a deceased sister, the only other persons entitled in distribution to her personal estate. The substance of the allegation, in support of these papers, sufficiently appears from what fell from the Court.

Lushington and Addams for Mr. Manly.

Jenner and Haggard for Mrs. Lakin.

Judgment—Sir John Nicholl. The papers propounded are, under the circumstances of the case, entitled to be considered as the will of the deceased. The deceased had formerly been a governess in the family of Mr. Gosling; and at the time of her death filled the same situation in Mrs. Carr's family, who resided at Dunston Hill, near Durham. She appears to have saved about 1200l., which was invested in India **[131]** bonds, and managed for her by Mr. William Ellis Gosling. On January 11th, 1827, being then at Dunston, she wrote to Mr. William Ellis Gosling, and after stating that she wished to transfer her money into some other stock, and mentioning the bad state of her health, she went on—

"I will trouble you again respecting the disposal of my little property, if you will permit me, as I feel more likely to die, than to live."

In consequence of this letter Mr. W. E. Gosling wrote advising her to make her will, and offered his assistance "in submitting it to a professional man, to ascertain that it was properly drawn up, and in taking care of it for her." In reply, she caused to be written, by one of the Misses Carr, the papers propounded. Paper A was as follows:—

"Dunston Hill, Jan. 22d.

"My Dear Mr. William,—I am very much obliged to you for suggesting that it would be better for me to leave the formula of the will to you, as, no doubt, you will do right, and I should do wrong. I have five nephews and nieces, to whom I wish to leave a hundred pound a-piece, if there is enough. Their names are Mary, Rosa, Frederick, Georgina, and James; a hundred pound in money amongst my other friends, with the disposal of which I will trouble Mrs. Sandoz, and the residue to my brother. I will not trouble you with regard to my personal property, as I dare say Mrs. Sandoz, or her daughter, will have the goodness to do that for me.

"I am very thankful that you will undertake to **[132]** do it for me, for I feel that I am quite unequal to do it at present.—I am, &c. "MARY MANLY."

By the second (marked B), addressed to Mrs. Sandoz, after giving to the two Misses Gosling five guineas each to purchase a ring or a seal, she says, "I will leave a memorandum for what is to be done with the residue of the 100l., and also with my goods and chattels, if either you or your daughter will have the goodness to take charge of them."

The first she signed herself, the latter she was too exhausted to sign. Here, then, is a full disposition of her property among her brother's children, for whom also she marks her affection in the letter to Mrs. Sandoz. The question is, whether she abandoned this disposition or adhered to it; and considered it final and operative. Nothing further was done either by herself or by Mr. Gosling, and, I think, the true construction of her conduct is, that she imagined nothing further necessary: she leaves the formula to him, but she had declared her wishes, and she had signed them; and, not receiving any subsequent communication from Mr. Gosling, she would conclude that she had done all that was essential, and that he had ascertained the letter would have legal effect. She, however, did intend to give some directions relative to the division of a sum of 100l. among her friends; but that was to have been a separate act, the non-performance of which—whether arising from ill health—from indecision—or from change of purpose in **[133]** that respect—cannot invalidate or affect paper A; nor paper B, as far as it goes. Here is particular affection pleaded for the children of her brother James; and no intercourse with Mrs. Lakin, nor the Masons. The paper itself sufficiently shews regard, and testamentary intentions—on this point it does not require extrinsic support.

The Court is, then, satisfied that she intended to make this disposition, that that intention continued till death, and that she considered these papers operative. I, therefore, admit the allegation; and, if the facts pleaded are proved, shall have no hesitation in pronouncing for the validity of these papers as her last will.

This allegation being fully proved, the Court, in Hilary Term, 1828, decreed administration, with the papers annexed, to James Manly, and gave the costs of all parties out of the estate.

MARSH *v.* TYRRELL AND HARDING. Prerogative Court, Michaelmas Term, By-Day, 1827.—Where fraud is charged, the Court allows a greater latitude of pleading than in ordinary cases; but, even then, remote facts must not be as minutely stated as those which bear directly on the point at issue.

[See further, 2 Hagg. Ecc. 84.]

On the admission of an allegation.

This was a suit respecting several testamentary papers of a married woman, executed under certain powers reserved to her by deeds entered into before her marriage. The deceased, Sophia Harding, died, at the age of sixty-one years, on the 8th of May, 1827. A will, dated March 9th, 1827, and a codicil, April 21st of the same year, were propounded by Edward Tyrrell, one of the executors; and a previous will and codicil, both **[134]** dated February 28, 1818, were propounded by Arthur Cuthbert Marsh, one of the executors thereof. John Harding, the husband, who was appointed an executor under the will and codicil of 1827, appeared by a separate proctor, and prayed the Court to pronounce for an intestacy.

An allegation had been given in, on behalf of Tyrrell, reciting extracts of an indenture bearing date March 8, 1816, between Sophia Harding, then Smyth, the deceased, of the first part, William Marsh, Arthur Cuthbert Marsh, and Richard Creed of the second part, by which it was provided that certain monies and stocks should be invested in the names of the three latter persons, and should so stand upon trust to pay over the interest to the use of Sophia Harding, then Smyth, independent of any future husband, with a power of disposal by will, attested by two witnesses; and, as to one sum of 10,000l., by a deed of gift also.

The plea then exhibited a copy of the power, and alleged that, in pursuance of this power, she gave instructions for, and afterwards executed by mark, the will of March, 1827; and also the codicil of April, 1827; and her capacity at both times.

The question now arose on the admissibility of an allegation brought in on the part of Arthur Cuthbert Marsh.

Addams in support of the allegation.

Lushington and Nicholl contrà, were of counsel for Mr. Tyrrell.

Phillimore for Mr. Harding.

[135] *Judgment—Sir John Nicholl.* This allegation is certainly of very great length, consisting of thirty-five articles, and occupying above seventy pages; there are, in addition, twenty-eight exhibits, and reference is made to other instruments. It is a consideration not to be over-looked that, if an allegation of this extent be essential in reply to a condidit, answers of an equal length, and entering into much explanation, will be requisite—and from two parties appearing by separate proctors, and the quantity of the depositions will, necessarily, be almost incalculable. Thus great expence will be incurred; but the mischief will not rest there: for, as fraud is charged, it may be expected that every passage, capable of proof, will be contradicted, and that, even where no direct contradiction is offered, the effect of the charges will be attempted to be taken off, by giving a different colouring to the circumstances. This may run to a still greater bulk, and lead to further responsive pleading, and to exceptive allegations. Yet if justice, the primary object, requires this detail for the purpose of detecting and obviating fraud, it must be gone into; but the extreme length of a cause may, of itself, tend to defeat justice, since the enormous expence may prevent its arrival at a due and proper conclusion. My duty, therefore, is not to allow a minute examination of distant and remote facts, which only bear, by inference, on the point at issue; while, in respect to those which bear directly on, and are more nearly connected with, it, greater latitude must be permitted.

What, then, is the substantial issue? The suit arises upon the will of a married woman, and it is **[136]** agreed on both sides that she had the power to make a will, under the deeds of settlement in 1816 and 1817; for, though the husband may not admit them to be valid, he cannot call them into question in this Court. The will of 1827 is attested, as required by the power, and is, therefore, to be considered just as if she were sole. The executor sets up this instrument, and if its factum be proved—if it be the will of a capable and free testatrix's—there is an end of the case. The factum

of that will is, then, the true issue: except legacies to three servants, it gives to the husband every thing over which she had a power of disposal. There is also a short codicil, merely leaving rings to three friends. Both instruments are attested by three witnesses, and were propounded in a mere condidit, pleading the deed of settlement, execution, and capacity.

The present allegation is for the purpose of impeaching that will and codicil, and of shewing fraud, circumvention, importunity, and conspiracy. The history and circumstances, as laid, are certainly strong; and hold out a suspicious appearance against the husband. To establish such a case, and to detect and defeat the fraud, may require considerable detail; for to obtain a will of this nature would probably be a clandestine transaction, to which a few persons joined in the conspiracy, would alone be privy, and which could only be unravelled by entering into a detail of circumstances shewing the improbability, inconsistency, and ultimately the falsehood of the adverse case.

The party opposing the will is the executor of a will made nine years previously. The several deeds of settlement were entered into in 1816 and **[137]** 1817: the marriage took place in June, 1817: the will, in favour of Marsh, was executed in 1818; and its factum is not impeached. There is no trace of any intermediate testamentary act, which, operating as a revocation, would disprove uniform adherence to that will. It may be, therefore, very important to ascertain the reasons of that will, as they may shew the improbability of such a sweeping benefit to the husband.

After these preliminary remarks I shall proceed to examine summarily the present allegation.

The first article enters into a detail of her property, the advantage of which I cannot see, as the instruments shew its amount and nature.

The second article certainly carries back the history very far; but, as the case considerably depends on adherence to the disposition of 1818, it may be necessary to trace back her life in order to discover why she should have selected this particular branch of the Marsh family for the objects of her testamentary bounty; more particularly as, after Marsh had undergone misfortunes, she persisted in her previous intentions: it may be, indeed, that his difficulties were an additional reason for the continuance of the disposition.

The third and fourth articles contain very long recitals—they are useless, and should be omitted, as the deeds themselves are before the Court.

The succeeding articles, to the tenth inclusive, are not objected to as inadmissible, but as only requiring to be reformed and compressed.

The eleventh and twelfth articles are material and admissible: for it is a fact in this case that, by the will of 1818, a legacy of 500l. was left to each of three servants; which legacies are re-**[138]**-duced, by the will of 1827, to 300l. each: it is, therefore, important to shew a continuance of her confidence in, and affection for, these servants.

The thirteenth pleads general treatment, and is admissible.

The latter part of the fourteenth article, and the exhibits in the fifteenth, have been objected to; and I agree in the objections taken against them. The letters cannot be read as proofs of importunity and ill treatment on the part of the husband, for it is quite clear that the deceased was not privy to the parts containing complaints against him; but had those complaints been written from her dictation, they would have been evidence on the same grounds that her declarations would be received. The letters may, perhaps, on revision, be found admissible as proofs of other circumstances, for if written, even in part only, by her direction, they shew confidence in this servant, who is a legatee of a larger amount in the former than in the latter will.

I shall not advert to the remainder of this allegation more particularly than to remark that it is asserted the deceased was reduced to a most unresisting state; that, in that state, this will, exclusively in favour of the husband, was obtained from her; and that other conduct of a very suspicious nature was resorted to by him, and by some of the persons connected with this will.

The thirty-fourth article, when considered with reference to these circumstances, may be important. I shall not specify any other article, but recommend to the counsel a general and careful revision of the whole.

Allegation reformed.

[139] IN THE GOODS OF JOSEPH HALL. Prerogative Court, Michaelmas Term, 14th Dec., 1827.—An action at common law being brought, in the archbishop's name, by the administrator de bonis non against the executors of the original administrator for the balance of the intestate's effects, the Court will direct the bond, given by the original administrator, to be attended with, on security being given to indemnify the archbishop against costs.

On motion.

Joseph Hall died intestate in May, 1820, leaving one brother and sister, and a nephew and niece, the only persons entitled in distribution to his personal estate.

In the month of June letters of administration, under seal of the Prerogative Court of Canterbury, were granted to John Hall, the brother; he died in 1824, without having made a distribution, and leaving a considerable sum of the intestate's effects in his banker's hands. By his will he appointed his widow and Joseph Hodgkinson executors: they took probate. In March, 1825, the nephew and niece took administration de bonis non to Joseph Hall, and, as his legal representatives, made repeated applications to the executors of John Hall for the balance of the intestate's estate, which they admitted was in their possession, but refused to pay. An action had, therefore, been brought against them, in the Court of King's Bench, by the administrators.

Lushington—on affidavits that his parties were legally advised they could not proceed to trial, unless the administration bond, a breach of which was assigned, was produced; and stating that the action was brought solely against the executors of the original administrator, and not against the sureties; and that his parties were willing to give security as against costs—moved the Court to direct the administration bond to be [140] attended with in the Court of King's Bench, and produced at the hearing of the cause described *The Archbishop of Canterbury* v. *Hodgkinson and Hall.*

Per Curiam. The Court granted the motion; but thought it fit that the archbishop should be indemnified against costs, as the action was brought in his name.

Motion granted.

CUNDY *v.* MEDLEY. Prerogative Court, Michaelmas Term, 14th Dec., 1827.—Papers, on the face of them, unfinished, with no circumstances to account for such their state, are presumed to be abandoned, and, consequently, are not entitled to probate.

On the admission of an allegation.

Two papers were propounded as together containing the last will of John Medley. The first began:—

"This is the last will and testament of me John Medley of London which I now make and date the twenty second day of October eighteen hundred and twenty four:" and, after enumerating his property, giving several legacies, and bequeathing the residue, it concluded—"this is my last will and testament dated as above the twenty second day of October eighteen hundred and twenty four. I appoint my Executors"

The second was in the following words:—

"Exors Mr A John Cundy of the house of Capel Cuerton and Cundy Stockbrokers Royal Exchange London to whom I give and bequeath one hundred pounds"

The allegation pleaded that John Medley died [141] on the 12th of August, 1827, a bachelor, leaving behind him two unmarried sisters, a married sister, and several nephews and nieces who would have been entitled in distribution if he had died intestate; and that his personalty amounted to 17,000l.: that he was a man of retired habits, reserved about his affairs, and kept up little intercourse with any person: that he had no occupation, that he employed Capel, Cuerton, and Cundy as his stockbrokers and bankers, and reposed great trust and confidence in them: that in 1820 the house where he lodged was burnt down: that 250l. in bank notes, belonging to him, were destroyed: that Capel, Cuerton, and Cundy, having ascertained the numbers, and given security, obtained payment of the amount at the bank: that in October, 1824, the deceased wrote No. 1, and some time afterwards No. 2—intending them together to operate as his will; and by No. 2 appointed Mr. Cundy executor: that both papers were in the deceased's hand-writing: that they were found in a pocket-book deposited in a trunk in his bedroom, wherein he kept other papers of moment.

This allegation was given on the part of Mr. Cundy, and opposed by two of the deceased's sisters, Ann and Priscilla Medley, who prayed that the Court would decree to them administration of the goods of their late brother, John Medley, as dead intestate.

Dodson and Addams in support of the allegation.

Lushington and Nicholl in objection to its admission.

[142] *Judgment—Sir John Nicholl.* It would be contrary to all the principles maintained in this Court to allow the present allegation to go to proof. The paper No. 1 is, on the face of it, unfinished: it is not subscribed—it concludes, "I appoint my executors," and there breaks off abruptly: it is written on the back of an old passport from the French Minister: the deceased evidently intended to do something more to it: at the utmost it is a draft for a will, and an unfinished draft, for he purposed to appoint executors.

No. 2 is a little scrap of paper, and there is nothing intrinsic, or extrinsic, to fix the date; but, whether it was written before or after No. 1, still both papers, taken together, are unfinished; they are mere memoranda preparatory to a more formal will: for, though in respect to the disposition of his property he had made considerable progress, yet it is clear that he intended to appoint more than one executor, the word executors being in the plural both in No. 1 and No. 2. The deceased lived nearly three years after the only date, applying to either papers, that can be ascertained; there is nothing pleaded to account for their unfinished state, or to repel the legal presumption of abandonment; and I shall, therefore, reject this allegation, pronounce that the deceased is dead intestate, and decree administration to the two sisters who have applied for it. Mr. Cundy must, however, have his expences out of the estate, as it was proper that these papers should be brought before the Court, more especially as there were minors interested under them.

Allegation rejected.

[143] IN THE GOODS OF WILLIAM APPELBEE. Prerogative Court, Caveat-Day, 8th January, 1828.—An executor having, in pencil, altered a will (by the direction of the testator who approved of it when so altered) and then cancelled it, only in order that another might be drawn up—the preparation of which will was prevented by the death of the deceased: probate of the cancelled will (in its original state) will be granted, on a proxy of consent being given by all persons interested.

[Referred to, *Dixon* v. *Solicitor to the Treasury*, [1905] P. 44.]

On motion.

William Appelbee died on the 7th of November, 1827, leaving behind him Mary Ann Arnald, widow, his natural and lawful sister, and only next of kin; and Sarah (wife of Charles Bassage), his lawful niece—the only persons entitled in distribution in case he had died intestate. The deceased duly executed his will on the 14th of April, 1823. In 1825 he delivered this will (the exhibit A) to Mr. Jackson, the sole executor, and requested him to make certain alterations in it. Mr. Jackson drew his pencil through the signature at the bottom of the will, and made some alterations with the same material: the deceased expressed his approbation of them, and said that he would make a copy, and execute the same in the presence of witnesses.

On the 29th of September, 1827, the deceased mentioned to his solicitor that he had made his will in his own hand-writing, and promised to shew it to him; and on the first of November he told an intimate friend—whose opinion he had asked respecting the papers marked B—that he would write his will again; and, on the evening of the same day, the deceased mentioned to his sister that he proposed to re-copy his will. On the 6th the deceased brought the papers (B) from his bed-room into the parlour, and said to his sister, "That he had intended to reduce them to a **[144]** smaller compass, but found himself too weak to do so; and added, that if he did not get better, he would have his will written for him on the morrow." On the following day the deceased died: "B" was found in a closet of his bed-room; and "A" was found (with the signature of the deceased, and the names of the witnesses struck through) in a box with leases and documents of importance.

These circumstances were fully substantiated by affidavit, and Mrs. Arnald and Mrs. Bassage and her husband had executed a proxy, consenting "to probate of the said will of the deceased, bearing date the 14th of April, 1823, or letters of administra-

tion with the said will, or the said testamentary memoranda annexed, of all and singular the goods, chattels, and credits of the deceased, being granted in such manner and form, and to such person, as the Court may direct."

Lushington moved for a decree.

Per Curiam. The paper B is, in substance, the same as the will of 1823, marked with the letter A; but it also contains a great deal of matter extraneous, and not of testamentary import. There can be no advantage in annexing it to the will. The signature of "A" being struck through, is to be regarded as preparatory to the deceased making a new will—which he did not do; this must be considered, then, as only a conditional cancellation, and, consequently, not a revocation.(*a*)[1] The **[145]** Court, therefore, as the consent of all parties interested has been given, thinks it would best consult the intentions of the deceased, by decreeing probate of "A" singly, as it originally stood before the signature was touched.

Motion granted.

IN THE GOODS OF ANNA MARIA ORMOND. Prerogative Court, Caveat-Day, 8th January, 1828.—The Court will grant administration, with papers, annexed to a person, as attorney of an executor according to the tenor, without requiring a regular power of attorney; such person being clearly authorized to act, by letter, from that executor—the executor of the residuary legatee (who was also executor, but did not take probate) having consented.

On motion.

Anna Maria Ormond died at Surat, in the East Indies, on 11th May, 1826—a widow. By her will, duly executed, she appointed her mother, Mrs. Bloxam, sole executrix and residuary legatee. This will was left in England. The deceased subsequently wrote, in India, three papers of a testamentary import; and probate of these was granted at Bombay to Richard Moore, as executor, according to the tenor. He collected the property in India, and transmitted it to England to Mr. Bloxam, the deceased's brother, with a letter (dated Surat, May 4, 1827), containing this passage—"I felt gratified on hearing from you, as it enables me to entreat your good offices to act in the will of your lamented sister, and to conclude my executorship."

Lushington on these circumstances, and after stating that Mrs. Bloxam, the mother of the deceased, survived her daughter, but died without taking probate; and that Mr. Isherwood, the executor named in the will of Mrs. Bloxam, consented to the present application, moved that letters **[146]** of administration (with the will as contained in four paper writings annexed) of the goods of Mrs. Ormond be granted to Charles John Bloxam, as the lawful attorney, and for the use and benefit of Captain Moore.

Per Curiam. There is no occasion in the present instance for the Court to require a regular power of attorney: (*a*)[2] the letter to Mr. Bloxam so manifestly authorizes him to act in the arrangement of the deceased's property, that its handwriting being proved, and the consent of Mrs. Bloxam's executor being regularly given, the administration may pass. But the securities must justify.

Motion granted.

HOBY *v.* HOBY AND HOBY.(*b*) Prerogative Court, Caveat-Day, 8th January, 1828.—Supervening insanity is sufficient to account for the non-execution of a paper, written shortly before, and consistent with the intentions and affections of the deceased; nor will it so reflect back on previous eccentricity as to invalidate such a paper.

(*a*)[1] Vide *Onions* v. *Tyrer*, 1 P. Wms. 343; *Burtenshaw* v. *Gilbert*, 1 Cowp. 52; *Ex parte Ilchester*, 7 Ves. 372, 379; *Winsor* v. *Pratt*, 2 B. & B. 650.

(*a*)[2] Peter Bramhall Eaton, and Martha Eaton, his wife, having been drowned together in the Bristol river, leaving a daughter—their only child—aged six years, administration of the effects of Peter Bramhall Eaton was granted to one of two appointees of the next of kin, then resident in the West Indies—on the production of a letter from him, in which he expressed a wish "that they will act for him in every point both for his little niece, and himself;" and on the consent of the infant's relations in this country. Hilary Term, 1828.

(*b*) The cause was argued, on the by-day after Michaelmas Term, by Phillimore on behalf of the executor; and by Lushington and Dodson for an intestacy.

Judgment—Sir John Nicholl. The deceased, James Hoby, died at Walham Green, Chelsea, on the 14th of March, 1826, a **[147]** bachelor, leaving two brothers, the only persons, entitled in distribution to his property, which amounted in value to 4000l. He had formerly kept the Fountain Tavern, in Catherine Street, Strand; and a paper, all in his own hand-writing, not signed nor attested, is propounded, as his will, by his cousin James Hoby, the executor named therein; and it is opposed by the deceased's brother Thomas Hoby. The grounds of opposition being not merely that the paper is unexecuted, but also that the deceased was not of sound mind; it is necessary for the Court to consider both these points.

The contents and form of the instrument may bear upon each of them. It is in these words:—

"Walham Green, 17th of Aug. 1825.

"I James Hoby of Walham Green Middlesex being of sound mind and body and fully revokeing all former wills heretofore made do declare this my last will and testament when it pleases God to call me I wish to be buried in a plain and decent way at East Barnet near my D^r^ Parents and I nominate and appoint my D^r^ Cousin in Skinner St Fringe Manufacturer my executor (Mr. James Hoby) to have possession of all my effects and property and to pay and dispose of what is given as legacies and bequests to those hereinafter named to his sister Mrs. Wright of Hereford (my) cousin I bequeath one hundred pounds and the print of our Saviour on the Cross now in the dining room To Mr. James Cranston Jun^r^ of the King's Acre Hereford all my books to Mrs. Edwards my cousin of Bunshill I give and bequeath one hundred **[148]** pounds—to my unfortunate brother Tom I give one hundred pounds—to my poor Cousin Sarah Clarkson 20l.—to the old Friend Mr Salkeld 20l.—to Mr Warren resident here for his kindness and attention one hundred pounds—and after the payment of these legacies I give and bequeath all the remainder of my property to my D^r^ Cousin and Executor to have and hold the same for himself and family hopeing he will take care to pay these legacies and bequests—not being at this time involved in any debts I leave my cousin and executor Mr James Hoby to sell or dispose of such part of the property as he chuses or retain it excepting the bequests made in the will—Also the Lease at Walham Green I hope it is clearly understo*n* that the linen wine household and every other articles on the Excepting has been bequeathed is to become my Cousin Mr James Hoby's together with money at my Bankers—

"I have here unto set my hand and signature

n "

These are the very words of the will. There is the commencement of a letter, but there is no subscription. The date, and also the few last lines, are in darker ink than the body of the will, and were written, apparently, at a different time from the remainder, except, perhaps, some corrections which are in the darker coloured ink, and some letters which seem as if they had been amended or retouched. This instrument, then, is a complete disposition: it leaves some legacies; it appoints an executor, and bequeaths the residue: **[149]** it is rationally expressed, and, though it passes over the deceased's brothers, it disposes of the property among his family, giving, however, the bulk of it to his cousin James Hoby.

The evidence applying to the deceased's affections proves too clearly, even to require citing, that he was wholly estranged from his brothers, and greatly attached to this cousin—and that these feelings were not the offspring of any sudden and recent impression, but may be traced back as far as the account of his life extends. The Worralls speak to declarations of this import, while he lived at Ealing in 1815: nay, Brundrett says that, at the time of his first employment as the deceased's confidential solicitor, viz. fifteen or sixteen years before his death, "he was in the habit of speaking of his brothers in the strongest terms, as disapproving their characters and conduct."

There is clear proof, then, that he felt hostility towards his brothers; that he entertained a most unfavourable opinion of them, and declared they should never have any of his property: while, on the other hand, the whole res gesta shews his entire confidence in his cousin James—with him he lived on terms of the most friendly intercourse—to him he resorted for advice or assistance in any difficulty, and he alone, during the long illness subsequent to the will, had the care and custody of the deceased.

That his affections, long settled and fixed, were entirely in concurrence with the

disposition of his property under this will, is a material fact, as shewing—first, that it was not an hasty and transient purpose, which he was likely to abandon, and to which it was not probable he would adhere: [150] secondly, that it was not an intention arising out of any delusion of mind, and insane dislike, against his brothers: but, thirdly, that, on the contrary, the act itself was quite in unison with the sound mind of the deceased, and bears no marks of any perversion of understanding; nor is any change of former intentions. It does not grow out of, nor in any manner vibrate in concert with, the subject on which, more particularly, the insanity shewed itself when that calamity did actually visit him. These considerations go strongly to sustain the whole case in both its branches.

The deceased was a person of great singularity of character; he was odd and eccentric—vain and boastful; had collected china and books, prints and plate in his house, which he was proud of displaying: he was not weary of telling their history again and again—decies repetita placebit. He was fond of his garden, his flowers, and his green-house plants; he liked to exhibit them, and to boast of their great value, and, as amateurs frequently are, he was a little suspicious that they were stolen by his job-gardener. He was also irritable, and liable to excitement—passionate and violent. It is not then extraordinary that a person of this temperament should finally become actually insane; and it has been justly argued that this subsequent insanity reflects back on these eccentricities a semblance of an insane tendency and character, but it will not convert them into proofs of actual insanity already existing; they may be either symptoms of ultimate derangement or collateral accompaniments of existing disease, if other acts decidedly insane could be shewn, but not insanity per se.

[151] In such an individual it is not quarrelling with the coachman for stopping too long at an inn; nor dabbing the mess of fish in his face for neglecting to take care of it; nor violently kicking his dog, nor boasting that half Fulham belonged to him, that can prove actual insanity; they are oddities; they are eccentricities; they are even symptoms of approaching derangement; but they do not establish derangement itself. And it is to be observed that most of these acts are imputed to him at a time when the principal of the brother's own witnesses—the Kings—admit that his mind was sound. King first attributes insanity to him on Sunday, the 14th of August; for he says that the deceased was odd, but he never considered him decidedly insane till the 14th of August.

Now King was intimately acquainted with him, for six or seven years lived near him, had borrowed 300l. of him, on bond, in June or July; yet various of the acts, from which it is attempted to describe him as insane, happened long before that period. On the other hand, a dozen witnesses, long acquainted with him, and of different descriptions—his medical attendant, his confidential solicitor, his neighbours, his inmates, and his servants—all swear they never considered him of unsound mind till the 21st of August, four days after the date of the will.

It thus becomes important to enquire into the state of the deceased on the 14th of August, and during the intermediate period, till the 21st. On the evening of Sunday, the 14th of August, he fancied he had been robbed of his plate by Warren. This Warren was a sort of protegé of the deceased; he had been brought up as a cabinet-[152]-maker, which was his father's trade. The deceased had lent him money to go into business at Bath; he there failed. He afterwards, in London, with the assistance of the deceased, set up in business again; and having been there equally unsuccessful, he had for some time resided with the deceased as a companion. He is a legatee of 100l. in the will, and the deceased, as he states, also gave him on the 17th of August a draft for 100l. and a bond from King for 300l. Warren's explanation of the transaction of Sunday, the 14th of August, is that the plate was usually kept in a chest within a cupboard in his bed-room; that he had that morning taken it out to clean; that he and the deceased had some angry words; that he put the plate away, and went to town, saying he did not know whether he should return. During Warren's absence it appears from the brother's witness, Nutt (the details of whose evidence are far too loose to be relied on), that the deceased, who had been examining his treasures of different kinds, became very enraged, thinking, and having worked himself up into the belief, that he had been robbed of part of his plate, went to his neighbour King, in great agitation, and told him that Warren had robbed him; that he would go to town to his cousin, James Hoby, immediately, and obtain a warrant to arrest Warren, who had said "that he did not know whether he should return;" and he thought,

perhaps, he might go off with his property. He also made the same complaint and charges to others of his neighbours, and certainly was exceedingly agitated. It was at this time, between eight and nine o'clock in the evening: King very kindly undertook to go, and went, for him to James Hoby. **[153]** However, before King came back Warren had returned, shewed the deceased where the plate was, explained his error, and the deceased was quite satisfied; and upon King's reaching the house he finds them together in a friendly manner; the matter being perfectly cleared up.

Now, that a person of this frame of mind, supposing himself to have been robbed by an almost adopted son, should be agitated, and should be nearly, if not quite, worked up into madness, is not extraordinary. That, after he became decidedly insane, this notion, so vividly imprinted on his imagination, should return, is also not extraordinary; but I am by no means satisfied that the character of actual insanity, or that any thing beyond high excitement and irritation, manifested itself, even on this Sunday, the 14th of August. The excitement, undoubtedly, was extreme; it might amount to actual delirium—Ira furor brevis est—as long as it lasted the mind might be unsound, but when the mistake was discovered the mind was restored, and reason resumed its place.

King deposes that the deceased, both then and the next day, said "his head had been so bad he really did not know what he was doing when he came to him." And this declaration has been relied on as proving derangement—derangement by the deceased's own admission. If so, it also proves recovery—the removal of delirium; for one of the strongest proofs of re-established faculties is the consciousness and admission of the party himself that he had been disordered. The return and continuance of this derangement during the ensuing week has been deposed to, and much dependence is placed on it. To Nutt, as I have before **[154]** said, I cannot trust; nor to the Kings' accuracy, in respect to time; but their veracity I have no reason to doubt. They mention no circumstance enabling them to fix the events, as occurring, rather between the 14th and 21st than after the 21st; they frequently saw the deceased subsequent to the 21st; they might easily confound what passed on the later occasions with what they suppose to have happened at a previous period. King swears that a letter from the deceased was brought to him early on Monday morning by Warren; he repeats it positively; yet when the letter is shewn him he admits "that it must have been brought to his house by some other person after Warren had left him." I believe it to have been an honest mistake; but if he could fall into such a mistake, both as to the person and as to the time of day, how much more easy was it for him to have been in error as to whether these circumstances happened in the week before the 21st, or in the week after? I am the more disposed to think that they must have happened at the latter time; because the facts correspond with what then took place, but not with what is established, by unsuspicious proofs, to have been the condition of the deceased during the foregoing week. On this part of the case, it is not, I think, shewn that decided insanity existed between the 14th and the 21st; at the utmost, reason was fluctuating; and it appears doubtful, whether, on Sunday, the 14th, while the impression that he had been robbed remained upon his mind—whether, even then, he was worked up to a state of delirium.

I proceed, then, to the evidence immediately referring to other acts in that week; and, more **[155]** especially, to the instrument propounded. This, as I have said, was manifestly written at two different times. The bulk and body of the will, comprising the complete disposition of his property, was first written in paler ink—the date, August 17th, 1825, and a small addition at the end, in a darker ink, and one or two slight corrections were made, and a few of the letters retouched with that darker ink: so that the body—that is, the important part—may have been written long before the 17th of August. On that day the uncle of the deceased (the father of the executor) visited the deceased, and found him in his bed-room, sitting at a writing table with his papers about him. The deceased said "he had been busy making his will," and asked him to go down and order luncheon, and he would come down to him presently. The uncle staid to dinner. After dinner, he says:—

"He and the deceased being alone together, the deceased, pointing to a picture which was then hanging up in the room, observed that he had left the picture, and also 100l. to Elizabeth, meaning Elizabeth Wright, deponent's eldest daughter; that he had also left a legacy of 20l. to his friend Salkeld, and 20l. or 10l. to Mrs. Clarkson, a cousin of the deceased; that he had left his books to a Mr. Cranstoun. He then

said that he would not tell deponent more of his will; who, in a joking way, said that he did not wish to know, as he had no occasion for anything from him. The deceased then added that he had left the greatest part of his property to those he liked best; and he recollects him to have said that he had left a young man, of the name of Warren, 100l."

[156] Here is a direct reference to, and recognition of, this will; for he declares that he had left the greatest part of his property to those he liked best, and the whole history demonstrates, that his cousin had long been the person he liked best. Nutt thinks, but is not positive, that this happened on the 16th: it is not very material whether it happened the day before, or the afternoon of the day on the morning of which he wrote his will: if on the 16th, then it was preparatory to the act of the following day—if on the 17th, at dinner time, then it was after the transaction with Caird and Rouse, who were there between eleven and twelve o'clock. At all events, this conversation furnishes strong evidence in support of the act, as shewing decided intention, and perfect capacity.

It is fully proved that his opposite neighbour, Caird, a baker, was requested to come in order to attest his will, and that Mr. Rouse, the deceased's apothecary, happening to be at Caird's house at the time, upon Nutt, the messenger, telling the deceased, he sent a second time, begging Mr. Rouse to accompany Caird. They both went over, and found the deceased in his dining-room, at a writing-table, with papers before him: he said "he was very ill, and had been making his will, being assured that he could not live long." He read the will to them, and tendered a pen to Rouse that he might witness it; and undoubtedly it is no proof of derangement of mind in such a person that he was not aware of the regular form of executing a will. Mr. Rouse (thinking the deceased bilious, and out of spirits), feeling his pulse, said he was in no danger, rallied him, and told him he was no worse than he had been before, and **[157]** in order to avoid depressing his spirits, prevailed upon him to postpone the formal execution.

On the ninth interrogatory he says: "He advised the deceased to postpone the execution of his will, because he considered that his mind wanted rousing; that he was already too much depressed and out of spirits, and the execution of so solemn an instrument was likely to make him worse; respondent did not perceive that the deceased's mind was in a confused state or that he was unfit to make a will; his memory was perfect, and his understanding correct."

Caird fully confirms Rouse's opinion, so that this alone prevented the execution—there was not any hesitation on the part of the deceased: it was not deferred from his doubting or deliberating, but because his medical attendant dissuaded and diverted him from it.

Both these witnesses were well acquainted with the deceased; Caird had been his opposite neighbour for five years, with whom he used often to gossip, as he expresses it; Rouse, his apothecary, for some length of time. They knew his general mind, and habits, and deportment: if he had been at this time in a state of insanity and derangement they must have discovered it. This evidence, then, bears strongly on both points—fixed intention, and soundness of mind. I might perhaps rest the case here; but where there is any suggestion of insanity it is proper to look at all confirmatory circumstances.

On the following day, the 18th of August, the deceased was worse, and Dr. Latham was called in. His disorder was not one of the head—not paralysis nor apoplexy—not brain fever—it was **[158]** diarrhea. Dr. Latham, it appears, was not then consulted for the first time—he had often attended him before. He says:—

"On the 18th of August, 1825, he visited the deceased, who thought himself dying; that deponent laughed at him, knowing the deceased was not in danger; that on the 19th or 20th, when he again saw him, he was much better; that on the 21st he found him in a state of great nervous irritation and excitement, which were partly allayed; but on the 1st of September he considered that the case should be treated as one which might end in confirmed insanity." He further says, "That on the 18th, and on the intermediate days between that and the 21st, he is quite certain that nothing occurred in the manner and conversation of the deceased which gave him any reason to believe that the deceased was not of perfect capacity; he conducted himself and conversed as a person of sound mind; and at no time previous to the 21st had he any cause for believing that the deceased was not of sound mind, memory, and

understanding." And to the thirty-eighth interrogatory the same witness answers, "That on the days previous to the 21st of August, the deceased was, as respondent verily believes, and of his belief he swears positively, of sound and perfect mind, and was capable, as he believes, of any act requiring calm and cool consideration."

It may not be unfit to remark that the character of the deceased's derangement, when it does actually take place, is rather delirium than delusion—rather high excitement than false impression. In delirium, intervals of coolness and actual lucidity are much more common than when a per-**[159]**-manent delusion has seized the mind; though, when excitement returns, some circumstance that had before made a strong impression may, not improbably, revert, and attend the delirium: such appeared to have been the case with respect to the deceased's notion that he had been robbed, and by Warren; but that is not an impression in any degree connected with the disposition contained in this instrument, nor shewing itself in these testamentary transactions.

It was observed that there was an inconsistency in the legacy to Warren "for his kindness and attention," and these repeated charges of robbery. In the first place, this argument assumes that the Kings are correct in fixing the date of those declarations between the 14th and 21st of August: in the next place, it assumes that the body of the will was written on the 17th, which might have been written long before the 14th; but, in the last place, what sort of inconsistency does it shew? Inconsistency with the existence of insanity!—it shews that when he wrote this will he had not on his mind the false idea that Warren had robbed him; it, therefore, proves rather the absence than the presence of disorder. His whole conduct to Warren is natural enough, supposing him sane—he had, through error, and under excitement, made false charges against him on the 14th—he was convinced they were unfounded—Warren was hurt, and felt injured by them—on the next morning, the 15th, the deceased made him a present of a diamond ring—a sense of his injustice rendered that act not unnatural—on the 17th, being about to execute this will, by which he had bequeathed **[160]** him 100*l.* only, he gave him a draft for another 100*l.* and King's bond for 300*l.* borrowed in the previous June or July. Whether the will was written before, and he made these gifts, not choosing to alter the will, or whether he preferred that they should not appear in his will—even if written on that day—yet they do not bear the character of an insane act, much less of still thinking that Warren had robbed him. His property was worth about 4000*l.*: the amount of these presents, particularly after their long connexion, and these unfounded charges, might not be irrational nor extravagant; nor does he irrationally give him either articles bequeathed specifically by will, nor even all his property ejusdem generis; for there are other bonds actually left sealed up, and the envelope thus indorsed, "To be opened by my dear cousin and executor Mr. James Hoby." This is not an unimportant act—it is an act of sanity, and not only so, but is strong to prove adherence. Whether written before the 17th, on the 17th, or after the 17th, it still has effect—if before, it shews that the will was written before, and evidences a long and deliberate intention while sane; if on the 17th, it confirms the sanity on that day—if after, it proves adherence to this will—in either case it tends to support the will. Adherence, however, is very sufficiently established, and abandonment of, and departure from, intention, are in the last degree improbable.

On the 18th the deceased wrote to his cousin, requesting he would bring down Brundrett, as he was extremely ill—"in a dangerous way." Warren, who carried the letter, told the cousin that the deceased had alarmed himself; that the medical **[161]** gentlemen thought that there was no danger, and that in a day or two he would be able to go to Brundrett (that no danger was apprehended is confirmed by the testimony of Latham and Rouse): Brundrett, the solicitor, was, therefore, not brought down; but on that or the following day his cousin went to see the deceased, and dined with him; the will was produced; this cousin urged him to alter it in favour of his brothers—the deceased refused, and said "he would go to Brundrett the next day and have his will made out as it was; after the behaviour of his brothers to him he would do no more than he had done."

Here, again, is firm adherence to the will and sound mind.

The next day the deceased was no better; the diarrhea continued; and on the 21st he became delirious and insane, and so he remained till his death, though with intervals of calmness. The completion of the act was thus prevented, but the testamentary intention existed as long as capacity existed.

It has been asked—why was not the will executed in the intervals of the disorder?

In the first place, the intervals were hardly of that duration that it was proper or likely that such an act should be proposed. In the next place, the deceased was not in possession of the will; for when actual derangement seized him, all his papers were sealed up and sent to Mr. Brundrett, his confidential solicitor, under the authority of James Hoby, who, by the instrument itself as well as by the sealed envelope, was declared his executor.

Upon the whole, I am of opinion that this instru-**[162]**-ment contains the sane testamentary intentions of the deceased, and for these reasons—

First. That it is founded upon the conduct and declarations of the deceased for years before his death; and this constitutes an important foundation of the act:

Secondly. That the deceased was of sound mind when he wrote; and on the 17th, when he would have executed this paper; for no part of the contents connect themselves with the particular subject of the deceased's insanity—viz. his being robbed:

And, lastly. That the unfinished state of the instrument is sufficiently accounted for and the adherence to it sufficiently proved.

I therefore pronounce for the paper.

As to costs: Thomas Hoby, as one of the next of kin, was justified, from the unfinished state of the paper, in putting the executor on proof of it: I shall then give no costs against him; nor shall I allow his costs out of the estate, because he has set up insanity and abandonment and has failed to prove them; besides, he has a legacy of 100l. under this instrument: nor shall I give them to the other brother who has intervened, as the appearance of two parties in the same interest by different proctors is not to be encouraged. I shall leave them to the liberality of the executor.

Probate decreed.

[163] BRAY *v.* BRAY. Arches Court, Hilary Term, 2nd Session, 1828.—In a suit for separation by reason of cruelty brought by the wife, an acquittal of her witnesses (for a conspiracy in counselling her to institute this suit) upon an indictment laid by the husband and his evidence thereon, in which he admitted and repeated certain accusations originally alleged in the libel as acts of cruelty, may be pleaded as a continuation and admission on oath of that cruelty.

[Discussed, *Russell* v. *Russell*, [1897] A. C. 395.]

On the admission of additional articles.

This was a cause of divorce, by reason of cruelty, originally promoted in the Consistory Court of London by Saba Eliza Bray against the Reverend Bidlake Bray; and came up to this Court by appeal from the admission of the libel. On the by-day of Michaelmas Term, 1827, the decree was affirmed and the cause retained.

The present question was the admissibility of certain additional articles, pleading, first, that in February, 1827, an indictment was preferred, on the prosecution of Mr. Bray, against Elizabeth Malkin, the mother of Mrs. Bray; William Hammersley, her uncle (indicted by the name of William Spode); George Vance, her medical attendant; and Robert Shank Atcheson, her solicitor, for conspiring to separate Mr. and Mrs. Bray; and "for counselling Saba Eliza Bray to promote against the said Bidlake Bray a certain cause of divorce or separation by reason of cruelty;" that the grand jury, on the evidence of Mr. Bray and of another witness, returned a true bill; that the indictment was heard before Lord Tenterden **[164]** and a special jury on the 2d of November last, when Mr. Bray and many others were examined for the prosecution; that no witnesses were examined for the defence, but the evidence of Mrs. Bray, whose examination, taken in private, lasted four hours, was read; and the Lord Chief Justice then declining to receive any further evidence, the jury thereupon acquitted the defendants.

The second article exhibited, in supply of proof, a copy of the bill of indictment.

The third in substance pleaded: "That in the examination of Bidlake Bray on the trial of the said indictment, he did admit and confess that he had declared both before and after the birth of the child of which his said wife, Saba Eliza Bray, was delivered, that he believed it to be the child of her uncle; that he had also asked the said Saba Eliza Bray, his wife, if she knew the meaning of incest, and that he had intended to convey to his said wife a reproach of incest with her uncle, William Hammersley, by his manner and insinuations; and the said Bidlake Bray did, in like manner, on the said occasion, admit that he had, both before and after the birth of

the said child, declared that he thought she, the said Saba Eliza Bray, did not come a virgin to his bed."

Phillimore and Addams in objection. These articles are inadmissible; they can furnish no useful information; the libel consists of no fewer than 37 articles; they embrace a long period of time, and are very detailed as to acts of cruelty; and two and twenty witnesses have been examined upon them. The Court has never gone so far in admitting evidence of "res inter alios acta;" the **[165]** verdict at common law against a paramour is allowed to be pleaded in divorce causes, to shew there is no collusion; but even that till latterly was not admitted without much opposition.(*a*)[1] Another objection is that we shall be compelled to plead the grounds of the verdict and go into a voluminous statement of Mrs. Bray's evidence. In *Brisco* v. *Brisco* the wife was charged with adultery; and the Court of Delegates (*b*) would not allow the proceedings in *Winnington* v. *Winnington* (*c*) to be invoked, in which Winnington was proved guilty of adultery with Lady Brisco.

Dr. Jenner. No. Winnington was proved guilty of adultery with a person supposed to be Lady Brisco.

Per Curiam. The reason is clear: that was another cause to which neither husband nor wife was party.

Argument resumed.

We remember no instance of the introduction of the proceedings in detail as well as of the verdict. Besides, how is this indictment cruelty? It is a proof, as far as it goes, of his attachment to his wife. Again, as to the declarations, it is not pleaded that they were made to Mrs. Bray in person; but, further, these very declarations have already been pleaded in the libel.

Jenner and Lushington contrà. There is a great deal in this case not easy to prove, except from the declarations of the husband **[166]** made at the time or immediately subsequent; therefore the Court will not easily be induced to reject clear evidence of such declarations. As to the objection "res inter alios acta" in *Verelst* v. *Verelst*, the cross-examination at common law was invoked to discredit a witness; (*a*)[2] here, too, Bray was the party prosecuting, and was examined as a witness. Are not the repetitions of the accusations evidence of cruelty; and can the Court on account of the length of the plea exclude the admissions on oath of the husband that he has made such accusations? It is established that the indictment was unfounded and only brought to put an end to this suit: this is material for the Court to know.

Both on principle and precedent these articles are admissible, especially when the original declarations were made in the absence of witnesses, and the whole passed merely between husband and wife.

Judgment—Sir John Nicholl. The Court would be very unwilling to load unnecessarily the cause with additional matter; but it cannot take upon itself to reject that which bears directly upon the point at issue. Looking, then, at the history contained in the original libel, it is impossible to say that the articles now offered to the Court do not connect themselves with the principal case. The husband accused his wife of the most abominable intercourse that **[167]** can possibly be conceived—no less than incest with one of her nearest connections: and the indicting her material witnesses for a conspiracy, in order, if he could convict them, to affect their evidence in this suit, must be considered a continuance of that persecution which Mrs. Bray, if the facts stated in the libel are true, has already suffered. The acquittal, therefore, of the parties on that indictment may be important to enable the Court to arrive at a just decision of this case.

The third article is intended to establish not merely a declaration of the husband, but a solemn admission on oath of a part of the charge brought against him, viz. asserting before and after the birth of the child that that child was not his, but the fruit of an incestuous connection between Mrs. Bray and her uncle. Though that

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(*a*)[1] Vide *Elwes* v. *Elwes*, 1 Consistory Reports, 289, note; and *Loveden* v. *Loveden*, 2 ib. 51.

(*b*) *Brisco* v. *Brisco*, Delegates, 24th of July, 1826.

(*c*) The case of *Winnington* v. *Winnington* was decided in the Consistory Court of London on the 23d of June, 1826.

(*a*)[2] *Verelst* v. *Verelst*, 1 Phill. 145. On the 5th of July, 1814, the decision of the Court of Arches was affirmed by the Delegates.

may be admitted in the husband's answers to the libel, the wife is not bound to depend on the chance of that admission, coupled with such explanations and qualifications as he may choose to give. It is not, I think, possible to conceive cruelty of a more grievous character (except, perhaps, great personal violence) than the accusation made by this husband against his wife.

As to its being a proceeding in another Court and between other parties, this is surely the last case to which the objection of res inter alios acta can apply, for this is the very act of the party himself—it is his own prosecution, it is an act which he himself has done; and, therefore, he cannot say, "I was not a party to these proceedings, and consequently they ought not to be brought in evidence against me."

Now, in suits for divorce by reason of adultery **[168]** the action of the husband against the paramour of the wife, if brought in proof against the wife, is res inter alios acta: for the wife is there no party to the action. The case which has been referred to, of *Winnington* against *Winnington*, was still more res inter alios acta: for a sentence in that cause could be no evidence in *Brisco* against *Brisco*, for neither of the parties in the latter were parties in the former suit.

These additional articles may be very shortly proved; and as it was undertaken that the wife's costs should not be taxed against the husband, de die in diem,(*a*) but should be reserved to the close of the suit, no objection on that ground can now be raised. If it should turn out that the husband has been guilty of this misconduct towards his wife, he may be liable to costs as between party and party, but the claim to them as between husband and wife is waived for the present.

Under these circumstances I think I am bound to admit the articles, trusting that they will be proved with as little delay as possible.

Additional articles admitted.

[169] PRANKARD *v.* DEACLE. Arches Court, Hilary Term, 3rd Session, 1828.—Where, on the death of the archdeacon, the proceedings in a criminal suit were moved after the execution of a proxy, but before appearance by the defendant either personally, or by proxy, from the Archidiaconal to the Episcopal Court, and there went on to sentence the original proctor appearing for him but without a new proxy: on appeal—the appellant having been cognizant de facto, of the progress of the suit; and through his proctor in the Court of Appeal, having recognized (by some of the formal documents in the cause) that the proctor in the court below was his lawful proctor, the proceedings are valid; nor is it a fatal objection that the articles were exhibited in the name of the surrogate, and not of the Judge.—Semble, that if no proxy at all were given, the proceedings would not be null unless it were proved that no authority was given de facto to the proctor; and that the principal was ignorant of them. The proxy is only essential to secure the adverse party, and to protect the proctor.—Quære: whether, the Archidiaconal and Episcopal Courts being concurrent, it is any irregularity even in form, on the death of the archdeacon, to invoke the causes in his Court into the Episcopal Court.—Usages of different dioceses, in respect to the exercise of jurisdiction, if not contrary to the general policy of law and to justice, may be said to constitute the law of the particular diocese in that respect.

[Referred to, *Fagg* v. *Lee*, 1873, L. R. 4 Adm. & Ecc. 141.]

This was an appeal from the Episcopal Consistorial Court of Wells, in a cause of the voluntary promotion of the office of the Judge.

The citation was of the following tenor:—

"Charles Sandiford, clerk, Master of Arts, archdeacon of the archdeaconry of Wells, in the county of Somerset, to J. B. F. G. and J. M. our lawful apparitors, greeting. We do by these presents authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite or cause to be cited Edward Prankard of

(*a*) The principle upon which the costs of the wife are taxed, de die in diem, against the husband is thus stated by Sanchez:—"Quando uxor litem divortii adversus virum intentaret, dubium non est, quin ei alimenta et litis expensæ à viro ministranda sint, ne expensis destituta à causâ cadat." Sanchez, lib. 10, disp. 8, s. 28. Vide also Oughton, tit. 206 and 207.

There is, however, an exception to this rule when the wife has a separate maintenance. Vide *Wilson* v. *Wilson*; *Davis* v. *Davis*, 2 Consistory Reports, pp. 203, 204.

the parish of Uphill in the said county, and our archdeaconry and jurisdiction, to appear before us, our surrogate, or lawful deputy, or some other competent judge in this behalf, in the Cathedral Church of St. Andrew in Wells aforesaid, and usual place of holding our Consistorial Archidiaconal Court [day and hour], then and there to answer to certain articles of our office to be ministered to him touching and concerning the mere health of his soul, and the correction and reformation of his manners and excesses; and more especially for quarrelling, chiding, and brawling in the parish church of Uphill aforesaid, on the third day of March instant, and for laying violent hands upon the Reverend John Henry Gegg, of the parish of Uphill aforesaid, on the same third day of **[170]** March in the said parish church, then and there to be exhibited and objected to him at the instance of the Reverend Thomas Deacle, clerk, rector of the rectory of the parish and parish church of Uphill aforesaid, the promoter of our office in this behalf. And further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof. Dated at Wells the 8th of March, 1826."

On the 9th of March Mr. Deacle executed a proxy: That, whereas a certain cause or business of office is intended to be commenced in the Consistorial Archidiaconal Court of Wells, promoted by *Deacle* against *Prankard*, I, the said Thomas Deacle, have nominated and do hereby nominate Samuel Prat, one of the procurators general of the said Consistorial Archidiaconal Court, to be my true and lawful proctor for me, and in my name to appear before the Reverend Charles Sandiford, clerk, Master of Arts, archdeacon of the said archdeaconry, his surrogate, or lawful deputy, or other competent judge in this behalf, and for me, and in my behalf, to issue, or cause to be issued, the usual citation in the said business to give in articles, to receive the answers of the said Edward Prankard thereto; to produce and examine witnesses thereupon, &c. &c.

On the 14th of March Prat appeared before the Reverend Robert Foster, M.A., surrogate of the archdeacon of Wells, and exhibited this proxy and returned the citation.

On the 24th of March Mr. Prankard, by a proxy duly executed, appointed Thomas Robins, one of the procurators general of the Consistorial Archidiaconal Court of Wells, to be his lawful **[171]** proctor, and in his name to appear before the archdeacon of Wells in the said Court, his surrogate or lawful deputy, or other competent judge; and in his behalf to receive articles, if any should be offered by Deacle, and to act as proctor until the final determination of the cause, ratifying and confirming whatsoever as his proctor he should lawfully do.

On the 26th of April both proctors (Prat and Robins) appeared before the Reverend Robert Foster, M.A., surrogate of the vicar general of the Lord Bishop of Bath and Wells, and alleged that the Reverend Charles Sandiford, the archdeacon of Wells being dead, the archdeaconry of Wells was void, and prayed; and the Judge, at their petition, decreed the several causes depending in the Consistorial Archidiaconal Court of Wells to be brought into this Court, and proceeded in immediately. They were accordingly brought in by the deputy registrar of the said Consistorial Archidiaconal Court.

On the same day Prat exhibited articles which, on the first session of Trinity Term, viz. the 30th of May, were admitted; and Robins gave a negative issue.

The articles were thus headed:—"In the name of God, Amen. We, Robert Foster, clerk, Master of Arts, surrogate of the Worshipful Richard Beadon, Master of Arts, vicar general and official principal, &c."

In the second and third articles were pleaded the 5 and 6 Edw. VI. c. 4, s. 1 and 2: and the two succeeding articles went on to charge—

"That the said Edward Prankard did upon the 3d of March, 1826, brawl, chide, and quarrel in the **[172]** parish church of Uphill aforesaid, and did then and there in an angry and passionate manner accuse the said John Henry Gegg of iniquity and injustice when presiding in vestries, and throw your finger close to his face, and say 'this is not my fist;' and did then and there use several other brawling and chiding words and expressions against the said John Henry Gegg. Also that, upon the day and in the church aforesaid he did, in an angry and quarrelsome manner, lay violent hands upon the said John Henry Gegg, by striking him a violent blow on his arm, and by repeatedly pushing his head and shoulder with great violence against the chest and other parts of the body of the said John Henry Gegg."

In the last article it was prayed "That the said Edward Prankard be duly corrected and punished according to the exigency of the law, and be condemned in the costs."

Upon these articles four witnesses were examined; and after informations, the sentence, of which the following extracts are subjoined, was promulged on the 16th of January, 1827:—

"In the name, &c. We, Robert Foster, &c. surrogate, &c. rightly and duly proceeding in a certain cause of office, &c. And the parties lawfully appearing before us in judgment by their proctors respectively, and the proctor of the said Thomas Deacle praying sentence to be given for, and justice to be done to, his party, and the proctor of the said Edward Prankard praying for justice to be done to his party; therefore we, Robert Foster, the surrogate aforesaid, having first maturely deliberated, do pronounce, decree, and declare that the said Edward Prankard did, not only **[173]** by words quarrel, chide or brawl in the parish church of Uphill on the said 3d day of March last, but did then and there lay violent hands on the said John Henry Gegg; and that the said Edward Prankard hath, by the latter of his said excesses, namely, in having laid violent hands upon the said John Henry Gegg at the time and in the church aforesaid, ipso facto, fallen into and incurred the penalty of excommunication, according to the statute of the fifth and sixth years of the reign of Edward VI. late King of England in that case made and provided; and for and as a person so excommunicated ought to be openly and publicly denounced in the face of the church, and ought to be imprisoned for a time not exceeding six months, according to the statute of the 53d year of the reign of George the Third, late King of England: And we do by these presents decree that the said Edward Prankard be so published and denounced, and that he be imprisoned for the space of fourteen days accordingly: and we do condemn him in the costs of this suit."

From this sentence Prankard appealed to the Court of Arches. The proceedings in that Court are stated in the judgment.

For the appellant, Lushington and Addams. Upon the proof of the articles we offer no objection; but, without referring to the merits of the case, we contend that, on principle, the whole proceedings are irregular and void. A citation issues against Mr. Prankard to appear in the Court of the Archdeacon of Wells: previous to his appearance, but subsequent to his executing a proxy, the archdeacon dies, and all causes then depending **[174]** before him are removed into the Episcopal Court of Wells by an order of that Court. Articles are there given and the cause proceeds to sentence. There is, however, nothing to shew that Prankard was cognizant of the existence of the suit in that Court: he has no legal summons from it; nor does he give a voluntary appearance in it, and he is not called upon for answers—a decree which, though irregular in these suits, not unfrequently issues from the provincial Courts. Even if a party were shewn to be cognizant in fact, the Court would not conclude him unless he were formally and legally cognizant. In *Durant* v. *Durant* (1 Add. 114), where, upon a decree for answers (to an allegation of faculties) personally served on the proctor, the husband was pronounced in contempt for not appearing; this Court held (though it was admitted that the defendant in that case had notice) that the only notice a party was bound to attend to was a service upon himself: "Whatever is to be done personally by the party, absolutely requires in strictness a personal service of the notice or decree for doing it upon the party."

It is clear that, if the proctor had no authority to appear in the Episcopal Court, all acts there done are nullities. This results from the nature of a proxy which is thus restricted by Oughton, "Procurator, generaliter, ad omnia constitutus, nil potest in istis quæ speciale mandatum requirunt; sed factum procuratoris nocet domino in his quæ non excedunt fines mandati" (tit. 48, note 6). Now, upon looking at the proxy given by the appellant **[175]** to Robins, it will appear that it is confined to the Archidiaconal Court: the whole authority of the proctor was derived from that instrument—he is bound by its terms and cannot exceed its limitations—that is the effect and meaning of a proxy. The invariable practice of exhibiting a new proxy, on an appeal to the Court of Arches, is a strong illustration of this argument.

In this case a concurrency of jurisdiction is not shewn, and it is not to be presumed: there are many archdeacons who enjoy a peculiar jurisdiction; besides, the proofs in a criminal suit should be accurate and precise. Even if it were established that the jurisdictions are concurrent, these proceedings would be null and invalid.

The inconvenience of a different course of practice is quite manifest. Can it be said, for example, that a suit originally instituted in the Court of the Archdeacon of St. Albans could be carried on the death of the archdeacon to the Episcopal Court at Lincoln? And the only difference between such a case and the present arises from the contiguity of the jurisdictions; as it accidentally happens that in this both Courts are held at the same place. The jurisdiction of the King's Bench and Common Pleas is concurrent, yet it cannot be maintained that writs issuing from the former Court are returnable into the latter. *Williams* v. *Bott* (1 Hagg. Con. 1), and *Thorpe* v. *Mansell* (ibid. 4 (note)), shew the great strictness with which these Courts watch criminal proceedings. In the first case the objection was not taken till after issue had been joined; and in both the objection was of form, **[176]** and not of essence and substantial justice, and yet it was upheld.

But, further, two objections arise upon the articles themselves: in the first place, they do not set forth the 53 Geo. III. c. 127, the statute under which the sentence would be carried into execution; and, secondly, and principally, they are headed—not in the name of the "Judge," but of the "Surrogate." No instance, we submit, can be adduced of a criminal suit being so instituted. Oughton, in the title—De modo procedendi per accusationem, says: "Si quis crimen commiserit, et de eodem non fuerit præsentatus, vel Episcopus, vel Archidiaconus non processerit contrà eum per Inquisitionem; quælibet tamen persona habet interesse, et Judicis Officium implorare, et voluntariè promovere: et Delinquentem, ad respondendum Articulis, ex Officio Judicis promoto, ministratis, in jus vocare potest, et parti comparenti Articulos (nomine Judicis et ex ejus officio promoto) objicere, et ministrare, et delinquentem accusare" (1 Oughton, tit. 150, § 1, 2). It must then be the office of the Judge that is promoted, and the articles must be given in the name of the "Judge," and not of the "Surrogate."

This objection has been taken in several cases, and always supported. *Nicholas* v. *Ernly* (Arches, 1727) was a suit for dilapidations originally brought in the Consistory Court of Sarum, by the patron of the living against the incumbent. Upon the incumbent being dismissed from the suit in the Court below, Nicholas appealed to the Arches; where Dr. Bettesworth (who was at that time the dean), observing that the articles ran in the name of the **[177]** "Surrogate," said, "he could take no cognizance of them, and sent back the process sealed up." A few years afterwards was the case of *Lewis* v. *Grosvenor* (Arches, Hil. Term, 1732)—a suit of defamation by a lady (it was at that time usual to proceed criminally for that offence), which came before the same Judge, on an appeal from Hereford, and was remitted because the articles were in the name of the "Surrogate."

Court. Have you taken any opportunity of examining the sentences to see that these suits were dismissed on that ground?

Argument resumed.

We have not; but the cases are in the handwriting of Dr. Compton; they are copied by him, and it appears that, both in one and in the other, Dr. Bettesworth held the objection fatal and declined entering into the merits.

Jenner and Dodson for the respondent. It is not denied that the cause is of ecclesiastical jurisdiction, nor that the proofs as to the commission of the offence are sufficient. Various objections, however, have been taken in respect to the validity of the proceedings themselves; and we admit they may be taken (as they have now been) at the latest period of the cause, provided the defects complained of materially injure the party and may have been incurable at an earlier period.

First, we apprehend that the appearance of the defendant by his proctor in the Episcopal Court of Wells, and the subsequent proceedings in that Court, and in this, the Court of Appeal (such as bringing up the appeal, suing out an inhibition, giv-**[178]**-ing a proxy, and exhibiting a libel of appeal, by which the proctor in the Court below is recognized as the lawful proctor of the defendant), have cured the alleged defect of the citation, and removed all the supposed grievances. After such recognitions it cannot be successfully contended by the appellant that he was not cognizant of the progress of the suit in the Court appealed from: and if he were not personally present, it was clear that he was by proxy, and therefore legally present. *Williams* v. *Bott* and *Thorpe* v. *Mansell* that have been cited, do not apply; nor is *Durant's case* in point: in that case the husband had no legal personal knowledge of the decree; and the doctrine of this Court has been, since the passing of the 53d Geo. III.

c. 127, that the party should have a clear and positive knowledge (but not in all cases a personal knowledge, if, for instance, wilful absence can be shewn) before the punishment, under that statute, be inflicted upon him. Further, in the absence of any proof to the contrary, it will be presumed that the episcopal and archidiaconal jurisdiction are concurrent: and the invocation of causes, therefore, is not irregular.

Secondly, the use of the surrogate's name has been much pressed as a fatal objection: in reason and principle it does not seem to have been improperly adopted, as he was the Judge de facto.

Thirdly, the 5 and 6 Ed. VI., under which the offence is charged, is set forth in the articles: but the 53d Geo. III. c. 127, § 3, only modifies the punishment; it therefore need not be pleaded, and in the sentence it is noticed. On the whole, we submit that the irregularities, if any, are not of such a character as, at this stage of the cause, to quash the whole proceedings.

[179] In reply it was said that the proxy exhibited in the Court of Appeal has no retrospective effect; that libels of appeal are uniform, and can only fairly be taken as admissions that certain proceedings have been had de facto; and in respect of any presumption as to a concurrency of jurisdiction, or otherwise, a sentence of excommunication surely can never be imposed on mere presumption.

Judgment—Sir John Nicholl. This is an appeal from a sentence of the Episcopal Consistorial Court of Wells, in a cause of office instituted against Edward Prankard, for "quarrelling, chiding, and brawling, and laying violent hands upon the Reverend John Henry Gegg, clerk, in the parish church of Uphill, on the 3d of March, 1826." That sentence was delivered on the 16th of January, 1827, declaring that the articles were proved, and imposing the penalties consequent upon the violation of the 5 and 6 Edward VI. c. 4, in some degree altered by the 53 Geo. III. c. 127, § 3. An appeal, however, to the Arches Court of Canterbury was interposed and duly prosecuted, and the case having been argued on a former day, it has now become my duty to pronounce judgment on that appeal.

The transaction, as laid in the articles, took place at a vestry-meeting held in the parish church, and called for the purpose of inspecting the rates and assessments. At this vestry were present the Reverend Mr. Deacle, the rector of the parish; the Reverend Mr. Gegg, who, I apprehend, is the curate; and who has been resident in the parish above twenty years; Hancock, one **[180]** of the churchwardens; Prankard, the defendant, one of the collectors of the rates, and several other parishioners. Prankard was in possession of the rates, but was unwilling to produce them for inspection, though requested and urged so to do; and it was in the course of this discussion that the brawling and smiting are alleged in the articles to have occurred.

Four witnesses have been examined in support of the charge, and they sufficiently prove it. The first witness is the churchwarden, Mr. Hancock, jun^r^., who thus deposes on the fourth and fifth articles:—

"That, on the 3d of March, 1826, there was a vestry-meeting in the parish church of Uphill, at which he was present, and also Edward Prankard, the defendant, and several other parishioners; that after the notice for the vestry was read Prankard pulled a paper out of his pocket, and said, 'There was the amount of the rates:' on which the Reverend Mr. Gegg asked where the rates were? Prankard, in a loud and angry manner, answered, 'that he would shew the rates in his own hands, but would not let them go out of his hands to any person;' and, shortly afterwards, in an angry and quarrelsome manner, told Gegg that he paid no poor-rates for the house he lived in, and that he (Prankard) was as honest a man as he (Gegg) was; and several times threw his finger close to Gegg's face, upon which Gegg said, 'Don't insult me, you are throwing your fist in my face,' and turned his back towards Prankard, who then said, 'It is not my fist, this is my fist,' clenching his hand, and holding it up before his own face: shortly afterwards Prankard put the rates into Deacle's hands, **[181]** who delivered them to Gegg, upon which Prankard flew at Gegg, and fell upon him, seizing him by the arm, and endeavouring to get the rates out of his hands, and pinned him against the wall, pushing his head and shoulder against Gegg's breast with great violence, as great as he could, and appeared to be in a very great passion; during which Gegg called out for help two or three times; deponent went to his assistance, and pulled Prankard away by force, who shortly afterwards left the church."

This witness, who was officially present, and attending to the whole proceeding, and who is an indifferent person, is confirmed by the Reverend Mr. Gegg and two other witnesses, so that the unlawful and indecent conduct imputed is fully established. Against these proofs nothing is opposed; the defendant has tendered no allegation, and has not addressed any interrogatories to the witnesses; and, even in argument, it has not been attempted to deny that the case is made out as respects the merits. So far, then, as regards the facts, there is no question nor difficulty.

As little doubt can there be that this is an ecclesiastical offence. The statute of Edward VI. was passed expressly to protect the church and churchyard against being made the scene of these uncharitable and unseemly acts of quarrelling and violence, so ill suited to the place. It is the duty of the Court to enforce the law, which, though of ancient date, is in no degree obsolete nor grown into desuetude; for it has uniformly since been acted upon whenever its violation has been brought to the notice of these Courts. The statute itself has annexed the penalty, viz. for brawling—**[182]** suspension ab ingressu ecclesiæ: for smiting—excommunication ipso facto; but the subsequent statute, 53 Geo. III., has qualified the punishment of excommunication, and substituted imprisonment, for any time not exceeding six months. It has not, however, given to these Courts the power of carrying into execution, by their own authority, the sentence of imprisonment; but of pronouncing the quantum within the above limit of six months, and of certifying the sentence into Chancery, whence a writ in conformity is to issue. Here, then, the facts being proved, there was a power to have imposed a severer sentence: the Judge, however, has mitigated the penalty by reducing the term to fourteen days. The Court below, therefore, was fully justified on the merits, and no ground of appeal existed; and unless some new objection to the formality of the proceedings be offered, I should pronounce against the appeal, with costs, and remit the cause.

This is the view of the case which the Court is disposed to take upon the merits. Something new, then, must be offered in this Court which was not offered in the Court below. No attempt has been made in this Court by the appellant to palliate the nature of the offence or dispute the sufficiency of the proofs: but, at the very hearing in this, the Court of Appeal, an objection is raised, for the first time, to the form of the proceedings; and it is argued that such an irregularity has found its way into the cause, that the whole is a nullity, and that the party is entitled to a dismissal. This objection is taken, not in respect to any want of jurisdiction on the subject-matter—the offence committed; for that is an objection that may be taken at any time, **[183]** even after sentence; (*a*) not upon any informality, by which the substantial justice of the case has been defeated, or which was attended with any injury to the appellant, such as that he had not the full means of defence against the charges; not upon any circumstance which, if irregular, might not have been known and taken advantage of in an earlier stage of the business, either immediately it occurred, or, at all events, before sentence in the Court below, or as a ground of appeal to be stated in the præsertim: but after the party has gone on throughout the whole proceeding in the Court at Wells, of which he was de facto conusant (for it has not been, and cannot be, suggested that he was not conusant), acting by his de facto proctor, who prayed articles, went to sentence, and entered an appeal; after he has proceeded in the Court of Appeal, and regularly appointed a proctor to prosecute the appeal, which proctor brings in the appeal, gives a libel, and goes on to sentence; at the very hearing the objection started is that the defendant was not legally, in point of form, before the Court from which the appeal is brought, the Episcopal Court of Wells.

The proceedings, out of which the objection arises, are contained in the process sent up from the Court of Wells. The first entry in that Court is:—

"Third session, Easter Term, 1826, before Robert Foster, clerk, surrrogate of Richard Beadon, vicar general and official principal of the bishop of Bath and Wells, in the presence of William Parfitt, deputy registrar. Robins and Prat alleged **[184]** that the archdeacon of Wells was dead, and the archdeaconry vacant, and prayed, and the Judge decreed, the several causes in the Consistorial Archidiaconal Court of Wells to be brought into this Court, and to be proceeded on immediately."

(*a*) Vide *Darby* v. *Cosens*, 1 T. R. 555; and *Leman* v. *Goulty*, 3 T. R. 4, as to prohibitions after sentence.

The proceedings were accordingly brought in by the deputy registrar of the Archidiaconal Court. The deputy registrar of both Courts is the same person—Parfitt; and both Courts are held in the same place—the Cathedral Church of Wells. Among the proceedings brought in was the original citation in the suit, described, *The Office of the Judge promoted by Deacle* v. *Prankard* (p. 169, supra).

The proxy signed by Deacle is not an immaterial document: it is dated on the 9th of March (p. 170, supra).

On the 14th of March the citation is returned, personally served, and the certificate is continued to the 11th of April, the first session of Easter Term. On that day nothing was done; the archdeacon being dead. These are all the stages of the cause in the Archidiaconal Court of Wells; the remainder of the proceedings were had in the Episcopal Court.

The next instrument is the proxy, dated the 24th of March, from the defendant Prankard to Robins (p. 170, supra).

On the third session of Easter Term, April 26th, Robins appears in the Episcopal Court of Wells for Prankard; exhibits his proxy and prays articles, otherwise his client to be dismissed. The articles are accordingly brought in, and stand upon admission.

[185] On the first session of Trinity Term the articles are admitted; a negative issue is given; and from that time the cause proceeds by the usual steps in the Episcopal Court of Wells, and in this Court: no subsequent irregularity in either Court is suggested.

The first objection taken is that the citation is null, for that, having required an appearance in the Archidiaconal Court, the Episcopal Court had no jurisdiction.

In answer it is said, first, that the citation is not essential to the proceeding if the party appears: the object of it is to bring the party before the Court: if it is irregular he may appear and object—if not served he need not appear at all; but if he appears he waives any objection so far as respects the formality of the citation. In this case he appears by his alleged proctor (whether that proctor was sufficiently authorized I will presently consider), he prays articles, joins issue, goes on to a hearing, appeals, and gives a new proxy in the Court of Appeal. This appearance, if sufficiently authorized, and these steps have then healed any informality in the citation; and bind him to subsequent proceedings.

It is, however, rejoined that the proxy was to appear in the Archidiaconal Court, that there was no authority to appear in the Episcopal Court; and, therefore, that it was no legal appearance. But this is the act of Prankard's own proctor, the person he had intrusted to defend him: and there is no attempt, no affidavit, to shew that the party was ignorant, in fact, of the proceeding; the proctors, the registrar, and the place are the same. If there had been no proxy at **[186]** all, would that render the proceedings null, unless it could be proved there was no authority de facto, and the principal ignorant that the cause was in progress in the Episcopal Court, and thus had lost the opportunity of defending himself? I know not that such a position has been maintained by any text-writer; and no precedent has been cited. The proxy is not essential, except to secure the adverse party and to protect the proctors; but if the case goes on, and the knowledge of the party is established, I cannot understand that all acts are void. Here, too, there was a proxy, and it has not been, and cannot in common sense be, contended that the authority asserted to be given, and to have been acted on, was not that intended to be given, viz. an authority to defend Prankard from this charge.

But Prankard has, I apprehend, legally recognised that Robins was his proctor in the Episcopal Court; for he has executed a proxy to a proctor of this Court, authorising him to prosecute this appeal, to give in a libel, and to do all other necessary acts, and engaging to ratify and confirm the same.(*a*) Whatever then has been done here by his proctor is the same as if done by the party.

(*a*) This proxy was in substance as follows:—

"Whereas there is now depending in the Arches Court of Canterbury a certain cause or business of appeal and complaint of nullity between Edward Prankard, heretofore of the parish of Uphill, in the county of Somerset, in the diocese of Bath and Wells, and province of Canterbury, but since and now of the parish of Wrington, in the same county, diocese and province, the party promoting the said cause or business,

The first act here is the libel of appeal; which, after setting forth that a certain cause of promot-[187]-ing the office of the Worshipful Richard Beadon, M.A., vicar-general, &c., and official principal of the Consistorial Episcopal Court of Wells, at the instance of *Deacle* against *Prankard*, was lately depending in the said Court before the Judge aforesaid, thus proceeds in the third article: "That the proctor of the said Edward Prankard believing his party to be very much injured and aggrieved, by and from all and singular the nullities and grievances in the said proceeding, hath rightly and duly appealed."

He had, then, a proctor in the Episcopal Court, and that proctor has duly appealed. The appeal is brought up in supply of proof, and shews who that proctor was.

[188] "In the name of God, Amen. I, Thomas Robins, one of the proctors of the Consistorial Episcopal Court of Wells, the lawful proctor of Edward Prankard, &c., and signed, Thomas Robins."

Here, then, Prankard, by his proctor in this Court, recognizes the fact that his proctor in the Episcopal Court had appealed, and that that proctor was Robins. Surely this removes the objection and estops him from asserting that he was not legally before the Episcopal Court at Wells.

But, secondly, is this—that it was coram non judice—even an objection in form? and is there any irregularity in the proceedings even formally? The general jurisdiction of the diocese is in the bishop, and archdeacons only have that which the bishop chooses to grant out to them. Causes of office, in particular, belong to the bishop, unless specially granted; and there are sufficient grounds to presume, till the contrary is shewn, that, at least, a concurrent jurisdiction was in this case reserved. The archdeacon is termed oculus episcopi, and by general law and primâ facie his duty is to assist the bishop.(*a*) This presumption is strengthened, in the present instance, by the regularity observed in the mode of invoking the causes; [189] by the style of the Court, "the Consistorial Archidiaconal," by its being held in the same place, by its being frequented by the same proctors, and by its having the

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of the one part, and the Rev. Thomas Deacle, clerk, rector of the rectory of the parish and parish church of Uphill aforesaid, the party against whom the said cause is promoted, on the other part.

"Now know all men by these presents, that I, the said Edward Prankard, &c. do appoint Edward Toller, the elder, and Edward Toller, the younger, notaries public, &c. to be my true and lawful proctors and proctor for and in my name to appear before the Right Honourable Sir John Nicholl, Knight, &c. and exhibit this my special proxy, and pray and procure the same to be enacted, and in virtue thereof to give a libel, &c. and to receive an allegation or allegations, if any be given, by or on the part and behalf of the said Rev. Thomas Deacle, clerk, &c. and generally to do all and every other act, matter, or thing, that shall or may be necessary or expedient to be done on my behalf in or about the premises until a definitive sentence in writing or final decree shall be had or given in the said cause, &c.; and whatsoever my said proctors or proctor, their or his substitute or substitutes, shall lawfully do or cause to be done herein, I do by virtue of the presents hereby promise to ratify and confirm the same. In witness whereof, I have hereunto set my hand and seal, the twenty-fifth day of April, in the year of our Lord 1827. "EDWARD PRANKARD."

Signed, sealed, and delivered in the presence of us, &c. &c.

(*a*) The office of the archdeacon is thus described in a letter from Pope Innocent the Third: "Sane consoluit nos tuæ fraternitatis devotio, quid ad officium Archidiaconi debeat pertinere, et in quibus per ipsum cura Episcopalis solicitudinis debeat relevari; et nos prout possumus respondemus:—Archidiaconus (secundum statuta Beati Isidori) imperat Subdiaconis et Levitis; Parochiarum solicitudo, et earum ordinatio ad ipsum pertinet, et audire debet jurgia singulorum. . . . Item in Epistolâ Beati Clementis Papæ Prædecessoris nostri, Oculus Episcopi Archidiaconus appellatur, ut loco Episcopi per Episcopatum prospiciens, quæ corrigenda viderit, corrigat et emendet, nisi adeò fuerint ardua negotia, quod absque majoris suis præsentiâ nequeant terminari." Decret. Greg. lib. 1, tit. 23, c. 7.

And Lindwood says: "Visitationem per modum scrutationis simplicis tanquam Vicarius Episcopi habet Archidiaconus de jure communi, sed in tali scrutatione ut nomine suo correctiones faciat præterquam in levioribus, nisi consuetudo hoc sibi tribuat, jus non habet." Lindwood, De Officio Archidiaconi, p. 49.

same registrar with the Episcopal Court; it is not a foraneous distant jurisdiction. The archdeacon's authority is rather given to relieve than to exclude the bishop; and if he dies, it is for the benefit of the suitors that all proceedings are immediately moved into the Episcopal Court, and that the business goes regularly forward. I can see no impropriety nor inconvenience in such a practice, and no illegality in point of principle; and from what was done without objection taken by the defendant or his proctor, who, as his proctor, appeared and exhibited his proxy in the Episcopal Court, there is sufficient to presume that it is the course and usage of this particular diocese: and it is well known that the different dioceses have their peculiar usages, and those usages, in respect to the exercise of jurisdiction, constitute pretty much the law in the particular case, unless they be contrary to the general policy of the law and to justice.

If, then, there is no irregularity, no nullity, in the Episcopal Court invoking the cause, and becoming a competent jurisdiction, the citation and proxy are both in due form; for the citation runs, "to appear before the archdeacon, his surrogate, **[190]** or other competent judge," and so also the proxy—"before the archdeacon, his surrogate, or other competent judge." If, by the death of the archdeacon, and the removal of the suits, the chancellor had authority to proceed, he became the competent judge; and Robins, Prankard's proctor, did right in giving an appearance and exhibiting his proxy in the Episcopal Court. It was clearly so understood in that Court, and it appears so to have been understood in the Court of Arches, when the appeal was entered, when the libel of appeal was brought in, and when the new proxy was given: and the objection was only taken at the hearing, it being then clear that there was no possibility of any other defence. I am of opinion, therefore, that though the citation was to appear before the archdeacon, and though the proxy was conformable thereto, the exhibition of that proxy in the Episcopal Court, and an appearance there, after the cause had been invoked, do not, when all the subsequent proceedings are considered, present, at this late stage, an objection which renders the suit from the beginning to the end a mere nullity.

The second objection taken is, that the articles are in the name of the surrogate and not of the Judge, the official principal—"The Reverend Robert Foster, surrogate of Richard Beadon." Now, unless there should be adduced some clear authority holding this to be irregular and illegal, I should deem it to be more correct and proper: for the suit is described as the office of the Judge promoted; the citation is to appear before the Judge or his surrogate, and in this case the office of the Judge is exercised by his surrogate. The whole is done by and before **[191]** his surrogate; and though it is proper and necessary to insert the name of the Judge whose functions the surrogate is executing, lest the chancellor himself should be unqualified from having no jurisdiction; still the surrogate of the chancellor is the person exercising the office which is promoted—he is, quoad hoc, the Judge.

Unless, then, there can be produced some clear and decided authorities where this has been held a fatal error, I can see no ground to allow the objection. No authority has been quoted from books, nor any dicta of judges, except two cases about a century ago, before Dr. Bettesworth, the then dean of the Arches, of which some slight notes have been referred to in argument—viz. *Nicholas* v. *Ernly* in 1727; and *Lewis* v. *Grosvenor* in 1732. Both these cases are said to have been dismissed, because the articles were in the name of the surrogate. I have caused a search to be made into the Arches papers, and there is nothing to be collected from those papers to lead me to suppose that the suits were dismissed on the grounds alleged; nor to confirm the statement given in the notes.(*a*) *Lewis* v. *Grosvenor* was a suit for defamation: and

(*a*) There are two contemporaneous suits, entitled *Nicholas* v. *Ernly*: one described as "Causa Appellationis," the other as "Causa Dilapidationis." Nicholas was patron, Ernly was rector of the church: the former suit, as appears from the sentence porrected, was a business of calling in and revoking a faculty for the repairs and alterations of the parsonage. The Court below at Sarum refused so to do; but the Court of Arches reversed that sentence. The other—the "Causa Dilapidationis"—appears to have been an original suit in the Arches, to which Ernly appeared under protest: his protest was allowed, and he was dismissed, but there is nothing to shew that it was a suit of office. Among the papers, however, of the late Dr. Swabey, a note of this case, in

though it is not now very usual to make such matters a ground of cri-**[192]**-minal prosecution, yet formerly, after the twelve months,(*a*) in which a civil suit could be brought for defamation, had elapsed, it was held that a party could be proceeded against by articles. It seems that this case was quoted by one of the counsel in argument in *Austen* v. *Dugger:* it was not noticed in the judgment;(*b*) but it appears by a note that the counsel, in reply, said "that the judge, whose surrogate gave the articles, was not named at all." This, I admit, would be a good and valid objection, because no jurisdiction is shewn. However, there is so much difficulty **[193]** in ascertaining what really were the grounds of sentence in either of these causes, that I cannot feel myself in any way bound by them.

The cases decided by my Lord Stowell, which have been quoted, do not come up to the present. In *Williams* v. *Bott* (1 Consistory Reports, 1), in the copy of the articles delivered to the defendant, the name of Sir William Wynne was inserted instead of that of Sir William Scott. It was held that the copy was, as respected the defendant, the same as an original, and the objection that the articles were in the name of a person who was not a judge was fatal: Sir William Wynne was not a competent judge—he had no jurisdiction at that time to give articles. I fully concur in that decision, but it does not apply to the present question. So in *Thorpe* v. *Mansell* (ibid. 4), the judge, whose office was promoted, was described as "vicar general," and not as "official principal:" now the vicar general is not the proper judge in criminal matters—"in foro contentioso"—the jurisdiction belongs to the official principal. Neither of these cases, to my mind, governs the present.

Upon the whole, I am of opinion that the proceedings are sufficiently regular to compel this Court to affirm the sentence. The case, of itself, is one that calls strongly for the interference of the law for the purpose of maintaining order and decency. I shall, therefore, pronounce against the appeal, and I feel myself bound to condemn the appellant in costs, and to remit the cause. If I have taken a wrong view of the objections, there are two remedies open to the party; either an appeal **[194]** to a superior tribunal; or an application for a prohibition, if the judge below is moved to issue a significavit, and to enforce his sentence: but, after the best consideration I can give the subject, my judgment is, that for the reasons stated, the sentence just declared is proper.

The Court affirmed the decree, and condemned the appellant in costs.

HAWKES *v.* HAWKES. Arches Court, Hilary Term, 3rd Session, 1827.—A proxy from a husband in India to institute proceedings in the Court of Exeter against his wife for adultery, held—the wife having changed her residence, before the commencement of the suit, into another diocese—that the Court may proceed, under letters of request from that latter diocese, without a new proxy from the husband.

[See p. 526, post.]

This was a suit of divorce, by reason of adultery, instituted by the husband against the wife, and which came by letters of request from the Episcopal Consistorial Court

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the hand-writing of Dr. Audley (at that time at the Bar), has been discovered, and kindly communicated to the editor:—

"*Nicholas* v. *Ernly.* Arches, 1726. From Sarum. Appealed from the rejection of articles against a clergyman for dilapidations, promoted by the patron of the living. The articles ran in the name of the surrogate who sat that day. The dean thought this a sufficient reason for the judge below to reject them; and therefore remitted the cause. Dr. Strahan for the appellant, said he saw no reason why the judge who sat might not object articles in his own name, as well as give sentence or sign an excommunication. Note.—The judge below had also rejected the articles because a suit for dilapidations would not lie, but against the executors of an incumbent."

In the case of *Lewis* v. *Grosvenor*, from the assignation book, it appears that it was an appeal from a grievance; that a sentence was given pronouncing for the appeal in the grievance; and that the Court retained the cause; and proceeded to a final sentence for the respondent.

(*a*) Now by the 27th Geo. III. c. 44, § 1, limited to six months.

(*b*) *Austen* v. *Dugger*, 3 Phill. 120; and see 1 Add. 307, the same case in a further stage.

of Bath and Wells; but it appearing that the proxy which the husband (who was on service in India) had executed was for the commencement of proceedings in the Consistorial Court of the Bishop of Exeter (in whose diocese Mrs. Hawkes was residing at the time instructions for the proxy were transmitted from this country); these facts were now mentioned to the Court, in order to take its opinion on the validity of the present proceedings, when it was stated by the proctor for Major Hawkes that at the period of their commencement Mrs. Hawkes was living within the jurisdiction from whence issued the letters of request.

Per Curiam. Under the circumstances, and on an affidavit that the residence of the wife was changed before this suit was instituted, the Court will hold the proxy sufficient. It may, however, be advisable for the **[195]** proctor of the husband to send out to India for a fresh authority, which may arrive before I am called upon to sign the sentence; but if it should not, I shall hold that the proxy, which has been exhibited, is valid.

THE OFFICE OF THE JUDGE PROMOTED BY GRIFFITHS *v.* REED AND HARRY, OTHERWISE HARRIS. Arches Court, Hilary Term, 4th Session, 1828.—In a criminal suit for incest instituted under circumstances indicative of vindictive feelings: sleeping in the same room (conduct which the parties proceeded against had been allowed without objection or complaint to continue for thirteen years), though attended by other facts inducing a strong presumption of guilt, is not sufficient proof of the offence; and the Court, unless most stringent and conclusive evidence be produced, will dismiss the parties; but give no costs.

[Referred to, *Rex* v. *Dibdin*, [1910] P. 103.]

This was an appeal from the Episcopal Consistorial Court of Llandaff from an order or decree made on the third day of February, 1825, by the Judge of that Court, whereby he rejected certain articles, and dismissed the defendants from all further observance of justice, in a cause or business of the office of the Judge, promoted by Evan Griffiths against John Reed, of the parish of Wick, in the county of Glamorgan, diocese of Llandaff, and province of Canterbury, and Alice, otherwise Alse Harris, of the same place, spinster, "touching their soul's health, and the reformation of their manners and excesses, and more especially for the crimes of incest, adultery, fornication, and incontinency by them committed."

The parties charged were in the relationship of uncle and niece.

The appeal was not prosecuted till the 21st of January, 1826; and on the by-day of Trinity Term in that year the cause was heard upon the appeal, when, on behalf of the respondents, several objections were made: it was contended that the citation was decreed at the instance of a proctor of the **[196]** Court from which it issued; that the defendants were cited in one and the same instrument; and that they were articled together; that the articles themselves pleaded, among other irregularities, "notorious suspicion; common fame and report; and great scandal and offence to and among the inhabitants of different parishes [specifying ten by name] and others in the neighbourhood thereof:" and were inadmissible both in form and substance.

The articles were directed to be reformed; and on the fourth session of Michaelmas Term, 1826, they were admitted as reformed. The heading of the articles confined the charge to that of incest; and with a view to substantiate it, the eight first articles pleaded, with great care and minuteness, the genealogy of the defendants, supplying, in some instances, the absence of proper exhibits (owing to the register-books of baptism having been lost or mislaid), by acknowledgments and by general reputation, that the parties in the pedigree were respectively related to each other in the manner set forth.

The ninth articled and objected "that all who commit the respective crimes of incest, adultery, fornication, and incontinency are and ought to be duly and canonically punished according to the exigency of the law."

The tenth—that, notwithstanding the premises pleaded and objected in the several preceding articles, "you the said John Reed, and you the said Alice, otherwise Alse Harry, otherwise Harris,(*a*) **[197]** some time in the year 1809 began to live and

(*a*) On the admission of the articles, as reformed, it was objected that the alteration in the name of the defendant Harris (as it stood in the citation and in the articles as originally drawn) from "Harris," singly, to "Harris otherwise Harry," was important and substantial, and in criminal pleadings ought not to be allowed.

cohabit together in a criminal and incestuous manner, and continued so to live and cohabit in the dwelling-house of you the said John Reed, in the said parish of Wick, and whilst Elizabeth Reed, wife of you the said John Reed, now deceased, was living and residing in the said house during great part of the said year 1809, and during the whole or greater part of the two following years, to wit, &c. And we do further article, &c., that you were in the constant habit during the said period of sleeping at nights together and lying naked and alone in one and the same bed, and thereby committed the foul crime of incest."

The eleventh, "that in consequence of the criminal and incestuous intercourse carried on between you, and your carnal knowledge of each **[198]** other's bodies, you the said Alice, &c., became pregnant, and were, on or about the 18th day of December, 1811, delivered of a female bastard child, since deceased, at the house of you the said John Reed, situate in the parish of Wick aforesaid, and in the county of Glamorgan, which said bastard child was begotten on the body of you the said Alice, &c., by you the said John Reed. And we do further, &c., that the said female bastard child being likely to become chargeable to the said parish of Wick, application was made to you the said John Reed as the reputed father thereof, by or on behalf of the churchwardens and overseers of the poor of the said parish, to provide for the support of the said bastard child; that in answer to or upon the occasion of the said application you the said John Reed did admit and confess that you were the father of the said bastard child,(*a*) and that you did as such, and in that character, on or about the 26th of December, 1811, together with Richard Bevan Reed, of the said parish, gentleman, enter into and sign and execute a certain bond to indemnify David John, George Thomas, and John Dunn, the then churchwardens and overseers of the poor of the said parish of Wick, their successors, and the other parishioners and inhabitants of the said parish, of and from all manner of costs and charges for or by reason of the birth, maintenance, and education of the said female bastard child, although at the earnest re-**[199]**-quest and entreaty of you the said John Reed the name of you the said John Reed, as the reputed father of the said bastard child, was not mentioned or specified in the said bond."

The article concluded by pleading divers admissions, both during the life of the child, and since its death, that they were respectively the father and mother of the child.

The twelfth pleaded the original bond as an exhibit.

The thirteenth, "that from and after the birth of the said child, and until the present time, you have continued and still do continue to live and cohabit together in a criminal and incestuous manner in the said parish; that during the whole or greater part of the aforesaid period, to wit, during the several years (1812 to 1825 inclusive), and the present year 1826, or at least until the citation issued against you in this cause, you have been living in the same house, and in the constant habit of sleeping at nights together in one and the same bed, and have frequently had the carnal use and knowledge of each other's bodies, and thereby committed the foul crime of incest."

The fourteenth, fifteenth, sixteenth, and seventeenth articles pleaded the usual and

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Per Curiam. The Court, however, overruled the objection, and observed that it did not consider the variation material; that, in these Courts, those irregularities only were fatal which might lead to some substantial injustice; that this variation would be productive of no uncertainty nor inconvenience, and the form had been adopted merely to connect the female defendant with the certificate of the entry of her father's marriage, where it appeared that his designation was "Harry;" that in that county "Harry" and "Harris" were the same name, for it had become usual, with the present generation, to add the final "s," thus "David" became "Davis," "Jenkin" "Jenkins," "John" "Jones;" that if advantages were taken of such slight informalities in County Courts, it would be hardly possible to succeed in criminal suits; that it was important to public morals that such a scandal, if it existed, should be suppressed; and therefore admitted the articles, reserving to the party any advantage from want of proof of identity.

(*a*) This averment was negatived by the evidence of George Thomas and John Dunn, the two parish officers. Thomas deposed that "Reed did not then or ever to the deponent acknowledge that he was the father of such child;" and the evidence of Dunn was to the same effect.

formal averments, and the articles concluded by praying that the defendants "might be duly and canonically punished and corrected according to the exigency of the law, and be condemned in the costs of the complainant."

To these articles a responsive allegation was given on the part of the defendants, and admitted without opposition. The substance of this plea may be gathered from the judgment of the Court.

Twelve witnesses were examined in support of [200] the articles and exhibits, and thirteen upon the allegation; and the argument principally turned upon the credit due to the testimony of Ann Lewis, the only witness, examined by the promovent, who spoke directly to acts of criminal familiarity; and whether the Court could act on the evidence of a single witness, though corroborated by circumstances of strong suspicion.

Lushington and Addams contended that the exception taken to Lewis was to her character, and not to her evidence; and that after interrogatories had been administered the ancient doctrine of these Courts was, that the witness was not open to exception. Her evidence also was probable in itself, and consistent with the admitted facts in the cause; though it was true, therefore, that she was a single witness, yet her evidence being corroborated, was sufficient to make out the charge: this had been decided in the case of *Wheatley* v. *Fowler*, on an appeal from Norwich, where the appellant (the original defendant) had been articled against for adultery, and found guilty on the evidence of a particeps criminis in conjunction with some corroborating circumstances. In the Arches the judgment of the Court below was sustained, and these concurrent sentences were afterwards affirmed, with 100l. costs, by the High Court of Delegates.(*a*)[1]

Jenner and Haggard for the respondents, argued that in a criminal suit the asserter of the charge was bound to establish it; and that, more especially in a case of this description, where the proofs should be strict and full in proportion to the enormity of the accusation, and the penal consequences [201] it involved. Here the proof of the charge rested on the sole testimony of a witness who had discredited herself, and whose character and evidence were completely destroyed.

In respect to the case of *Wheatley* v. *Fowler*, it appeared that Wheatley, a Methodist preacher at Norwich, was articled against by Fowler for adultery and fornication with Fowler's daughter, Mary Mason (before her marriage), and for other excesses; that Mason having been previously prosecuted, had, upon the confession of the crime, been enjoined penance;(*a*)[2] and that this was alleged and admitted when she was produced on a compulsory, in support of the articles; and that interrogatories were addressed to her. The corroborating circumstances, too, in that case were: that on two several occasions Wheatley acknowledged to Paul and Keymer, two of the elders of his congregation, and who were examined on the articles, that the charges were well founded. He had also been seen in most indecent postures with three other women; and displaying his own person, and theirs, in a most offensive manner.(*b*)

In that case, then, the witness, previous to her examination, had been restored to credit, and that in confirmation of her evidence there was fortissima probatio—the confession of the party himself.

[202] *Judgment—Sir John Nicholl.* The full argument, which the Court has heard, has brought the true point of this case into so narrow a compass that it is unnecessary to state either the proceedings, or the evidence at any length. It is a suit for incest brought against the two defendants, Reed and Harris, who stand towards each other in the relation of uncle and niece: the relationship is fully established; it is not indeed denied that Alice Harris is the daughter of Reed's sister; and the only question then is, whether the incestuous intercourse is proved.

It has been justly observed that the charge, if true, is highly criminal and scandalous; that it would subject the party to a severe punishment—to excommunica-

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(*a*)[1] *Wheatley* v. *Fowler*, Delegates, 1758.

(*a*)[2] The Court of Arches rejected, with 50l. costs, an allegation exceptive to the credit of Mary Mason, in which it was alleged "that she had not performed any public or private penance for the crime of pretended adultery which she had confessed to have committed."

(*b*) The defendant was enjoined a solemn and public penance, to be performed in a linen cloth with a paper writing, denoting his crimes, fixed on his breast, in the usual manner.

tion, which, by a late act (53 Geo. III. c. 127, s. 3), is commuted for "such imprisonment, not exceeding six months, as the Court, pronouncing or declaring a person excommunicate, shall direct;" and that, therefore, the proof of the charge must be clear and full.

The incestuous connection is alleged to have commenced in 1809, and to have continued till the promotion of the present suit. During a part of the time Reed's wife was living, and in the same house, so that there was adultery aggravating the incest; that circumstance increases the demand for proof by diminishing the probability of the fact. It may seem strange that if this infamous connection had been so long subsisting—for fifteen years—no person in the neighbourhood should sooner have attempted to abate the scandalous and **[203]** offensive nuisance; and that the suit should remain to be at last brought by an attorney, living at four or five miles distance, between whom and the uncle there had been various litigations on other subjects. It may happen that the uncle, though a gentleman of some property, may be more immediately surrounded by persons of lower degree not very ready to take up such a matter—for instance, his tenants or farmers—that he may have little or no intercourse except with his inferiors, who, even if their notions of decency were outraged, might not choose to engage in litigation with him. The suit certainly does not appear to have been brought at last free and clear from a suspicion of other motives than a wounded sense of moral feeling. These considerations, in several views, do not diminish the necessity of strict proof.

That any act of criminal intercourse was ever seen is not suggested; no indecent familiarity; no personal liberty; nothing which, in proceedings of a different nature, is termed a proximate act is alleged; but it is fully proved that for fifteen years Reed and Harris slept in the same room, in which however there were two beds.

There is indeed one witness, and one witness only, who deposes that they slept constantly in one and the same bed, and that she had seen them in bed together; that witness is a woman of the name of Ann Lewis, who deposes that about ten years ago (about 1817) she went to live in Reed's service as maid of all work; she lived there about seven years, and that during the whole period Reed and Harris slept in one and the same bed together every night. She adds particular reasons **[204]** for believing criminal acts, and states "that she has frequently seen them in bed together."

If this witness is believed, her evidence, slightly corroborated by circumstances, would afford a sufficient proof of the crime: but her credit and character have been excepted to in plea; and two witnesses have been examined who, "having heard her give evidence at Cardiff on the inquiry [an inquiry arising out of a dispute between Reed and Griffiths, the parties in this suit], do not hesitate to depose that Ann Lewis is a person not to be believed on her oath." In that cause Griffiths failed, and Reed recovered against him damages to the amount of 150l. Now this goes far to remove the testimony of Ann Lewis out of the case.

I may also mention that this witness, it appears, after she had quitted Reed's service, became servant to Griffiths: but this is not all; she positively asserts that they slept constantly and openly together, "the same as if they had been husband and wife;" she does not even mention that there was a second bed in the room; but there are other witnesses produced, two by Griffiths himself, who had been Reed's servants, Leyson and Hopkins, deposing that they, Reed and Harris, "slept in separate beds, and that they never had any reason to believe that they slept in the same bed."

These witnesses were not in Reed's service at the same time with Ann Lewis; but there is a witness produced by the defendants, Mary Evan, who was Reed's servant for six months, and who was there a considerable time with Ann Lewis; for she states that Ann Lewis, not being able to get a place, was allowed, from charity, to remain at Reed's **[205]** during the winter, and Evan's testimony is that there were two beds—that each was slept in, and "she has no doubt that Reed slept in one, and Harris in the other, and she has no reason to believe or suspect that they were ever criminally connected."

It is difficult to reconcile Ann Lewis and Mary Evan—which tells the truth, or what degree of credit is due to either, need not be decided: the burden of proof lies on the promovent, and it may be difficult to place great confidence in many of the witnesses; but looking to all the preceding circumstances respecting Ann Lewis'

credit, and to the whole tone and tenor of her deposition, I am of opinion she is a witness to be laid very much, if not altogether, out of the case.

Is there, then, other evidence upon which the Court can convict the defendants? There are facts which cannot be denied exciting suspicion—violent suspicion—of the crime charged. The very circumstance of their sleeping in the same room, even in separate beds, is scandalously indecent, unless under the pressure of absolute necessity from extreme illness or abject poverty. The latter excuse cannot be set up. Reed is stated to be a man of property; his house had several rooms in it with beds in them; but what is the defence and explanation?

In 1809 Reed had a violent paralytic attack, was extremely ill, probably in some danger for a time, and in a senseless state: his wife suffered something of a similar attack about the same time: she, therefore, could not attend him; on the contrary, she required the maid-servant to attend her. In this distress the niece was sent for [206] to assist in waiting upon her uncle, the defendant, and Mrs. Reed was very glad of her arrival.

Thus far there arises no suspicion, and there might be no impropriety so long as the violence of the paralytic attack continued unabated: though, considering that the niece was a spinster of thirty-three years of age, and that the uncle was only about sixty, perhaps a married woman of the village of more advanced age might have been a person more proper and decent to attend him as nurse, to sleep in his room, and to do all offices required for him; but it might be pushing refinement and delicacy too far to impute any suspicion to this commencement of her sleeping in his room.

But the violence of this particular attack, which (so long as it continued undiminished) extinguished suspicion, was soon got over: he recovered; he never had a second attack; he was restored so far as to be able to walk about the village with a stick; to ride on horseback, being assisted on and off; to ride to market, sometimes attended, sometimes alone: he could go to Cardiff to be present at the writ of inquiry, nay, he seems to have gone to the assizes at Hereford, a distance of sixty or seventy miles. Whether he had any person on these occasions to sleep in his room does not appear, but it is in no degree made out that his bodily infirmities were such as to justify the indecency of having a young female to sleep constantly in his room. If he required any assistance in the night, either to administer medicines (which is not proved) or for any other purpose, the unseemly indelicacy might have been avoided by the female sleeping in some other [207] room, and by having a bell put up, instead of his knocking or poking with his stick; for if Alice Harris were hard of hearing, the other servants were not. The mere fact then of her sleeping in the same room, though in another bed—she about thirty-three, he about sixty—is, of itself, not only indecorous but suspicious; but this suspicion becomes extremely violent when some other admitted facts are adverted to.

On the 18th of December, 1811, Alice Harris was delivered of a female child, who died in infancy: she removed into another room—the best room—only for the purpose of lying in; and as soon as her confinement was over she returned to sleep in Reed's room: during her absence no other person slept in his room, the necessity was not sufficiently urgent to require any person, as far as appears by the evidence of Leyson. The parish officers were on the alert to get the child sworn in order that the parish might not be burdened with the maintenance of it: Reed prevented this, and a joint bond, from his son and himself, was given to the parish. This bond was at first objected to because the father of the child was not named; but upon its being re-executed and attested by a neighbouring attorney-at-law, the bond was accepted.

There is no evidence that at that time Reed acknowledged himself expressly to be the father of the child, nor that he or Alice Harris has since so acknowledged, except the testimony of Ann Lewis, to whom I cannot venture to give any credit on that circumstance: but these facts lead to a violent suspicion that Reed was the father, and that suspicion is much strengthened by no other father [208] being assigned to this moment. It is suggested that there might be reasons for not disclosing the father; and that young Reed, the son, might be the person. No satisfactory reason can be advanced sufficient to counterbalance the odium and scandal of allowing the suspicion to remain that this child was the fruit of an incestuous connection between the uncle and niece. If young Reed were the father there is no incest; he was only her cousin; but neither the facts nor the conduct of the parties support such an explanation: there is no proof that the son was living at home; there is no proof of

any resentment shewn towards either the son or the niece on account of this child; on the contrary, the father and son join in the bond; the niece remains in the house; she is allowed to be confined in the best bed-room, and as soon as she recovers she returns to sleep in the bed-room of her uncle; and even now, when prosecuted for incest, no other father of the child is set up or suggested, though it would have been a complete defence to the strongest circumstance in the charge.

If the parish officers had been as alert in supporting the moral character and public decency of their parish (of which the churchwardens are to a certain degree the guardians) as they were in protecting the parish against the maintenance of the child; and if they had at that time brought a suit, recenti facto, to put an end to this scandal and nuisance; and in defence there had been no other father assigned, the circumstances might have gone far to establish the actual incestuous connection. But when neither parish officers nor respectable neighbours come forward; when the matter is allowed to rest for thirteen years, and is at last taken [209] up under the feelings and occurrences that attended the commencement of the present suit; (*a*)[1] when all the witnesses who where servants in the house, with the single exception of Ann Lewis, swear they never saw any indecency, nor any thing to lead them to suppose that the defendants did not occupy separate beds—when they will not depose even to a belief of a criminal intercourse—it is possible that no act of incest may have taken place; and that this highly suspicious and indecorous course of conduct may have gone on from not entertaining a due feeling of its impropriety; it is possible that the uncle, having no sense of decency nor regard for his own character, nor for that of his niece (whose reputation was already destroyed by the birth of this child), might persevere in setting public opinion, and the scandal of the example, at defiance, rather than forego the convenience of having her to sleep in his room. This is possible; and I can hardly venture on the present evidence to decide that the charge is proved—a decision which would impose upon the Court the duty of pronouncing excommunicated, and through the medium of a significavit of consigning to a prison for a period not exceeding six months, both the niece and this old man, now at the age of seventy-[210]-six years, and under very great bodily infirmities: he is too near the grave for such a step, if an imperative duty does not call upon the Court to take it.

But although I shall dismiss the parties, I shall certainly not dismiss them with costs. Here is a violent presumption proved. The old rule of practice as laid down by Clarke is, that if neither the charge, the "crimen objectum," nor violent suspicion of the charge, "vehementes præsumptiones criminis objecti," be proved, the party accused shall be dismissed with costs, unà cum suis expensis; but if public fame or vehement presumptions are proved, and the defendant be required to produce compurgators (ob quas purgatio indicta fuerit), then the defendant may be condemned in costs. (*a*)[2]

The "purgatio indicenda" is now a practice become obsolete; and the matter of costs is left much in the discretion of the Court, upon a just consideration of all the circumstances of the case. If this suit had been brought by the parish officers, or by some neighbour apparently from a sense of moral duty, I might have felt myself bound to adopt the latter rule, and to have condemned the defendants in costs; for here is a vehement suspicion proved. But remembering how many years have been allowed to elapse—remembering also the occurrences which manifestly induced the bringing of this suit, I shall arrive nearest at the justice of the case by dismissing the defendants, leaving each party to the payment of their own costs.

(*a*)[1] It was proved that in an action of trespass brought by Reed against Griffiths and others, and which stood for trial at the Summer Great Sessions for the county of Glamorgan in 1824, the defendants withdrew their plea, and suffered judgment to go by default; and that a writ of inquiry was afterwards executed before the Sheriff and a jury, when the damages were assessed at 150l., besides the costs. It was also proved that in June, 1824, a suit of the same nature as the present had been instituted in the Court of Llandaff, at the promotion of William Rees (at that time servant to Griffiths), against the same defendants; from which they were dismissed.

(*a*)[2] Vide Clarke's Praxis, tit. 321, 322. Also Oughton, tit. 149, and tit. 150, s. 7.

[211] PARKER *v.* HICKMOTT AND PARKER. Prerogative Court, Hilary Term, 1st Session, 1828.—On the testator's death an alteration appearing in a will which, during his lifetime, was in the custody of the writer (one of the executors), who swore such alteration was made with the testator's concurrence, but gave no further explanation, and declined to propound the will so altered, the Court will assign the executors to take out probate of the will in its original state, the residuary legatees on being personally cited to propound the will, or to shew cause, &c., not appearing.

On motion.

John Parker, late of Seven-Oaks, died in the month of May, 1827, leaving a will regularly attested, and dated 11th of December, 1826, whereby he devised his freehold estate to his brother Henry Parker, charged with an annuity of 25l. to his (John Parker's) wife for her life. He also, among other bequests and legacies, gave to his wife a legacy of 1000l. The deceased appointed his brother Henry Parker and William Hickmott executors.

The will was written by Henry Parker, who had the custody of it during the life of his deceased brother. On the will being produced there was a manifest alteration of the widow's legacy, the words one thousand having been erased, and the words six hundred written upon the erasure.

Henry Parker stated in an affidavit that the legacy was reduced by the desire and with the concurrence of the testator; but gave no further explanation.

[212] A caveat having been entered on the part of the widow; the same was warned: but the proctor for the executors having declined to propound the will in its present state, a decree issued at the instance of the widow against the residuary legatees (Henry Parker being one), citing them to propound it in that manner, or to shew cause why the executors should not be assigned to extract a probate of the will as originally written, with the said legacy of 1000l. reinstated.

This decree having been personally served; and no appearance given—

Jenner on behalf of Mrs. Parker, moved the Court accordingly; and that the costs of the widow should be paid out of the estate.

Per Curiam. It is not stated when the erasure was made: but there being no party before the Court who prays probate of this will with the alterations; and a decree with intimation, issued under seal of the Court, having been personally served, I shall allow the probate to pass agreeably to the tenor of the decree; and direct the costs of the widow to be paid out of the estate.

Motion granted.

IN THE GOODS OF JOHN HOWE. Prerogative Court, Hilary Term, 1st Session, 1828.—When pencil alterations are inferred to be deliberative, probate in common form will be granted of the paper, without such alterations; the only party materially injured by such grant having executed a proxy of consent.

On motion.

John Howe, late of Hoxton, died on the 25th of November, 1825. By his will duly made and **[213]** executed on the 27th of April, 1824, he appointed John Faulkner and James Hall executors. Ann Elizabeth Buckle, spinster (now the wife of George Passingham), was the residuary legatee.

On the 24th of November, 1827, the testator was attacked with paralysis, and continued insensible till his death on the following day. The will was found by Mr. Faulkner (within a few hours of the deceased's death) locked up in a cupboard with his plate and other articles of value, and with his papers of moment and concern. The will was in an envelope with the seal broken. Upon being opened, several erasures and interlineations made in pencil, and very indistinct, were discovered; and it was presumed they were made by the deceased, who had informed Mr. Faulkner that he contemplated some alterations in his will. These alterations were, with the single exception of an increase of a legacy of 75l. to 100l. to one of his nephews, in favour of the residuary legatee. The property of the deceased was under 2000l.

Addams moved that probate should be granted to the executors without the pencil marks; the residuary legatee having consented and executed a proxy to that effect.

Motion granted.

[214] ARBERY *v.* ASHE. Prerogative Court, Hilary Term, 1st Session, 1828.—The Court will not at once reject an allegation propounding a will, which sounds to folly when facts are pleaded, shewing that the deceased, up to his death, conducted himself in the ordinary concerns of life as a sane man.

On the admission of an allegation.

The Reverend Robert Hoadly Ashe, late of Crewkerne in the county of Somerset, died in May, 1826, leaving a widow (since dead) and several children. In June following, letters of administration, as if he were dead intestate, were granted by this Court to Charlotte Hoadly Ashe, spinster, one of his natural and lawful children. In September last a decree was extracted at the suit of Elizabeth Arbery (wife of John Arbery of Weymouth) calling upon Miss Ashe to bring in the letters of administration, and to shew cause why the same should not be revoked; and administration, with a will (as asserted) of the deceased annexed, be granted to her as the universal legatee.

In support of this paper an allegation, consisting of ten articles of the following effect, had been brought in; and its admissibility was now debated.

1. That the deceased died at the age of seventy-five, leaving a widow and Charlotte Hoadly Ashe, spinster, and others his natural, lawful, and only children; that he was rector of Misterton in the county of Somerset, and also perpetual curate of Crewkerne in the said county; and had so been from 1775; that the widow and children of the deceased, save William Hoadly Ashe (one of his **[215]** said children), quarrelled with the deceased about sixteen years before his death, and during all that period resided separate and apart from him, and to the time of his death were never reconciled to, nor had any communication with, him; that his property amounted to 1500l.; and that the widow and the deceased's children were possessed of property entirely independent of him.

The second pleaded that William Hoadly Ashe resided at Crewkerne with his father (the deceased), who manifested on all occasions the most parental affection for him; that from and after the death of the said W. H. Ashe, who died at Crewkerne on 4th February, 1818, the deceased (Dr. Ashe) often declared, in the presence of divers credible witnesses, "that his family, meaning his wife and children, should never benefit by him; should have none of his property; and that he would rather give it to a stranger:" and he also often declared he intended to bequeath his property to Mrs. Arbery.

The third—after pleading the factum of the will; and that it was in the deceased's own hand-writing—"that the deceased did, on the day of the date thereof, after he had drawn and prepared the will, walk to the Swan Inn in the village of Misterton (at that time and now kept by Mary Rendell, the aunt of the party proponent), where he had been in the habit, for upwards of fourteen years, of visiting and holding his annual audit, and receiving his tithes; that after he had arrived at the inn he took out of his pocket his said will, and then, in the presence of several persons, signed it, and published and declared the same to be his last will and testament." The article then pleaded the **[216]** attestation, and that the deceased was of sound mind.

The fourth—that after the execution of his will he folded it up in an envelope, which he sealed and addressed to Mrs. Arbery; and then left it in the custody of her cousin, Susan Rendell—and requested it might be given to the said Elizabeth Arbery; which was accordingly done.

The fifth pleaded the great age and blindness of Mrs. Rendell; and that on the day aforesaid the deceased also brought with him a paper-writing, which he said required to be signed by the churchwarden of Misterton, for procuring an allowance for her from the Blind Institution in London, and that the deceased had been in the habit of preparing for her similar papers for many years.

The sixth pleaded the hand-writing of the instrument propounded.

The seventh—"that the deceased, some time after he had so executed his will, whilst conversing with Mrs. Arbery respecting it, expressed himself, in the presence of credible witnesses, as follows:—'I never will make another will, as I am a minister of the gospel; and mind, as soon as I am dead, that you come and take possession of your property.'"

It was also pleaded that the deceased, though somewhat eccentric in his conversation and habits, was at all times, till his death, of sound mind; that for fifteen years preceding, and for some time after, the making his will he invariably performed

divine service, preached, administered the holy sacrament, and did all the duties of incumbent of Crewkerne and Misterton, and managed all his own concerns.

[217] The ninth—that neither the party proponent, nor her husband, heard of the death of the testator until some time in June last, when she was informed that letters of administration to his effects had been granted to Charlotte Hoadly Ashe, the other party in this cause, who had possessed herself of his property.

Lushington for the allegation.

Dodson contrà.

Judgment—Sir John Nicholl. The paper propounded in this cause is a most extraordinary one; more especially with reference to the deceased, and considering his condition and station in life. It is in these terms:—

I promise & swear that I will give all my Plate—Watch & Seals—Rings and all that I have in the World—at my decease—
I promise & swear that I will give Elizabeth Arbery—at my Decease—all that I have in this world or ever shall have in wtaver in money or lands—

ROBT. HOADLY = ASHE D.D.

Witness our hands, Elizabeth Cleal, Martha Rendell.
Dec. 14th, 1824.

A paper couched in these strange terms, and written in this strange manner, coming from a person of education raises a great doubt, whether it could have been the offspring of his mind when sound. The custody also of the paper, when sent to Mrs. Arbery, has been careless; for it is in a very torn and shattered state: this shews that [218] she had no great confidence in its validity; and the delay of twenty-one months in producing it leads to the same inference. The whole proves that Mrs. Arbery has a very arduous case to make out, in order to establish that the deceased was of sound mind at the time of the execution; still I do not know that the Court, on the face of the paper, can positively pronounce that he was not so. Mrs. Arbery may, perhaps, do well to consider whether she will not give up the pursuit. It may be of some benefit for her to relinquish this paper: in persisting in this undertaking she will incur a considerable risk of expence, as, if it is shewn that he was insane at any previous time, the appearance of the paper itself may be sufficient to condemn it.

There may, however, be facts accounting for the disposition. It is pleaded that his family had a separate and independent provision—though its nature or amount is not stated; nor does the allegation describe what was the sort of intimacy the deceased kept up with Mrs. Arbery, nor give any reason why she was selected as the object of his bounty. It is also pleaded that he brought this paper to the place where he usually held his audit, and there he executed it: there is nothing extraordinary or unnatural, perhaps, that he should direct it to be delivered to the party benefited. It is also alleged that he subsequently recognized it as his will, and declared he would make no other; and it is further pleaded that after the execution of it he continued to perform divine service in the parish church, and to administer the sacraments.

The whole tenor and shape of the paper very [219] strongly "sounds to folly." Swinburne—in the passage that has been quoted—thus states the law: "If in the testament there be a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's frenzy, insomuch that if there be but one word sounding to folly, it is presumed that the testator was not of sound mind and memory when he made the same."(*a*) Such is the doctrine of Swinburne; but it applies only to the case of a person who is sometimes sane and sometimes insane; and of whose state when he wrote his will there is no direct proof. I cannot, therefore, on the face of the paper, reject it at once, and pronounce the man insane in opposition to such conduct in life as I have before referred to; but I strongly recommend an arrangement out of Court.

As in cases of married women there should be some security for costs, the husband must, of course, join in the proxy, more especially here where the woman is in a low condition of life, and the property amounts in value to 1500l.

Allegation admitted.

(*a*) Swinburne on Wills, part 2, s. 3, ad finem.

In the Goods of Armine Anne Dyer. Prerogative Court, Hilary Term, 2nd Session, 1828.—Probate may be granted in common form of a will written entirely in pencil by the deceased, who, a few days before death, declared she wished it to operate, unless altered.

On motion.

The deceased, on the 26th of December, 1827, died at the age of about 80 years, a spinster, [220] possessed of personal property amounting to 3000l. She left four persons entitled in distribution in case of an intestacy.

On the 20th of December, and on a subsequent day, the deceased spoke of her will—described where it would be found—and said that she had appointed her nephew executor; and that she intended the same should operate unless she altered it. Upon her death, a few days afterwards, a will, written in pencil, entirely in the handwriting of the deceased, and dated on the 21st of July, 1823, was found in conformity with her declarations.

Lushington on affidavits of these facts moved that the paper should be admitted to probate.

Per Curiam. By granting this motion the Court will, of course, not preclude any one interested in the property from contesting this paper at a future period; but if the contents of these affidavits are true (and the Court has no reason for doubting them), the paper is clearly valid. The application, however, would have been stronger if it had been accompanied by the consent of those interested under a prior will, and who may be prejudiced by its revocation.

Motion granted.

[221] Stanley *v.* Bernes. Prerogative Court, Hilary Term, 2nd Session, 1828.—In an administration, pendente lite, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the Court will not dispense with such administrators entering into a joint bond.

[See further, 1830, 3 Hagg. Ecc. 373.]

On motion.

This was an application to the Court by both parties to grant an administration, pendente lite, jointly to James Campbell, agent of Mr. Bernes, and William Collins, agent of Mr. Stanley, and limited to recover the sum of 14,800l. due to the estate of John Stanley, the deceased; of which 6900l. were due from Mr. Campbell, and 7900l. from Baring Brothers and Company; and also to receive the dividends on certain stock standing in the deceased's name; and the Court was further asked to permit the administrators, instead of entering into a joint administration bond for the property, so limited, to enter into separate bonds, each to the amount only of a moiety of the limited property.

Lushington and Addams, counsel for Mr. Stanley.

Jenner and Phillimore for Mr. Bernes.

Per Curiam. The state of the property renders such an administration necessary. Many of the facts are pleaded to have occurred, and must be enquired into, in a foreign country; and, consequently, much time may elapse before the case is heard. The administration, however, should be limited, not only to recover and to receive the several sums, but also to invest them in the public funds.

The prayer that the administrators may give [222] separate bonds is quite a novel application—I can see no necessity for it, nor would any advantage result, because administrators must always act jointly; they cannot, like executors, act independently. The Court, therefore, can discover no reason for departing from the rule hitherto universally observed. Administrators, pendente lite, are the appointees of the Court, and are not to be merely considered as the nominees, or agents, of the several parties on whose recommendation they are selected.

Limited administration decreed—the usual security being given.

In the Goods of John Herne. Prerogative Court, Hilary Term, 2nd Session, 1828.—Administration with a paper annexed, wherein were sundry alterations in the body, a blank left for the date, and which appeared, from internal evidence, to have been written more than nine years before death, and was endorsed "outline of the will," cannot be granted, in common form, on the exhibition of a

proxy of consent from all interested under an intestacy, there being no evidence to rebut the presumption that the paper was deliberative.

On motion.

John Herne, formerly of Islington, in the county of Middlesex, but late of Woolstone in the county of Warwick, died a bachelor on the 1st of December, 1827, leaving Mary Whiteman, wife of William Whiteman, and Elizabeth Davis, widow, his natural and lawful sisters, and only next of kin, who, with four nephews, the children of a deceased sister, Eleanor Johnson, were the only persons entitled in distribution to his personal estate, of the value of between 4000l. and 5000l.

[223] After his death a paper, of which the following is a copy, was found :—

~~I~~ Jno Herne of Islington in the County of Middlesex by this his last will devises to the Overseers & Churchwardens of his native village Woolstone in the County of Warwick for to have ^A the sum of five guineas per ann. to be secured to them in trust out of ~~my~~ his real estate at W. aforesaid for the benefit of the poor industrious in the said villag of Woolstone and given to them in such portions as the Churchwardens and Overseers for the time being ^A shall deem equitable and just the first annual payment of five Gui^s to be made to them on the 25^th^ day of Jan^y next following ~~my~~ his descease and the like sum of 5 Gui^s on every succeeding 25^th^ day of Jan^y for ever perpetually. The remainder of ~~my~~ his real estate and all other ^A personal property (*a*)[1] he gives to ~~my~~ his two sisters Sarah Handcox and Mary Whiteman ~~my~~ his four nephews Mc^l^ W^m^ Charles and John Johnson ~~my~~ his Niece Ann Fowler ~~my~~ his Niece Eliz. Johnson and his ^A ~~my~~ two Neph^s^ Aaron and died 20th Dec^r^. 1817 John Herne to be equally divided among them, or so many of them as may be living at the time of ~~my~~ his descease and ^A ~~I~~ appoint ~~my~~ his Nephew John **[224]** Herne sole Ex^r^ of this ~~my~~ his last will and testament in testimony whereof ^A ~~I~~ he the said testator the said John Herne has (*b*) hereunto set and affixed ~~my~~ his hand and seal the ——— day of ——— JOHN HERNE.

(Endorsed.)

Outline of the Will of John Herne
of Islington in the County of Middlesex
3rd Jan^y 1818.

The search among the deceased's papers, the finding, the hand-writing, the interlineations, signature, endorsement, and that no other testamentary paper could be discovered, were fully set forth in affidavits; and proxies from Mrs. Whiteman and her husband; from Mrs. Davis; and from two of the nephews were exhibited, consenting that administration, with the paper annexed, should be granted, in common form, to Michael and Charles Johnson, the other two nephews.

It also appeared that the sole executor died in the life-time of the deceased.

Nicholl in support of the motion. The body of this paper is dispositive, and any variation from the usual form may be accounted for by the apparent want of education in the writer. A difficulty arises on the face of the paper from the interlineations—the omission of a date in the body of the instrument—and the use of the words "outline of the will" in the endorsement; but the doubt, arising from **[225]** these circumstances, is rebutted by the care with which the paper was preserved. "Outline of" does not point to the intention of any subsequent act so strongly as either "plan designed for" in *Mathews* v. *Warner*; (*a*)[2] or "what I purpose to be" in *Roose* v. *Moulsdale* (1 Addams, 129); it is tantamount to "this is my will expressed summarily :" and though a proxy of consent only dispenses with formal evidence, yet, where the

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(*a*)[1] The words "he gives" were originally written "I give."
(*b*) The word "has" was originally written "have."
(*a*)[2] 4 Burn. Ecc. Law, p. 107; also 4 Ves. jun. 186.

case is nearly in equilibrio, it will be of some avail as shewing the opinion of those best acquainted with the deceased's intentions.

Per Curiam. I cannot, consistently with the rules laid down on former occasions, grant this motion.(*c*) The rule is this: if an imperfect paper is supported by affidavits stating facts which, if established by plea and proof, would render the paper valid, that then, on a proxy of consent, the Court will grant its probate. In the present instance the affidavits do not furnish sufficient facts. The instrument, on the face of it, is imperfect, and even converted into a deliberative paper by the deceased himself: true it is that it is signed, but when—does not appear—there is a blank left for the date. The inference is that, when he signed it, he intended to do something more, and that his signature was placed there when it was first written. It is now in a different state from what it originally was—it then was in the first person throughout down to the very last para-[226]-graph, it was afterwards changed to the third person, and, on the outside, are these words :—

"Outline of the will of John Herne of Islington in the county of Middlesex, 3d Jan^{y} 1818."

It, therefore, is probable, on the face of it, that when this endorsement was made the paper was intended only to be deliberative; even this is nine years before his death, and, from the erasure of Aaron Herne's name, and the interlineation above, it appears that it was written some time previous to the 20th December, 1817: consequently it is to be inferred that the deceased did not intend it to take effect in its present form. This is the presumption of law in every unfinished paper, and that presumption is always held to be strengthened when the paper, as in the present instance, purports to dispose not only of personal, but also of real, property, as to which it clearly must be inefficient. Some recent recognition would then be necessary to render it operative: if it could be shewn that shortly before his death he had so referred to it as an existing will, that his intention would be carried down to that time, the case would be altered; but there is nothing of the kind later than the date. The affidavits only allege that it is in the hand-writing of the deceased, and was found among a bundle of papers in a box; but that it was not known how long it had remained there.

It would then be too much, on the consent of parties—not aware perhaps of their interests—to allow the administration with this paper annexed [227] to pass the seal. The Court is bound to protect those who may give an unguarded consent. To grant this motion would not only be going further than precedents authorize the Court, but would be a departure from them, and from principle. I therefore reject the motion.

Motion rejected.

ROSS, OTHERWISE RUSS *v.* CHESTER. Prerogative Court, Hilary Term, 2nd Session, 1828.—If no suspicion of fraud exists, a will—consistent with previous affection, and declarations, and supported by recognitions and circumstances shewing volition and capacity—is valid, though made in extremis, and though the instructions were conveyed through the party benefited.

[Applied, *Fairtlough* v. *Fairtlough*, 1839, Milw. 36. Referred to, *Davies* v. *Gregory*, 1873, L. R. 3 P. & D. 32.]

Judgment (*a*)—*Sir John Nicholl.* This case arises upon a will made in extremis—almost in articulo mortis; the validity of which must depend on satisfactory proof of volition and capacity. The account given by the witnesses is generally fair, and there is no suspicion of fraud or circumvention. The paper is in the hand-writing of Joseph Searle, one of the attesting witnesses: it is propounded by Mrs. Ross, and opposed by Mrs. Chester, the cousin and sole next of kin of the deceased. The property is very small, amounting only to 250l.; it would have been far better, in such a case, that the parties should have come to a compromise; but there being now no hopes of such a conclusion, it is my duty to decide the question judicially.

The deceased was a widower; and Mrs. Ross was the second wife, and widow of his father. Since the death of the latter the deceased and Mrs. Ross [228] had lived

(*c*) Vide—*In the Goods of Tolcher, Deceased*, 3 Add. 16.

(*a*) Addams for the will. Lushington for an intestacy.

together for nearly forty years; he entertained for her the greatest affection and regard; while, with his cousin Mrs. Chester, it does not appear that he kept up any intercourse whatever. Hence it is probable that, if there was any will, he would leave all his property as a provision and support for the old lady—his mother-in-law; so Mumford says, that it was "the general impression that Mrs. Ross was to have what the deceased possessed." It is in evidence too that he made declarations to that effect.

Kingsbury deposes that the deceased talked "of Mrs. Ross's relations—never of his own—he never mentioned Mrs. Chester; he spoke of Mrs. Ross as the only person belonging to him."

Searle states that "about five or six weeks before his death the deceased, speaking of Mrs. Ross, said, 'The poor old soul must make the best shift she could when he was gone, but she would be left tolerably well.'"

I can only construe this to mean "left tolerably well by him," and to refer to the proposed disposition of his own property: I have still less difficulty in so construing it when I turn to the account given by another witness, Peck, a neighbour and an intimate acquaintance of the deceased for nine or ten years—with whom the deceased used to sit and chat while the witness (a shoemaker) was at work; for he speaks strongly to declarations of intentions.

"He has many times heard the deceased say he should leave whatever he had to the old lady (meaning Mrs. Ross). He did not mention the lease of his house in particular, but the deponent several times asked him whom he meant to give it [229] to, and he always answered, 'To the old lady.' The deponent also spoke to him several times about the propriety of making a will, and the last time he did so was about five weeks before his death, when he asked him 'to whom he meant to give the lease of his house;' and he replied, 'To the old lady, my mother-in-law, Mrs. Ross:' deponent observed, 'That's right, for she'll live longer than you or me perhaps,' and the deceased replied, 'Perhaps she may, Mr. Peck,' and then added 'that she should have it, and he would not leave it to any one else.' The deponent then told him he ought to get a will made, and he said 'he would, and would leave the old lady every thing he had.'"

Mrs. Searle, the wife of the writer of the will, also deposes to similar declarations:—

"Deponent on the said Thursday (the day on which the deceased was taken ill) went in to see him; and he requested her to sit down until Mrs. Ross should return. In the course of conversation the deceased, speaking of his property, said, 'I have got but little, but must leave it all to the old woman; for God knows what will become of her.'"

Nothing can be of greater weight than this affection and these repeated declarations in different parts of his life, when, in no degree, opposed or counteracted by any circumstances of a contrary tendency: they lay a strong foundation for this will, and supply proof of intention, even if capacity, at the time of doing the act, were in any degree doubtful.

I approach, then, the day of his death. His illness, which had been short, had only confined [230] him to his bed for a few days, and was occasioned by a violent cold affecting his breathing and producing asthma—this accounts for his speaking but little: in the morning, Searle, the husband of his nurse, went for his friend Pulteney, as the deceased wanted him very particularly; not being able to see him, he went a second time, and Pulteney could not then come, for he was obliged to attend a vestry: on communicating this to the deceased he exclaimed, "Oh my God! what shall I do! I must resign it to the will of God and Searle;" but he did not say what it was he meant so to resign. This is the result of the evidence of Searle on the second article; and of Mrs. Searle on the fifth interrogatory.

As far as this goes, it is uncertain what he was to leave to "God and Searle;" but it shews that the whole affair originated with the deceased, and that he had an anxiety to do what he sent for Pulteney to do. Coupling, however, all the circumstances together, I cannot but think that the capacity of the deceased on that morning was beyond doubt, and that his object in sending for Pulteney was to effect some testamentary act; more particularly when I advert to what Mumford says. Searle allows that his own account is somewhat imperfect, and gives, as a reason, that he was very ill at the time of his examination, so ill indeed that he was not able to undergo a

cross-examination, in which he might perhaps have given a fuller explanation.(*a*) His account to Mumford, recenti **[231]** facto, is more intelligible; and to that I shall presently advert.

Here, then, if it be correct, is sufficient to infer that the object of sending for Pulteney was to make his will. Searle did not set about it till some time after; when, the deceased getting worse, Mrs. Ross went up to Searle and desired him to draw "a bit of a will as fast as he could." Paper was procured, and Searle wrote the instrument.

Certainly there is no clear evidence of instructions directly for the act itself; the message was carried by Mrs. Ross to Searle; but there is evidence that the deceased knew what was going forward, and that his wishes accompanied the act—from Peck, to whom I have already referred; for when he called that morning the deceased told him "that Searle was writing his will;" and this is a species of recognition when his testamentary intentions are so clear. It is not material, nor singular, nor unusual, that the witnesses differ as to the hour at which the execution took place. On the second article Peck thus deposes:—

"He went to ask the deceased how he did about nine o'clock in the morning of the day on which he died: the deponent took hold of the deceased's hand and asked him if he knew him: the deceased answered, 'Yes, Peck, I know you very well;' and then said, 'The will's being wrote: Searle, the lodger, is writing it upstairs:' the deponent observed, 'You have driven it off too long;' and the deceased answered, 'It should have been done before; but it was neglected when you talked to me about it before.' Deponent is **[232]** quite sure that what he has just stated was what the deceased then said to him; and that he was then of very sound mind, memory, and understanding."

Now, unless this is direct perjury and fabrication, here is capacity, conversation, and recognition of the act at that time in progress. After this, very slight evidence of execution will suffice. The paper being written, Mumford, a neighbour, is sent for, and the will is carried to the deceased, but before that takes place Mrs. Kingsbury, coming in accidentally, is told by Mrs. Searle that "Searle was writing the will, leaving the house and all that was in it to Mrs. Ross:" she thus goes on:—

"Mrs. Ross then desired deponent to ask the deceased if he would like any body's name to be put into the will after her death: and deponent, in consequence, leaned over the bed and said to him, 'Mrs. Ross very much wishes to know if you would like to put any body's name in the will besides hers after her death.' [There was no attempt therefore to circumvent the deceased.] He at first made no answer; upon which the deponent repeated her enquiry in the same terms as before; and the deceased then said, 'No, nobody.' This is an intelligible answer: it shews he must have understood the question and the transaction; it is a sort of recognition of the whole act; it shews, also, the fairness of the proceeding: this must have happened before Mumford arrived, and before they proceeded to the execution. The will is brought; it is read over to the deceased; he is asked if he will sign it, and, according to Searle, he answers, 'No, **[233]** no, I am not dead yet.' If this was the reply, it shews some confusion of mind or misunderstanding of the question; and Mrs. Searle also speaks to the same answer. That, no doubt, was their impression, and so Mrs. Searle seems to have told Mrs. Chester, for she has had conversation with her; but Mumford deposes to another answer which possibly the Searles might not hear. Mumford's account is to this effect:—

"Deponent was sent for, and went to the deceased's house, where he found him in bed. Searle was standing by the bedside with a paper in his hand, and Mrs. Ross and Mrs. Searle were also present; deponent asked Searle what he had got in his hand, and he said a paper he had been writing: deponent asked him how he came to write that paper, and he replied that he had been into the borough, at Ross's request, for a Mr. Pulteney; but who was unable, at that time, to come; that when deponent told this to the deceased he had thereupon said, 'Then, sirs, I must leave it to God and you to do it in the best way you can for the old woman' (meaning Mrs. Ross). Searle further stated that he had written a will for the deceased, which was the paper he had then got in his hand: deponent observed that it would be proper Searle should

(*a*) Upon the death of this witness a motion was made that his evidence might be received, although he had not been repeated, nor examined on interrogatories, when the Court directed that the consent of the adverse proctor should be stated in acts of Court; and also that the application was made, in this form, on account of the smallness of the property.

read the will to the deceased: Searle assented, and accordingly read the will to the deceased audibly and distinctly; observing to him, as if in explanation of its contents, whatever there is, is for Mrs. Ross, upon which the deceased said, 'Yes, yes.'"

This clearly points to a testamentary act—"Yes, yes." This is an express approbation of the contents upon not only a reading over, but a distinct **[234]** explanation of the disposition. The pen was then put into his hand: Searle says, at first, he could not hold it, but that of his own accord he picked it up, and with the assistance of Searle made his mark. This was not a necessary act—it would have been valid, though he was unable, from bodily infirmity, or from being overtaken by the stroke of death, to sign it, if the Court had been satisfied that he intended and approved the disposition. But here is the signature, such as he could make it; and Mumford and Searle afterwards witnessed it in testimony of his approbation. Mrs. Searle will not swear either that he was capable or that he was totally incapable; but it is clear from the interrogatory that she has had much conversation with Mrs. Chester as to his answer, "No; I am not dead yet," and is so committed to it, that she may feel some difficulty in speaking as strongly as she otherwise might to his capacity. But looking to all the facts and circumstances—to his testamentary declarations "that he should leave all to this old lady;" to his anxiety that morning to see Pulteney; to his exclamation, "Oh my God! what shall I do? I must resign it all to the will of God and Searle" (when he learnt that Pulteney could not come); to his assertion to Peck "that Searle was writing his will;" to his answer to Mrs. Kingsbury, "No, nobody," when she asked "if he would like to put any body's name in the will besides Mrs. Ross';" to his saying "Yes, yes," when the will was read over and explained; to his previous affections, and to general probability—I am convinced, though this act was deferred till late, and was completed almost articulo mortis; yet that it was the mind **[235]** and intention of the deceased so to dispose of his property, and that it is sufficient for carrying into effect his wishes in relation to his personal estate; I therefore pronounce for the paper.

As to the next of kin being allowed their costs out of the estate, they were certainly justified in entering into the investigation, considering the will was made in articulo mortis—and my only doubt arises from the smallness of the property—but, on the whole, I think they are entitled to their costs.

IN THE GOODS OF THE REVEREND SIR JOHN LIGHTON, BARONET. Prerogative Court, Hilary Term, 3rd Session, 1828.—A testator having appointed two executors, and provided that on the death of either of them two others should be substituted: on the death of the original executor, who had proved the will, and on a proxy of consent from the other, probate will be granted to one of the substituted executors, it appearing to have been the testator's intentions that the substitution should take place on the death of either of the original executors, whether happening in the testator's life-time or afterwards.

On motion.

The Reverend Sir John Lighton, late of Donoughmore, in the county of Donegal, died on the 4th of April, 1827; the deceased in and by his last will, dated the 17th of March, 1827, appointed executors in the words following:—

"And of this my will I nominate, constitute, and appoint Sir Samuel Hayes, and the Reverend Stewart Hamilton, executors and trustees; and, in case of the death of either of them, I nominate and appoint Edmund Hayes, and my brother Henry Lighton, to act and be executors and trustees in their stead."

[236] On the 10th of June Sir Samuel Hayes proved the will in his Majesty's Court of Prerogative in Ireland, the right of the Reverend Stewart Hamilton, his co-executor, being saved. Upon the death of Sir Samuel Hayes, in the life-time of the Reverend Stewart Hamilton, probate of the said will, under seal of the Prerogative Court of Ireland, was decreed to Edmund (now become Sir Edmund) Hayes, for completing the administration of the deceased's effects in that country, with a power reserved to Henry Lighton, the other substituted executor. This probate was decreed on the 11th of January, 1828.

The deceased died possessed of a policy of insurance on his own life in the Equitable Assurance Office, in England, of the value of about 6300l.; and for the purpose of obtaining payment of it the present application was made for a grant of probate, in this country, of the same will to Sir Edmund Hayes. It was founded on the affidavits of Sir Edmund Hayes, of Mr. Shaw of Dublin (who prepared the will), and

of Dr. Abraham Colles (the physician who attended the deceased); that he, the deceased, at the time of executing his will, was in a very dangerous state of health, and contemplated the near approach of his death; and that it was intended by the deceased that the substitution of executors should take effect in the event of the death of either of the first named executors at any time.

A proxy also was exhibited under the hand and seal of the Reverend Stewart Hamilton, by which he waived his title to probate, and consented that it should pass to the substituted executors, jointly or severally.

[237] Jenner—on these documents, and on reference to a case (*a*) in which the Court had made a grant similar in some of its circumstances—moved that probate be decreed to Sir Edmund Hayes, Baronet, as one of the substituted executors.

Motion granted.

IN THE GOODS OF THE COUNTESS DA CUNHA. Prerogative Court, Hilary Term, 3rd Session, 1828.—Administration, limited to the receipt of dividends in the English funds, granted to a minor residuary legatee, the wife of a minor, both subjects of, and resident in, Portugal, on a certificate being produced that by the law of Portugal she was entitled.

[Referred to, *In the Goods of Earl*, 1867, L. R. 1 P. & D. 450.]

On motion.

The sum of 14,911l. 16s., three per cents., was entered in the books of the Governor and Company of the Bank of England, in the name of "Her Excellency Donna Maria Gertrudes Quintella, of Lisbon, spinster, now the wife of His Excellency Don Joze Maria Vasques da Cunha, **[238]** Count da Cunha." This lady dying, by her will, dated 8th September, 1824, appointed her daughter, Donna Maria da Carmo (a minor), residuary legatee. The will was established in Portugal, and a judge administrator assigned; who, in that character, had the entire management and control of the minor's property. On the marriage of the minor to the Count of Vianna, under the licence of the Princess Regent of Portugal, her disabilities as a minor ceased, and the appointment of the judge administrator was revoked. The husband was also a minor; but it appeared that, by the laws of Portugal, by reason of his holding a commission in the army, and of his marriage, he was considered of full age; and was legally authorized to do all acts the same as if he had attained the age of twenty-one. On this account, therefore, a guardian could not be appointed.

To establish these facts, the following documents were laid before the Court, viz. the sentence of the Court at Lisbon confirming the Countess da Cunha's will, and the will therein embodied; the appointment of the judge administrator; an affidavit as to the existence of the stock in the manner described; and a certificate of four Portuguese advocates as to the law of that country on this matter. The certificate was as follows:—

(Translation.)

We, the undersigned advocates in the civil and criminal courts of the capital and city of Lisbon, and in the Supreme Tribunal of the Caza da Supplicacao thereof, do attest that, by the laws and customs of the kingdom of Portugal, it is compe-**[239]**-tent to his Excellency the Count da Vianna, an inhabitant of the said capital, and to her Excellency Donna Maria, his wife, countess of the same title, to administer the property and effects belonging to them respectively, although neither of them, the said

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(*a*) In *The Goods of Milo Bourke, late of Jamaica, Deceased*, it appeared that by his will, executed a few hours before his death, he appointed his brother and Mr. Murphy executors: the will also contained this clause:—

"In case of the death or departure from this island of my said brother, I appoint Joseph Fannin, merchant, an executor in his stead."

The brother died, having proved in Jamaica. Mr. Murphy renounced in that island, and declined to take probate in England. On an application by Mr. Fannin (supported by his own affidavit) for probate in this country in common form, and upon stating that he was shortly about to return to Jamaica, the Court was satisfied that his appointment, as a substituted executor, was clearly intended to take effect, either upon Mr. Bourke, the brother, dying or quitting Jamaica in the life-time of the testator, or subsequent to his death, and granted the probate. Michaelmas Term, 1st Session, 1826.

husband and wife, may have yet attained the age of twenty-one years. We do also attest that, pursuant to the same laws, all legal obligations and instruments duly made by the said Count da Vianna are valid in the kingdom of Portugal, notwithstanding he is under twenty-one years of age. We finally attest that, by virtue of the dotal contract, or respective agreement made on the 15th January, 1814, previous to the marriage of the Count da Cunha with Donna Maria Gertrudes Quintella, Countess da Cunha, deceased, the said Countess da Vianna enjoys full right, during her life-time, in conformity to the said laws of Portugal, to administer and receive the interest and dividends on the sum of 14,911l. 16s. three per cent. consolidated annuities, standing in the books of the Governor and Company of the Bank of England, in the name of, &c. &c.

Done in Lisbon, 15th January, 1828, and signed by José Manoel Pinheiro de Castro, Joaquim Lourenco Lopes, Francisco Pinto Coelho de Castro, Manoel Felis de Oliveira Pinheiro.

In explanation of this certificate, it had also been ascertained that, by the law of Portugal, the Countess of Vianna, under the dotal contract, was entitled only to the dividends of the stock during her life.

Lushington, upon these documents, now moved for an administration, with the will of the Coun-**[240]**-tess da Cunha annexed, to be granted to her daughter, limited to the receipt of the dividends.

The Countess of Vianna, being the residuary legatee, is, under the will of her mother, the Countess da Cunha, entitled to the administration: the Courts of Justice in Portugal have put an end to their own authority to administer. Two difficulties, however, arise; the Countess of Vianna is a minor, and a married woman, and her husband is also a minor; and, by our law and practice, a minor cannot take the administration,(*a*) nor appoint an attorney to take it for her; she must appoint a guardian; but as this, it appears, cannot be done by the laws of Portugal, the case resolves itself into this question—Will the Court enforce the practice as it exists in England, or adopt the Portuguese law?

Under the special circumstances, the Court, perhaps, will not think it necessary to enter upon this consideration, but decree this administration to pass, as no possible danger can arise from a grant so limited.

Per Curiam. From the documents it appears that the Countess da Vianna is entitled to the dividends; and, as no possible inconvenience can arise from this limited grant, the Court allows it to pass.

Motion granted.

[241] IN THE GOODS OF ALEXANDER FERRIER. Prerogative Court, Hilary Term, 3rd Session, 1828.—The legatee for life of certain property having assigned over his interest to the substituted legatee, an administration with a will annexed, limited to that interest, and granted to the legatee for life, may be revoked, and a new administration, limited to that property, decreed to the substituted legatee, then possessed of the sole entire interest therein.

[Distinguished, *In the Goods of Reid*, 1886, 11 P. D. 71.]

On motion.

By indenture dated the 9th of November, 1794, made between John Briggs the elder, and Martha Lysaght, widow, the relict of Arthur Lysaght, in contemplation of their marriage, it was agreed that John Pybus, George Westcot, Alexander Ferrier, and Thomas Lane should, of their settlement, be appointed trustees, and that the said John Briggs should assign over to the said trustees whatever sums might become due to the said Martha Briggs from the third part of the net produce of the estate of her former husband, to be by them laid out in government funds, or lent on good security, or employed in the purchase of land, as the said John Briggs should think proper to direct; and it was further agreed that the said trustees should be accountable to John Briggs for the income or produce of the above sums, or lands, during his life, and afterwards to the said Martha, his then intended wife, in case she should survive him; but that, on the decease of both of them, the sums thereby assigned in trust should so remain for the benefit of the child or children of the said intended marriage, and to be divided amongst them, on their coming of age, in such proportions as the last

(*a*) Vide Toller's Law of Executors, p. 100, 4th ed.

surviving parent might direct in writing, but, in default of such direction, then equally.

[242] The marriage having taken place, an investment was made of the above-mentioned third part in the public funds. Of the marriage, two children only—John and Stephen—attained their full age, who, with their father, survived Martha Briggs. Mr. Ferrier, the last survivor of the trustees, died in May, 1809, without being possessed of any personal estate within the province of Canterbury, except this trust-property: his executors therefore refused to prove within the province of Canterbury, and administration (with will and codicils annexed) of his effects—limited so far only as concerned the interest and dividends then due, or which thereafter might grow due, on the trust stock, during the life of John Briggs—had been granted to him by this Court. A proxy from John Briggs—the administrator—was now exhibited, consenting that this administration should be revoked in order that a grant, limited to this trust stock, might be decreed to his two sons.

On the caveat-day after last Michaelmas Term Daubeny moved the Court to revoke the administration formerly granted to John Briggs, the father, and to decree it, limited to the trust property, to the two sons.

Per Curiam. The Court said there was a difficulty in revoking an administration which was effective as to all the purposes for which it was originally granted; and also expressed a doubt whether it would be justified in taking such a step, as the father might still retain a power of appointment, in respect of this money, between his children, or might possibly have assigned his life interest **[243]** to a third person. It, therefore, directed the matter to stand over.

On this day Daubeny renewed his motion and brought to the Court's notice the opinion of an eminent Chancery counsel to the effect—that a Court of Equity, had it been applied to during the life-time of the trustee, would have compelled him to transfer the stock to the sons, the father having first assigned over his life interest to them, and released his power of appointment.

Per Curiam. The object of this application is, that the sons should obtain possession of, and control over, the principal during the life-time of the father, these three persons having the only interest in the property; for there is now an affidavit of the elder Mr. Briggs that he has not assigned over his right to any third person. The Court would be inclined to do all that the trustee or his representative could be called upon to do; but there is this awkwardness, that I am asked to revoke an administration good for all the purposes for which it was originally decreed; still I think myself justified, under the circumstances, in directing that, as soon as the father shall have assigned over to the sons his interest under the trust deed, and shall have executed a release of his power of appointment, the former limited administration may be revoked, and that administration limited, as prayed, may pass to the sons.

Motion granted.

[244] MARTIN AND OTHERS *v.* LAKING AND OLDHAM. Prerogative Court, Hilary Term, 3rd Session, 1828.—The widow having, after the testator's death, caused his will to be destroyed, probate of the draft of such will granted; and the widow condemned in the whole costs of the suit.

Robert Martin died on the 14th of December, 1826. In Hilary Term, 1827, a proctor appeared for Elizabeth Martin, the lawful widow of the deceased, and alleged her to have been sworn, and to have entered into the usual bond with her sureties, and prayed administration. This was opposed by two of the executors appointed by the deceased to his will, whereof the draft had been propounded, and an allegation given in, stating in substance—

That the personal property amounted in value to 11,000l., and his real estate to 2300l.; that in 1811 he became the father of a female illegitimate child, who was christened by the name of Martin, and was brought up by the deceased in his own house, and educated at his expence, and was, upon all occasions, acknowledged and treated as if she had been his only child; that in 1814 the deceased, having an intention to provide for his illegitimate daughter, executed his will agreeably to a draft which he had previously approved of, and which had been prepared from his own instructions; and that within a fortnight of his death he declared "that his said daughter would have 10,000l. or more;" that in 1826 he married his housekeeper, Elizabeth Rawlings; and shortly before his marriage he gave her 1000l. for her own

use, and informed his solicitor that he proposed, by a codicil, to make her a small addition.

[245] The widow, in her answers, admitted that she directed the above-mentioned will to be destroyed, and that she afterwards said the deceased himself had destroyed it, "because she conceived and imagined that the deceased, by his marriage, did, in effect, revoke and make void his will."

Lushington for the executors, prayed the Court to pronounce for the will as contained in the draft, and to condemn the widow in the whole of the costs.

Phillimore contrà, admitted that the proof established that the draft was entitled to probate; but trusted the Court would not condemn the widow in costs, as she had clearly acted under a mistaken view of the law.

Jenner for five of the next of kin cited to see proceedings, prayed for their costs out of the estate.

Judgment—Sir John Nicholl. This is a case, that does not very often occur, of a will which was in existence at the testator's death, but afterwards destroyed: fortunately the draft was preserved.

The allegation, which is fully proved, states the education of the deceased's illegitimate daughter; that she was brought up in his house, and treated and acknowledged as his lawful child: it then pleads the due execution of his will; and there is no doubt that it was, when executed, conformable with the draft now before the Court. In 1826 the deceased married Elizabeth Rawlings, with whom he had previously cohabited for nine or ten years. Before marriage he had conveyed to her a thousand pounds. The will—exclusively **[246]** in favour of the child—the widow, shortly after the testator's death, caused to be destroyed, notwithstanding strong remonstrances were made at the time on the impropriety of such a proceeding. By whatever inducement she was tempted to this misconduct, it is clear that the will, having been in existence since the deceased's death, is valid, and consequently that this draft also is valid. I am, therefore, bound to decree probate thereof, and to go the length of condemning the widow in the full costs.

It is a little fortunate for her that, at the time she was guilty of this act of spoliation—one of the grossest frauds that can be committed—the statute, which imposes the penalty of transportation for such offences, had not been enacted: since then a provision, in one of Mr. Peel's bills, has been made by the legislature for the punishment of crimes of this nature.(*a*) The moral guilt of Mrs. Martin is, however, the same; and I feel no hesitation in condemning her in costs, whether they can be obtained or not. The costs of the next of kin may be paid out of the estate.

[247] PITT, Assignee of Woodham *v.* WOODHAM. Prerogative Court, Extra-Day, 14th Feb., 1828.—The Court will not, at the instance of the assignee of an insolvent, and on a suggestion that the insolvent had not received his distributive share, call upon the widow and administratrix of the father of the insolvent for an inventory and account, after a long acquiescence of the insolvent and his assignee; and when it is shewn that a valuation and inventory of the deceased's effects were made shortly after his death, and facts are proved from which it may fairly be presumed that the insolvent had received considerably more than his full share.

Act on petition.

This was an application for an inventory and account.

Addams for the widow and administratrix, cited *Ritchie* v. *Rees and Rees* (1 Add. 144), and prayed the Court to dismiss his party.

Lushington contrà, for the assignee, observed that in the case cited, the deceased

(*a*) By 7 and 8 Geo. IV. c. 29, s. 22, it is enacted, "That if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to any of the punishments which the Court may award, as hereinbefore last mentioned [viz. transportation for seven years; fine or imprisonment, or both]; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument is the property of any person, or that the same is of any value."

had been dead forty-four years; and though the party was in that instance relieved from the obligation of delivering an inventory, the Court was very anxious at that time, and would always be so, to guard against a relaxation of the rule of law in this respect.

Judgment—Sir John Nicholl. This is a suit for an inventory and account against the widow and administratrix of John Woodham. He died intestate in February, 1803, leaving behind him a widow and four children, two sons and two daughters, all minors; Mary Anne, being fifteen years of age; Caroline, thirteen; John, eleven; and Thomas, eight. Thomas consequently became of age in 1816. In 1820 he took the benefit of the Insolvent Act, when he swore to his schedule; and at that time he did not pretend that he had any claim on his father's estate. Pitt was appointed his assignee; and in **[248]** 1827 cited the administratrix to exhibit an inventory and account, suggesting that Thomas Woodham had not been paid his distributive share: this demand is made twenty-four years after the death of the intestate—eleven years after the insolvent was of age and seven years after his insolvency. Now, to justify the party in making this application, and still more to justify the Court in acceding to it, very strong reasons must be adduced; for the presumption that the intestate's estate has been duly administered is very strong.

The deceased was an oilman, carrying on business in Queen-street, now Museum-street, Bloomsbury. The widow states that the whole of the property at the time of his death was under the value of 900l.; that she took administration under 1000l.; that the debts amounted to 193l., and the funeral expences and mourning to 75l., leaving a net amount of 630l. If this be correct, the widow being entitled to one-third and each of the four children to one-sixth, the share of each of the latter would be 105l.; and if the value of the property had fully amounted to 1000l., each child would have been entitled to about 150l.; and if the goodwill of the business had been valued at that time, I cannot think it would have made the distributive shares exceed 160l.; for this Court cannot go into any consideration beyond what was the value of the property at the deceased's death: but, further, there is nothing to shew that the good-will was not included, as I suppose it was, in the estimate of the effects at 900l. On the other hand, Mrs. Woodham states that to her son Thomas she advanced 358l.; and of this about 300l. before 1809; so that the sum advanced was much more than the principal and **[249]** interest on his distributive share, calculated at the highest possible amount. Under all the circumstances, at this late period, the Court must, I think, presume that Thomas Woodham received his full distributive share; for it would be exposing parties in this station of life to very harassing demands if they were called upon for an inventory and account after so long an interval, as they cannot be expected to keep very regular vouchers.

In confirmation, however, of the correctness of her representation as to the effects of the deceased and of their value, the widow further states that two persons in the employ of a friend of the deceased attended and took an account of the book-debts, of the stock in trade, &c.; and that a regular inventory and appraisements of these and of the furniture were made by a sworn appraiser, Abbot, who is since dead; that it was upon this inventory and valuation (which cannot now be found) she ascertained the amount of the effects in order to take administration; and she was thus enabled to swear them under 1000l. This statement is corroborated by Mr. Butterworth, a friend of the deceased and of his family, who assisted the widow upon the death of her husband, was several times at her house, accompanied her to Doctors' Commons when she took out administration, and became her surety. He speaks to the making of the inventory and valuation by Abbot, and says that the widow was wholly guided by it, and that he believes that "every part of the deceased's personal estate was included;" and if "goodwill" was to **[250]** be valued, it must be inferred that it was not omitted.

Here, then, under the circumstances, there is a sufficient constat that the personal effects did not amount to 1000l., as the administration was taken under that sum; and there is good reason to believe and presume that the son Thomas received more than his distributive share. In substance, an inventory and account have been given, and that is all that can now be expected or furnished. Where is any thing to falsify all this or to induce the Court to suspect that there are any omissa, or to call for a more particular and detailed inventory and account? The widow, the eldest son, and one daughter have carried on the intestate's business; the other daughter went out as a governess: these, by their industry and frugality, have supported themselves; have

added a little to their property; and laid out, in maintaining and educating this very son Thomas, more money than his distributive share; while he has become an insolvent, and can give no better description of himself at the head of his affidavit than by the unprofitable addition of gentleman. His claim is only on the property which his father left at his death; for this Court has no authority to search into the profits which the widow and other children have acquired since by their own industry, but only to insist that every thing of which the intestate died possessed should be fairly included in the inventory; and I am of opinion that the administratrix has sufficiently shewn that all was accounted for, and that the son has admitted the receipt of all to which he was entitled. True it is **[251]** that there is no formal release, but there is what is tantamount to it, viz. a long acquiescence of himself and his assignee, and no claim asserted at the time of his insolvency, when he swore to the schedule of his effects.

Upon the whole, therefore, I think there is no reason whatever to order any further explanation: on the contrary, I can see no sufficient ground which justified his calling at all on his mother at this late period—eleven years after he came of age, and seven years after his insolvency—more especially after the affidavit to which she was sworn in April last.(*a*) If he, an insolvent, and his assignee, choose to institute a proceeding which has much the appearance of a desire to harass, and of a hope possibly to extort something from this old woman—and enter into unnecessary details of subsequent circumstances, which have no real bearing on the question, they must do it at their own peril, and at the risk of costs. I feel that I am bound to dismiss the administratrix, and to condemn the assignee in costs.

[252] IN THE GOODS OF AARON HURRILL. Prerogative Court, Trinity Term, 4th Session, 1828.—Extrinsic evidence is necessary to make an unfinished paper operative; nor will a proxy of consent from all entitled in distribution, or otherwise, justify the Court in granting probate to such an instrument, unless the affidavits set forth facts which, if proved, in solemn form of law, would sustain a disputed paper.

On motion.

The deceased, on the 29th of December, 1827, died: he left behind him a widow and six children, the only persons who would be entitled to his personal estate in case of an intestacy: on the first of January two of the deceased's sons found, carefully preserved, a paper, all of his own hand-writing, enclosed in an envelope unsealed, and thus endorsed—"The last will and testament of Mr. Aaron Hurrill, dated 1827. Extrix Mrs. Hurrill." The will purported to dispose of all his real and personal property in favour of his wife: it was regularly drawn, and thus concluded, "In witness whereof I have to this my last will set my hand and seal this day of 1827"—but it was neither signed, sealed nor further dated than by the year: there was also a clause of attestation, but it was not attested.

The children executed a proxy of consent that probate might be granted to Mrs. Hurrill. An affidavit was also exhibited as to the paper and envelope being in the hand-writing of the deceased; to the place of finding it; and that he left no other testamentary paper.

Dodson in support of the motion.

[253] Per Curiam. The Court, after stating the facts, said: I cannot, according to established rules, grant probate of this paper in common form: it is manifestly unfinished; and consequently requires some circumstances to repel the legal presumption that the deceased had not finally made up his mind thus to dispose of his property. The affidavits merely go to hand-writing and finding; and are consistent with the paper having been written many months before the deceased's death. The proxy of consent from the six children (who, I presume, from having executed it, are all of age) is not sufficient to induce me to break through the rule that a probate shall not be granted, even with the consent of all persons who would be otherwise

(*a*) In this affidavit Mrs. Woodham, after specifying various sums, amounting altogether to 358l. 18s. 9d., which she had paid to and for the immediate benefit of her son Thomas since the death of his father; and that she had, in fact, expended considerably more on his behalf, stated that, as her agent, he was indebted to her 44l., being a balance due on the sale of two hogsheads of oil.

entitled, unless the affidavits set forth facts which, if proved in solemn form of law, would sustain a disputed instrument. Now that which is here stated would not, if fully established by plea and proof, enable the Court to grant a probate: the affidavits do not contain facts sufficient to render this a valid document. I feel the less hesitation in arriving at this conclusion, as the children, being all of age, can, if satisfied of the deceased's intention, effect the same object in a different and a more gracious mode, by assigning and conveying to their mother, when administratrix, all their distributive shares, relying on her afterwards to make a proper arrangement: but in conformity with the rules of this Court I cannot grant the present motion; and shall, therefore, decree administration to the widow.

Motion refused.

[254] JONES AND JONES *v.* JONES AND JONES. Prerogative Court, Hilary Term, 4th Session, 1828.—After publication, on an affidavit that the depositions had not been seen, and that the matter was noviter perventa, exhibits may be pleaded.

On motion.

In this case two wills of William Jones were propounded, one, dated February 21st, 1822, by James Jones, one of the deceased's sons; the other, dated May 12th, 1823, by two of the daughters: and this was an application by James Jones to be allowed to give in an allegation after publication, pleading four letters (two dated shortly before, and two shortly after, the execution of the will of May, 1823) written by Mary Jones, one of the adverse parties, and admitting that the deceased, at the date of those letters, was in a childish state. An affidavit sworn by James Jones was brought to the above effect, and stating that he was for the first time informed of the existence of the letters on the ninth of February instant; publication having passed on the 24th of January.

Lushington in support of the motion.

Jenner contrà.

Per Curiam. This is a special application to be allowed to plead further matter in the principal cause, after publication has passed, and the proctors have declared they gave in no further allegations unless exceptive. An affidavit has been made that the facts are noviter perventa, and that the depositions have not been seen: generally, in applications of [255] this nature, the affidavit is required to state another circumstance as to the nature of the facts, viz. that they are material to the decision of the cause; for then the Court would be able to form some opinion whether the plea might safely go to proof: but as this allegation is merely for the purpose of introducing exhibits, letters written by the adverse party, I think, I am bound to allow it to be brought in.(*a*)[1] The most summary way of making these letters evidence will be the best: they may possibly be admitted, even without answers, in acts of Court: at all events, in answers explanatory of their meaning, and of the circumstances under which they were written, unless indeed their authenticity and genuineness be denied, and even then evidence of hand-writing alone would be gone into.

As to the effect these exhibits may have in the cause, it is unnecessary at present to enter into that consideration; if they are not material, they will do no injury; if of importance, the Court should be informed of their contents: I, therefore, think them proper to be introduced.

Motion granted.

[256] BRYDGES *v.* KING.(*a*)[2] Prerogative Court, Hilary Term, 4th Session, 1828.—The clearest and most consistent evidence of capacity and volition are required to support a codicil conveying bequests of such extent as to be irreconcileable with the character of the deceased, and with her intentions as proved by her

(*a*)[1] Instrumenta produci possunt post publicationem testium, etiam usque ad conclusionem exclusivè: quià in his cessat timor subornationis: etiam, post conclusionem, stante justâ causâ Judex potest scripturas admittere. Maranta, part 6, p. 41, s. 47. And Gail says: Si post conclusionem reperta sint nova instrumenta, Judex debet conclusionem rescindere. Gail, lib. 1, obs. 107. Vide also Oughton, tit. 104 (*c*), and Dornsperger, lib. 1, c. 5, De Instrumentis.

(*a*)[2] This cause was argued by Jenner and Phillimore, of counsel for Sir Harford Jones Brydges; and by Lushington and Addams contrà.

affections, and former testamentary dispositions; the deceased being, at the time, within ten days of her death, and in a state of extreme weakness and debility; all her confidential friends excluded or absent, and those only about her who are benefited under or engaged in the preparation or execution of the instrument.

Judgment—Sir John Nicholl. An instrument, as a second codicil to the will of Mrs. Mary Brydges, is propounded in this case by Sarah King, a legatee under it; and is opposed by Sir Harford Jones Brydges, an executor and the residuary legatee appointed by the will.

The validity of the paper must rest principally on the credit given to the attesting witnesses; for, if they can be fully trusted, it is proved to be the act of a capable testatrix. The depositions are not of a very extraordinary length, but so many of the attending circumstances have been noticed in argument, and the credit of the witnesses so much depends upon an accurate view of the evidence, that it may be necessary, notwithstanding the time it may occupy, and the fatigue it may occasion to the Court individually, to refer to and read more of it than the Court is, in ordinary cases, accustomed to do.

The deceased died on the fourth of February, 1826, unmarried, having no nearer relation than a cousin german, or a cousin german once removed: she was at the time of her death more than seventy-two years of age; she resided at Hambrook Grove, near Bristol, and had personal property to **[257]** the amount of between 50,000l. and 60,000l., besides real estates of some value: she made and executed her will on the nineteenth of March, 1823, by which, after leaving several small legacies, she bequeathed to Sir Harford Jones, on condition that he took the name of Brydges, her Hambrook estate, and also a legacy of 35,000l. stock; to Mr. Wotton, her estates in Hertfordshire and Bedfordshire, and also a house and premises at Ledbury, provided he would not sell them; and she appointed these two persons, together with a Mr. Daniel, her executors; and Sir Harford Jones her residuary legatee. The first codicil to this will, dated on the fifteenth of April, 1825, revokes the devises to Wotton, and his appointment as executor, and gives those estates to Sir Harford Jones, with the same condition respecting his change of name as was contained in the will, and confirms his nomination as her executor and residuary legatee. The disposition by both these papers then has for its principal object her cousin, Sir Harford Jones: he is to have her real estates, he is to have her personal property, he is to take her name, and become the representative of her family.(*a*)

[258] In respect to character, this old lady is represented by the pleas and evidence to have been penurious, proud of her family, and clever. The disposition of her property by the will accords with this character: as penurious, she gives only a few trifling legacies—with the exception of one of 2000l. stock to her cousin Mary Wotton, and one of 200l. to her executor Mr. Daniel, none of these legacies exceed 100l., and altogether they amount to less than 3000l.: as proud of her family, she selects her cousin, Sir Harford Jones, of whom it is proved she was fond of talking, and she requires him to continue the family name: as clever, she is herself the writer of the will, which is clearly and accurately expressed (and being embodied in technical language, was probably framed upon some precedent), very fairly written, very cautiously executed, and is attested by most respectable witnesses—Mr. Wadham, the lord of the manor; Mr. Harford, a gentleman of fortune in the neighbourhood; and Mr. Day, her then medical attendant. The first codicil, by which she revokes the devises to Mr. Wotton and transfers them to Sir Harford Jones, is marked by the same traits, and bears still stronger proofs of care; for she will not trust to herself to prepare it, but she sends for her old confidential solicitor, Mr. Russell, and the

(*a*) On the 4th Session of Easter Term, 1826, an application was made by counsel to the Court, supported by an affidavit of Sir Harford Jones, that a probate of the will, and of the codicil thereto, dated 15th April, 1825, be granted to him, reserving the question as to the validity of the paper-writing dated the 25th of January, 1826. This motion was opposed also by counsel; but the surrogate (Dr. Arnold) decreed the probate to pass the seal; the sum of 18,000l. three per cent. Consolidated Bank Annuities being first invested in the names of trustees, to abide the issue of the cause, subject also to the revocation of the probate, in case the paper-writing, propounded as a further codicil, should be established.

witnesses are nearly of the same description as those to the will, Mr. Wadham, Miss King, and the solicitor, Mr. Russell. These circumstances denote the character of the disposition and her own character; and to this disposition she adheres for nine months, and till within ten days of her death, though she had been ill for some time, and for the last two months had been confined to her bed.

[259] It does, however, appear that when the first codicil was thus formally prepared and executed, in April, 1825, the deceased had thoughts of writing a further testamentary paper, in order to leave some benefit to the attesting witness, Miss King; but still, at that time, she had not made up her mind to any definite act of liberality towards either Miss King or her own servants.

The codicil propounded is dated on the 25th of January, 1826, ten days before the death of the testatrix; and it gives 10,000l. to Miss King; 1500l. to her manservant, Gay; 1000l. to her apothecary, Hay; 100l. each to a brother and sister of Miss King, and 30l. to each of her servants; and, lest her personalty should not be sufficient to satisfy the legacies, the paper revokes the bequest of 35,000l. to Sir Harford Jones, and reduces it to 20,000l.(*a*) This disposition appears to me improbable and alarming—more especially when connected with all the history and facts. Looking **[260]** at the character of the former papers, the smallness of the legacies, the design that Sir Harford Jones should be the representative of the Brydges family, I think her conduct in taking away this large amount, even for any objects, is not very probable nor consistent; but when the objects of her bounty are considered—Miss King, an humble companion of two years and a half standing; Gay, a servant of all work; and Hay, one of her medical attendants for not quite two years—it becomes more extraordinary, and creates suspicion, as much **[261]** exceeding the most liberal reward that could be expected for their services in their several stations.

(*a*) This codicil was as follows:—

Whereas I the undersigned Mary Brydges of Hambrook Grove in the parish of Winterbourne in the County of Gloucester Spinster have in and by my last Will and Testament bearing date the nineteenth day of March one thousand eight hundred and twenty three, given and bequeathed unto my Relation Sir Harford Jones of Boultibrook in the County of Radnor, Baronet, the sum of five and thirty thousand Pounds Stock, and also made the said Sir Harford Jones residuary Legatee of my said will—Now therefore, I the said Mary Brydges do hereby revoke and declare to be null and void, the said bequest of thirty five thousand pounds to the said Sir Harford Jones, and instead thereof I hereby give and bequeath unto the said Sir Harford Jones the sum of Twenty thousand pounds—And I hereby Give and Bequeath unto my sincere and worthy friend—Miss Sarah King the sum of Ten Thousand Pound to be paid to her, her Executors, Administrators or Assig^{n} within twelve months after my decease, as and for her and their own monies for ever. And I do also hereby give and bequeath unto the said Sarah King my Gold Watch and Chain, and my little Dog, Fidelé, as a testimony of my gratitude for her very kind and unremitted attention to me during my long illness—I do also hereby Give and Bequeath unto Mr. John King the sum of One hundred pounds, and my Bay Gelding "Gay"—and I also give and bequeath unto Miss Eliza King the sum of One hundred Pounds. I also hereby Give and Bequeath unto Mr. John Hay of Whites Hill in the parish of Winterbourne, Surgeon; the sum of One Thousand Pounds, as an acknowledgment of the very great care, and anxiety he manifested for my recovery—I do also hereby give and bequeath unto my man servant Thomas Gay the sum of Fifteen Hundred Pounds, and also my grey mare "Mary Fox" and my broad wheel Cart, for his long & faithful services to me—To each and every of my other Servants, I hereby give and bequeath the sum of Thirty Pounds, and I do in all other respects confirm my said will (except so far as the same is altered by a former Codicil thereto) and direct this to be taken as a Codicil to my said last Will, and in part thereof, In witness whereof I have hereunto set my hand and seal this twenty fifth day of January in the year of our Lord one thousand eight hundred and twenty six—

M. BRYDGES L.S.

Mary Cunningham Bristol
Tho^{s} Witchell Winterborne
James King Bristol

Note.—The clause of attestation was much in the usual form.

It was contended that the circumstances render the disposition not improbable; that Miss King was her companion, was particularly kind and attentive to the deceased during her illness; that the deceased was sensible of it and very fond of her; that it was understood the deceased had an intention, when she executed her codicil in April—and that it was admitted to have been her duty—to take care of and provide for her; but, to my judgment, this does not render probable a legacy of 10,000l., nor does it much lessen the suspicion nor the demand for satisfactory proof.

Again, it is said that Gay, though a servant of all work, yet was accustomed to lift the deceased in and out of her carriage, and to assist in moving her in bed; and, by the exertion, met with an accident—a rupture: it is not quite clearly proved that the original injury was so occasioned, nor that it was sustained in the service of, nor was known to, the deceased; but, if it were, the hurt must have been trifling, for he continued to perform the same offices till her death, and after her death he became a volunteer in a troop of yeomanry. The rupture, then, must have been of the slightest kind, and 1500l. is rather an exorbitant compensation on the part of this testatrix.

Hay, whom she had consulted not quite two years, was the village apothecary, residing at hand, her most frequent, but not her principal, medical attendant—not the one in whom she reposed the most confidence: Mr. Baker, a **[262]** surgeon of Bristol, was the superior; but, living at a distance, he could not visit her frequently, and the expence would have ill accorded with the deceased's penurious habits; to Mr. Hay, however, this paper gives a legacy of 1000l.: the magnitude of this benefit, again, is improbable and suspicious. Besides these bequests, here are legacies to Miss King's brother John, to her sister, and to all the servants; who, of course, by this bounty would be conciliated and silenced.

When, then, in addition to the magnitude of these legacies, it appears that, with the exception of those called in as instruments of preparing and attesting the act, these were the persons, and the only persons, who were around the sick bed of the deceased, and when she was now within ten days of her dissolution—the case becomes so alarming that, if the Court intends to exert a proper vigilance in the investigation, evidence of volition and capacity—incontestable and uncontrovertible as to its truth and effect—must be required. If a fraud were concerted, and the party principally benefited intended to help herself thus liberally, it was expedient to quiet the man-servant and the apothecary, by allowing them largely to participate; and to conciliate, by smaller portions, the other members of the family who had access to the deceased.

The instrument having been made so shortly before the deceased's death, the Court is called upon to enquire what was her condition at that time. Her age was pretty advanced—above seventy-two: she had been ill some months, had been confined to her room for three months, and to her bed for two months; her complaint was **[263]** visceral, and therefore likely to produce gradual dissolution; from lying in bed she became excoriated and ulcerated (as it is described) from shoulder to hip, so that it was necessary to cover the parts with plaster; the discharge still further weakened her; she was become so extremely feeble that, although from the visceral complaint evacuations could only be procured by artificial means, she was in a state no longer to bear the operation, and the woman employed to administer the remedy was dismissed.

When the capacity is put in issue, on the responsive allegation two witnesses, viz. this woman, Green, and Carpenter, are produced to support the attesting witnesses. Green says:

"She began attending about a month before Christmas; she attended a dozen times at least; three or four times a week; but she cannot take upon herself to fix the time of her last attendance."

If she began a month before Christmas, and attended three or four times a week, she would have completed her dozen attendances by the end of December, and there is nothing that enables her to fix the time late in January, though she loosely talks of continuing her duties till a little more than a week before the death of Mrs. Brydges. Hay's bill charges, from the first of January, visits every day; and, from the sixteenth, dressings and plasters, and visits two or three times a day till her death: Baker, too, attends in January, and every other day from the eleventh to the twenty-first of that month, yet Green never sees Baker there; and Hay she only

knows to be there twice by hearing his voice. The in-[264]-ference is that she was dismissed long prior to the time she supposes. To the eleventh interrogatory she answers: "She has no knowledge whatever of a person of the name of Mary Cunningham:" and Cunningham was staying in the house from the 22d to the 26th of January.

Her evidence is more consistent in another particular, with her having ceased to attend the testatrix at a much earlier period: for she says, on the thirteenth interrogatory, "The deceased was, in all respects, as sensible at the last as she was at the first of respondent's attendance on her: she did not perceive any difference."

Considering that Mrs. Brydges was rapidly sinking at the date of the codicil, either this witness must have quitted the house sooner than she now fancies, or else no great reliance can be placed on her testimony.

On the fourteenth of January Miss King wrote to Sir Harford Jones, giving an account of the deceased's state: that letter has been annexed to the sixth interrogatory, and contains the following passages:—

"Knowing it to be your particular wish to be kept advised of the state of your dear cousin's health is the reason of this so soon following my last respects, which I hope meets your approbation. Since I last had this pleasure, I regret to say Mrs. Brydges has continued to grow worse, and my candid opinion is that she is gradually declining, though Mr. Baker, when he saw her yesterday, said he could not see any immediate danger; he has promised to come again in a day or two, when I will write you again, should occasion require it."

[265] According, then, to the result of the evidence of Green, and of this letter, the deceased, towards the middle of January, is gradually sinking—dissolution is approaching; Baker's visits are frequent; but the danger is not immediate.

Carpenter is made to state that, on the twenty-fifth of January, he was called into the deceased's room: that he was told by the deceased herself to fetch James King, to take the old mare; and from his description, Mrs. Brydges would appear to have been quite alert.

This is not a fact pleaded, and it is the only time that Carpenter, an out-door workman, is suggested to have seen her; he has been discharged since the death of Mrs. Brydges, and before his production as a witness: it will be for the consideration of the Court, therefore, whether this story is probable, and how far consistent with Cunningham—whether he is to be credited, or whether this is an after-thought to bolster up the case and the testimony of the subscribing witnesses. These, however, are the only two persons in support of the general capacity.

On the other hand, the facts lead strongly to a contrary deduction. At this advanced age, after this long illness—having been confined to her bed two months—being in extreme bodily debility, ending in gradual dissolution, the deceased must, so shortly before her death, have been labouring under considerable mental infirmity. There are some other facts also inducing the same conclusion: she had a job of work going on in her house—an addition making to it by contract: she liked to enquire how the building was advancing; she was impatient to get it finished; yet the workmen [266] were often stopped; and Witchell, the mason, the principal contractor, who slept in the house, was never called into her room for the purpose of direction or enquiry after November, till he is summoned, at eleven o'clock at night, as a witness to the execution of this codicil. These workmen wanted money very much on account of their job, especially at Christmas time, yet they could get none: the promise was that they should have some as soon as the deceased was well enough to sign a cheque. Brown, their own witness, says on the fifteenth interrogatory:

"That besides the work he performed under Witchell's contract, he, at the same time, had other jobs in hand for the deceased, the payment of which he looked immediately to her for. In respect of his own private demand against the deceased he several times, in the latter end of the year 1825, applied to Thomas Gay, and also to James King, to get his bill paid: and, in respect of the contract work, he very often about the same time applied to Thomas Witchell. Thomas Gay and Sarah King both said that as soon as Mrs. Brydges was well enough to sign a draft on the banker, the money should be paid; and Witchell said that they had told him the same thing: respondent was very much distressed for want of money."

There are some other material facts illustrative of the state of the deceased. In

the latter end of December Sir Harford Jones, who was then staying at Bristol, went over to Hambrook Lodge to visit the deceased, but did not get a sight of her; and Miss King, in her answers, admits the fact, stating:

[267] "That she went up stairs twice to the deceased in her chamber, and informed her that Sir Harford Jones was there, and, upon both occasions, she brought down an answer, as the fact was, that the deceased declined seeing him, saying, she was very poorly and unable to bear talking."

Looking, then, upon this to be true, here, at the end of December, the deceased is so poorly, and so little able to bear talking, that she cannot see the person to whom, above all others, she was most attached—whom she was probably most desirous to see, who was the principal object of her bounty, who was to take her name, and become the representative of her family. The fact is undisputed that he did not see her.

Another circumstance respects Mr. Russell, her solicitor, her man of business, to whom she was constantly applying as long as she was able: up to August she used to go over to Bristol two or three times a week to speak to him; he is since dead, but his nephew, who kept his attendance-book, proves that, in November, his uncle was very anxious to see the deceased, that he went over to Hambrook, and, on his return, said "that Miss King would not allow him to see the deceased." This fact is admitted in her answers to the eighth article:

"The respondent admits that the articulate John Russell did, after the commencement of the aforesaid illness of the testatrix, call at her house at Hambrook on several occasions, as she believes, and make enquiries after her health; and he may have made other applications requesting to know when he might see her, and that he was told by [268] the respondent, and otherwise with her knowledge, on reference first had to the testatrix herself, that she, the testatrix, was not in a state, meaning of bodily health, to see any person on ordinary business, such as that usually transacted between persons in the relation to each other of the deceased and the said John Russell, or to attend to any such business."

Now that is the best way Miss King can soften down this occurrence in her answers; and it is certain that Russell, though he frequently went to Hambrook Lodge, never got access to the deceased after she was confined to her bed; and the day after the execution of the codicil Miss King sent a message to Russell "that Mrs. Brydges was much in the same state, and could not be seen."

These facts infer that the deceased was either so ill and weak as to be unfit for the transaction of ordinary business, or to see her dearest friends; or else there was a fraudulent exclusion of those in whom she had confidence—Sir Harford Jones and Mr. Russell, her solicitor: if her state were such as justified their exclusion, she must have been quite unequal to business; otherwise an interview could only have been denied in order to effect some clandestine purpose.

What, then, is the evidence (and a most important piece of evidence it is) of the only respectable witness—whose visits could not be refused—of Baker, her superior medical attendant; he is the single witness having access to the deceased that is left to Sir Harford Jones, for all others were either shut out, or disqualified by the legacies given them: he is disinterested, and there is no [269] reason to doubt his impartiality; and from his profession he is able to form a sound opinion: he states on the fifth article:

"That he attended the deceased of the illness whereof she died, commencing his visits on the 26th day of October, 1825, and visiting her eight times between that day and the end of the following month of November. During the month of December he visited the deceased about once a week; deponent visited her on the 4th of January, 1826, and from the eleventh day of the same month he visited the deceased every other day until the 21st, when, having occasion to leave home, he did not see her again until the 31st of January, after which he visited her daily until her death. When the deponent commenced his said attendance (on the 26th of October) he found the deceased labouring under visceral disease, to which she had been formerly subject: the complaint now attacked her with increased force, and had a very evident effect upon her bodily strength, and also on the faculties of her mind; both of which, from the commencement of the said attack, began to decline. The deponent only saw the deceased out of bed once (and that in the month of November) during her last illness: and from the reports made to him, and his own

knowledge of her debility, he does not believe she ever, after that time, left her bed. From the first of deponent's said attendance (in October) the deceased was more or less lethargic; but, towards the end of December, her lethargy had very much increased; so much so, that he almost always, in his after visits to the deceased, found her dozing, and in a state of stupor, out of which he found a difficulty to rouse her. From **[270]** the month of October even the deceased's lethargy was such that the deponent did not attempt to enter into conversation with her, as on former occasions he had been accustomed to do, but confined himself to the mere questions which related to her complaint: to these questions, and particularly after the month of December, the deponent had great difficulty in obtaining an answer from the deceased; and when she did give an answer she was frequently corrected by Miss King, her attendant; for instance, as to the number of her evacuations, which the deceased frequently forgot: she also forgot how time passed; this did not much surprize deponent, lying, as the deceased constantly did, in bed, with the window shutters closed, or curtains down: the day-light was excluded: on this account, as he believes, candles were sometimes lighted in her bed-room in the day-time. In the course of the month of December the deceased complained there was a man behind her who was pinching her back" [her sufferings in her back are admitted and described by other witnesses]: "deponent tried to talk her out of this idea; but to no purpose: she declared that she had seen the man: on several subsequent occasions she repeated the same thing. The deceased, on account of long confinement to her bed, contracted an ulceration of the back, which discharged violently, and was one of the causes of her death. Deponent is decidedly of opinion, and believes, that the deceased was quite unable to attend to business after the month of December, 1825; he cannot depose that she was incapable of the least degree of mental application; he does not believe that she was capable of trans-**[271]**-acting business of a serious nature, or which required mental application, at any time, after the month of October, 1825, He considers that the deceased, if she had been roused, might have been capable of giving an order as relating to her household affairs, until a late period of her life, but not capable of business that required an exertion of the mind. He found it impossible to keep the deceased's mind fixed to a point when he had roused her; for, as soon as she had answered one question, she relapsed into her lethargy, and to pursue his enquiries it was necessary again to excite her."

This seems a very fair representation, and this evidence, from an impartial, disinterested witness—competent to form a correct judgment—and supported by the reasonable probability arising from facts—such as her long illness, her extreme debility, and the dissolution which so soon ensued—leaves the condition of the deceased as to capacity in a state extremely doubtful; and it agrees with Miss King's admitted conduct as to Sir Harford Jones and Mr. Russell not seeing the deceased: it certainly is not so conclusive but that unsuspected witnesses—telling a consistent story—might shew that rousing, aided by self-exertion, would render her equal to a slight testamentary act; but coupled with the character of the deceased—the nature and magnitude of the disposition—the persons in whose behalf that disposition is made—it requires that the credit of the attesting witnesses should stand unimpeached, and above all exception.

I cannot but agree with the counsel that if the story to which those witnesses—at least two of them—depose is fully believed, the codicil is **[272]** valid: the case, however, as stated at the outset, depends upon their credit.

The three witnesses are—James King, the brother of the party; Mary Cunningham, her intimate friend; and Witchell, a mason, who slept in the house. The credit of the two first, and the effect of the circumstances spoken to by the last, are the material enquiries; and I will first consider Witchell's narrative; in point of character he stands unimpeached, but he was present at so small a part of the transaction that his facts are of little weight: his evidence is of the following tenor:—

"During the two last years of the deceased's life he had been constantly employed by her in and about her residence; and by reason thereof he slept in deceased's house. At about eleven o'clock of the night of the 25th day of January, 1826, deponent, being in bed at the deceased's house, was called up by her servant, Thomas Gay, who told him that Mrs. Brydges desired he would come up into her room to witness a codicil to her will: deponent is certain that it so happened on the 25th of January, because on the next day, the 26th, he received from Miss King, who lived with deceased as her companion, 250l. in part payment of his contract" [this has the appearance of

a conciliatory act, as Witchell was much in want of money]: "deponent dressed himself as quickly as he could, and went up into deceased's bed-room; besides the deceased, who was in bed 'pillowed up,' he found there his fellow-witnesses, James King, Mary King, and also Miss King, and Thomas Gay. Deponent, on so entering the bed-room, went round to the bed-side where James **[273]** King was standing, and Mary Cunningham near him. James King, holding a book with a paper on it before the deceased, asked her 'whether what he had written was to her liking.' The deceased answered, 'Perfectly so,' or 'Quite so.' James King then handed a pen to the deceased, and she wrote her name at the foot of the paper held before her as aforesaid. Having signed it, deceased said to Miss King, 'That will do.' When this was done, James King took the paper to a table near the bed-side, and handed the pen to Mary Cunningham, who signed her name, as did also deponent (the pen being in like manner handed to him by James King), as witnesses; and after them James King himself. After the said paper had been so witnessed, James King read over the clause of attestation to deponent. At this time the deceased asked Miss King whether it was not time for her to take her medicine; and deponent left the room and went to bed again. At the time that James King read the clause of attestation to deponent he also told him that the paper so witnessed was a codicil to the deceased's will, whereby his (King's) sister was left ten thousand pounds."

This witness is then called upon to depose as to capacity; and after identifying the codicil, says:

"Mary Brydges, the deceased, was at the time of her approving of and signing her name to the said paper-writing, or codicil, and during the whole time of deponent being present on the evening or night of the 25th day of January, of sound, perfect, and disposing mind, memory, and understanding, and talked and discoursed (what little deponent heard her say on such occasion) rationally and sensibly."

[274] On the 6th interrogatory he answers—"That the deceased kept her room from about September, 1825, until her death; and she generally kept her bed during that period. Respondent was only once in deceased's bed-room between the November preceding and the time of her death, save the time of the execution of the codicil aforesaid. On such single occasion, and also when the codicil was executed, deceased was in bed: he never saw her between November and her death out of her room; or at any other time than the two occasions deposed of. The respondent never saw the deceased in a state of stupor. On the first of said two occasions of his seeing deceased in her bed, which happened, as he believes and best recollects, in the November preceding her death, the deceased sent for him, and gave him directions for raising a wall. On the latter occasion she executed the codicil. At the time she executed the codicil her head hung heavily; but she acted, as it appeared to respondent, entirely of her own accord, without being roused thereto, or shewing unwillingness or irritation."

And on the 7th interrogatory—"He cannot recollect that he saw the deceased on any other than the two occasions deposed of between the end of October, 1825, and her death, and he believes that he did not: on both such occasions the deceased's mental faculties did not appear to him to be, and he believes the same not to have been, weakened, nor her memory impaired. Respondent forming his belief on what passed between himself and the deceased, and on what was done by her on the two occasions deposed of, swears to his positive belief that the deceased was, at such times, in a **[275]** condition to attend to the business which was then spoken about and transacted; and he knows not, and never heard, and has no reason to believe, that the faculties of the deceased ever failed her so as to unfit her for business."

The whole of this account given by Witchell, and the facts, prove nothing that can, I think, be deemed at all sufficient: what passed might as well apply to a draft as to a codicil: all he hears the deceased say respecting the paper is "Quite so," and "That will do"—all he sees her do is writing a paper on a book; but it seems to me by no means clear that he could see whether there was any signing at all of the codicil, or of any other paper—it is not impossible that an imposition and contrivance were practised on this drowsy person just called from his bed. How are the parties placed, according to James King's own account, on the seventeenth interrogatory? Sarah King is standing close to the deceased, one hand behind the pillow, the other holding the candle—James King is next to her, fronting the deceased, holding the book deskwise (that is sloping up), of course leaning over the bed—Cunningham next to him fronting the deceased—Witchell next to her also fronting the deceased; so that

there were four persons standing by the side of the bed, and Witchell was the furthest from the deceased, and must have been near the bottom: it is hardly possible that he could see the actual writing—scarcely the paper—so as to distinguish what it was —whether a codicil or a draft, or whether any thing was in fact written—still less whether the name was previously written, and a mere dry pen put into the deceased's hand. Whether there is **[276]** room for the Court to suspect any such deception must be decided on a view of the case in all its bearings; but in a clandestine transaction at midnight, where parties are helping themselves, they are exposed to all suspicions: I only say that it is not impossible that no signature was then made; they must remove all doubts: the effect of Witchell's testimony, giving him full credit for honest intentions, goes but a short way towards proving capacity; he was suddenly called up, and was only in the room about five minutes: he speaks to no act of reading over, to no act of sealing, to no desire that any person should attest, to no words of publication—"She said little—her head hung heavily."

It comes, then, to the evidence of the brother, and of the female friend of the person principally benefited; and, under all the circumstances already adverted to, it would be hardly safe to trust to the statement of such biassed witnesses. It is said that it was not improbable the deceased might wish to employ the brother of Miss King to draw up this codicil; and perhaps it would not have been if the alteration had been slight; but if she intended to make an alteration to such an extent—to revoke, so materially, the bequests to Sir Harford Jones—it would have been more consistent with the shrewd and cautious character of the deceased to have had professional assistance—either her own confidential solicitor, Mr. Russell, or, at least, some other attorney. On the other hand, if a fraudulent imposition were intended, professional aid would be carefully excluded: Miss King and these parties would only trust her brother and her friend to prove the im-**[277]**-portant facts: nor would they venture to have respectable neighbours, nor disinterested persons to attest; they would not place the transaction in the middle of the day, they would choose the hour approaching to midnight, and would call the mason out of bed merely to be present at the signature and nothing more: the persons engaged, and the time chosen, are at least as consistent with fraud as with fairness; and the whole has a most suspicious appearance.

Another circumstance, with respect to time, strikes me as pointing to fraud; the preparation, and execution, took place during the absence of Baker; he had attended the deceased from the 26th of October, 1825, eight times by the end of November—about once a week in December—on the 4th of January; but from the 11th to the 21st of January his visits had been on every second day; and it is to his opinion, and not to Hay's, that Miss King refers in writing to Sir Harford Jones on the 14th of January, in the letter already mentioned. On the 21st of January Baker had occasion to leave home, and did not return till the 31st: this ten days' absence, during which his visits on alternate days were discontinued, could hardly have been unknown to these parties; the time was opportunely selected for obtaining this codicil—the deed was done during the absence of this medical attendant—the only disinterested person who had access to the deceased.

The time chosen, then, added to the other circumstances, tends considerably to increase the suspicion, and to excite the doubts and jealousy, of **[278]** the Court: nor is that suspicion much diminished by that which has much been relied on, viz. Hay's telling Baker on his return "that Mrs. Brydges had repeatedly enquired for him, that she was desirous of their joint opinion whether she could recover; that he had given his opinion she could not:" and Miss King's declaration "that the deceased had become quite resigned; and repeatedly regretted the respondent's absence."

In the first place, this is at variance with the deceased's unwillingness to see Baker; but, in the next place, the assertions of Hay and Miss King are no proof that such an enquiry was ever made by the deceased. Hay was aware of the codicil before the deceased's death, and it is not likely that his 1000*l.* legacy was concealed from him; whether he was or was not actually a party to the making of the codicil—whether he represented the enquiry to have been made by the deceased herself directly to him, or through Miss King, does not appear: the latter is consistent with the evidence of Baker on the eighteenth interrogatory:—

"When the respondent resumed his attendance on the deceased on the 31st of January Mr. Hay told him, as Miss King did also, that the deceased had repeatedly enquired for him in his absence; and that she was desirous of having respondent's

and Mr. Hay's opinion as to the probability of her recovery. Mr. Hay said that he had given it as his opinion that she could not recover; and Miss King said that the deceased had, since that communication, become resigned. He does not recollect that it was said that the deceased was much [279] affected at the report of her danger. Miss King said that deceased had repeatedly regretted respondent's absence."

If a fraud had been effected, Miss King, aware that a codicil was to make its appearance, would be anxious to pave the way for it, and to suggest circumstances that should render it more probable, and be a sort of announcement of the act, such as representations of the deceased's resignation: while, on the other hand, if all had been fair, and the deceased quite capable, why did they not disclose to Baker that a codicil had been made, even though they did not mention the contents? why did they not take the first moment, on the 31st of January, to desire Baker to see the deceased, to satisfy himself that she was capable, and if possible to rouse her, and to remind her of the transaction, and get a recognition that she had done some testamentary act? but they never said a word on the subject till two days before her death, and I therefore do think that those declarations to Baker might be nothing more than a mere colourable preparation for the production of the codicil; they are not inconsistent with the incapacity of the deceased, and the fraudulent procuring of this codicil—they tend but little to remove suspicions.

I approach, then, the other two attesting witnesses, the chief of whom, the writer of the codicil, is James King, the brother of the principal legatee, a young man twenty-six years of age, an accountant or clerk to a merchant at Bristol; his salary is 70l. a year, and he has perquisites that make it amount to 100l.: owing to some family misfortunes, about ten years ago, he went into service for a year and a half, he then became [280] a clerk in a counting-house for several years, and subsequently, after having been at home for some time, he has been for four years in his present employment. There is nothing in this to the discredit—it is rather to the credit of his steadiness and abilities: that his abilities are not inconsiderable may be collected, not only from his success in life, but also from his deposition: he is not stupid, nor ignorant, so as to be incapable of conducting such a transaction, whether the transaction was fair, or whether it was a contrived fraud and conspiracy; but it is one thing to be equal to trump up a plausible story; and another—and far more difficult—to make it probable, and consistent in all its branches, more especially where it is necessary to have colleagues, who are to fit in the different parts to each other, and yet to avoid the appearance of confederacy: they may preconcert some of the main features, but, if the story be not true, detection will unexpectedly peep out in some collateral or incidental points which had not been sufficiently arranged.

By these tests I propose to examine the evidence, and shall begin with the account given by James King, and then proceed to that given by Mary Cunningham. The Court will see what improbabilities, what contradictions, what circumstances of suspicion there are, and whether, on the whole, it can venture to repose full confidence in their testimony. I may first observe that King is not merely a brother giving evidence for a sister, but he is the manager of the suit; he applied to every witness, and was active in procuring their attendance; it is his own act, his own cause; if Miss King fails, it is difficult to say that he [281] may not be responsible for the expences; but, at least, his credit must be strictly examined: he states:

"That having been sent for in the middle of the day of the twenty-fourth of January, he arrived at Hambrook Lodge about seven o'clock in the evening; he took some refreshment, and was then fetched into the deceased's bed-room: his sister, Gay, and the maid-servant were in the room, but the latter soon left it."

He goes on making the deceased in the most perfect mind, not only full of intelligence but of activity and alacrity:

"The deceased, on perceiving deponent, who went up to the bed-side, said to him, 'Mr. King, I have been waiting for you; I am glad you are come, for I have a great deal upon my mind which I must do before my death: you know what I have often promised to your sister, and I cannot think of leaving her to the mercy of Sir Harford Jones after my death: I have sent for you for the purpose of penning down what I wish to do for your sister, Thomas Gay, and those friends who have been so kind and attentive to me during my illness: I am sensible that I cannot recover, and my doctor, Mr. Hay, has told me that I cannot possibly live many days; I, therefore, wish you to sit down, and write what I shall tell you.'"

Now all this is very good, if it be true; but it makes the deceased of a very perfect and alert understanding at this time.

"Deponent, in reply, told the deceased that he was incompetent to perform what she required of him, as he had never done such a thing as to make a will, and he was quite ignorant of the form of **[282]** words which were (as he believed) necessary to be used in drawing up such an instrument; that if it was her intention to alter, or add to, her will, she had better send for Mr. Russell (meaning deceased's attorney) as a proper person for the purpose."

This, again, is very fair, if it is but true.

"The deceased said in answer that she had a reason for not sending for Mr. Russell; it was because she did not choose all the world to know, before her death, what her intentions were"

She had, however, trusted Mr. Russell to make a codicil for her in April.

"Deponent rejoined, saying, 'he thought it would be illegal for him to do it' (meaning to make deceased's will or codicil): she replied, 'Not so, you are fully competent to write anything I may tell you, and were I to call in a stranger passing in the street to write it, it would be as legal as if done by Mr. Russell.' Deponent then consented, and sat down at a table close to deceased's bed-side, upon which the deceased directed Sarah King (who with Thomas Gay had been present during the aforesaid conversation) to fetch pen, ink, and paper. As soon as the deponent was furnished with the materials for writing, and ready to begin, the deceased, sitting up in bed supported by pillows, without further preface, began to dictate, and dictated, 'I, Mary Brydges, of Hambrook Grove, in the County of Gloucester, spinster, do, in addition to my will'—which the deponent committed to writing."

He was quite ignorant of the law, but he follows her dictation.

"Either at this period, or before the deponent **[283]** began to write (he cannot now be certain which), the deceased gave Sarah King, his sister, her keys, and desired her to go and fetch 'the codicil, made by Mr. Russell, for your brother's government.' Sarah King accordingly left the room, and in about five minutes returned with the codicil now marked B, dated on the 15th of April, 1825: when Sarah King brought in the said codicil she handed it to the deceased, who thereon desired that it might be given to deponent; this done, the deceased proceeded, saying, 'I must begin with your sister,' and she then dictated the words—'I give and bequeath to my sincere friend, Sarah King, the sum of ten thousand pounds,' which the deponent committed to writing; and, referring to the codicil B, added therefrom the words, 'to be paid to her, her heirs, executors, and administrators:' the deceased went on—'and also my gold watch and chain, and my little dog,' which deponent also wrote down, as he likewise did the further words dictated by the deceased in respect of such legacy to his sister, namely, 'for her long and kind attention,' or to such effect. The deceased then dictated a legacy of one hundred pounds to Eliza King, and to John King one hundred pounds and her bay colt, which deponent reduced into writing. She next dictated a legacy of one thousand pounds to John Hay, calling him, in addition, 'her medical attendant, for his kindness and unremitting attention,' or words to that effect, which deponent wrote down; and deceased, adverting to a circumstance wherein Mr. Hay had assisted her with a loan of money, asked deponent 'whether he recollected it, and further said how attentive Mr. Hay had been in his visits.' The deceased next **[284]** dictated a legacy of fifteen hundred pounds to Thomas Gay, calling him 'her faithful servant;' which legacy deponent also reduced into writing, as he did the further bequest to him of a grey carriage-mare and a cart: after this the deceased went on to speak in terms of commendation of Thomas Gay—'that she made such bequest in consequence of his long services, and the accident he had met with' (which deponent believes to be a rupture). Deceased then said that she must consider her other servants, and directed him to set them down for thirty pounds a-piece, which he did. The deceased next said 'that she wished to name him, the deponent;' on which he observed 'that he could not be a legal witness to the codicil if she did so.'" He was, therefore, learned in law in that respect.

"The deceased replied 'she was sorry for it;' and observed that that (meaning what she had dictated) was all she had to say. The deponent then said that he would read to the deceased what, from her dictation, he had written; and did audibly and distinctly read the same all over to her in the presence of his said sister and Thomas Gay, who had been present during the dictation aforesaid, or nearly the whole time

thereof, one or the other occasionally leaving the room, but for short intervals only. The deceased, during the reading, from time to time said, 'Very good,' and nodded her head, and smiled, and generally, by such her expressions and manner, approved of the contents of the paper: having ended the reading, the deceased desired him to make a fair copy of the paper, and added, 'We must have it properly attested:' and said 'that she wished the depo-[285]-nent, Thomas Witchell, and Mary Cunningham (who were both in the house) to witness it. The deponent then immediately proceeded to make and made a fair copy of the draft so approved of, and having completed it, he read it over to the deceased aloud, and then at her desire handed it to her: the deceased, sitting up in bed, read it to herself, and in so doing observed 'that she doubted whether she had sufficient money unappropriated to pay the legacies she had thereby bequeathed, and then directed deponent to write down that the legacies she had given by the said paper were to be paid out of the legacy of thirty or thirty-five thousand pounds (he forgets which) bequeathed by her will to Sir Harford Jones.' The deponent accordingly added at the foot of the draft a clause to the effect dictated by the deceased, and having done so, he read over to her the said additional clause in an audible and distinct manner, and she approved thereof in general terms, adding 'that it was too late, and that she was too much fatigued, for a fair copy to be made that night.' The deceased also desired the deponent 'to destroy the fair copy made as aforesaid (which he did by putting it into the fire in deceased's bed-room), and to take the said draft away with him, and bring it fairly copied to her the next day;' and then told Sarah King to carry 'Mr. Russell's codicil' back to where she took it from. The deponent then having first drawn, at the deceased's desire, a cheque upon her banker for the sum of three hundred and twenty-five pounds, in favor of his sister Sarah King, to pay the various sums due to the deceased's tradesmen, took his leave." Here is also inserted on the [286] margin of this deposition the following passage:—"Having first, on a separate paper, copied from the codicil, marked B, the form of words to be used as revocatory of Sir Harford Jones' legacy, which form the deponent, with a slight variation, adopted in making the copy to be deposed of." That explanation was rather necessary, because the revocatory clause in the two instruments are expressed in the same words.

Now, in this representation, for this is the account of what passed on the night when the instructions were taken, there is as alert a testatrix as fancy can suppose: she enters into long conversations, and explanations, and dictates every part of the paper. James King was so ignorant of forms that he was unwilling at first to draw up the instrument, and as Miss King, in her affidavit of scripts before the commencement of the cause, swore that the deceased had dictated it, James King is anxious, in every part of his deposition, to shew that the whole proceeded from her: she was not only mentally but bodily alert; she is alive to every thing that is going forward—she not only sends for her former codicil, but she hands the keys—the former codicil is delivered to her—so that she must have had the free use of her hands and arms; she not only from time to time during the reading says "Very good," but in spite of the dreadful state of her back she nods her head and smiles—afterwards James King makes a fair copy, and reads it to the deceased—then, at her desire, hands it to her, and she, sitting up in her bed, reads it over to herself; there is not the slightest apparent difficulty either in sitting up, or reading the paper over; there is no allusion to the darkness of the [287] room, or to the candle-light, and there is no mention of any spectacles in this part of the evidence. The instrument itself, marked D, is in a small and rather cramped hand, and it begins in these terms:—

"I the undersigned Mary Brydges Spinster of H. G. in the Parish of Winterborn County of Glocester in addition to my last will dated the ——— day of ——— do now in sound mind and intellect make this codicil."

This is the commencement of the codicil, and it is quite fairly and regularly written; it hardly needs a correction, except the introduction of the formal words of the "parish of Winterborn," and of "spinster:" and the deceased was so capable that she could dictate a paper of this description without its requiring any alteration.

Having disposed of these legacies—amounting altogether to 13,000l.—she begins to doubt whether she had sufficient to pay them without reducing the legacy to Sir Harford Jones of 35,000l. stock to 20,000l. stock. Now the deceased was worth between 50,000l. and 60,000l.; was shrewd, and well acquainted with her concerns,

and she had only disposed, by her will, of about 3000l., in addition to the bequest to Sir Harford Jones: it was strange, then, that she should doubt, but it is not strange that the Kings should not be quite aware of, the extent of her property, and should think it more safe to reduce that legacy. This revocatory alteration rendered a fresh copy necessary, but the deceased, becoming fatigued, desired it to be made the next day; the fair copy, which had been written prior to the change in [288] the amount of Sir Harford Jones' legacy being thought of, was unfortunately destroyed; why it should have been, no satisfactory reason appears. She was not, however, so fatigued but that she could sign a cheque for 325l.—a large sum—and, if this story of the draft were true, it, collaterally, would support the capacity; at all events, as I have before remarked, the money was very convenient and therefore conciliatory to Witchell.

Now I do feel a great difficulty in bringing up my moral conviction to a belief of all these circumstances, considering the condition of the deceased. What part of them may be true I cannot undertake to say: but that none of them were thrown in for the purpose of giving the deceased the appearance of more volition and capacity than she possessed at that time, I cannot persuade myself; and unless I can believe the whole, I must not rely on any part: it is not enough if the Court is not convinced that the witnesses are beyond suspicion; and, in my judgment, the credit of this witness is shaken.

The next morning James King draws out an A B sketch, and shews it to his friend Day, a lawyer, who suggests a few verbal alterations; that A B form is not produced, nor is Mr. Day examined. In the middle of the day, on January the 25th, James King is again sent for to come to the deceased immediately: it is a little extraordinary that he should be sent for, as the deceased had, the night before, desired him to copy the codicil and bring it over with him, and it is not stated that she had become worse: the reason too assigned for not going—that he was busy at the counting-house of his employers—when his sister [289] and the other legatees might lose their legacies by an unexpected death, is not very satisfactory nor probable: he could not even attend to business of such importance as a codicil giving a legacy of 10,000l. to his sister, of 1500l. to Gay, of 1000l. to Hay, nor even, so far as appears, make an application to his employer to release him from their counting-house for half a day!

Again, he does not get to Hambrook Lodge till eight o'clock in the evening: the deceased was then asleep and he could not see her till ten: "At about ten o'clock the deponent, being desired, went up to the deceased, whom he found sitting in bed propped up as before with pillows: he had with him the draft and the fair copy. The deceased, on seeing him, complained that she had been sitting up to receive him, and of his having disappointed her: on explaining that business had detained him she was satisfied. The deceased then enquired 'whether he had completed the paper she had given him instructions for the day before:' deponent said 'that he had, and hoped it was properly done:' the deceased replied 'she hoped so too.' He then, from his pocket, produced the aforesaid draft and fair copy, and proposed that he should read the copy to her, to which she assented: in the mean time the purpose of deponent's coming being known, Thomas Gay, who announced him, went to call Thomas Witchell, who had gone to bed in the house; and deponent's sister had brought Mary Cunningham into deceased's room as witnesses; deponent, in the presence of Mary Cunningham and of his said sister and Thomas Gay, read the fair copy aforesaid all over to the deceased in an audible and distinct [290] manner, and having done so he enquired of her whether the same was agreeable to her intention? and she answered, 'Perfectly so, that nothing could be better!' Deponent then handed the said fair copy, and also the draft aforesaid, to the deceased, who herself then perused the said copy with evident tokens of approbation; saying, here and there, 'Very good,' and nodding her head by way of assent: previous to commencing the reading the deponent proposed waiting until Thomas Witchell was dressed and present, but the deceased said it was of no consequence: Thomas Witchell had come in and was present at the time that the deceased, in answer to deponent's enquiry whether she approved of the said fair copy, approved of the same. The deceased having thus perused the said paper enquired whether the witnesses were ready" [now this was after Witchell was in the room]; "the deponent said that they were; and to facilitate the execution of the said paper, got a music-book, upon which he laid the paper, and handed a pen to the deceased, he holding the music-book and paper thereon in a convenient position, and his sister, Sarah King, a candle, the deceased signed her name at the foot of

the paper, in their presence, and in the presence of Thomas Witchell and Mary Cunningham, and also of Thomas Gay. Having completed her signature, the deceased handed the pen to Sarah King, asking her whether that (her subscription) would do. Before the deceased had signed her name, and in the act of signing it, she said aloud, 'Now witness my hand.' The paper being so signed, the deceased desired the deponent to seal it, which he did in her presence, making an im-**[291]**-pression of deceased's own seal on black wax: when this was done, the deceased, addressing herself to deponent, in the presence of the several persons aforesaid, said, 'Now let this or it be properly attested.' He then read to Mary Cunningham and Thomas Witchell the clause of attestation, and he moreover to Thomas Witchell, on account of his absence when the paper was read to the deceased, explained to him that such paper, which he had been sent for to see executed, was a codicil to the deceased's will, whereby she had bequeathed ten thousand pounds to his (deponent's) sister, and some minor legacies to other persons. The said Mary Cunningham, next Thomas Witchell, and lastly the deponent, in the presence of each other and of the deceased, then severally subscribed the clause of attestation as witnesses of the execution of the codicil. The deceased appearing fatigued, and expressing a desire to take her medicine, deponent and the other witnesses left the room, leaving the codicil on the table: he brought away with him the draft thereof."

The same observations will apply to this account as to that of the preceding night respecting the great alertness and readiness of the deceased. It is strange that, as King came on purpose to have this codicil executed, and as Witchell was talked of the night before as a witness, that he should be allowed to go to bed. James King, indeed, says, Witchell came into the room on the night of the 24th; but that is contradicted by Witchell; but why was he suffered to go to bed when James King arrived at eight o'clock, and the immediate execution was only prevented by the deceased being asleep? It looks as if it were **[292]** a contrivance that he should see as little as possible of the transaction—the bare act of signing: and some things are declared to have passed after his entrance to which he does not depose, such as the deceased enquiring whether the witnesses were ready, to which James King answered, they were; such as in the act of signing, her saying aloud, "Now witness my hand;" such as her desiring the paper to be sealed, the sealing it in her presence, her saying, "Now let this be properly attested." All these circumstances are thrown in by King, and are not mentioned by Witchell, but are, in a degree, contradicted; for he swears "deceased said but little, and her head hung heavily."

The Court is perfectly aware that some witnesses will recollect what others do not bear in mind; and will sometimes place the parts of the transaction in a different order and detail; and, therefore, it does not rely much on these variations alone; but the important details and remarks stand, at least, on the uncorroborated testimony of James King: so far as Witchell is concerned, he does not confirm him in these particulars. In chief, King speaks of the sealing being by the desire of the deceased, and before the attestation—the paper itself shews that was not the fact—the seal was affixed, beyond all question, after it was attested, for the wax has run over the first letter of Bristol after Cunningham's name. On the 27th interrogatory King says:—

"The seal on the codicil in question was affixed thereto after Mary Cunningham had subscribed her name as a witness."

Whether, on seeing the codicil to identify it **[293]** at the end of his examination, he perceived that the seal had run over the writing, the Court is not aware, but the very positive and particular way in which he deposes, in chief, on this point is clearly at variance with the fact:—

"The paper being signed by the deceased, she desired the deponent to seal it, which he did: the deceased then said, 'Now let this or it be properly attested!'"

Here, then, is a direct contradiction between his evidence in chief, and on interrogatory; and it is open to suspicion that this variation arose from his observing the seal when he identified the instrument; (*a*) or it may be that, when he was cross-

(*a*) The Court was informed, on its enquiry in the course of the argument, that it was not usual for the examiner to shew the instrument, to which a witness was examined, till that witness had gone through the particulars of the execution; but to shew it to him at the end of his examination-in-chief, in order that he might identify it.

examined he forgot how he had told his story in his deposition: he was examined in chief on the twenty-eighth of November; and, upon interrogatories, on the fourth and fifth of December—at all events this leads to an inference that truth is not the foundation of his deposition, for truth is uniform and consistent.

Before proceeding to consider more particularly the circumstances respecting the draft, I shall examine the evidence of the other subscribed witness, Mary Cunningham, as far as it applies to the factum: she is a young woman of the age of twenty-five years, the daughter of a tin-japan manufacturer, in Redcliffe-street, Bristol, residing with her parents at Hill's-bridge Parade, and **[294]** "she commonly goes out during the day to work with ladies at their own houses; she does so more for the sake of employment than profit." This, though not very material, appears in her answer to the first interrogatory; she is a great friend of Miss King, who, according to James King's answer to the third interrogatory, has been residing for the last six months at the house of Cunningham's parents. If there was confederation between the parties to support this codicil, she would be taught to make the deceased very active in originating the transaction, as James King made her active in giving the instructions, and in the execution. Here again, therefore, the Court must look to the probability, and to the consistencies of the different parts of her own evidence, and to its accordancy with, or discrepancy from, that of James King.

"Deponent was acquainted with Mary Brydges, late of Hambrook Grove, during the two years next preceding, and until her death: she made such acquaintance by going to visit Sarah King, who, between two and three years, and until deceased's death, resided with her as her companion. In the course of deponent's acquaintance with the deceased she was in the habit of staying at Hambrook Grove, on a visit, for a week or ten days at a time."

Yet James King had never seen her there, and the workmen about the house never knew of the existence of such a person.

"Deponent and Sarah King had for several years previously been intimate friends: deponent was visiting and staying at the deceased's house aforesaid from the 22d or 23d day of January last **[295]** past until the 26th of the same month. Deponent, the said Sarah King, and Thomas Gay, the deceased's man-servant, being together in deceased's bed-room (she being confined to her bed) in the morning part of the said 24th day of January, the deceased desired Thomas Gay 'to send Carpenter (who was employed in the stables and grounds) to Mr. James King, at Bristol, for that she wanted to see him on particular business.' At about ten o'clock in the evening of the same day the deponent, who was sitting in Miss King's bed-room, received a message from the deceased, brought her by Miss King, saying 'that Mrs. B. (meaning the deceased) wanted her.' Deponent accordingly went into the deceased's bed-room, Miss King going with her: they found the deceased lying down in bed, and James King with writing materials before him at a table by the bed-side. Thomas Gay was also in the room. The deceased was conversing in a low tone of voice, she being very feeble, with James King, and she also said something to Miss King, who had gone, on entering the room, to the bed-side, whilst deponent remained at the fire; deponent did not hear, not taking notice, what the deceased then said to James King and his sister. When deceased had finished speaking to them, which occupied but a minute or two, she addressed herself to the deponent (who advanced to the bed-side), saying, 'My dear, I wish you to witness this codicil that I am now making in favour of my dear Miss King.' Deponent said, 'Certainly, Ma'am.' The deceased, whilst so speaking, held in her hand a paper, which had just previously been given her by James King."

James King does not say one word about this.

[296] "The deceased just about the same time was raised up in bed by Miss King, who propped her up with pillows."

According to James King she was propped up when he first entered.

"And so sitting up, the deceased, to herself, read over, using spectacles, the paper so handed to her by James King, while Sarah King stood by, holding a candle to light her, the other candle remaining on the table where James King had been writing. When the deceased had looked over the said paper she, speaking to James King, said that she thought there was not money enough besides 'the thirty-five thousand pounds.' The deceased said much more to James King on that occasion, referring to the paper she had read over, than deponent can now recollect; but she well recollects that the tenor of what deceased said was that she had not money to satisfy the legacies men-

tioned in the said paper, without deducting the same from what she had already bequeathed by her will. From what then passed between the deceased and James King, deponent found that the said paper would not do, and that she would not be wanted to witness it, and therefore left the room."

So that on the evening of the twenty-fourth this witness was only present for a short time—she came in after the paper dictated had been copied, and she left the room before the alteration in respect to the 35,000l.: nothing about the cheque passed in her presence. She goes on:

"The following day, the 25th of January, she heard the deceased (being in her bed-room) desire Thomas Gay (also there) to send 'Thomas' (meaning Thomas Carpenter) for Mr. King: this hap-**[297]**-pened about noon. At about eleven o'clock at night (of the same day) Sarah King came to deponent, who was sitting in her (King's) bed-room, and said that Mrs. Brydges wanted her. They went into the deceased's bed-room together. Deponent found James King (of whose arrival she had heard ever since eight o'clock) and Thomas Gay already in the room: the deceased was lying down in bed."

This witness differs as to that fact from what James King deposes.

"Deponent went up to deceased's bed-side and asked her how she was: she said, 'Much the same;' and added, 'she had sent for her (deponent) to witness a codicil she had made:' deceased used the very words, 'to witness a codicil that I have made in favour of my dear Sarah King and other persons who have been so particularly kind to me during my illness; as I cannot die happy without leaving them something; and what I am doing is not enough to repay them for their kindness—especially my dear child'—meaning by 'my dear child' the said Sarah King, of whom she frequently spoke by that appellation. The deceased then said to Sarah King, 'My dear, tell Thomas (meaning Thomas Gay, who was standing by the window) to call Witchell.'"

James King says nothing of this long conversation—nothing of this declaration—not a very probable one at such a transaction.

"After waiting two or three minutes, the deceased desired James King, who was by the bed-side towards the fire (the curtains being on that side withdrawn, as the same were at the foot of the bed), to read the codicil, or words to that effect; he, James King, having, when so spoken to, the **[298]** codicil to be deposed of in his hand. She, at the same time, desired him not to wait for Witchell, as it was quite sufficient that deponent was present. James King then, in an audible and distinct manner, read the said codicil all over from beginning to end: while he was reading, the deceased, two or three times, said, 'Perfectly right'—'it is just as I wished it:' and when the reading was over the deceased (who in the mean time had been raised, as before, into a sitting posture, and supported by pillows) took the paper into her own hand, and to herself read it over. It was about this time that Witchell (who slept in the house and had gone to bed) came into the room; she believes Gay had shortly preceded him. Deceased desired Witchell 'to come round,' meaning to the bed-side, which he did; and then said to him, 'I wish you to witness this codicil to my will:' the codicil was then either in deceased's hand or on the bed: the deceased then asked 'whether all was ready,' upon which James King placed the codicil on a music-book and held it in a convenient position (desk-wise) before the deceased, and handed a pen to her, while Miss King held a candle, standing close to the deceased, and deponent and Witchell close by, and in front of the deceased; who then signed her name at the foot of the paper, and having done so, said to Miss King, 'Will that do, my dear?' Mr. King then removed the book, and took the codicil, so signed, to a table standing in the pier between the windows fronting the foot of the bed, where the curtains were undrawn, so that the deceased could see what was done there, and the candles were removed from the table at the bed-side to the pier-table. James King having pointed out to the deponent **[299]** the place, she signed her name as a witness to the codicil: he then handed the pen to Witchell, and read to him the clause of attestation, and told him that the paper was a codicil to the deceased's will; that it had been read over in deponent's presence, and that the deceased had thereby left his sister (Sarah King) ten thousand pounds, besides other legacies: Witchell then subscribed his name, and after him James King. Previous to the deceased signing her codicil she desired James King to affix a seal to it; and at the same time desired Sarah King to fetch her (the deceased's) seal, with which, being brought, he, with black sealing-wax, made an impression thereon. Witchell left the room as soon as he had subscribed the

codicil. Deponent herself, in a minute or two, after hearing the deceased desire Sarah King not to let her fall asleep without giving her her medicine, returned to Miss King's room, leaving James and Sarah King and Thomas Gay with the deceased."

As to the capacity of the deceased, the same witness deposes:

"The testatrix was, on the 24th and also on the said 25th days of January, at the time of her giving instructions for a codicil to her will, and at the time of her executing the codicil, and on all previous and subsequent occasions of deponent being present with her, of sound, perfect, and disposing mind, memory, and understanding, and talked and discoursed rationally and sensibly, and well knew and understood what she then said and did."

She says in a further part of her evidence on the seventh interrogatory:

"She knows not, and does not believe, that the mental faculties of the deceased were weakened from **[300]** the latter end of October, 1825, or that her memory became impaired. The only difference respondent perceived in the deceased, from the first of her acquaintance with her until her death, was the alteration in her bodily health, and bodily weakness resulting therefrom."

So that in point of capacity there was no diminution of it from the time of her first acquaintance with the deceased.

In this part, again, Cunningham makes the deceased very alert—desiring Gay to send for James King about noon, but assigning no particular reason—nor was it very probable, as she had appointed him the night before: she describes the deceased as very much alive about Miss King—and very minute in her reasons for giving her 10,000l.; she states several circumstances after Witchell came into the room which Witchell does not confirm—she, in chief, places the sealing with great particularity, even before the signing of the deceased; and she asserts that the deceased, at all times, both before and after, was in a state of perfect capacity: it is not a case, therefore, of temporary drowsiness and stupor, with a power on special occasions of rousing herself to exertion. If this witness' account be true, it is extremely difficult to say that Baker's evidence is not false, but the latter is much supported by many unquestioned facts. In respect to the sealing, she also, like the other witness, very soon contradicts her deposition in chief. In answer to the third interrogatory, she says:

"The word or addition 'Bristol' following her subscription is of her own handwriting. She cannot recollect whether James King sealed the **[301]** codicil before or after respondent had subscribed her name and addition aforesaid: she well recollects that the codicil was sealed at the table standing between the windows, and by direction of the deceased; respondent being shewn the codicil, cannot be certain whether the same was sealed before or after her subscription."

Now she was examined in chief on the 30th of November, and to this part of the interrogatories on the 1st of December: she and James King and Miss King were all living together in the same house—the better recollection of Cunningham does then excite some suspicion that she had had some conference with James King. This witness and James King certainly agree in the general description of the deceased, and in some leading circumstances, but they are such as might have been preconcerted; though, even in some of these, they differ in several particulars: but where such a confederacy exists it will, more probably and more decidedly, be detected upon some collateral broad fact than upon the transaction itself. Here is a collateral circumstance, on which they were not likely to be so well prepared. James King, on the twelfth interrogatory, says:

"On the 24th day of January, or night thereof, the deceased herself examined several bills and accounts, and her banker's book, previous to her desiring respondent to draw a cheque for her, as deposed of in chief."

On a subsequent interrogatory, the 15th, he answers:

"That the cheque, being the exhibit No. 1, shewn to him, was signed by the deceased in his presence on the night of the 24th day of a January, **[302]** and by him was presented to her for such purpose, not immediately after the execution of the codicil in question, nor on the evening of the execution thereof, but immediately after the codicil or copy made from the instructions taken down in writing, deposed of in chief, had been destroyed. The deceased next day used the same inkstand when she executed her codicil as was used by her when she signed the cheque."

This fixes the time of drawing the draft to the night of the 24th.

On the thirty-fifth interrogatory he answers:

"That he drew the cheque by order of the deceased. Previous to naming the sum to be drawn for she had various bills and accounts before her, as she sat up in bed: she looked the same over, and herself named the amount to be drawn for, and directed that the cheque was to be made payable to the producent. The deceased did not say any thing by which it appeared whether she did or did not know the balance of cash she had in the hands of her banker."

On the next interrogatory he says:

"That among the bills and papers which the deceased examined, previous to her ordering the cheque to be drawn, was Gay's account book, in which were entered sundry house and other expences defrayed by him, among which, when due, he inserted his wages. Nothing was said, at the time deceased signed the cheque, as to the amount of Gay's wages, or the sundries for which he was to be repaid. The sundries, amounting to 42l. 13s. 9d., were set forth in an account book kept by the producent: the deceased herself looked over the bills referred to in Gay's book, and in **[303]** that of the producent: having done so, she desired respondent to add up what the same and 250l. to Witchell would amount to: he did so, and handed his calculation on a scrap of paper to the deceased, who looked over it, and then ordered him to draw for the amount of the total."

James King, then, directly binds himself down to this cheque being drawn on the evening of the 24th, after Cunningham had quitted the room; for it was after it had been determined not to have the codicil copied for execution that night. Here is a long and intricate transaction, in which the deceased is most minute and active, as if she were in perfect health; the time and the circumstances are positively fixed and accurately described; if true, here was capacity abundantly sufficient for a testamentary act—if true, I say—but it certainly is not very probable nor consistent, though she was so anxious about this codicil, yet so fatigued she could not wait to have it copied, that still she was so little fatigued that she could go through all this settlement of accounts, examining various vouchers, when, for two months before, Witchell, although very eager for it (particularly about Christmas) could get no money, because the deceased was too weak to sign a draft: but this is a collateral matter; and, if the codicil be not founded in truth, it is upon such a matter that the Court would expect the most striking contradiction to arise. It is necessary, then, to examine Cunningham's account of this exhibit: in chief, of course, she says nothing about it; because, if drawn at all, it was after she had quitted the room; it is on the twelfth interrogatory she speaks to this paper:

[304] "She never knew the deceased to be averse to parting with money, or to pay small sums: the deceased was very charitable: the exhibit or cheque marked No. 1 was signed by the deceased in her (respondent's) presence and that of Miss King, and of no one else as she now best recollects, on the 25th of January, in the course of the day, and before dinner time (six o'clock), as she now best recollects, and verily believes. At the time the deceased was signing the cheque she (deceased) and Miss King were in close conversation, so that respondent, standing near the window, did not hear or attend to what was then said. In the course of the same morning [namely, the 25th], and previous to her signing said cheque, the deceased, in respondent's presence and hearing, asked Miss King for Witchell's bills in order that she might know what she ought to draw for." On a further part of that interrogatory "respondent is not sure whether the said cheque is or is not filled up and endorsed by James King: she is not well acquainted with his hand-writing: she thinks it very likely to be of his hand-writing, because the deceased often employed him in matters of business, as she has heard and believes."

The witness therefore could not have been present when the draft was drawn, because it was filled up and endorsed by James King.

"She knows not whether the deceased did or did not sign the cheque with the same pen and ink as was used by her afterwards in subscribing the codicil: respondent was not taking notice at the time deceased signed the cheque: she did not actually see the deceased sign it; but saw her writing, Miss King being at the bed-side, and **[305]** immediately after respondent saw the cheque in Miss King's hand. She believes Gay was in and out of the room."

Here, then, Cunningham fixes the day, the time of the day, and the persons present, in direct contradiction to James King: the day—the 25th—not the 24th; the time before dinner—six o'clock—not at eleven o'clock at night; the persons

present—herself and Miss King—not James King: she enters into particulars—as sending for Witchell's bills in order to know what to draw for: she sees the deceased writing (no very easy operation for her)—Miss King standing by the bed-side—and, immediately after, the cheque in Miss King's hand. These are variances which I find it difficult to reconcile, and it is as difficult to decide which to believe, or whether to believe either.

But these difficulties do not end here: on the next day she comes, and disavows these answers. It seems that she was examined to the end of the sixteenth interrogatory on the 1st of December; on the 2d of December she corrects her former statement:

"Respondent, since yesterday, has been reconsidering what she then deposed in answer to the twelfth interrogatory as to the day on which the cheque, interrogate and produced to her, was signed. She now recollects more accurately, and deposes that the said cheque was signed in the evening of the 24th day of January last by the deceased, in the presence of respondent, Sarah King, and James King, who, at such time, drew out said cheque. Thomas Gay was also in and out of the room: she recollects that the deceased told **[306]** James King the sum for which he was to draw. She does not recollect any more that passed on such occasion respecting the said cheque, or the amount for which the same was drawn."

Now all this must be equally false; or at least it is decidedly in contradiction to herself and to James King. According to her deposition in chief, finding she was not wanted as a witness at that time, she had left the room before the burning of the fair copy; and according to James King there was a long transaction of business; the deceased had some bills and Gay's account before her, and he, King, wrote the items on the back and cast up the whole amount; this must have taken a considerable time. These various representations are quite unaccountable, except by referring to Cunningham's answer on the last interrogatory:

"She came to town from Bristol in company with the producent, James King, and Thomas Witchell: she is staying in Bury Street, St. James'. Sarah and James King are also staying in the same house, as did Witchell while he was in town: she sees the producent and James King daily, taking meals with them: she has conversed with James King and Witchell since their examinations; but not on the subject of this cause, because Mr. Toller warned her not to do so: she has not had any conversation whatever with the producent, or James King, or Witchell, respecting their evidence, or with either of them respecting what she herself had deposed on the preceding days of her examination, or respecting this cause, or the codicil in question."

James King also, on the thirty-ninth interrogatory, speaks to their living in the same house, **[307]** and at the same table; but "that he has not conversed with the producent or either of his fellow-witnesses since their examination, or since his own in chief, on the subject of this cause: he was admonished not to do so, and has attended to the same."

That is the way in which she ventures to answer that interrogatory. It is very difficult not to suspect—violently to suspect—that the contradiction arose from the two witnesses not having preconcerted what account they should give of this cheque: and it is equally difficult not to suspect that there must have been, on the evening of the 1st of December, some conversation, some explanation, notwithstanding the very proper injunction from the proctor; and that this correction by Cunningham sprung from that intercourse—James King, in his deposition in chief, having committed himself to the cheque being signed on the evening of the 24th. I find it therefore very difficult to believe that there had been no intermediate communication between them on the evening after Cunningham's first statement, though James King, on the thirty-ninth interrogatory, unhesitatingly swears in the words already quoted.

Perhaps, without going further, this Court might be bound to say that it could not safely give credit to these two witnesses, and that the proof failed: but another important circumstance was pointed out by Dr. Phillimore in the course of the argument. The codicil in question is written upon precisely the same paper as the will; not only the same black margin, but the same water-mark; and it is hardly possible that James King should have stumbled at Bristol upon a sheet of **[308]** paper of the same sort as the deceased had happened to use two years before in writing her will: it is still less probable from another circumstance—the date of the paper; for it appears upon further examination that the date of the water-mark in each is 1813;

so that James King, procuring a sheet of paper at Bristol to write this codicil, gets a sheet of paper of 1813, and that precisely corresponds with the paper of the will: this is next to incredible; it is a detecting circumstance. The counsel who spoke second in support of the codicil (for the first, if I remember correctly, did not advert to this observation) in accounting for this was obliged to suppose that the fair copy had been made, not at Bristol, but at Hambrook, after James King's arrival on the evening of the 25th; for, had he deposed that it was written at Bristol, it was admitted it would be difficult to support his credit. His evidence is—and it is a material point—

That "on the following day, in order to satisfy himself that what he had taken down in writing was of a legal effect, he made a transcript thereof in blank as to names and the amount of legacies, and called on an attorney of the name of Day, and submitted the same to him. Mr. Day made a few verbal alterations: the deponent, from the original draft, and the blank transcript corrected by Mr. Day, in the course of the same morning, being the 25th of January, made a fair copy agreeably to the deceased's directions, in order to the due execution thereof as a codicil to her will." Further on he says "he went up to the deceased's bed-room with the fair copy aforesaid" [that is, the copy he had made at Bristol; **[309]** for he had not made another], and "from his pocket produced the aforesaid draft, and fair copy."

On the twenty-eighth interrogatory he says "that he did, on the morning of the 25th day of January (previous to drawing out, in its present form, the codicil in question), call at the office of Mr. Brooke Smith, an attorney in Bristol: Mr. Smith was not at home, in consequence of which respondent went to Mr. Day, before whom he laid an A B C case for instructions to guide him in preparing the codicil in question. In the evening of the same day, and after respondent had prepared and finished the codicil in question, he again (before leaving Bristol to go to the deceased) called on Mr. Smith, who was then again out of the way: respondent saw his managing clerk, Mr. Rawlinson, from whom he, verbally, enquired the form to revoke a bequest; which form Mr. Rawlinson wrote down on a piece of paper: respondent did so, to satisfy himself that the information he had in the morning obtained from Mr. Day was correct: he found that it was so."

Here, then, the witness, not in one passage, but repeatedly, does fix himself with having written the codicil at Bristol before his return to Hambrook Lodge; the paper is nearly conclusive to discredit the witness to that fact.

The signature itself is suspicious—it is not unlike that to the first codicil—it is very dissimilar from those to the drafts signed by her within the last three months, and from that of the draft dated on the 24th or 25th of January, whichever it may be. And though Witchell supposes he may have seen this codicil signed, deception may have been **[310]** resorted to, and the affair so managed as to impose upon him in that respect. Such a similitude to the former codicil, and dissimilitude from the drafts, is a circumstance not altogether free from suspicion, though it is not necessary that the Court should rely on it in the decision of this cause.

The whole transaction is clandestine, which, of itself, affixes a strong indication of fraud and contrivance. Here is not a single declaration by the deceased of a wish, about this time, to do a testamentary act of any sort; there is no recognition whatever by her that she had done any such act; there are no disinterested persons who have access to her, except Mr. Baker. Here is, on the following day, the 26th, a message, sent by Gay from Miss King, to Russell, that "Mrs. Brydges is much in the same state, and could not see him," excluding Russell thereby. Here is subsequent concealment, not venturing to disclose the existence of the paper, as if conscious that it would not bear investigation—all these are confirmatory circumstances of suspicion.

Looking, therefore, to the improbability of the disposition—from its difference, in the character and amount of the legacies, from the former papers; looking at the condition of the deceased; considering who were the persons around her—that they are, most of them, closely connected together, and are materially benefited under this paper; considering also the necessary jealousy of the law in guarding the beds of dying persons against fraud and circumvention—I am of opinion that the evidence of the two subscribing witnesses (for the third can prove nothing sufficiently material) **[311]** is so shaken in credit that the validity of this codicil cannot safely be pronounced for upon such testimony: I, therefore, pronounce against it.

No costs have been prayed by Sir Harford Jones, either from a conviction that

the deceased intended, and ought to have done, something in the way of remuneration for Miss King, or from a hopelessness of ever receiving them, if given: he has, perhaps, acted properly, but certainly very liberally, in not praying costs.

The Court, therefore, is not called upon to make any further observation on the subject, but merely to pronounce against the codicil.

DEW *v.* CLARK AND CLARK. Prerogative Court, Hilary Term, 4th Session, 1828.—A sentence of the Prerogative Court, pronouncing against a will, and decreeing administration to the daughter, having been affirmed by the Court of Delegates, and the cause remitted: the Court will not allow the execution of the sentence to be delayed, by a prayer for an answer to the interest of the widow, who had been cognizant of, though not cited to see proceedings, nor by a caveat.—21 Hen. VIII. c. 5, § 3, leaves it to the discretion of the ordinary to grant administration to the widow or to the next of kin.

In this case a sentence in the Prerogative Court of Canterbury against the validity of the will of Ely Stott, and a decree of administration to Charlotte Mary Dew, the daughter of the deceased, were affirmed by the High Court of Delegates,(*a*) and the cause was remitted.

[312] Against this remission Mr. Scurlock entered a caveat in the Court of Delegates, which that Court disregarding, directed the remission to pass under seal: he further entered a caveat in the Prerogative Court that nothing should be done in the goods of Ely Stott without his being informed thereof.

Mr. Shephard also gave an appearance for the widow, and prayed an answer to her interest.

Mr. Loveday (for Bush) brought in the remission, and now prayed the Court to proceed according to the tenor of former acts.

Per Curiam. The decree of administration to the daughter is part of the sentence of this Court affirmed by the Delegates, and which I am now bound, on the remission of the cause, to carry into execution; but independent of that, the statute (21 Hen. VIII. c. 5, § 3) leaves it in the discretion of the ordinary to grant an administration to the widow, or to the next of kin: here the daughter has directed proceedings to be instituted, and has conducted them to a favorable termination; she has incurred all the expence and hazard of the suit, and exposed herself to the danger of a failure; the Court, therefore, would feel much disinclination (even if it had the power) to take the administration out of her hands. That the widow was cognizant is not, and cannot be denied, though a decree to see proceedings was never served upon her: indeed her interest **[313]** has, in no way, come into question—it has not been asserted nor denied.

In respect to the caveat against the grant of administration, at this late period, after a sentence by this Court pronounced so long ago as Easter Term, 1826, and since affirmed by the Superior Court; and which caveat, I understand, was not entered till Saturday last, the day before yesterday; a contrivance of that kind cannot be permitted to interfere with the decision of the Court of Delegates, which this Court is now called upon to carry into execution.

I direct the grant of administration to pass to the daughter: the usual security will be given, so that the interests of the widow will be sufficiently protected.

(*a*) The Judges who sat under this commission were—Mr. Baron Hullock, Mr. Justice Littledale, Mr. Justice Gazelee, Dr. Arnold, Dr. Dodson, Dr. Blake, Dr. Salusbury.

Sir Charles Wetherell, Dr. Lushington, and Mr. Bligh were of counsel for the Messrs. Clark, the appellants.

Dr. Jenner, Dr. Phillimore, Mr. Denman, and Mr. Knight contrà.

The cause was argued, at Serjeants' Inn, on the 16th, 17th, 18th, 19th, and 21st of January, 1828; and, on the 13th of February the Court of Delegates affirmed the sentence of the Prerogative Court, and decreed the costs out of the estate.

The judgment of Sir John Nicholl in this case, edited, with permission, from the Judge's notes, is printed separately, and published by J. Butterworth and Son, London, 1826. [Referred to, *Smith* v. *Tebbitt*, 1867, L. R. 1 P. & D. 401; *Banks* v. *Goodfellow*, 1870, L. R. 5 Q. B. 557. Discussed, *Waring* v. *Waring*, 1843, 6 Moore, P. C. 353; *Boughton* v. *Knight*, 1873, L. R. 3 P. & D. 68.]

IN THE GOODS OF DAME SUSANNA GRAVES. Prerogative Court, Hilary Term, 4th Session, By-Day, 1828.—A monition against an administrator pendente lite will be granted at the end of a suit, to compel him to transfer, to the person entitled, every thing in his possession acquired in that character.

On motion.

A suit was lately depending in this Court respecting the validity of the will and codicil of Dame Susanna Graves, widow, promoted by William Blacknell Wilson, one of the next of kin of the deceased, against Robert Baxter, the surviving executor named in the said will; and afterwards against Daniel Heming, the executor of Robert Baxter, who died during the dependence of the cause.

An administration pendente lite, limited to the receipt and investment of the dividends due or to grow due on two certain sums of stock, "for the [314] use and benefit of such person or persons as should thereafter appear to have a just right and title thereto," was granted to Thomas Wilson and Thomas Brooksbank, respectively, the nominees of the parties in the suit.

The will and codicil were, on the 19th of February, 1827, pronounced to be valid; probate thereof was granted to Daniel Heming, and the limited administration pendente lite decreed to have ceased, and expired.

Mr. Heming had called upon the administrators to transfer the stock purchased by the dividends as aforesaid into his name: Mr. Wilson was ready; but Mr. Brooksbank refused so to do.

Lushington now moved for a monition to issue against Mr. Wilson and Mr. Brooksbank, requiring them to transfer this stock into the name of Mr. Heming, the general representative of the deceased.

Addams contrà. That it is impossible to comply with the motion, one circumstance will satisfy the Court—a petition was presented to the Vice-Chancellor praying that stock belonging to the deceased's estate, and standing in the name of the Accountant-General, should be transferred to Mr. Heming, and the application was refused.

Lushington. The fact is, during the pendency of the suit, respecting the validity of the will in this Court, the proceedings in Chancery were suspended: in that cause an order was made on Baxter, who had then a limited probate, limited to the property over which Lady Graves had a disposing power by settlement, to pay all stock into the Accountant-General's hands; certain stock was transferred; afterwards the limited probate was [315] revoked, and a general probate granted by this Court to Heming. The petition to the Vice-Chancellor was in respect to a sum of 7000l. in the hands of the Accountant-General; and was refused, because the matter could not be decided on an interlocutory proceeding, but must wait the final hearing; but no order has ever been made on Brooksbank to pay over the money in his possession.

Per Curiam. An administrator pendente lite is merely an officer of the Court, and holds the property only till the suit terminates; as soon as it is concluded he must pay over all that he has received in his character of administrator to the persons pronounced by the Court to be entitled: his other functions are then completely at an end, and the Court is bound to take care he discharges the duty committed to him as far as the delivery over of every thing to the proper party. In the present instance, if there is any contest or opposition respecting the property, application must be made elsewhere, but as it is my duty to enforce the transfer of the stock, I am bound to grant this motion. If, from the proceedings in the Court of Chancery, there is sufficient reason to stop this transfer, an injunction may be applied for.

Motion granted.

[316] IN THE GOODS OF JOHN O'BYRNE. Prerogative Court, Hilary Term, By-Day, 1828.—Administration being granted to a person out of his Majesty's dominions the sureties to the bond should be resident within the kingdom.

On motion.

On the 16th of January, 1823, administration, under the sum of 100l. to John O'Byrne, was committed by this Court to Edward Gernon as the attorney of Mary Burke, widow, the lawful daughter of the said deceased.

Addams—stating that an increase in the property had arisen from the award of a sum by the Commissioners for adjusting the claims of British subjects on the French government—now moved the Court to enlarge the administration to the sum of

8000l.; and to decree a requisition to issue to swear Edward Gernon, at Bourdeaux, to the truth of the premises, and to take his bond for the due administration.

Per Curiam. This attorney is resident out of the jurisdiction of this Court; and the application is not only for a requisition to swear him, but also to take security; under these circumstances the sureties should be resident in this country; there should also be an affidavit why the additional grant is necessary, and it would be better to insert, if the fact be so, that no person in this country has a claim upon the property. This affidavit being brought in, the requisition may issue.

Motion granted.

[317] MACLAE AND EWING *v.* EWING AND CRUM, AND ALSO *v.* REID AND OTHERS. Prerogative Court, Hilary Term, By-Day, 1828.—Probate will not be granted to a paper never seen by, nor read over, but only explained, to the deceased, who died suddenly before he saw the solicitor; the answers of the executor (speaking against his own interest) being the only evidence of instructions which were verbally conveyed by him to the solicitor; especially when the intentions of the deceased appeared fluctuating, and when there was a previous paper in his hand-writing clearly entitled to probate.

This was a cause of proving, in solemn form of law, the last will and testament of Robert Ewing, deceased, promoted by Humphrey Ewing Maclae and Margaret Ewing, the executors named in a will bearing date the 1st of June, 1825, against James Ewing and John Crum, two of the executors named in a testamentary schedule, bearing date the day of February, 1827 (without subscription), in which Mr. H. E. Maclae and Miss Ewing were also named executors. A decree, at the instance of the executors under the will of 1825, had been served upon various parties, citing them "to see proceedings."

Lushington and Haggard in support of the testamentary schedule of 1827.

Phillimore and Addams for the executors under the will of 1825.

Jenner for Robert Reid (an executor under a will dated the 4th of November, 1818, and one of the persons cited), objected to the answers of Mr. Maclae being received as evidence against his party.

Lushington in reply said that the objection was not tenable; since it had been recently decided by the Court that the answers of an executor named in two wills, both propounded in **[318]** the same cause, might be read as against a third party.(*a*)

Judgment—Sir John Nicholl. Robert Ewing, the deceased in this cause, died on the 10th of February, 1827, at Dalby Terrace, in the City Road, at the age of 68 years, a bachelor, leaving an only sister, who is since dead, and several nephews and nieces. His personal property is stated to amount to 18,650l.; and there was also a heritable estate in Scotland. He had an illegitimate daughter, Margaret (the wife of Robert Reid), who died in October, 1826, in the deceased's life-time: of the three children which survived her, two are dead—but that is a circumstance immaterial in the consideration of this case; for these children the deceased entertained the greatest affection, as also for his niece, Miss Ewing; and it was ever an object, which he was very desirous to attain, that she should have the care and management of them.

The deceased had executed several wills—one, in 1808; by which he gave half his property to his daughter who was then unmarried; a second, in 1818, by which she had the same benefit, but trustees were interposed in order to protect the property from the engagements and controul of her husband. In 1825 he executed a third will, by which he left a life interest in one-third of the **[319]** residue to his daughter, independent of her husband, with a power of disposal of the principal among her children; she being dead I apprehend this third vests in the children: the other two-thirds were bequeathed to his niece, Margaret Ewing, and his nephew, Humphrey Ewing Maclae. This paper is uncancelled, and will, undoubtedly, operate if the paper propounded be not valid, for an intestacy is quite out of the question.

On the daughter's death the deceased became anxious to make a fresh disposition

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(*a*) *Rich* v. *Mouchett and Isherwood*, Prerog. 7th July, 1824. The sentence in this case, establishing the will and codicil propounded by Rich, was affirmed by the High Court of Delegates on the 9th of July, 1825; and an application for a Commission of Review, afterwards made and argued before Lord Chancellor Eldon, in December, 1825, was refused.

of his property, and determined on making a new will. At this point of the case a considerable difficulty arises, as the only evidence to be obtained must be gathered from the answers of the executor,(*a*) for the solicitor received all instructions through him, and though he may be a person of the highest honor, though the deceased may have placed the greatest confidence in him, and though he may be speaking against his own interest, yet, on answers alone, to pronounce for such a paper is going a step further than this Court has ever previously gone. Another difficulty is that the contents of the draft were not read over to the deceased: they were only communicated to him in the way of explanation, and he manifested con-[320]-siderable fluctuations of intention; the execution was postponed; however, on a subsequent representation, he did consent to execute it: and it is certain that, at that time, Maclae, and Druce, the solicitor, must have thought that he intended to give effect to the disposition as contained in the draft, because a fair copy was prepared—still when it came to be read over it might have produced much discussion, and the deceased might not then have given it his full sanction and approbation. The blank —left for a clause regulating the disposal of the sum of 4000l., in case his niece, Margaret Ewing, made no appointment of it, and in case of the death of all his grandchildren—is most material; and when I consider that this unexecuted paper is to revoke a will—written with his own hand at no great distance of time—unless I could be quite certain that the deceased would have executed it without alteration, I could not pronounce for it.

Again, on the evening preceding his death, the allusion to the will of 1825, in the enquiry addressed to Maclae, "whether a will in a man's own hand-writing would be sufficient," coupled with Maclae's answer, "that he thought it would as to personal estate," strongly shews that he had not finally decided to execute the paper propounded, nor to abandon the former will. Certainly, the deceased had no doubt as to the other legacies, but only as to the manner of securing the 4000l. to his daughter's children independent of the engagements of their father—still, on the whole, I think it safer to decree probate of the will of June 1, 1825, but I shall direct the costs of all parties to be paid out of the estate.

[321] HAWKES *v.* HAWKES. Prerogative Court, Hilary Term, By-Day, 1828.—The primâ facie presumption is that pencil alterations are deliberative and those in ink final: when they are of both kinds in the same instrument the presumption is strengthened. A doubt whether a testator intended a particular bequest to form part of his will, and to take effect, will not vitiate the whole will, especially if a strong disinclination to die intestate be shewn.

This was a very complicated case, from the obliterations and interlineations in pencil and in ink appearing upon the face of the papers; and it has only been thought expedient to report so much of the judgment as elucidates the view which the Court took of those alterations.

Phillimore and Addams in support of the two papers A and B, propounded by Samuel Hawkes, one of the executors therein named, and a brother of the deceased.

Lushington and Dodson contrà for Francis Hawkes, also a brother of the deceased.

Judgment—Sir John Nicholl. This case on some points is short and clear; but on others, from the state of the papers propounded, and of other papers connected with them now before the Court, it is one requiring a careful examination; but, after such examination, it seems free from doubt in respect to the proper decision.

The testator, James Hawkes, died suddenly at Brighton on the first of May, 1827, by the bursting of a blood-vessel, having on the twenty-first of October, 1826, in the presence of three witnesses, who have attested it, duly executed the will propounded; it is all in his own hand-writing; it originated with and was prepared by himself;

(*a*) June 30, 1827.—Mr. Maclae having declined to renounce his executorship, the Court was moved to permit his examination, although a party to the proceedings, as being the only person who could give evidence on the principal parts of the allegation propounding the draft; dated February, 1827. In support of the motion a comparative statement was exhibited of his interest under the will of 1825, and under the paper of 1827; from which statement it appeared that, under the latter instrument, his benefit was considerably less than under the former.

The Court, however, rejected the application.

and his capacity is unimpeached. The will, therefore, when executed, was valid: so far the case, as [322] to the factum, is short and clear; the question then is, how far it has been since altered and revoked?

After entering on a short statement of the history, circumstances, and family of the deceased, and of the substance of the will, and examining other papers in the cause, which it held not material to the decision of the case, the Court proceeded:

The question then comes to the face of the papers propounded: there are various erasures and crossings and interlineations, some in pencil, some in ink: the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute; but when they are of both sorts the presumption as to each is stronger: if the writer had made up his mind and intended the variation to be final he would, instead of pencil, have used the other material, ink: if he were deliberating only and undecided, he would not use ink, but pencil. Upon the evidence also, upon the deceased's own declarations and conduct, and upon the nature and appearance of those pencil marks, I am satisfied that they were intended to be not finally revocatory, but only deliberative, and depending upon future acts. Against all the pencil alterations and their effect I shall, therefore, pronounce.

I come, then, to the alterations in ink: I have already said that the presumption is that the deceased had definitively resolved so to alter his will; and the parol evidence goes strongly to support that presumption; for the deceased, when he shewed either the paper propounded, or some similar paper, to his solicitor, Faithful, a year and a [323] half before, desired him to make his notes in pencil and not in ink, as he intended the instrument to be his will. The alterations in ink are made in a cautious and curious manner, tending to confirm the idea that they were meant to be permanent: the lines are struck through not merely by hand, by drawing the pen through them in an irregular manner, but, to my eye, the obliterations appear to be made with the assistance of a ruler, forming a broad, dark, equal line, nearly effacing the whole writing; and in one or two instances (as where he varies the bequest to Dearlove—first increasing it from 2000l. to 2800l., and then reducing it again to 2000l.) there are two or three parallel lines drawn across very carefully. These observations confirm me in the opinion that these alterations were made deliberately upon due consideration, and intended to be permanent and final. Similar observations apply in respect to the interlineations.

It is by no means certain that these alterations may not have been made before the execution, and that these are not the identical papers shewn to Faithful; nor is this even improbable; for at the execution the deceased so doubled up the papers as not to allow the witnesses to see more than was necessary to attest his signature: the alterations in ink may, therefore, have been previously made, and the will may be in the same plight and condition, except as regards the pencil marks, that it was on that occasion.

I cannot accede to the suggestion that if the matter in this respect were doubtful, or if it were uncertain whether the deceased did or did not [324] mean any particular bequest to remain, or to be revoked, that such doubt or uncertainty would vitiate the whole will, and render the deceased intestate: nothing can be so manifest as that the deceased did not mean to die intestate, nor that either his real or his personal property should be disposed of by law to his heir, or among his next of kin. But, supposing these erasures and interlineations to have been made after the execution, they would equally direct the distribution, at least of the personalty: for the fact is clear not only from the presumptions on the face of the paper, but from the parol evidence, that the deceased wished it to have validity as his will, in its present shape.

The deceased had interviews with his solicitor long before and long after the execution of the will—one eighteen months before his death—the will was not then interlined, and he was careful that any alterations should be made only in pencil: another, two months before his death, after the will had been executed, and then the alterations in ink had been made; so that there is no improbability that it was altered previous to execution: the last interview took place on the 30th of April, the night before the sudden death of the deceased, when (and this was his last act) he deposited this instrument with Faithful, at the same time declaring and publishing it as his will, in case of his death before he completed a substitute by deed. Whether it can in every respect operate, or in all its parts carry the intentions of the deceased into effect,

it is not necessary for this Court to decide; but I am satisfied that he did not consider any of the pencil marks as part of his will; [325] and I am also satisfied that he intended those alterations, which he has so carefully made in ink, to be final and effectual.

The Court, therefore, pronounces for the validity of these papers, but without the pencil marks and writing in pencil.

LADY KIRKCUDBRIGHT *v.* LORD KIRKCUDBRIGHT. Prerogative Court, Hilary Term, 15th March, 1828.—The destruction of a latter will revives a former will nearly of the same import; the motive on which the variation was made having ceased to operate; and reconciliation to, and declarations in favour of, the universal legatee under the former will just previous to death being shewn: such revival being always a question of intention, and admitting the introduction of parol evidence.—It is not settled whether the principle of law is that, on the revocation of a latter will, a former will is presumed to revive or not.

This was a cause of proving in solemn form of law the last will and testament (bearing date the 3d of November, 1824) of Sholto Henry, Baron Kirkcudbright, who died on the 16th of April, 1827, promoted by Mary, Baroness Kirkcudbright, his widow, the sole executrix and universal legatee named in the said will, against Camden Gray, Baron Kirkcudbright, the natural and lawful brother and one of the next of kin of the deceased.

The King's advocate and Lushington for Lord Kirkcudbright. The question is whether, by the destruction of the will of 1825, the deceased proposed to give operation to the will of 1824: the presumption is against the revival unless circumstances shew the contrary. It is clear that the second will was intended expressly to revoke the first, and that the testator would have actually destroyed it had he not been prevented by the party benefited, who kept possession of it against his wishes. The will of 1825 has an express revocatory clause. No general declarations, no proof of affection, would revive a will under such circumstances; there must [326] be clear evidence of intention: this is not a simple case of revival; but of recalling into existence that which the deceased would have destroyed if in his power.

Phillimore and Dodson contrà, were stopped by the Court.

Judgment—Sir John Nicholl. The question in this case lies in a very narrow compass, and is free from difficulty. It appears that the late Lord Kirkcudbright executed a will on the third of November, 1824, of which he appointed Lady Kirkcudbright executrix and universal legatee; and on the thirtieth of July, 1825, he made another will, by which he gave a legacy of 500l. to Charlotte Bicknell; but again left, with that single exception, the whole of his property to Lady Kirkcudbright. In August, 1825, he deposited this latter will with his bankers, where it remained till November in the same year, when he took it away himself: and as it was not to be found at his death it must be presumed that he destroyed it; and there is no circumstance to repel the legal presumption, though neither the time, place, nor manner of its destruction can be shewn. It might have taken place immediately he got it from his bankers; and even on the very day before his death he had an opportunity of destroying it.

The former will remaining uncancelled has been set up by the wife, and opposed by the present Lord Kirkcudbright—the deceased's brother; who alleges that it is a revoked will, and that the deceased is dead intestate. It is not quite settled whether the principle of law is, that on the revoca-[327]-tion of a latter will, a former uncancelled will is presumed to revive or not. The presumption may depend, primâ facie, on the nature and the contents of the will themselves, exclusive of circumstances dehors the will. If the latter will contains a disposition quite of a different character, the law may presume such a complete departure from the former intention that the mere cancellation of the latter instrument may not lead to a revival of the former; but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it may be presumed (because it is the rational probability) that when the testator destroyed the latter, he departed from the alteration, and reverted to the former disposition remaining uncancelled. This case strongly carries with it the latter presumption. Both wills are in character the same; the former gives his whole estate to his wife; the latter, after giving away only a small legacy, still bequeaths the bulk of his fortune to her: it is a mere codicillary altera-

tion, and it is extraordinary that it was not done by a codicil only. The destruction, then, of this latter document bears the inference that he merely meant to revoke the legacy, and then to revert to the former disposition exclusively in favor of his wife. That he considered both wills revoked, and purposed to die intestate, is, on reference to the acts done, in no degree, to my judgment, the correct view of the probable intention, nor the primâ facie presumption. I should, therefore, be much disposed to hold, on considering the papers alone, and if no corroborating circumstances were adduced, that the will of November, 1824, had revived. But it is admitted that all such cases are **[328]** questions of intention to be inferred from circumstances, and that extrinsic evidence is let in. It is hardly possible but that some facts bearing upon that question must exist; or that a case should ever arise resting only on the legal presumption. If it could be shewn that he intended to revoke this will and to die intestate, there is no rule of law that excludes such proof; nor, on the other hand, would a party be precluded from shewing that, by the destruction of the latter will, the deceased proposed to re-establish the former. Accordingly, in this case, both parties have gone into evidence of intention, and the result of that evidence leaves no doubt upon my mind that Lord Kirkcudbright believed and intended that the former will should remain valid.

It is true that unhappy differences arose between the deceased and his wife, occasioned, not by unfounded jealousy and violence of temper on her part, but by profligate and insulting adultery on his part with his own servant in his own house. But, notwithstanding these differences and quarrels, he makes his will in November, 1824, giving his whole property to his wife; and though he tells his solicitor that he will delay the execution in terrorem—to induce Lady Kirkcudbright to acquiesce in his adultery—I cannot attach much importance to this fact as spoken to by Mr. Squire, since he does execute it, himself carrying it to a tradesman's and getting witnesses to attest it. There was, therefore, a deliberate and decided intention to give his property to his wife; and the fresh will is as slight a departure as can be from the original one. It appears also that with his propensity for other women, still he **[329]** was much attached to Lady Kirkcudbright, even when he quitted her society; for, though in May, 1825, because she would not patiently submit to this adulterous intercourse being carried on in his own house, he actually separates himself,(*a*) and goes off to London with his cook-maid, and lives **[330]** with her for two years, from lodging to lodging; yet he writes affectionate letters to his wife; sends her the news-

(*a*) On the 4th Session of Michaelmas Term, 1827, an allegation was tendered on the part of Lord Kirkcudbright, pleading that in the course of 1825 the deceased gave his solicitor instructions to draw up regular articles of separation between himself and Lady Kirkcudbright: the Court, however, rejected the allegation upon the following grounds:—

Per Curiam. In this cause four allegations have been already given in, and publication would have passed on the first session of this term if it had not been stopped by the assertion of the present allegation. In this advanced stage of the cause the Court would not admit a plea unless it were sworn that the facts intended to be alleged were, not only noviter perventa to the knowledge of the party, but that he was advised that they were material and important to his case. The affidavit, brought in to induce me to admit this allegation, is deficient in this latter point; nor does the Court wonder at the omission, when it looks at the history as detailed in the pleadings and papers already before the Court.

After stating the facts as detailed in the judgment, the Court proceeded:—

That differences did exist in the spring of 1825 there is no doubt; that Lord Kirkcudbright actually withdrew from his wife and cohabited with Bicknell, and that he made a will giving her 500l., but in all other respects confirming his former will, admit of no question; after these facts are established, that articles of separation were prepared but subsequently abandoned, cannot weigh a feather, nor carry the case one step further. It cannot be worth while again to open the suit in order to introduce matter of such extremely trivial importance. I shall probably consult Lord Kirkcudbright's interest in not allowing this plea to go to proof; but, whether this be so or not, it is my duty to the other party to reject it; and I reject it accordingly and decree publication to pass.

Allegation rejected.

papers; speaks of her most tenderly; pays her many little attentions; occasionally even goes down to Southampton to visit her; writes with a power of attorney to his friend Rudd, who manages his affairs, expressing his wishes for the comfort of his wife—"her convenience and comfort constitute the principal anxiety of his heart:" at last he gets tired or sick of his scandalous life, and becomes anxious for a reconciliation and to return home. Under these feelings he makes a strange proposition (for he is proved to be very eccentric though clever)—that he should again cohabit with his wife; and bring back this very servant, under a solemn promise of having no further connexion with her: but, on his lady very properly rejecting that proposal—and, if he had any good sense or feeling, he must have acquiesced in the moral tone of mind that rejected such an insulting offer—he gives it up; says he likes her the better for it; and at length on Good Friday, April the thirteenth, 1827, he returns to his home and to his wife. He was then in extremely ill-health, suffering under an attack of inflammation in the chest. On his arrival he was very kindly received. Sargant's account of her quarrelling with him after dinner, and again the next day, and of her neglecting him, is so inconsistent with the other evidence as to be entitled to no credit. She attended him to the warm bath that evening, and paid him all possible attention. It so happens that Rudd saw them there together:—

"She was, he says, assisting him to undress, when he, the deponent, went in. The deceased **[331]** observed to him that he was glad he was come home, and addressed Lady Kirkcudbright in a kind and familiar manner." On that occasion, therefore, this witness perceived no want of cordiality between them. On the following day she was equally attentive and affectionate; she pressed Mr. Maul, the surgeon—who had some reluctance from the course of life Lord Kirkcudbright had pursued—to attend him. On the Sunday, in Maul's presence, the deceased expressed his gratitude to her in these terms:—

"He was afraid he should not live long enough to make her amends for the kindness she had shewn him;" and Maul adds, "that the expressions struck him as singular, for he, the deceased, was not accustomed to acknowledge attentions from any one;" and the next morning he was found dead in his bed. Here, then, is the fact of this return home and the renewal of conjugal kindness, in support of the conclusion drawn from the nature and contents of the papers.

In respect to these wills the deceased had in 1824 deposited his iron chest and writings with Rudd; and in 1825 the will, the subject of the present suit, was also sent to Rudd by a servant, in a packet sealed with Lord Kirkcudbright's arms. There is no direct proof whether it was sent by the deceased or by Lady Kirkcudbright; but the deceased was at Southampton at the time, or had only just left it; and it was more likely to have been sent by him, as Rudd was his own confidential agent. It is not probable that it was sent without his privity, notwithstanding the declarations of Lady Kirkcudbright to the Eames', supposing those declarations to have been accurately recollected; still less probable is it that **[332]** he was ignorant of its existence in an uncancelled state; indeed it is proved that he was always aware of its existence, because he told Squire that if it had been in his custody he would have destroyed it; and the very case set up admits this; for it is averred that he wished to obtain possession of that paper in order to cancel it, but that his wife would not deliver it up. This fact of his knowledge is most material.

It is said that there were declarations made by him when he executed the second will that he would have destroyed it; but, first, no reliance can be placed on his declarations; and, secondly, the question is not what he intended when he executed, but when he destroyed, the second will, knowing the first to be in existence. Counsel, however, have argued that if he had destroyed it, it could not have been revived; but is it clear that he would in that case have destroyed the second will without executing a new one; or, knowing of the existence of the former will and wishing it not to take effect, can there be any reason to doubt that he would have executed a short revocatory instrument, either making a new disposition or declaring that he meant his property to go according to law. Now in regard to the revival of the latter will, continued affection alone would perhaps not be sufficient, but instead of this the evidence is that he declared his brother and sister should never have any of his property; that he was saving all he could to make his wife comfortable, as he told Eyton, and, more particularly, his friend Ross, who thus deposes:—

"He often heard deceased declare that he meant to leave the whole of his property

to Lady Kirkcudbright: he used to say that his brother and **[333]** sister should never be a shilling the better for him, but that my lady (as he sometimes called Lady Kirkcudbright) should have the whole: upon one occasion, in the latter part of November, 1825, the deceased, alluding to the deponent's having recently sent her ladyship some wine by his order, observed, 'That he hoped it was of the best sort, as it was for her own drinking,' and he also, upon the same occasion, spoke of the manner in which he had endeavoured to secure his property to her as hereinafter deposed."

Now the way in which he does hereafter depose is on the ninth article:—

"That in all his communications with the deceased [and he was very intimate with him], both in June, 1825, and in November following, the deceased's general manner of speaking of his connection with Charlotte Bicknell was such as to indicate regret, not at the intercourse itself, but only as being the means of keeping him in a state of separation from Lady Kirkcudbright; and he always understood from the deceased that it was his intention such connection should not deprive Lady Kirkcudbright of any of the advantages he intended her to have under the will, which he spoke of having made as before deposed"—that is, the will of November, 1825.

In a further part of his deposition Ross says:—

"Bicknell was present when the deceased, speaking to deponent, observed, 'In consideration of Charlotte's good conduct and kind treatment, I have settled 500l. upon her; she knows it to be the case, because she has seen the instrument duly prepared by a legal man,' or to that effect: deponent observed 'he thought the deceased had **[334]** behaved very handsomely, and Charlotte Bicknell acquiesced in some manner in what he said.' She afterwards left the room, and then deponent inquired 'how he had settled the said 500l.?' The deceased replied, 'You don't take me to be such a fool; it's all fudge; I merely said so to please the girl, and prevent her from relaxing in her attentions to me: I had a paper prepared by a legal man to give it the air of reality, and make her mind satisfied.' He then gave deponent to understand that he either had destroyed, or intended to destroy, the paper he had just been speaking of, which he said had, until then, remained in his own possession; and he added that he should give Charlotte ten pounds or guineas when he had done with her, and that as he had given her a great many clothes, and kept her very well, he thought she would be very well paid."

These are the deceased's own declarations, and his own account of the will of 1825. Why, if it was made with this view, did he get it back from the bankers, if he had not intended to destroy it? Why should he not have left it there? These declarations, coupled with the facts, shew that he only executed it "to please the girl, and prevent her from relaxing in her attentions." But this is not all; for he also tells his old schoolfellow Cole, three weeks before he went home, that "as soon as he got to Southampton he would make a codicil in the deponent's favor; that his will was at Southampton, in the possession of Lady Kirkcudbright; but that if he had had it then with him, he would have got Mr. Weymouth, his solicitor in town, to have made the codicil at once." He once previously observed to the deponent "that **[335]** he should take care to leave everything to Lady Kirkcudbright, and that, whatever he might give to others, he would not injure her; but, thank God, he had something to spare for an old friend, when he was gone."

Now, whether he would have made this codicil or not is not the question; but here is the fact, that he knew the will was at Southampton. It further appears that, for some time before he went back to Southampton he was tired of his life with Charlotte Bicknell, and declared "he should leave her with her friends, and only give her a few pounds," which possibly he may have done when he parted with her. After then stating this evidence, it seems to me quite impossible to believe that he considered this will as revoked, or that he meant or supposed himself to be intestate; or to doubt that he intended this will to operate. I, therefore, pronounce for it, and in so doing I think that I do not interfere with any principles recognized by this Court.

Costs were prayed by Phillimore; but the Court said that it was not, on the whole, a case for costs, as it was necessary to bring the question before the Court, though the allegation, ripping up the old quarrels, was rather uncalled for.

[336] IN THE GOODS OF DELICIA AIRD. Prerogative Court, Hilary Term, Caveat-Day, 1828.—A person appointed limited executor in a will may be appointed general executor in a codicil by implication, and without express words.

On motion.

The deceased was a spinster; and by her last will, after giving to Donald John Macpherson M'Leod, son of Major-General John M'Leod, of the 78th Regiment, the sum of 2122l. 11s. 6d. new four per cents., to be at his sole and absolute control at the age of sixteen years, and a vested right at her decease, and also all her plate, linen, books and furniture to be vested, and at his own control in manner aforesaid,(*a*)[1] thus proceeded:

"I appoint the said Major-General M'Leod executor of this my will for the purposes hereinbefore mentioned, and make no present disposal of any other property I may be entitled to." Signed, sealed, &c. on the 24th of January, 1828.

This will was written upon the first side of a sheet of foolscap paper; and on the second side was a codicil of the same date, of which the following is a copy:—

"I, the within named Delicia Aird, declare this to be a codicil to my will bearing date this day, and" [after bequeathing a legacy of twenty guineas each to two servants] "all the residue of my personal property I give to the within named Donald John **[337]** Macpherson M'Leod to and for his own use, to be vested and at his own control at the same time and in like manner as the bequests in his favour in my will contained." In witness, &c.

The residuary legatee, it appeared, was of the age of eight years; and the residue consisted of about 300l.

The King's advocate now moved for a grant of probate of the will and codicil to General M'Leod as executor.

Per Curiam. The Court was of opinion that the residue being bequeathed to the son "in like manner as the bequests in his favour in the will contained," came to him subject to the executorship of his father, and therefore granted the motion.

Motion granted.

GREEN, BY HER GUARDIAN *v.* PROCTOR AND NEWEY. Prerogative Court, Hilary Term, Caveat-Day, 1828.—A legatee, under a former will, who, after long acquiescence, calls in probate of and contests a latter will, setting up a case of incapacity and undue influence, which is disproved—will be condemned in costs from the time of giving in an allegation.—Semble, a next of kin—à fortiori a legatee under a former will—contesting a will, under circumstances manifestly vexatious, may be condemned in the whole costs.—Semble, that the guardian of a minor instituting a suit cannot be condemned in the costs incurred, after a proxy has been exhibited, for the party then become of full age.

[Followed, *Beale* v. *Beale*, 1874, L. R. 3 P. & D. 180. Distinguished, *Leigh* v. *Green*, [1892] P. 17.]

Judgment (*a*)[2]—*Sir John Nicholl.* Elizabeth Grigg died on the twenty-fourth of June, 1826, at Oldbury, in Shropshire, at the age of 60 years, leaving behind her several nephews **[338]** and nieces—entitled in distribution (had she died intestate) —to her property, which was of the value of about 3000l. Her will, executed on the nineteenth of June, 1826, and attested by three witnesses, was propounded in a common condidit, in May, 1827, by Proctor and Newey—her executors; and is opposed in the name of Elizabeth Green, a minor—by her stepfather, Joseph Green, acting as her guardian: she was a legatee under a former will of 1822, and is the daughter of a niece of the deceased. The alleged grounds of opposition are—incapacity, undue influence, control and custody: of every single ground there is not only a total failure of proof, but a complete disproof—even by the niece's own witnesses—so much so that her counsel declined to argue the case upon the merits.

The deceased, having been unwell for some time, on Monday, the twelfth of June, was driven over in a gig to Birmingham, five or six miles distant from Oldbury, by Proctor, the husband of one of the nieces, and one of the executors: she there went to the house of Mr. Wills, a solicitor, and gave him instructions for her will. On this

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(*a*)[1] No other property was left under the will.

(*a*)[2] The King's advocate and Haggard for the executors, Lushington and Salusbury contrà.

occasion Mr. Wills proceeded with the utmost professional delicacy; learning that Mr. Proctor's wife was to be benefited, he desired him to withdraw before he received the instructions—he took them down in writing, very carefully, and explained them to the deceased; and, finding one niece more benefited than the other, he took this further precaution—without either persuading or dissuading—he asked her "if she had well considered the disposition, and hoped it was not from any sudden feeling:" she satisfied him it was her deliberate purpose. The following Friday **[339]** was appointed for the execution, but on the Wednesday the deceased was taken suddenly ill, and carried back to Oldbury in a state nearly of insensibility: if she had then died, that would not have invalidated the instructions; but it is clear on the following day she recovered; and from that time till her death was in full possession of her mental faculties. On the nineteenth Mr. Wills attended at Oldbury to see the will signed: he offered repeatedly to read the will over to the deceased; she declined, declaring "it had been read to her, and was quite right:" he again offered, saying "it was no trouble;" but she was in pain and weak, and refused. The will was then executed and attested; and there is not the slightest doubt of her volition, capacity, and knowledge of the contents: she died about five days afterwards, during which time her family and friends had free access to her. Of the factum of the will then there is the most satisfactory evidence.

Now, it appears that the will was read over at the funeral, and no objection was then taken; if there was any ground for calling the deceased's capacity into question, it should have been done immediately. The probate was not obtained hastily—it was not taken out for three months—not till November; this was ample time for calling for proof, per testes: but the executors are allowed to remain in possession of the probate till the April or May following; when, on actions being brought against some of the family to recover debts due to the estate, Green, who is indebted to it in the sum of 400l., calls in the probate, and puts the executors on proof of the paper, under the colour, and in the name, and as protector and **[340]** guardian of his step-daughter, a minor, and a legatee under the will of 1822, and, in this suit, he sets up in plea a most unfounded case in point of fact. There is nothing that justifies him in this opposition. I hardly recollect a case so vexatiously and falsely offered to the consideration of the Court. The party setting it up would be liable to the full costs if they had been pressed for; he is not entitled even to the ordinary privilege of a next of kin calling for proof, per testes, whom it is not usual to condemn in the costs incurred before the giving in of an allegation; though even next of kin, calling in probate under circumstances so manifestly vexatious, would be liable to the payment of full costs; for the Court is not precluded from taking such a step if it deems it necessary for the sake of example, and in order to deter parties from frivolous opposition; but here, Joseph Green, the step-father, who is the party, stands on a former will; and it is quite clear the opposition was merely set up by him and others to delay the payment of their debts to the estate. In this case, however, considering the near connexion that subsists between Proctor and the Greens, and that under the former will they shared pretty equally, I shall not carry the matter further than to condemn the party in costs from the time of giving an allegation, which are all that have been asked for. The costs, up to the time of a proxy being exhibited for Miss Green, will fall upon her father; those since must be borne by her, as the Court, perhaps, might have some difficulty in enforcing them against her father.

[341] IN THE GOODS OF MARY ALICIA GILL. Prerogative Court, Hilary Term, Caveat-Day, 1828.—Probate of a will of a feme-covert (supposed, at the time of the grant, to have been sole) revoked; and administration granted to her next of kin, the husband having died after her. The administration of a feme-covert's goods left unadministered by the husband having been held, in several cases, to belong, under the 31 Edw. III. st. 1, c. 11, and 21 Hen. VIII. c. 5, to the next of kin of the wife at the time of her death, though the right to the property is in the representatives of the husband.

On motion.

Mary Alicia Gill was the party deceased: she died in the lifetime of her husband, John Gill, from whom she had lived apart for many years. On her death a probate of a paper, purporting to be her will, was taken in this Court in the month of March, 1813, by William Cooper—the sole executor therein named—on the supposition that she had died a widow.

Dodson now prayed that the probate should be revoked, as the paper was executed during coverture, and was therefore null; and applied for an administration to be granted to Alice Ainsworth, widow, the lawful mother of the deceased, she having left no children nor father.

Per Curiam. The practice of granting these administrations to the representatives of the wife, when the beneficial interest in the property belongs to the representatives of the husband,(*a*)[1] is very inconvenient, and in defiance of all principle. Notwithstanding the statutes (*b*)[1] require that administration shall be **[342]** granted to the next of kin, it has been solemnly decided that the residuary legatee is entitled, and it has always since been the constant practice so to grant it.(*a*)[2] In that and every other instance but the present, the right to administration follows the right to the property; but in a case said to have been argued here by Lord Mansfield,(*b*)[2] then **[343]** at the bar; as also in a case before the High Court of Delegates, in 1748, it was

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(*a*)[1] By the 29 Car. 2, c. 3, s. 25, it is declared that the statute of distribution (22 & 23 Car. 2, c. 10) shall not extend to the estates of femes-coverts that shall die intestate, but that their husbands shall have administration of their personal estate, and enjoy the same as they might have done before the act. Vide *Wilson* v. *Drake*, 2 Mod. 20, notis.

(*b*)[1] 31 Edw. 3, st. 1, c. 11. 21 Hen. 8, c. 5.

(*a*)[2] Vide *Thomas* v. *Butler*, 1 Ventris, 217.

(*b*)[2] The printed reasons for the appellants—written by Mr. Hargrave, as junior counsel for Dr. Bouchier, in the case of *Bouchier* v. *Taylor*, on an appeal from the Court of Chancery to the House of Lords—asserted it to be settled that, soon after the statute of distribution, the right to administration which exists at the death of the intestate is transmissible—and that the representatives of that person, who was the next of kin, have the same right to it as such person, if living, would himself have. Lord Mansfield, in delivering his reasons against the decree of Lord Chancellor Northington (which was reversed), denied this position, and observed:

"That he remembered arguing a case before Dr. Lee as Judge of the Prerogative Court, in which, after great consideration, the latter held the right to administration not to be transmissible as above described, but to be grantable to the next of kin for the time being." On this Mr. Hargrave remarks:

"A case to the same effect, before the High Court of Delegates, was cited in Chancery by Lord Mansfield when Solicitor-General; and Lord Hardwicke allowed the practice of the Ecclesiastical Court to be so settled as to administration, though he decreed for a distribution in favor of a husband's representatives on the principle of transmissibility from him as the person entitled to administration at the time of his wife's decease. *Elliot* v. *Collier*, 1 Wilson, 168, 1 Ves. sen. 15, 3 Atk. 526. These authorities are certainly entitled to very great respect. But, on the other hand, there are cases according to which the right of administering ought to follow the right to the estate. In one case Sir Joseph Jekyll, Master of the Rolls, is represented to say that this point had been so solemnly determined by the Spiritual Court, *Bacon* v. *Bryant*, East. Vac. 1729, in 11 Vin. Abr. 88. The same doctrine is asserted by the reporter in 1 P. Wms. 382, and by Lord Macclesfield in Cha. Prec. 567, and by Lord King in a case in 11 Vin. Abr. 87, pl. 24. The practice also of granting administration to the residuary legatee, in preference to the next of kin, seems to be an additional authority on the same side; for it proceeds on the idea that the statutes, requiring administration to be granted to the next of kin, were made with a view to their benefit, and, therefore, become inapplicable when the next of kin cannot, in any event, be entitled to the surplus of the estate to be administered. See further (*Rex* v. *Dr. Bettesworth*), 2 Str. 1111." Hargrave's Law Tracts, 4to, p. 475.

Sir George Lee was Dean of the Arches and Judge of the Prerogative Court of Canterbury from January, 1752, to December, 1756; he was knighted upon succeeding to those appointments; and the editor has been unable to discover any trace of such a case as that described by Mr. Hargrave to have been argued by Lord Mansfield during that period; he is inclined to think that a confusion has arisen between the names of Sir George Lee and Dr. Bettesworth, who was his immediate predecessor in the same offices; for in the case of *Elliot* v. *Collier*, 1 Wils. 169, there is the following passage:—"Quære, the case of *Hole and Dolman* at Doctors' Commons in Michaelmas Term, 1736, cited by the Solicitor-General, who said he was of counsel in it, and that

ruled that [344] the Court was bound, by the statutes, to grant the administration to one of those persons who were next of kin of the wife at the time of her death: (*a*)[1] but if the persons, who at that time were her next of kin, die before the grant of administration, it has always been held that the Court may exercise its discretion.

I have directed the cases to be looked up, as I feel inclined, if the point should hereafter come before me, in a contested form, to send it up for the decision of the Court of Delegates, in order that the question may there be deliberately reconsidered.

In the present instance I shall allow the administration to pass, a proxy of consent from the representative of the husband, who is a party to the proceedings in Chancery, being first exhibited.

Motion granted.

The following cases upon this point, decided at different times, have been communicated to the editor from the manuscript collections of the late Dr. Swabey, and from the notes of Dr. Arnold:—

WELLINGTON, OTHERWISE HOLE *v.* DOLMAN. Arches, Mich. Term, 1736.

An appeal from Exeter.

Per Curiam (Dr. Bettesworth). The Court revoked the administration granted by the Court below to the Reverend Robert Dolman, executor of Jeffery Follett, late of Northam, [345] in the county of Devon, of the goods of Margaret Wellington, otherwise Follett, late wife of the said Jeffery Follett, and administratrix with the will annexed of the goods, chattels, and credits of Peter Wellington, late of Biddeford, left unadministered by the said Margaret Wellington; and decreed administration to Rebecca Wellington, otherwise Hole, wife of Henry Hole, the sister and next of kin of the said Margaret Wellington, otherwise Follett.

KINLESIDE *v.* CLEAVER. Prerogative, Mich. Term, 1745.

Mary Kinleside, formerly Galton, died intestate in April, 1744: administration was granted by the Prerogative Court of Canterbury to William Kinleside, the husband, who, having made his will and appointed his son sole executor, died; probate of this will was granted to the son by the Prerogative Court of Canterbury, and administration was prayed of Mary Kinleside's effects, left unadministered by her husband, to be committed to him as his executor. A proctor exhibited for Mary Cleaver, wife of William Cleaver, and alleged her to be the daughter, only child and only next of kin of Mary Kinleside, formerly Galton, and prayed the de bonis grant to her.

On the fourth session of Michaelmas Term, 1745, Dr. Bettesworth, Judge of the Prerogative Court of Canterbury, decreed the administration, de bonis non, to the daughter and next of kin of the wife.

On the 1st of July, 1748, this decree was af-[346]-firmed by the High Court of Delegates, with 5l. nomine expensarum.(*a*)[2]

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it was therein determined by the Judge and all the Doctors (not in the cause) that the husband's right of administration to his wife is not transmissible to his representative, but that it goes to the next of kin of the wife."

Elliot v. *Collier* was argued in 1747, and at that time Lord Mansfield was Solicitor-General. The foregoing statement from Wilson is confirmed by the following entries respecting the case of *Hole* v. *Dolman,* extracted from the assignation book of the Court of Arches:—

On the by-day after Trinity Term, 1736, common lawyers were directed to be heard, at the petition of both proctors.

On the fifth session of Michaelmas Term, 1st December, 1736, the proctors, on both sides, porrected sentences. The Judge having heard the advocates and proctors on both sides, and the opinions of the rest of the advocates present, read the sentence, &c. &c. &c. &c.

(*a*)[1] *Kinleside* v. *Cleaver*, vide infra, p. 345.

(*a*)[2] The Judges who sat under this commission were:—Sir Martin Wright, K.B.; Sir Thomas Birch, C.B.; Dr. Walker, Dr. Simpson, Dr. Pinfold, Dr. Chapman, Dr. Collier.

WALTON *v.* JACOBSON. Prerogative, Easter Term, 4th Session, 1765.

The question was whether an administration, de bonis, should go to the representative of the husband, or to the next of kin of the wife.

Per Curiam (Dr. Hay). The Court observed—it may be mistaken in whom is the interest—on that point it has no jurisdiction. The Court is ministerial and must follow the statute: the statute Edw. 3, c. 11, having said the next lawful friend, and the statute of Hen. 8 explaining it to be the next of kin. There is no difference between the first administration and the administration de bonis. If the husband forgets to administer and dies, the next of kin will have the administration. I decree the administration, de bonis, to the next of kin of the wife.

[347] REECE (FORMERLY MILNER) *v.* STRAFFORD. Arches, Trinity Term, By-Day, 1800.

An appeal from Worcester.

Jane Strafford (formerly Milner), wife of Thomas Strafford, was the deceased: her husband died without taking administration. The Court at Worcester granted administration to Sally Strafford, widow, the relict (second wife), and administratrix of Thomas Strafford. A citation issued, at the suit of Elizabeth Reece, the sister and next of kin of Jane Strafford deceased, to shew cause why this administration should not be brought in, and a new one decreed to her. The Court, however, affirmed the grant; and the case now came, upon appeal, before the Dean of the Arches for his decision.

Per Curiam (Sir William Wynne). The question is, whether administration of the wife's effects should be granted to the representatives of the husband, or to the next of kin of the wife? This has been long settled here. Formerly it appears to have been thought discretionary in the Court—perhaps because grants (without the statute or against it) are made to the residuary legatee. There are several cases. *Wellington* v. *Dolman* was solemnly argued in the Prerogative Court in 1736, and by common lawyers. *Elliot* v. *Collier*, in Chancery (1 Ves. sen. 15)—a suit by the next of kin of the wife for an account—in which it was held that they had no right; but it is laid down in that case that the Ecclesias-**[348]**-tical Court was bound to grant administration in that course. In *Kinleside* v. *Cleaver*, before the Delegates in 1748, the husband took administration: it was held that made no difference, and the grant was directed to issue to the next of kin of the wife. Since that decision the practice has been settled.(*a*)

The only point for me to consider is, whether there is any objection to the citation: it was irregular, inasmuch as it only called upon the party to bring in the administration and shew cause why another should not be granted, and that it did not say—to shew cause why the original administration should not be revoked: but the grant is revoked as to the party when it is brought in; the citation, then, was sufficient.

The Judge below granted administration to the only party asking it; when that was called in he confirmed it. No costs were given in the first instance, but it is so clear a point here that the party might have been satisfied on any advice, and, therefore, I give the costs of the appeal.

Sentence reversed.

[349] WEBB *v.* WEBB. Consistory Court of London, Hilary Term, 4th Session, 1828.—Facts of adultery newly come to the knowledge of the party may be pleaded after publication.

On motion.

This was an application for leave to bring in an allegation pleading further adultery on the part of Mrs. Webb since the admission of the libel on the 10th of May, 1827.

The affidavit of the husband stated that he came to London from Bath on the third day of February instant, and that until the fifth he had no knowledge, nor any information, that a criminal and adulterous intercourse had been formed and carried on between his wife and Thomas Walton; that he believes such criminal connection is still subsisting, and that he shall be able to substantiate by evidence the allegation now offered on his behalf.

(*a*) Vide Roper on Husband and Wife, vol. 1, p. 205, 2d edition.

Dodson in support of the motion.

Jenner contrà.

Per Curiam (Dr. Lushington). It has been correctly stated that the practice of the Ecclesiastical Court is to allow facts of adultery, that may have come to the knowledge of a party even after publication, to be pleaded: but **[350]** such pleas must be strictly watched—they are open to suspicion, and care must be taken lest litigants should avail themselves of information from the evidence. In the affidavit before the Court it is not sworn that the husband has not had access to and read the depositions—the presumption is that he has perused them. But in the case of Sir Wastel and Lady Brisco, adultery was suffered to be put in plea long subsequent to publication—where the party was in full possession of the evidence taken on the original case, and where, if great diligence had been used, the fresh charge might have been sooner pleaded, the additional fact alleged being adultery with one of the female servants, and the birth of two children (*Brisco* v. *Brisco*, 2 Add. 259). Now, here, Webb is an attorney at Bath; he has professional avocations to detain him there; the adultery, if committed, has been in London, and he has not had the same means, therefore, of discovering any recent misconduct of his wife, as others might have possessed; and he has sworn, in his affidavit of the 9th of this month, that he only knew of this connection a few days before; he has then taken the earliest opportunity of bringing it to the notice of the Court. I shall watch the proof of this additional plea with great jealousy, but I must, according to practice, permit the allegation to be introduced.

Motion granted.

[351] HARRIS *v.* HARRIS. Consistory Court of London, Hilary Term, By-Day, 1828.—1. In answers to an allegation of faculties it is proper to state that the wife brought no fortune; but not that her father is possessed of large property. —2. The estimated value of all marketable securities must be included in the calculation of the husband's income, in order to the allotment of alimony, pendente lite.

[See further, 2 Hagg. Ecc. 376.]

This was a suit of divorce instituted by the wife on a charge of adultery. An allegation of faculties having been admitted, the answers of the husband were taken, and, in respect thereof, each party had made and brought in an affidavit. The sufficiency of the answers was the question before the Court.

In his answers to the first article the husband claimed a deduction of 26l. 1s. 8d. as an annual payment for the assurance of the sum of 1000l. on his life; and in his answers to the seventh article, after admitting that he was entitled to six shares in the Economic Insurance Office, for which he paid 1500l.; and also to one hundred shares in the Asylum Insurance Office, for which he had paid 480l., but that some further instalments still remained due thereon; said, "that his (the respondent's) shares in the Economic were all mortgaged and assigned as a security to his agent for advances already made and to be made to the respondent, for the purpose of paying outstanding debts now owing by him, amounting to 250l. or thereabouts, and to meet the expences of the present suit, and he therefore derives and will derive no income whatever from such shares; and he further saith that his shares in the Asylum Insurance Office are also at present unproductive of income to him, the rules of the said office requiring as a condition of his holding such shares that the in-**[352]**-terest thereon be paid into the office as instalments of payment for the said shares, for which purpose such interest will be applied for the next six years at least."

In a further part of his answer to the same article—"that he had not on his marriage, nor has he ever since, had any portion or advancement whatever with his wife, although her father is possessed of a large property and income."

Phillimore and Addams in objection to the answers.

Jenner contrà.

Per Curiam. In disposing of the objections the Court observed that, in answers to an allegation of faculties, to state that the husband had received no portion with his wife was customary and proper; but the introduction of that part of the husband's answer to the seventh article—that his wife's father was in possession of a large property and income—was improper: it could have no weight in an allotment of alimony; and was inadmissible on two grounds: first, because it might lead the

Court into an inquiry as to the amount of the father's property; and, secondly, because there was no legal obligation on a father to maintain his daughter after marriage. The Court was also of opinion that the husband was not entitled to make any deduction in respect of the 1000l. for which he had insured his life, inasmuch as a policy of insurance was capable at any time of being converted into money; and further said, that though it might be true the shares in the Asylum Insurance Office might not, in the first instance, be available as income, yet if the Court were to allow this exemp-[353]-tion, a husband might so invest his income as to evade all claims upon him for the support and maintenance of his wife.

The Court, after entering into a calculation to ascertain the amount of the husband's income, continued—

"Taking, then, the income of the husband at 250l. per annum, and considering that he has two children to educate and maintain, and that he will have to pay the expences of this suit on both sides, I allot to the wife the sum of 75l. per annum as alimony, pendente lite: she must have the means of furnishing herself with a decent subsistence."

The Court directed the alimony to commence from the return of the citation, and that the amount of all debts which the wife had incurred since that time, and which had been discharged by the husband, should be first deducted.

[355] THE COUNTESS OF PORTSMOUTH *v.* THE EARL OF PORTSMOUTH, BY HIS COMMITTEE. Arches Court, Easter Term, 4th Session, 1828.—A marriage de facto solemnized, under circumstances of clandestinity inferring fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor (who had great influence over him, and by whom he was clearly considered and treated as of unsound mind) pronounced null and void; and the pretended wife condemned in costs.

[Referred to, *Mordaunt* v. *Moncrieffe*, 1874, L. R. 2 Sc. & D. 391; *Baker* v. *Baker*, 1880, L. R. 5 P. D. 148; *Moss* v. *Moss*, [1897] P. 269.]

This was a suit of nullity of marriage instituted originally in the Consistory Court of London on the part of the Earl of Portsmouth, acting by his Committee; and in an early stage of the proceedings came up by appeal to the Court of Arches, where it was retained.

The cause was argued by Lushington and Pickard for the Earl of Portsmouth; and by the King's advocate and Dodson contrà.

Judgment—Sir John Nicholl. This suit is described as brought by the Earl of Portsmouth, acting by his Committee, against Mary Ann Hanson, falsely calling herself Countess of Portsmouth, to have a marriage, in fact solemnized between them, declared to be null and void in law.

The proceedings originated in the following circumstances:—In January, 1823, a commission issued to enquire into the alleged lunacy of Lord Portsmouth; the inquisition was executed; very long proceedings took place; the [356] matter was strenuously contested; a great number of witnesses was examined; and the finding of the jury was "that Lord Portsmouth is of unsound mind, so that he is not sufficient for the government of himself and his property, and has been in the same state of unsound mind from the first of January, 1809." In consequence of this finding, Mr. Henry Fellowes, a distant relation, was appointed Committee; and by an order made in the Court of Chancery the Committee was directed to institute proceedings in the Ecclesiastical Court "for the purpose of annulling and declaring void the marriage of John Charles, Earl of Portsmouth, with Miss Mary Ann Hanson, now Countess of Portsmouth."

Thus the proceedings commenced in the Ecclesiastical Court. The verdict would not of itself affect the validity of the marriage de facto solemnized—though solemnized within the time of the finding by the jury. The finding is a circumstance and a part of the evidence in support of the unsoundness of mind at the time of the marriage, but no more; for this Court must be satisfied by evidence of its own that grounds of nullity existed. Accordingly a long libel was given in, setting forth in detail the mental condition and unsound conduct of Lord Portsmouth, and the measures pursued to effect the marriage; his birth in December, 1767; the death of his father in 1797; the great weakness of his mind from the earliest period; his marriage with Grace Norton in November, 1799; the settlement on that marriage and the names of the

trustees; Mr. John Hanson, the solicitor of the family, being one of those **[357]** trustees. The libel goes on, that after that marriage his mental weakness increased, until at length he became of unsound mind, that he so continued and still continues of unsound mind: averring, therefore, that he was from his birth and before his first marriage not of "unsound" but only of "weak mind," which afterwards "became unsound." The libel then proceeds to allege a variety of facts from that marriage till the death of Grace Lady Portsmouth as indicating unsoundness of mind, and proving that he was treated as a person incapable of managing his own property, and was always kept under a certain degree of superintendence and restraint. It further recounts Lord Portsmouth's conduct on the death of Grace Lady Portsmouth in November, 1813, and the circumstances attending the second marriage to Miss Hanson on the 7th of March following, to shew that that marriage was not the act of a person of sound mind, but was effected by fraud and circumvention. It then details the subsequent conduct of Lord Portsmouth and the treatment he experienced in continuation and confirmation of his former unsoundness. It mentions the birth of a female child at Edinburgh in July, 1822; his removal from thence just before that event by some of his family, and the subsequent proceedings under the inquisition already mentioned.

This is the general substance of the libel. The prayer of it is, "That the marriage may be declared null by reason of the earl being at the time of unsound mind and incapable of forming such a contract; and also by reason of the fraud and circumvention practised **[358]** on him upon that occasion; and that Mary Ann Hanson may be condemned in the costs of suit." It consists of forty-nine articles, and on it sixty-seven witnesses have been examined.

On the part of Lady Portsmouth an allegation in reply was given, setting forth that Lord Portsmouth was possessed of a capacity and understanding fully equal to the ordinary transactions of life; was so considered and treated by all persons till removed from Edinburgh on the 2d of July, 1822; corresponded with his friends; mixed in society like other noblemen and gentlemen; in 1790, on coming of age, suffered recoveries with his father, and made a new settlement of his family property. It explained the arrangements on his first marriage and detailed his observations upon it. It alleged that he settled accounts with his agents; attended public meetings and committees; prosecuted an offender and was examined as a witness in 1802; was much affected at the death of his wife; that the second marriage was freely entered into—was his own act and the result of no fraud; that his family wrote letters of congratulation on that marriage; that in 1814 Mr. Newton Fellowes, his brother, applied for a commission of lunacy, which was refused; that subsequently, in 1815, Lord Portsmouth executed a will and codicil, exercised his functions as a peer, and cohabited with Lady Portsmouth till removed by force from Edinburgh; and it exhibited many of his letters. This allegation consisted of above thirty articles, and fifty-seven witnesses were examined in support of it.

[359] Upon the result of this mass of evidence, given by one hundred and twenty-four witnesses, on pleas consisting nearly of eighty articles—depositions more in bulk than in any cause within memory before these tribunals—the Court has to decide whether the marriage is null and void.

The law of the case admits of no controversy, and none has been attempted to be raised upon it. When a fact of marriage has been regularly solemnized, the presumption is in its favour; but then it must be solemnized between parties competent to contract—capable of entering into that most important engagement, the very essence of which is consent: and without soundness of mind there can be no legal consent—none binding in law: insanity vitiates all acts. Nor am I prepared to doubt but that considerable weakness of mind, circumvented by proportionate fraud, will vitiate the fact of marriage, whether the fraud is practised on his ward by a party who stands in the relation of guardian, as in the case of *Harford* against *Morris* (2 Consistory Reports, 423), which was decided principally on the ground of fraud, or whether it is effected by a trustee procuring the solemnization of the marriage of his own daughter with a person of very weak mind, over whom he has acquired a great ascendancy. A person, incapable from weakness of detecting the fraud, and of resisting the ascendancy practised in obtaining his consent to the contract, can hardly be considered as binding himself in point of law by such an act. At all events, the circumstances preceding and attending the marriage itself **[360]** may materially tend to shew the contracting

party was of unsound mind, and was so considered and treated by the parties engaged in fraudulently effecting the marriage.

In respect to Lord Portsmouth's unsoundness of mind, the case set up is of a mixed nature—not absolute idiotcy, but weakness of understanding—not continued insanity, but delusions and irrationality on particular subjects. Absolute idiotcy or constant insanity would have carried with them their own security and protection; for in either case the forms preceding, and the ceremony itself, could not have been gone through without exposure and detection; but here a mixture of both, by no means uncommon, is set up—considerable natural weakness, growing at length, from being left to itself and uncontrolled, into practices so irrational and unnatural as in some instances to be bordering upon idiotcy, and in others to be attended with actual delusion—a perversion of mind, a deranged imagination, a fancy and belief of the existence of things which no rational being, no person possessed of the powers of reason and judgment, could possibly believe to exist.

Such being the species of case alleged, what is the sort of proofs of its reality which are laid before the Court? The case is of that importance that I should have been disposed, for the satisfaction of the parties and the relief of my own mind, to have entered into the circumstances minutely, and to have quoted the depositions supporting the several circumstances; but the facts are so extremely numerous, and if detailed at all require to be detailed with all the accom-**[361]**-panying incidents in order to see their just effect, while the evidence is so very voluminous, that the attempt would be almost endless and impracticable.

To several of the most important articles of the libel, those which set forth the general state of Lord Portsmouth, and his conduct before the death of the first Lady Portsmouth, there are above twenty witnesses examined; so that the existence of the facts generally cannot be doubted, and the shades of difference become immaterial: to select the depositions of particular witnesses would not be satisfactory, as the individual depositions selected might state too much or too little—more or less than the fair general result of all the testimony.

The facts themselves in point of time happened, some before the marriage in question, others after. Those before the marriage are the most important, especially those nearly approaching it, and they are also the most numerously deposed to; but those after the marriage are not immaterial as corroborative and confirmatory, and strengthening the presumption and the proof of unsoundness existing at the marriage. Even the evidence as to the state of Lord Portsmouth at the time of taking the inquisition, and the verdict itself, are not without weight, though nine years after the marriage. Applying to that time several medical gentlemen have been examined—persons particularly skilled in mental disorders—who had various interviews with the noble earl, and they give a decided opinion that he was of unsound mind. Upon their opinion, and also upon the circum-**[362]**-stances which they mention, it seems hardly denied that in 1823 Lord Portsmouth was unsound; and the explanation attempted is, that he might be in a state of excitement by being hurried down from Scotland (but that was six months before), or from knowing that the enquiry was then going on. However from the facts detailed by the medical witnesses—from their opinions as men of skill, confirmed by the finding of the jury—I am satisfied that at the time of the inquisition Lord Portsmouth was of unsound mind: so far the Court can have no difficulty at once in declaring its deliberate conviction. But some of the medical gentlemen read the affidavits, and they also (as I understand them) heard the witnesses examined at the inquisition, and upon that evidence, as well as upon their own observation and judgment, they carry back their opinions to an earlier period than the time of taking the inquisition. This testimony, therefore, is not without its weight and effect, even retrospectively; but the Court must principally rely upon the circumstances preceding the marriage in question, as spoken to by the witnesses produced on both sides in this suit.

Of the facts bespeaking unsoundness of mind, the persons examined to their belief that Lord Portsmouth was of "sound mind and capable of conducting the ordinary transactions of life" were for the most part wholly ignorant. They themselves admit weakness of intellect. They almost universally designate his lordship as a weak man. Imbecility is a matter of degree, and the degree of weakness differs in the same **[363]** individual under different circumstances, and according to the different habits existing, and the different situations in which he is placed, at one time or another of his life.

When the medical men give their opinion that the mental deficiency was connate, I do not understand them to mean that he was born either an idiot or a lunatic; but that his mind was naturally and constitutionally defective, and that its defect was not occasioned by any accident or supervening disease. At most, whatever may be meant by that expression, its being connate is only matter of opinion; it is not the case set up in the libel. Their opinion, however, if understood in the manner the Court has explained it, is confirmed by facts, and by the history of Lord Portsmouth. At school he was deficient, and not like other boys; he had especially that character of mind which afterwards accompanied him through life—timidity; he was easily intimidated and cowed; yet he was not incapable of instruction and of improvement; but the capacity of instruction and improvement is a quality possessed by a child at a very early age; it is possessed even by the brute creation; they can be taught, and can acquire things by habit and practice to a certain extent. Lord Portsmouth had a very good memory, and that in a great degree accounts for his receiving instruction, and also accounts for the wrong opinion formed by many witnesses; he could learn arithmetic and languages; but children of eight or ten years old are often perfect in the first rules of arithmetic, and make considerable progress in acquiring **[364]** languages: it is principally an effort of memory. Lord Portsmouth then was capable of improvement, and no doubt all possible pains were taken to improve him and to qualify him to fill the high station in society to which he was born. He was sent abroad, and had the benefit of foreign travel; he certainly therefore was not considered an idiot, whose mind could in no degree be informed by education, or enlarged by observation.

In 1790, soon after coming of age, he joined his father in suffering a recovery, and in making a new settlement of the family estates, in order to provide for younger children. Here again he was not esteemed nor treated as an idiot; but an act of that sort, proper in itself, and done in concurrence with his family and natural guardian, is no great proof that he did not labour under considerable weakness of mind.

In 1797 his father dies, and though he is then thirty years of age, he remains under the care and superintendence of his mother, who is described as a very clever woman; and is managed by her.

In 1799 he marries Miss Grace Norton. Looking at the circumstances of that marriage—he 32 years of age, Miss Norton 47—and at the settlement then made, by which his property is placed in the hands of trustees; it is hardly possible not to be impressed that this was a piece of family arrangement, for the purpose of protecting a person incapable of taking care of himself, and liable to be imposed upon, and to be entrapped into some improper connexion. With the propriety of that arrangement this **[365]** Court has nothing to do. The unsoundness of his mind might not at that time have grown to the extent which would render such a marriage, had under the protection and with the concurrence of his family, invalid; nor is it in question, so as to call for the expression of any opinion by the Court, either as to the propriety or the validity of that marriage. Under the maternal care of a wife nearly 50, a kind, prudent, discreet lady, Lord Portsmouth might still further acquire the habit of conducting himself in society in the manner described; his property, put out of his own power, was in the hands of trustees; he had by this settlement constituted them, as it were, the committees of his estates; his domestic concerns were all in the management of his wife; she took not only the superintendence, but the entire control, of every thing domestic; she acted as the committee of his person.

That in 1802, upon receiving a threatening letter of a most infamous kind from a person of the name of Seilaz, whom it was judged necessary to prosecute, he should be able to give evidence in a court of justice, is no conclusive proof of any great extent of capacity, even at that time; it was a simple fact he had to prove, requiring little, if anything, more than memory; nor does it appear that his cross-examination could require more than recollection of facts—not any considerable exercise of the understanding, and of the reasoning powers of the mind; yet even so early as that—in 1802—it was a matter of surprize and of subsequent talk that he did so well; so that the previous impressions **[366]** and public notoriety were very unfavourable to his understanding.

This examination is perhaps the strongest fact in support of his capacity; for his behaviour at parties, his receiving and paying visits, his making a few observations on the state of the weather, or on horses or farming, his going to public meetings,

races, and county balls, are not incompatible with great imbecility of mind; still less are they incompatible with the existence of certain mental delusions and irrational fancies and practices when freed from observation and control. Under the restraint produced by the presence of formal company—under a sense of being observed—a person labouring under considerable imbecility, and some delusions, will pass as possessing a certain degree of understanding; much more than the individuals of the company would give Lord Portsmouth credit for, if they knew his condition when not so restrained: it is just in the same manner that a child in the presence of company will appear very different from his character when at play and unrestrained; but the conduct of such a person will more especially shew itself to advantage when the superintendant is present to watch and to manage him, and by a nod or look keep him within proper bounds, and prevent his exposing himself and his infirmities of mind.

Under these considerations, the great mass of evidence produced to the general conduct and deportment of Lord Portsmouth, and the opinion of his capacity formed by the witnesses, weigh but little against the facts proved as to [367] his behaviour when under no restraint. It should, indeed, seem, that the more properly Lord Portsmouth was able to conduct himself under restraints and checks, the more strongly do the acts of which he was guilty at other times, when left to follow his own inclinations, wear the aspect of derangement rather than of imbecility. Unsoundness of mind does not shew itself upon all occasions; nay, it can often only be discovered by probing and close examination—sometimes even requiring the clue or key that will lead to its detection. He knew he was a peer of the realm, and had learnt some of the rights and duties that belong to that high station; but he either was so weak or so deranged that he was wholly ignorant of what he owed to himself and to his rank; as will appear by the facts to which the Court will very briefly refer.

What are some of the facts proved? I forbear, for reasons already assigned, to enumerate them with the details connected with them, as that would lead to much length, and they have been in a considerable degree stated by counsel.

Grace Lady Portsmouth treated him with great kindness and indulgence, and it is not improbable that such indulgence might lead to the more complete perversion of his mind. If he had been kept under more restraint, he might have continued only a weak man, instead of becoming deluded and unsound; but what is his conduct?

His servants were his playfellows in town and country; he played all sorts of tricks with them; more particularly in the country, where he was [368] less under observation, where he found additional playmates in his farm servants and labourers, and where he was less liable to notice.

He was fond of driving a team, and Lady Portsmouth so far indulged him as to have a team of horses kept for his amusement as a toy and a plaything, with which he carted dung and timber and hay; yet he used to flog these horses most unmercifully, and often in such a manner as to produce danger to his own person.

As further proofs of his unsoundness of mind may be added his propensity for bell-ringing, not, as sometimes young men will do, for exercise, but to share the money; this too by a nobleman of 40, at his own parish church, and near his own residence: his fancy respecting funerals, and his conduct and all the circumstances connected with that fancy: the slaughtering of cattle and the incidents attending that whim. Another trait is his pleasure in malicious cruelty to man and beast; never expressing any regret, but "serves him right" was his usual remark upon his own acts of cruelty. I allude only to these facts very generally, but to state them with the force and effect they have upon my judgment would require a detail of the minuter circumstances connected with each of them.

A still more decided delusion of mind is that relating to lancets, and tapes, and basins in women's pockets; the particulars of which, for the same and even for additional reasons, I do not enumerate. The fact is proved beyond all question; it was a delusion that continued even to the time of the inquisition. Dr. Ainslie ad-[369]-mits that "such a propensity is not consistent with a perfectly sound mind." What the distinction is between a mind not perfectly sound and an unsound mind is not explained by the witness; nor what is the state of the capacity of a man who, when between 40 and 50, twice married, and living in society, supposes that the gestation of a woman could be fifteen months; nor of one who admits that he knew another man was in bed with his wife, that he remonstrated, but "they never took

any notice of me," and who does not resent this, nor take any steps for relief, because the man was "too strong" for him. These and other circumstances, admitted on the interrogatories by this witness, occasion his evidence to produce no alteration in my opinion respecting the bearing of the facts before the marriage spoken to by the other witnesses; and the evidence of Swait, the bailiff, who is brought forward to contradict the facts, and to prove the correctness and propriety of Lord Portsmouth's conduct, is equally nugatory: for this witness, on the interrogatories, admits—

"That he did sometimes control the noble earl," that "when he was running a little contrary he threatened to tell Dr. Garnet of him." "Respondent has sometimes wrested a whip out of Lord Portsmouth's hand, when my lord in play has cut him across the legs."

What a picture is this of the noble earl, from a witness produced to prove his capacity and soundness of mind! A nobleman of 40 flogging an old bailiff of 60 for his amusement, and in play cutting him across the legs! the bailiff **[370]** not submitting nor quitting his service, but by force wresting the whip out of his hands! and the nobleman in his turn submitting to this indignity and forcible control!

I dwell too long on these circumstances. In 1808, whether Lord Portsmouth, perhaps from over indulgence and loose given to his fancies, became less manageable, as a froward boy does, or whether Lady Portsmouth, from her advanced time of life, approaching 60, grew less equal to the task, Mr. Coombe, a medical gentleman, was taken into the family to assist in superintending the noble earl. That gentleman soon acquired an ascendancy, by pretending to quarrel with him, and threatening to demand satisfaction as a gentleman. This of course had the effect of reducing Lord Portsmouth to passive obedience; generally at least, for on two or three occasions passion got the better of timidity. From that time Coombe's presence alone was sufficient to check him, whether at play with the labourers, or whatever irrational fancy he might be pursuing. Mr. Coombe's attendance continued three years, till 1811, when he left, not because Lord Portsmouth had recovered, but because Coombe's private concerns required his attention. It may be proper to repeat that a feature in the character of Lord Portsmouth, which accompanied him all through life, was that he was easily intimidated and controlled. This character usually marks and accompanies unsoundness of mind, whether it be imbecility or derangement, or a mixture of both: if a servant resisted him, he submitted and desisted; if a threat was held out to tell **[371]** Lady Portsmouth, or Dr. Garnet, or Mr. Coombe, it produced the same effect, and among others (it is not immaterial) the threat to tell Mr. Hanson occasioned the same result. Mr. Hanson's influence and ascendancy over him, as one of the trustees —the acting trustee indeed—is fully established.

In November, 1813, Lady Portsmouth died. Lord Portsmouth's conduct was of that inconsistent character which distinguishes persons of such a mind: at the funeral he behaved as at other "black jobs," as he termed them, one moment overcome with grief, the next merry again. He talked of a Miss de Visme as the object he was very anxious to engage; Miss Hudson, he said, was also suggested to him, but she was too old. The trustees thought it prudent to send him down to Hurtsbourne, attended by Coombe. Another wife was the string of his disorder, but Miss Hanson was never proposed by him as the object of his choice.

On the 28th of February, 1814, Coombe thought it prudent to bring him to London, and to deliver him up to his trustees, Hanson being one, and then in town; that day week he was married to the daughter of Mr. Hanson! Hanson, the confidential solicitor of the family, one of the trustees, who had a great ascendancy over him, who owed him every possible protection, married him to one of his daughters! It is unnecessary to state the jealousy with which the law looks at all transactions between parties standing in these relations to each other.

I will not enter into the particulars of the transaction; the whole of it will bear but one **[372]** interpretation!—every part is the act of the Hansons! Lord Portsmouth is a mere instrument in their hands to go through the necessary forms! the settlement is begun in forty-eight hours after Lord Portsmouth's arrival in London! the contents of that settlement, the mode in which it is prepared, the concealment of the whole from the friends and the other trustees who were in town, some in the same house with Lord Portsmouth—all these particulars bear the same character. The necessary forms are gone through, but in support of these mere forms not a witness is produced to shew that this nobleman was conducting himself as a man, understanding what he

was doing, or capable of judging, or acting as a free and intelligent agent: nothing tending to shew that he was a person of sound mind, nothing in his conduct inconsistent with unsoundness of mind—every circumstance conspires to prove that he was the mere puppet of the Hanson family, and that the celebration of this marriage was brought about by a conspiracy among them to circumvent Lord Portsmouth, over whom they, and particularly the father, had a complete ascendancy and controul, so as to destroy all free agency and rational consent on his lordship's part to this marriage.

A marriage so had wants the essential ingredient to render the contract valid—the consent of a free and rational agent. The marriage itself and the circumstances immediately connected with it do not tend to establish restored sanity; it was neither "a rational act," nor was it "rationally done;" the whole "sounds to folly" and negatives sanity of mind. The Hanson's, **[373]** in the mode of planning and conducting the transaction, shew that they treated and considered Lord Portsmouth as a person of unsound mind, and Lord Portsmouth, in submitting, acquiescing, and not resisting, confirms his own incompetency. Even if no actual unsoundness of mind, strictly so called, if no insane derangement had existed—if only weakness of mind, and all admit he was weak, yet considering the passiveness and timidity of his character on the one hand, the influence and relation of Hanson, his trustee, on the other, and the clandestinity and other marks of fraud which accompanied the whole transaction—I am by no means prepared to say that without actual derangement in the strict sense the marriage would not be invalid, but in my judgment Lord Portsmouth was of unsound mind, as well as circumvented by fraud.

As this is the great fact which the Court has to decide, it seems unnecessary to pursue the subsequent history. The Court gladly relieves itself from going through the disgusting particulars of the treatment which this unfortunate nobleman afterwards experienced from the pretended wife and her family and associates—forbearance in this respect is for their advantage; yet the subsequent treatment corroborates, and is confirmatory of, the former condition of Lord Portsmouth; no change in his mind and character is suggested to have taken place after the marriage; no supervening malady producing derangement of mind; he continued just the same man as before the marriage in mental condition, though treated in a manner very different from the kindness of the first wife.

[374] Upon the whole, the Court pronounces that the marriage in fact, solemnized between the Earl of Portsmouth and Mary Ann Hanson, is in law null and void; he being at that time not of sound mind sufficient to enter into such a contract; and that the celebration of such marriage was effected by fraud and circumvention; and pronouncing, as the Court feels bound to do, that latter part of its sentence, it feels also bound to grant the prayer for costs.

CHEALE *v.* CHEALE. Arches Court, Easter Term, 4th Session, 1828.—A suit by the wife against her husband having abated by the wife's death; the Court will not, at the petition of the proctor, direct the costs incurred by the wife to be paid by the husband.

On petition.

This petition, after alleging that in a cause promoted by Mary Cheale against her husband by reason of cruelty and adultery the Court, on the by-day of Trinity Term, 1827, had allotted the sum of 50l. on account of alimony to be paid to the wife; further stated that, on the 31st of August, Mrs. Cheale died without having received any part of the alimony, and that her proctor's costs had not been paid; and concluded with a prayer that the Court would direct the costs incurred on her behalf in this suit to be paid by the husband, and would refer the bill for taxation.

Lushington and Dodson in support of the application. Assuming that if the husband had died, we could not, in this Court, have proceeded against his executor; yet, since the husband is alive, the Court is not precluded by the death of the wife from enforcing against him **[375]** the costs which have been incurred on her behalf. A contrary decision would lead, in all cases of this description, to the necessity of strictly enforcing a taxation de die in diem during the suit. In this instance the costs are trifling, and, at any rate, must be taxed.

Per Curiam. At whose suit is the Court to tax the costs?

Lushington. At the petition of the proctor; and when his bill has been taxed a monition will issue in the usual form for payment to the proctor or his party.

Phillimore contrà. By the death of Mrs. Cheale the cause has abated, and the authority of her proctor ceased. A proxy is only a personal appointment, "ad comparendum, et ad agendum omnia quæ ipse cliens ageret si præsens personaliter esset" (Oughton, tit. 48, s. 1).

Per Curiam. The object of the law in permitting a de die in diem taxation was to obviate any inconvenience or delay that might otherwise arise, in the progress of the cause, from the wife's want of funds to meet the costs. Here the proctor forbore at the proper time to procure such taxation; and the Court cannot now assist him. His appointment is extinct. No precedent has been furnished me of a proctor suing a husband in these Courts for costs: he may, perhaps, have a remedy at common law, and if it is wished, the Court will direct his costs to be taxed in order to ascertain their amount. I must decline to make the decree prayed in this case.

Application rejected.

[376] IN THE GOODS OF JAMES GIBBS. Prerogative Court, Easter Term, 1st Session, 1828.—Where minors are concerned, probate in common form cannot be granted of a mere memorandum of doubtful construction, on affidavits shewing that the deceased intended to increase the benefit to certain legatees under a formal will, and was prevented by death from giving his solicitor instructions to that effect.

On motion.

James Gibbs died on the 3rd of March, 1828. He left a widow and seven children, minors—four daughters and three sons. By his will, dated the 17th of February, 1825, and duly executed, he appointed his wife (during widowhood), Samuel Pickering, and Thomas Gray, executors; and, after providing for the management of his business, and bequeathing legacies to his wife and three sons, he gave to each of his daughters 1000l. 3 per cent. reduced annuities absolutely, and 1500l. of the like stock for life, afterwards to their children; and the residue equally between all his children who should attain 21; the daughters' shares to them for life, and then to their respective children. The personal property amounted to about 25,000l. From an affidavit it appeared that the testator, during the last three months of his life, had frequently expressed to his executors, and to his eldest son, that he intended to alter his will and leave his daughters more property, in consequence of his eldest child, Mrs. Robinson, having died without issue; that on the 21st of February last he **[377]** wrote in the presence of his wife a memorandum as follows:—

"Martha Eliza Cate Sofia, 3 R. 1300—1000 3½, if James settles and occopys the frunt house he must alow his brother Thomas 50l. a year for that"

The affidavit then stated that he put this paper into his pocket-book, and both at that time, and on subsequent days, declared his intention of making an addition to his daughters' legacies; that on the 2nd of March he expressed himself to that effect to his solicitor, and appointed to attend at his office for that purpose on the following morning, but was prevented by sudden death.

The memorandum was found after the testator's death in his pocket-book; and Lushington now moved for probate of it, to issue in common form to his executors as a codicil.

Per Curiam. There are not sufficient grounds laid to enable the Court to grant probate of this paper. The original will is a long instrument, carefully prepared, and the disposition seems to have been maturely considered. The present paper was written as a mere memorandum, not as embodying the deceased's final intention. His object, as the affidavit tends to shew, was to give a larger portion to his daughters: but the construction of the paper is obscure whether the sum mentioned was to be an addition to, or substitution for, the benefit under the will; whether it was proposed to be given to them absolutely, or **[378]** for life, and then to their children. I should feel considerable difficulty in granting probate of this instrument even on a proxy of consent; but as on the present occasion the interest of minors will be affected, I am decidedly of opinion that the facts stated are insufficient to justify the Court in acceding to this motion.

Motion refused.

IN THE GOODS OF RICHARD MORESBY. Prerogative Court, Easter Term, 1st Session, 1828.—The deceased, supposing his will appointing his wife sole executrix and universal legatee for life to be lost, made in Peru a nuncupative will (not in conformity with the statute of frauds), with a general revocatory clause, and appointing two executors and his wife universal legatee absolutely. The executors renounced, and she took probate of that will in Peru. The former will being found (of which fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, granted to her.

On motion.

This was an application from the widow of Lieutenant Moresby, R.N., that probate of his will, dated on the 25th of January, 1821, might be granted to her as sole executrix; and in support of her application she made the following affidavit:—

"That she was the relict of the deceased, sole executrix, and universal legatee for life named in his will duly executed and dated the 26th of January, 1821; that shortly after this period the deceased left England in the command of a private merchant vessel, taking with him this will, and proceeded with his wife to Peru; that after their arrival they resided principally on board; but that during a temporary absence of Lieutenant Moresby the vessel with all his effects and papers, including his will, was captured by pirates, but was soon afterwards retaken: that on the occasion of [379] such capture the deceased lost several papers of consequence, and expressed his firm belief to his wife that his will had then been destroyed. That the deceased, as she has been informed, and verily believes, whilst at the city of Bolivar, was attacked with the illness of which he died; that on the 13th day of February, 1827, the day before his death, being incapable of writing, and fearing he might die intestate, he sent for a notary, in whose presence, and that of four other witnesses, he made a nuncupative will, by declaring that in contemplation of his death he nominated and appointed two executors, both resident in the city of Bolivar, and his wife sole heiress, and revoked all his other testamentary dispositions; but that the said will was not reduced into writing in the lifetime of the deceased." Mrs. Moresby further made oath, "that, upon the renunciation of the two executors in the proper Court at Lima, she there duly proved the nuncupative will, and administered the effects in Peru; and that shortly before the deceased's death, and, as she verily believes, while he was at Bolivar in his last illness, she discovered among his papers on board the will, dated 26th January, 1821, but that he died in ignorance of that circumstance." The affidavit further stated that both the executors were resident in the city of Bolivar, or some other part of Peru, of which one was a native.

The only property of the deceased in this country consisted of about 500l. due for arrears of half pay.

[380] Lushington. The question is whether a nuncupative will made and proved in Peru supersedes a prior will written and executed in this country—whether the statute of frauds (29 Car. II. c. 3, s. 22) does or does not affect such a case. The widow, in asking probate of the will of 1821, waives an interest which she would take under the will of 1827; in the former she has but a life interest; in the latter she is absolute universal legatee.

Per Curiam. It is not necessary here to decide the question (upon which there may be some doubt) whether the statute of frauds would apply to the nuncupative will made in Peru. Both wills contain nearly the same disposition, and give the whole property to the wife; the latter, absolutely: the former, of which she is content to take probate, for life only. It appears that the deceased did not intend to revoke the will of 1821, but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will. As, however, the former has been recovered, there is no objection to probate thereof being granted to the widow and universal legatee for life.

Motion granted.

[381] IN THE GOODS OF JOHN EWING. Prerogative Court, Easter Term, 1st Session, 1828.—Administration durante minoritate of children in the East Indies decreed to the uncle resident in Ireland, he giving full justifying security: the grandfather, to whom as next of kin the grant would naturally pass, being upwards of 80, and also resident in Ireland.

On motion.

Haggard moved, on the affidavit of the Reverend William Ewing, to the following effect:—

Per Curiam. The deceased was a major in the Madras regiment of infantry: he died intestate, and has left three children who are minors, all resident in the East Indies; and the uncle (the Reverend Mr. Ewing), who lives in Ireland, is desirous of being nominated guardian to take out administration for their use and benefit. The next of kin, whom the Court usually appoints, is the grandfather; but he is superannuated, being eighty years old; he is also resident in Ireland: it would then be extremely inconvenient to appoint him, since he would hardly live till the minors were of age. The uncle states the property to be in the hands of an agent, and under 500l.; and that he is willing to collect and invest it. He will give full justifying security, so that the interests of the minors may be protected. With this precaution, and under the special circumstances of the case, the Court will, I think, exercise a proper discretion in granting this application.

Motion granted.

[382] LARPENT *v.* SINDRY. Prerogative Court, Easter Term, 1st Session, 1828.—In decreeing probate, the Court is usually regulated by the grant of the Court of probate where the party was domiciled; i.e. the competent jurisdiction—in this instance the Court of Supreme Judicature at Fort William, Bengal.

[Applied, *In the Goods of Earl*, 1867, L. R. 1 P. & D. 451.]

On motion.

Thomas Barnes, of the H. E. I. Company's Civil Service, died in May, 1826, in India. He left two testamentary papers, written with his own hand, bearing date respectively the 12th of April, 1825, and the 6th of May, 1826, both beginning in the same formal manner, and both disposing of the whole of his property, though differently. By the first will, which was duly executed, he appointed five executors; but by the second no executor was named, though it contained this sentence—"which sum the executors thereinafter mentioned;" and the paper thus concluded—"I feel too fatigued to write more." This paper bequeathed the residue to the deceased's natural son, a minor, who was, in December, 1824, consigned to this country for his education: the paper was subscribed, but not witnessed.

Of both these instruments probate had been granted, as the will and codicil of the deceased, by the Supreme Court of Judicature at Fort William, in Bengal, to John Palmer, Esq., one of the executors in the will of 1825, with the ordinary power reserved. Of the other executors, three were willing to renounce; and a decree had been served, in the usual manner, on the remaining executor, Mr. Sindry, who was resident at Bombay.

[383] An exemplification of the probate in India having been transmitted to this country, Lushington moved for administration with the exemplified copy of the two papers annexed, as the will and codicil of the deceased, to be granted to Mr. Larpent, partner in the house of Cockerell and Co., the attornies of John Palmer, the executor.

The property within the province of Canterbury nearly amounted to 2000l.

Per Curiam. The form of the grant in India is not exactly according to our practice. Here the two papers would have been proved as together containing the will of the deceased: but the Court in India, which, as the deceased died domiciled there, is the Court of competent jurisdiction, has considered them as a will and codicil, and this Court is perhaps bound to follow it. The question how far this and other Courts of probate are to be governed by the decision of the Court of Probate where the deceased was domiciled has never been expressly determined, but I certainly should not feel inclined to depart from what has been the general practice, unless a strong case of inconvenience were brought under my consideration. I have, on the present occasion, the less difficulty in following the Indian grant, because I am not aware that there will be much difference in the ultimate result, whichever way the decree passes.

Let the administration with the exemplified copies of the two papers pass as prayed.

Motion granted.

[384] INGRAM *v.* WYATT. Prerogative Court, Easter Term, 1st Session, 1828.—Mere evidence of execution of a will and codicil by a person of weak and inert mind, appointing his attorney and agent sole executor and almost universal legatee of a large property, is insufficient, without proof of instructions by the deceased; instructions for the will being given to the solicitor, who prepared and attested it, by and in the handwriting of the executor's father (also the deceased's co-agent and attorney); the codicil being prepared exclusively for his own benefit by the executor, in whose house the deceased was living apart from his family; and other circumstances strongly inferring fraud and circumvention.

[Reversed, 1828, 3 Hagg. Ecc. 466. Applied, *Butlin* v. *Barry*, 1837, 1 Curt. 619. Discussed, *Barry* v. *Butlin*, 1838, 2 Moore, P. C. 483; *Fulton* v. *Andrew*, 1875, L. R. 7 H. L. 461.]

Judgment—Sir John Nicholl. John Clopton, the deceased in this cause, died on the 20th of November, 1824, aged about 74 years, leaving Miss Barbara Ingram, his sister, and sole next of kin. His personal property amounted in value to £25,000; his real estate to £250 per annum.

The will propounded bears date on the 4th of August, 1821: it bequeaths to his sister, Barbara Ingram, £2000; to his cousin, Barbara Ingram, £4000; to Hugh Carolan, £1000; to the poor of Stratford-upon-Avon, £50; to Henry Wyatt, the residue both of his real and personal property; and appoints Henry Wyatt sole executor.

The codicil, dated on the 5th of August, 1822, after reciting the clause of the will giving £2000 to his sister, revokes that legacy, and in all other respects confirms the will.

The will and the codicil are each attested by three witnesses; they are propounded by Henry Wyatt the executor; and are opposed by Barbara Ingram, the sister of the deceased. The present question is on the factum of those instruments respectively; and the proceedings that have taken place are shortly these. The **[385]** executor propounded the papers in a common condidit pleading instructions, execution, and capacity; the six subscribed witnesses were examined, and deposed to execution and capacity. Additional articles were afterwards brought in alleging the incapacity of Richard Wyatt (who received the instructions for the will from the deceased, and communicated them to the solicitor) in order to account for his non-examination; and on these articles two witnesses were produced.

In opposition to this case the sister gave in a long allegation, entering into the history of the deceased, and of all his conduct and transactions, for the purpose of shewing that this will and codicil were obtained without testamentary intention and capacity sufficient to give them legal effect.

To that allegation a long reply was made in order to establish testamentary intention, and to confirm and support capacity. Upon these pleas twenty-eight witnesses have been examined by the sister, and eleven by the executor, besides those before produced on the condidit, and additional articles: and it was upon their depositions and upon a great number of exhibits, which furnish very important illustrations of the case on both sides, that the cause was elaborately argued at the end and after the conclusion of last term.(*a*)

The case is of considerable intricacy, involved in a great mass of testimony and mul-**[386]**-titude of facts, important in value, and as it affects character. There were also other suits occupying fully the time of the Court in an unusual degree up to the caveat day; so that it was a matter of justice to all the parties that the Court should take time to deliberate and to revise the evidence and arguments.

For the sister it was argued that the disposition was in favour of a stranger in blood that the parties interested were active in obtaining the instruments; that the will was prepared from instructions conveyed by the father of the executor—the codicil by the executor himself—that these persons were the attornies and agents of the deceased; that the presumption of law was against the act; that the law, though not positively invalidating, yet required the clearest proof of unbiassed intention and full understanding of the nature and effect of such instruments; that the capacity of the deceased, though not intestable, yet was weak and liable to circumvention and

(*a*) The King's advocate and Phillimore were of counsel for the executor; Lushington and Dodson for Miss Ingram, the sister and sole next of kin.

imposition; that the evidence of the factum did not clear up these difficulties, and was insufficient to support the testamentary papers; lastly, that there were such marks of fraudulent conduct in the executor as called for his condemnation in costs.

For the executor: that though by the principle of law, where parties interested were active in the framing of the testamentary instrument, and stood in a particular relation to the testator, a greater degree of vigilance was required in investigating the transaction, yet that this case would fully satisfy the most jealous examination; that the deceased was not a person of **[387]** doubtful but of perfect capacity; that no circumstance of fraud attached upon the executor; that the evidence on the condidit, and of subsequent recognitions and conduct, fully established the testamentary intention and the validity of the will and of the codicil.

This is the general outline of the argument, though various collateral circumstances of detail were necessarily gone into; and in nearly the same order am I disposed to review the case, and—

First, to examine the principles of law applicable to the admitted facts of the case.

Secondly, to endeavour to ascertain the nature and degree of the deceased's capacity, and how far he was liable to, or secure against, imposition, noticing any circumstances creating a suspicion of any imposition having been actually practised.

Lastly, combining the condition and degree of the capacity of the deceased with the relation and conduct of the executor, to consider whether the evidence of the factum is sufficient to satisfy the demands of the law and the conscience of the Court, that this was the free act of a capable and intelligent testator.

A short statement of the admitted facts is necessary in order to consider the principles of law applicable to the case.

The deceased's original name was Ingram; he was the younger of two brothers, and had an only sister, the party opposing the present will. In earlier life he was wild and extravagant, and thereby (as Barbara Ingram, his cousin, states on the seventh interrogatory) "gave offence to **[388]** his relations, and involved himself in much pecuniary embarrassment, and lived many years in a state of indigence." On a very narrow income—an annuity of £72 left him by his father, and a portion of the Chetwode estate in Buckinghamshire, making together not quite £120 a year (for whatever else he had acquired from his father seems to have been dissipated)—he had for thirty years been leading a strange obscure life, in wretched lodgings or at coffee houses in this town; when in May, 1818, his elder brother Edward, who was tenant for life of the Clopton estate near Stratford-on-Avon, of the yearly value of £1500, and who had assumed the name of Clopton, died intestate; and in consequence that estate devolved on the deceased for life, and he soon after changed his name: he also succeeded to half his brother's personalty, amounting to nearly £10,000, and to the other moiety of the Chetwode estate. At that time he was living in a lodging at Mead's, an engraver in Queen Street, Lincoln's Inn Fields, and occupied a room up two pair of stairs, at eight shillings per week. Shortly after his brother's death he removed to lodgings at Hugh Carolan's, an apothecary in Charlotte Street, Fitzroy Square, where, in like manner, he had a room up two pair of stairs at the same rent. In the latter end of June, 1822, he went to Stratford, accompanied by Carolan, who, leaving him at an inn in that town, on the following morning returned to London. The same day the deceased was called upon by Henry Wyatt, who occupied Clopton House as his tenant: thither he was carried the **[389]** next day, and there with Henry Wyatt and his family he resided till his death in November, 1824.

This is a short history of the deceased; and it may be proper here to add that on the death of Edward Clopton, Richard Wyatt and his son Henry, who were attornies at Stratford, and agents to Edward Clopton, came to town and were met by Mr. Severne, an intimate acquaintance and friend of the sister, Miss Barbara Ingram, on whose part he was to act. On that occasion administration to the brother was taken out by the deceased, and Richard Wyatt and Severne became his sureties. Before Severne left town half the funded property was transferred into Miss Barbara Ingram's name; the other half into the deceased's name, then John Ingram: Wyatt and his son were to continue the agents and receivers of the Clopton estate; to remit the rents to the bankers, Messrs. Martin and Company; and the bankers were to receive the dividends, and when the balance in their hands exceeded £500 to purchase stock. Matters being thus arranged, Mr. Wyatt returned to Stratford, and the deceased

remained at his lodgings at Mead's, but soon after removed to Carolan's, as already stated.

Richard Wyatt appears to have come to town in 1819: the accounts at the stamp office were passed in that year, and a charge of £21 for the journey is made in the accounts for 1818 and 1819, settled in June, 1820, when Richard Wyatt was again in London. Those accounts are signed by both parties, and on the same day, viz. 30th of June, 1820. In July, 1821, the **[390]** Wyatts again come to London, Richard, the father, about the 25th, Henry, the son, about the 29th, and on the 31st of July the account for the year 1820 is signed. Early in August instructions in Richard Wyatt's handwriting are carried by Richard Wyatt to his town agent—Mr. Adlington—to prepare a will for the deceased. The draft of that will is prepared and sent by Mr. Adlington to Richard Wyatt, who returned it indorsed "4 August, 1821, ingrossed," and on that day the will is executed in the presence of the executor. In respect to the codicil: the deceased arrives at Stratford on the 24th of June, 1822, on the 26th he goes to Clopton House; soon after his arrival the draft of the codicil is prepared by Henry Wyatt—his attorney and agent—entirely for his own benefit; on the 19th of July he takes it to a law stationer, who makes the copy, carries it back and delivers it to Henry Wyatt; on the 5th of August it is read by Henry Wyatt to the deceased in the presence of one witness, and afterwards executed in the presence of three persons and attested by them.

Both instruments, then, are prepared from instructions, not given directly by the deceased, but through the intervention of the party interested, and are executed in the presence of the executor and residuary legatee—that person being the attorney and agent of the deceased.

Under these admitted facts the first consideration is whether the law has established any principles specially applying to such a state of circumstances. The Court has been refer-**[391]**-red to the case of *Paske* v. *Ollat* (2 Phill. 323). The same doctrine is held in *Billinghurst* v. *Vickers* (1 Phill. 193); it is hardly, however, fit for me to depend much upon those cases, as it would be relying upon my own authority; and I shall, therefore, only say that I see no reason to depart from the opinions there expressed; but as the present case is important, it may be proper to advert to some authorities in support of the principles maintained in those decisions.

By the civil law, if a person wrote a will in his own favour, the instrument was rendered void.(*c*) That rule has not been adopted in its full extent by the law of England, which only holds that such conduct creates a presumption against the act, and renders necessary very clear proof of volition and capacity: nor does the law of this Court determine that the act is absolutely void, even though the person making the will is the attorney and agent of the testator. The suspicion is thereby increased; and for obvious reasons: the testator reposes confidence in his attorney, and is less on his guard against imposition: while the attorney, from skill and knowledge, is more likely to be successful in such a contrivance, and has more influence so as to obtain a blind acquiescence. Courts of Equity have in many instances set deeds aside on account of the relation of influence in the person obtaining, and of confidence in the person granting, the benefit; as in the cases of guardian and ward—attorney and client—agent and principal—and the like—more par-**[392]**-ticularly in respect to attorney and client. As, for example, in *Walmsley* v. *Booth* (2 Atkyns, 25-27): it was this case. "Japhet Crook in 1728 being under several prosecutions for perjury and forgery, employed the defendant Booth as his attorney to get bail, which he accordingly did; Crook himself having used many fruitless endeavours for that purpose: during this transaction Booth drew Crook's will, who directed a legacy of £1000 to the defendant, and £500 apiece to the bail; the defendant, subsequently, got a bond for the security of his legacy. Crook afterwards revoked the will, and by another appointed the plaintiff, Mary Walmsley, executrix, and made her his residuary legatee After the death of the testator Booth brought an action on the bond, and obtained a verdict and judgment; and a bill was filed to be relieved against it on the ground of fraud; Crook living six years after giving the bond, and not attempting to be relieved, Lord Hardwicke decreed for the defendant." However, in the course of his judgment the Lord Chancellor said, "To be sure it is extremely wrong in an attorney to take bonds for services; but if a client, with his eyes open, will give such a bond,

(*c*) Vide Dig. lib. 48, t. 10, s. 15, and lib. 34, t. 8.

it would be going too far to say such a bond is absolutely void. This case has been compared to that of young heirs in distress for money in the lifetime of their fathers, but I do not think this comes up to the present case, for there the Court presumes weakness in the person and upon that consideration; but there is no pretence **[393]** for it here, for Crook was more likely to impose than to be imposed upon; and yet if there had been the slightest evidence of imposition upon Crook, I should make no scruple of relieving against this bond."

The slightest evidence of imposition then, even in the case of a very shrewd man, as Crook is represented to have been, would have been sufficient to set aside the bond.

The case afterwards came on for a re-hearing, when Lord Hardwicke reversed his former decision; and, on reversing it, said "that it was a case of a good deal of consequence: that it had been compared in the first place to the defrauding of young and improvident heirs where the Court relieves on the general principle of mischief to the public without requiring particular evidence of actual imposition upon them, and they are cases of general concern: they also give relief, because the circumstances and situation of young persons at the time of the agreement make them extremely liable to imposition."

In a further part of his judgment the Lord Chancellor says, "I think the case is stronger between attornies and their clients than any of the cases it has been compared with; because all Courts order their bills to be taxed; and there are a number of cases in this Court where a client unassisted by an attorney has paid a law bill and accepted of a receipt for it, and yet has been allowed to open the whole account notwithstanding, and to take exceptions to any improper or extravagant charge in the attorney's bill. Nay, even if a client **[394]** has given an attorney a bond or mortgage to secure the payment of what was charged to be due to him on account of a law suit, the Courts of Equity have relieved the client, and ordered the bill to be taxed. And what is the reason the Court goes upon in such determination? Why the great power and influence that an attorney has over his client."

On this second hearing the bond was set aside. So, in another case, the case of *Saunderson* v. *Glass* (2 Atk. 297), it was laid down in the course of the hearing that "if an attorney, pendente lite, prevails on a client to agree to an exorbitant reward, the Court will either set it aside entirely, or reduce it to the standard of those fees to which he is properly entitled."

Now these cases shew that there is a particular jealousy and anxiety on the part of all Courts in guarding suitors against that sort of influence and knowledge which attornies possess and may exercise injuriously towards their clients. There are other cases to the same effect.

In *Cray* v. *Mansfield* (1 Ves. sen. 379) a deed by one just come of age to an agent, as a bounty or gift, though there was no fraud, was in part set aside; so in *Pierce* v. *Waring*, cited in that case, a deed to the late guardian was annulled; and in *Oldham* v. *Hand* (2 Ves. sen. 259) the same doctrine was recognized.

The cases then shew how extremely jealous the law is to protect the unwary against undue influence and control. Where that relation of confidence exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the **[395]** transaction. As in the case of an interested witness, it is not necessary to prove falsehood; a court of law will not hear him at all; so in the case of such an executor it is not necessary to prove fraud and circumvention—he must remove the suspicion by clear and satisfactory proof. To shew that such has been the doctrine of this Court at all times (because it is the doctrine of common sense and of sound justice) I will state a note of a judgment of one of my predecessors, Dr. Calvert, who was as able and as excellent a Judge as ever filled the chair which I have now the honour of occupying. The case is *Middleton* v. *Forbes*, decided in this Court in Trinity Term, 1787. I was not of counsel in it, but was at the bar at the time. It was very elaborately argued by Dr. Wynne, the then King's advocate, and by Dr. Scott, now Lord Stowell, in support of the will—and by Dr. Harris and Dr. Bever for the next of kin. The judgment will sufficiently shew the circumstances of the case.

"John Wilcox died on the 21st of October, 1778, leaving a will dated on the 5th of August, 1776. The contents are in substance as follows:—'He describes himself as John Wilcox of Ringwood—cousin, heir at law, and sole next of kin of William Wilcox, late of Portsmouth Common, deceased: he directs his debts to be paid; he

leaves—to two female servants of his late cousin annuities of 10l. 8s. each—to his niece, Catherine Wilcox, and to his cousins, James Middleton of Ringwood, and John Middleton of Rumsey, all his property real and personal as tenants in common; if his niece shall have no issue he be-[396]-queaths her third of the real property to the Middletons; he appoints James and John Middleton his executors. The will is signed by the deceased and attested by three witnesses.' As to the state of the deceased: he had lived at Ringwood a poor man, but by the death of his relation he became possessed of about 3000l. Immediately on the death of this relation, Middleton, receiving notice, carried the deceased to Winchester—got administration to his cousin, then carried the deceased to Portsmouth, where William Wilcox had died, and soon after obtained this will. The Middletons afterwards got a deed of gift from the deceased, took possession of the estate, and kept possession of it till 1781, when Forbes took out administration to the deceased and proceeded against Middleton, in Chancery, to set aside the deed. The deed was set aside, and the decree affirmed by the House of Lords. During the proceedings in Chancery no mention was made of this will. The will has now been set up here. Objection is taken to it in point of law as giving the property to the attorney, and cases have been quoted in Chancery shewing that the objection would there be valid; but that rule has never been adopted here. In the testamentary cases quoted, *Barton* v. *Robins* (3 Phill. 455, notis) and *Ousley* v. *Wells* (Prerog. Trin. Ter. 1777) there were other circumstances of fraud upon which the wills were set aside. It is objected also that the subsequent deed revoked the will; but that is not so: for the deed disposed only of part of the property; [397] the will applies to the whole. Overruling, therefore, the legal objections, I come to the facts of the case; and the question is whether there is proof that this was the unbiassed act of the deceased. The first consideration is his capacity. It is admitted he was a drunken man, whom the boys followed and hooted—boys do not follow a mere drunken man, but an antick man playing tricks, such as this man did: his relations considered him in this light, for they made him a small weekly allowance. On his receiving this 3000l. the Middletons immediately carried him away and had the entire management of him; he had no regard for money; he was intirely under the direction of the Middletons, and under their custody, though not actually shut up, at Portsmouth, at a distance from his relations; the will was made by the person who had the beneficial interest—Qui se scripsit hæredem renders the will void under the civil law, though it is not so by the law of England. A deed is also obtained for the same purpose, and though the setting aside of the deed does not establish fraud, yet it is a corroborating circumstance. The ineptitude of such a bargain might be a sufficient ground to set aside the deed, but not the will, which does not take immediate effect. Yet the obtaining such a deed does come strongly to corroborate the fraud of the will: it shews that the testator was liable to imposition, that he executed a deed which he ought not to have executed, and that the Middletons obtained a deed they ought not to have obtained. In *Ousley* v. [398] *Wells* Sir George Hay laid the foundation of the fraud, on the part of the executor, in his amusing the next of kin in order to prevent their taking administration till he had obtained probate—that shewed a mala fides—here is a much stronger instance of mala fides in obtaining this deed—still this may be done away by full proof of the factum. Two of the attesting witnesses are dead, only one is surviving; here are no instructions, though instructions are not necessary where the capacity is not doubtful, yet where imposition and custody are suspected the defect of instructions is extremely material, more especially when the writer makes himself executor. Collins, the subscribing witness, says that a conversation passed between the deceased and Middleton and the witness' father about a will; but not that the will was prepared by the direction of the deceased, nor does he specify the conversation. The evidence of the execution does not specifically detail any thing as originating with the deceased himself, but merely what he said in answer to what was put to him.

"This is all that comes out to clear up these doubts, and to remove the suspicion of fraud: every thing originates with the Middletons—it seems a concerted plan to obtain this will—they shew that they thought the deceased liable to imposition, otherwise they would have trusted him, and not got the deed: they were afraid of the continuance of his affection, lest he should fall into other hands.

"Upon the whole, I do not think the evidence [399] of the execution does away the suspicious circumstances of fraud and imposition. I shall therefore pronounce against the will, but I shall give no costs."

I have looked into the original papers in *Middleton* v. *Forbes;* and the deposition of Collins, the only surviving attesting witness, was to the following effect:—"He is an auctioneer; he and his father were employed on the death of William Wilcox about his funeral. The transaction of which he is about to depose took place at his (William Wilcox's) house about a fortnight after the death. From a conversation between the deceased, Middleton and witness' father, he understood the will was ready for execution: the deceased expressed a desire then to sign it, and desired deponent to fetch a third witness, his uncle. The will was read in the presence of all three; the deceased was attentive—expressed full approbation—took a pen and signed his name, and published the paper as his will." The witness speaks to his full belief of his capacity—says "that the deceased was a wary man, perfectly sober, and expressed great obligations to the Middletons,(*a*) though the deceased was not acquainted with the nature and full extent of the property of which he was become possessed, yet he thought it considerable." This is the substance of Collins' deposition; and from my note of the sentence the learned Judge did not seem to think this witness discredited, yet on **[400]** the whole case he was of opinion that the will was not satisfactorily proved.

The circumstances differ in many respects from the present; for no two cases of circumstances agree exactly: yet the principles deducible from it confirm those laid down in *Paske* v. *Ollat.* This case shews where such grounds of suspicion exist, the evidence must be clear and decisive; it shews that it is not necessary to prove fraud and imposition; for the Judge gave no costs, so that fraud was not proved, yet he pronounced against the will; it shews also that though the parties may stand in a suspicious relation, and though there may be suspicious conduct, and some deficiency of capacity, yet satisfactory evidence of the factum may establish the instrument—that the instrument is not in law invalid.

Secondly, then applying and governed by these principles, I proposed to examine what was the state of capacity: for if the capacity was quite perfect, and the deceased in no degree exposed to circumvention, he would take care not to put his hand to an instrument and publish it as his will without fully knowing its nature and import, and approving its contents.

It was not denied in argument; that the deceased to a certain extent was possessed of capacity, which with clear proof might give effect to a testamentary instrument; that if the attesting witnesses could have spoken to instructions given by the deceased himself; to circumstances and conduct clearly and distinctly manifesting intention and volition, and that he fully comprehended the nature of the act, and **[401]** evinced a voluntary wish and desire so to dispose of his property—there was nothing in the evidence of incapacity sufficient to falsify such a case.

The deceased was not insane; nor was he an idiot: he had a certain degree of eccentricity; but no delusion: he had a certain degree of weakness of understanding that exposed him to imposition; but not that degree of imbecility which rendered him intestable. This is the sort of case set up in argument, and upon which the Court has to decide. It becomes important, therefore, for me to consider carefully what is meant by "imbecility of mind"—what are its marks and characters—and what are its effects and bearings in deciding upon the validity of a will.

In order to arrive at the true meaning of "imbecility of mind," we may resort to what the law describes as perfect capacity, which is most correctly found in the form of our pleadings. The averment to be contained in a common condidit is, that the testator was "of sound mind, memory, and understanding, talked and discoursed rationally and sensibly, and was fully capable of any rational act requiring thought, judgment, and reflection." Here is the legal standard. When all this can be truly predicated of the person, bare execution is sufficient: but if it cannot be truly predicated, a deficiency of capacity exists—a deficiency not necessarily rendering the person intestable, but in proportion to the degree of deficiency, requiring clearer and more direct proof of the unbiassed testamentary intention. Imbecility and weakness of mind **[402]** may exist in different degrees between the limits of absolute idiotcy on the one hand, and of perfect capacity on the other. When the law uses the terms "mind, memory, understanding—thought, judgment, reflection," it must not be supposed that they are quite synonymous; that each means precisely the same thing.

(*a*) It appeared that the Middletons were distant relations, and that one of them paid the deceased his weekly allowance before the death of William Wilcox, the cousin.

By no means: they are separate faculties, though nearly connected with and graduating into each other; and one or more of these faculties may be defective in a greater or less degree, while the others remain perfect in the same individual.

Locke, speaking of idiots, says, "Those who cannot distinguish, compare, and abstract, would hardly be able to judge or reason to any tolerable degree, but only a little and imperfectly, about things present and very familiar to their senses; and indeed any of the forementioned faculties, if wanting or out of order, produce suitable effects in men's understandings and knowledge." "In fine, the defect in naturals seems to proceed from want of quickness, activity, and motion in the intellectual faculties." (*a*)

In confirmation of this doctrine we find (and I state it from observation, from examples, and from high medical authorities which have lately come under my notice) (*b*) different faculties failing in different persons. For example, the memory is sometimes perfect where **[403]** higher powers of the understanding are greatly defective. When imbecility is original or, as medical authorities express it, connate, the memory is often perfect, especially of trifling and simple circumstances, though the other mental powers remain infantine; or, as the same authorities suppose and express it, "The brain has never developed itself." In such an individual the understanding has made little progress with years—it has not matured and ripened in the usual manner: yet, even in such individuals, unless the imbecility be extreme, some improvement will have taken place—some progress in knowledge beyond mere infancy will have been made; by the help of memory, by imitation, by habit, such an individual will acquire many ideas, will recollect facts and circumstances and places, and hacknied quotations from books, will conduct himself orderly and mannerly, will make a few rational remarks on familiar and trite subjects, may retain self dominion and spend his own little income in providing for his wants, as a boy spends his pocket-money, and yet may labour under great infirmity of mind and be very liable to fraud and imposition.

The principal marks and features of imbecility are the same which belong to childhood, of course (as already observed) varying in degree in different individuals—frivolous pursuits, fondness for and stress upon trifles, inertness of mind, paucity of ideas, shyness, timidity, submission to control, acquiescence under influence, and the like. Hence these infantine qualities have acquired for this species **[404]** of deficiency of understanding the name of "childishness." The effect is, that where imbecility exists at all, and in proportion to its degree, it becomes necessary, especially in a case exposed to other adverse presumptions, to ascertain its extent with some accuracy; to see how far the individual was liable to be controlled by influence—to submit to ascendancy—to acquiesce from inertness and confidence in those acts, upon the validity of which the Court has to decide.

The character of the deceased, and of his mind, is spoken to by a vast number of witnesses, though it is perhaps more accurately and satisfactorily to be collected from the documents, and from his conduct, and in no inconsiderable degree from obvious acts which he omitted to do; and I shall have occasion to examine whether there was not latterly one character of imbecility more particularly exposing him to imposition, namely, inertness and indolence of mind, or, as Mr. Locke has expressed it, "want of activity and motion in the intellectual faculties."

There are several witnesses examined to the character and capacity of the deceased, going back many years, to a time when he resided at the Black Lion, Water Lane; at the Cecil Coffee House; at the Russell Coffee House, and at other places: they give a strange and not a very precise account of him; some think him foolish; others out of his mind—qualities, however, not wholly irreconcileable: they describe him as filthy in his bed-room, disgusting at his meals, entertaining a dislike to women, insulting people in the streets, hal-**[405]**-looed after by the boys, abusing people for coughing, singing out "Yehep, Yehep." Some of these peculiarities may possibly be highly coloured and exaggerated: but even these witnesses do not make out a case of absolute incapacity, nor shew that he was wholly intestable, though they tend to lower him considerably beneath the standard of perfect understanding; and as the question does not turn upon the total absence but upon the degree of capacity, the evidence of these

(*a*) Essay on the Human Understanding, b. ii. c. 12, ss. 12, 13.

(*b*) The Court was understood to allude to the depositions of the physicians in the Portsmouth cause.

witnesses need not be stated at length, for they contribute but little to fix that point, and the facts themselves to which they depose are remote. The more material part to be examined is the state of the deceased at and about the time of his brother's death, and from thence to the execution of the codicil.

At the time of his brother's death the deceased, as I have said, was lodging at Mead's, the engraver's. Now to this part of his history a witness has been examined, whose evidence has been much observed upon by both sides—Miss Barbara Ingram, a legatee under this will in the sum of £4000—she is produced in opposition to the papers, and is in point of law deposing directly against her own interest; she declares upon oath that she has received no promise, and has no expectation of indemnity, if the will should be set aside. It is suggested that she may expect to be rewarded by Miss Ingram, the party who will have ample means of so doing: that is possible, but it is mere conjecture, and she denies it: she is very distantly related, being a second cousin once removed, and there are seve-**[406]**-ral other relations in the same degree; and it is also rather hinted that other persons, Mr. Severne and his family, are the most probable objects of Miss Ingram's testamentary favour. The fact however is, that she is deposing directly against her interest; for she will gain nothing by an intestacy, and will lose her legacy of £4000. She may have some bias on her mind, arising from friendship and regard for Miss Ingram, and still more from what she may conceive to be the justice of the case, which would induce the Court to look at her evidence with caution: but still she appears to have deposed according to her sincere impression of the truth, and she has had considerable opportunities of forming a judgment of the character of the deceased, and particularly about the most important period. On the second article she thus deposes :—

"Deponent (Barbara Ingram) first saw the deceased at Kensington about thirty-five years before his death; he called occasionally at deponent's aunts, Mary and Ann Ingram, with whom deponent resided from her childhood. The deceased came perhaps once a week for a week or two together, then absented himself for months, perhaps a twelvemonth together, without ever accounting for his absence." [This conduct is odd and eccentric.] "Deponent left London in 1792: she saw the deceased again in 1802, when he called at Kensington upon his sister. Deponent left London in 1806, and did not see him again till the death of his brother, when she called at Mead's." [The more material **[407]** period follows.] "From that time she called about once in a month or six weeks for the satisfaction of his sister—not at her request—she so called at his lodgings at Carolan's, and staid ten minutes or a quarter of an hour. She continued so to do till about the time deceased went to live at Wyatt's. The deponent considers deceased to have been decidedly imbecile in mind as long as she knew him—wholly incapable of the management of any business of importance. His conversation marked extreme imbecility." [It is clear from the context that the deponent means weakness, not absolute idiotcy.] "He rarely conversed upon any subjects than what articles of food were palatable or unpalatable; about the east wind being injurious to health—he had a particular aversion to the east wind, so that deponent rarely saw him that he did not so speak of it. When deponent called upon him at Carolan's, after he had asked about his sister, the state of her health, and her eyes, he seldom spoke of any thing but the game he had from Wyatt's, and such like trivial subjects. His manners were eccentric and offensive, perhaps more disagreeable than eccentric—spitting on the carpet and rubbing it over with his foot. He was extremely reserved; shy beyond any thing; but she does not consider that as at all accounting for any apparent weakness of intellect, for he was exceedingly frivolous; and said the same sort of things over and over again—not in the course of the same visit, but on each succeeding visit it was a repeti-**[408]**-tion of the same trifling remarks on the same frivolous subjects as the preceding. He did not talk irrationally: it was not derangement but feebleness of understanding that he manifested, and that he did uniformly. The deceased also appeared to be of a remarkably indolent, sluggish disposition—extremely averse to taking the least trouble in any way about any thing. He spoke, for instance, of his aversion to writing: he always desired deponent to give his kind regards to his sister, but excused himself from writing to her, because he said he disliked it. His dress was slovenly, and his whole appearance and manner were those of a person extremely supine and averse to the slightest exertion. He was personally civil to deponent: he came down to her, and attended her to the house door; but his manner was that of extreme indolence, both natural and habitual. He latterly com-

plained very much of his eyesight—he was always extremely short-sighted. He was very deaf latterly, so that to make herself heard she was obliged to raise her voice considerably. He might be equal to ordering what he liked best for dinner, and to the payment of little current expences, but she believes him to have been unequal to the management of any thing, incapable thereof from his extreme feebleness of intellect." That is, however, only matter of opinion.

To the 7th article she says, "She once saw young Wyatt at the deceased's lodgings in Great Queen Street; and afterwards heard him mention Wyatt as having sent him some [409] game, but in terms of displeasure for leaving him to pay the carriage of it: this he did on more than one occasion. All she ever heard the deceased say of any property that had come to him by his brother's death was, that it had come too late for him to enjoy it; that if it had come some years sooner he might have had some enjoyment from it."

If this description be tolerably correct, it shews considerable weakness of mind, and exhibits a character much exposed to fraud and imposition. It will be seen how far this portrait of the deceased is confirmed as to its likeness. Some of these traits are spoken to by the witnesses on both sides—his eccentric manner, his dirty habits, his shyness and reserve, his penuriousness. Mead, though the deceased had lodged there two years, would not suffer him to dine with his family, but sent him cold meat up to his room; even Carolan, his great friend upon whom he has heaped acts of bounty, pursued the same course; at first (according to Orlton) the deceased was allowed to dine in the parlour, but he was so disagreeable that he was sent up stairs; after a time he was tried again and was re-admitted into the parlour, but he was again banished to his own two pair of stairs room, and this witness is in some degree corroborated by the fact of the deceased having applied to return to Mead's, and being refused. His penuriousness, almost to a morbid extent, is acknowledged by some of Wyatt's own witnesses, who yet speak very strongly to their opinion of his capacity; for instance, Fountain, the owner of the Marquis of Granby public-[410]-house, and who supplied the deceased with wine, gives this account:—

"The deceased was in deponent's judgment a well-informed man, and could be amusing in the way of anecdote." [This is proof of memory.] "He was a very shy man; there were few people to whom he would talk. He quoted Shakspeare, and could repeat a great portion of several of the plays; he had evidently a good memory. He did at all times conduct himself as a sensible rational person: the only thing remarkable was the difficulty of getting money from him; he was unwilling to pay money at any time: he would allow an account to run up to three or four pounds, and then it was with difficulty that one or two was got from him. The account was delivered to him once every week, and deponent has known him, after looking at it, say he was charged for more than he had; but that was because he was unwilling to part with money: he appeared to be very penurious, but in no respect incapable of the management of himself and his affairs." That is, his own little income.

To the 9th interrogatory he answers, "The deceased was rather singular in his appearance; a little old spare man; very near-sighted and shy; very reserved generally. He was dirty in his appearance and habits; unpleasantly so undoubtedly, but he knew what good company was, and could behave as correctly as any man." To the 12th—"He was unwilling to pay. When respondent represented to him that it was [411] not customary to give credit for such small articles, it was still difficult to get the money from him, and then only a part at a time. There was part of his account unpaid when deceased left Carolan's house."

Here then, though for the last three years he was in the receipt of an annual income of £2000, he will not settle a little tavern account of a few shillings, but leaves London without paying it. Thus he was either very penurious, or else he did not comprehend that he had the use and command of this property acquired by his brother's intestacy. The witness thinks, because he was scrupulous in these petty matters, and able in this feeble manner to manage his own little income, that he was of course adequate to the transaction of business of consequence, and competent to regulate and understand more weighty affairs; the important consideration will be how far he was able to, and did really, comprehend his new concerns so as not to be liable to imposition.

Of his general capacity, an account very similar to Fountain's is given of him after he leaves London in 1822, and goes to Clopton House: he there resides with Mr.

Henry Wyatt and his family, is occasionally driven out in his gig, dines at his table, in company with Wyatt's professional and sporting friends, before whom he would naturally be on his good behaviour, and, after his shyness and reserve were worn off, would occasionally join a little in conversation, would talk of places he had been at, quote little hacknied passages from Shakspeare, and other authors, which in the course of a long life **[412]** he had picked up and recollected; and from these and the like circumstances, witnesses might draw an inference and form an opinion that he was a person of perfect mind. This evidence, given by six or seven gentlemen of station, might in some cases be of importance; and if the question were whether the deceased was sane or insane, whether there was such a degree of infirmity of mind as should shake the credit of witnesses deposing to full instructions and testamentary intention, it would be evidence of great weight as collateral support of such witnesses, and in opposition to testimony of total incapacity: but in a case like the present, turning on the degree of capacity from which, without evidence of instructions, and under circumstances of suspicion, full comprehension of the act and testamentary intention are to be inferred, the general statement and opinion of these persons, who speak to the deceased's condition at Clopton, bear with less force on the true point of the case. An old man of seventy-two, very short-sighted, rather deaf, enjoying the comforts of Mr. Wyatt's table (to which it appears by other parts of the evidence he was by no means insensible)—excited by the society and civilities of Mr. Wyatt's friends—might say and do all which these witnesses attribute to the testator, and yet might possess an extremely slender, feeble, inert mind, acquiescent in and impressed by any thing which Henry Wyatt proposed or suggested, and might have no sufficient comprehension of the nature and effect of a testamentary instrument which he might subscribe. Those witnesses **[413]** indeed who speak to recognitions must be distinctly considered; but the exact degree of capacity attributable to the deceased, and whether it comes up to the exigencies of this cause, must rather be decided on other parts of the evidence than on the testimony of the witnesses at Clopton House.

First, here are several letters written by the deceased's brother Edward, which certainly shew that the deceased was not considered as an idiot, incapable of expressing an assent to or dissent from the sale of the Chetwode estate—nay, when his mind was brought to the consideration, he could make a rational observation respecting it, such as that it was adviseable to sell as prices were high, or, as he expresses it, "to make hay while the sun shines," and the like; but the correspondence ends without any final answer being obtained from him: he could never be fixed to any decision. This then proves no more than that he was held not disqualified to do a legal act binding his property, or, as is admitted, that he had a testable capacity.

The next set of exhibits is the rental and observations on the Clopton estate, made in 1800 by Edward Clopton and sent to his sister Barbara; and, in 1818, on the death of the elder brother, forwarded by the sister to the deceased and endorsed by her "for the information of my brother John Ingram." These, again, only shew that Miss Barbara Ingram did at that time consider that the deceased was not incapable of understanding such documents if he applied his mind to the subject; or at all events that it was her duty to place these papers **[414]** in his hands; but she had not seen him for many years.

I come, thirdly, to the deceased's own letters, and they are of great importance: they establish testamentary capacity to a certain extent beyond all doubt; nay, that he was aware, in some degree, of his rights, and capable of comprehending some matters respecting his property, or at least respecting parts of it. His letter written immediately upon hearing of his brother's death to Mr. Grantham, the tenant of the Chetwode estate, is exhibited, and it is in these terms:—

"Sir,—My Brother having departed this life, the whole rent of the estate of Course comes to me, so you may pay it in to the Banker in Fleet Street, with a draft for me to receive it, or to Mrs. B. Ingram at Thenford, My Brother Dying without leaveing a will, it is not yet known what other property he has left You will I hope let me have it soon, as you are much behind hand in your payments, and I am at present out of Cash, do not forget to prevent my writeing again.—Your most humble servant,

"London, May 29th. "J INGRAM.

"18."

This letter carries at first sight more weight with it than it is entitled to, when coupled with the other letters. It relates only to the Chetwode estate, which he had

long held jointly with his brother; and it shews he was **[415]** aware that the other moiety of that estate devolved of course on him by his brother's death. But it is to be remembered that he had been in correspondence respecting the sale of that property, and that it was an object with which his mind, however dull and sluggish, had long been familiarized. In this very letter there are symptoms of very limited faculties—"The rent is to be sent as usual either to his banker in Fleet Street or Mrs. Barbara Ingram at Thenford"—not to him or his own bankers, Martin and Company—that change of place does not occur to his mind—no such "thought or reflection" originates with him; he is "anxious for this cash," but does not seem aware that the Clopton estate had descended to him, which was nearly of ten times the value of the other: Chetwode therefore was now become comparatively a trifling object, yet it alone is mentioned by the deceased. Grantham comes to town and calls upon him at Mead's, and says he made rational enquiries and held rational conversation about this Chetwode property—to that extent his attention is excited—he comprehends and understands, and is alive to what relates to this little estate. So Mrs. Barbara Ingram deposes, "all she ever heard him say about his brother's property was that it had come too late for him to enjoy it"—not entering however into any particulars which shew his apprehension of the extent of the addition: he might still only allude to Chetwode.

The next exhibit is the bond on taking administration to his brother. The fact of taking administration and executing this bond under **[416]** the circumstances go but a little way to demonstrate the extent of his capacity. Here were Severne, acting for the sister, and Wyatt, the old agent of the estates, with the deceased; he was old, rather deaf, nearly blind, not in the habit of business; the active part would naturally devolve on Wyatt and Severne, the merely formal part on the deceased: it proves that he was not an idiot, who could not be exhibited, and go through the forms of executing such an instrument and of transferring the property under an administration, in the presence and under the direction of friends; but the mere circumstance of having gone through the forms of such business when accompanied by Wyatt and Severne affords but very slender proof of his activity and apprehension in managing and transacting business. To give greater effect to this occurrence, no evidence on the part of the executor has been offered of any sort—no person has been produced to shew that he took a prominent part in the business, or gave directions or assistance respecting it; he does not say any thing to Mead that he was going to transact, or had been transacting, any such business. He makes no reference to it, nor has any conversation, as from himself, with his bankers. At his bankers, however, the arrangement already noticed was made, viz. that Wyatt should receive the rents of the estate and remit them to the bankers, who, when their balance exceeded £500, were to purchase stock. This arrangement (as has been argued) carries with it inferences of the deceased's weakness of mind and inaptitude for business, and that it **[417]** was necessary to act for him by a sort of guardianship: he was living in London, he might therefore from time to time have given his own directions; if he chose the remittances to be made to the bankers, he might have desired to be advised of such remittances by his agent; he might have enquired at his bankers of the state of his balance—he might have had a banker's book; he would naturally have done all this or something of the kind if he were in the management of his own concerns; but there is not a tittle of evidence in explanation; nothing to prove that the arrangement originated with the deceased, or was discussed or approved by him with intelligence and understanding. After this arrangement is made there is no letter to shew that Mr. Wyatt ever advised him of any remittance, or acted as if he considered the deceased had the least knowledge or comprehension of these matters. All that Wyatt does (so far as appears) is, in June, 1820—at the end of two years—to pass a sort of account with the deceased, in which the remittances are lumped—£550 in one year—£1690 in the other. The account is signed by the deceased, no voucher is referred to, nor, as far as appears, produced; nor is there even a date to any one item of receipt or expenditure. There is no banker's book, nor is there any thing to shew that the deceased ever makes a single enquiry whether the money was remitted or whether the surplus was laid out. The only time the banker's book is made up is in 1821, just when the will was signed; it is then copied out uno contextu from the banker's ledger, the **[418]** stock receipts and four drafts are stuffed into the pocket. It was found in his box at Carolan's after his death; but that there was any prior account from his bankers, or any subsequent account, though he remained a year longer in

London, there is not the slightest trace during the whole period from 1818 to 1822. The fact itself—the conduct of the parties—the conduct of the deceased—bespeak so strongly his inertness, his indolence, his inactivity, his acquiescence, that it does not require the evidence of Mr. Severne to confirm that view of it: it does not however prove want of testable capacity, if properly put in motion and called forth. If, in this arrangement, it could be shewn that it originated with the deceased, that he had proposed it as saving him trouble, that he had even upon discussion and consideration and the assignment of proper reasons agreed, or even, if afterwards, he had been active in executing this arrangement and in carrying it into operation, the unfavourable impression produced by it might have been taken off—it might possibly have told in favour of capacity—but the only evidence produced is quite the other way. Mr. Severne deposes that the deceased was a mere cipher throughout the whole business. Mr. Severne is undoubtedly a strong partizan; he has the management of the cause, he is therefore a biassed and prejudiced witness, to be heard with caution, particularly in matters of opinion and inference; but looking at his whole evidence, I see no reason to disbelieve him on matters of fact. But upon this part of the case the facts speak for them-**[419]**-selves and demonstrate that the deceased was not so active and alive to concerns of importance as to be in no degree in danger of circumvention and influence. He is by this arrangement treated as a child—as a person whose affairs were necessarily to be conducted for him; and his own subsequent inactivity respecting it confirms the character of inertness and indolence described by Mrs. Barbara Ingram.

The next occurrence in order of time is the change of name. Upon that occasion Mr. Gregory (the partner of Mr. Adlington) had some slight intercourse with him. I say slight, because he deposes that he understood the business had been arranged with Mr. Wyatt; the expences were paid by Mr. Wyatt and are charged in his accounts; the deceased, therefore, had only to go through the formal parts under the guidance of Mr. Gregory, who once also attended him to the accountant general's office to identify him, in order that he might receive a sum of money. On these two occasions he appeared to understand the business and conducted himself as a rational person. These transactions are so slight that they are of no great effect in fixing the extent of the deceased's mental powers, nor in ascertaining whether he was so far alive to his interests as to be in no danger of imposition.

To return, however, to the deceased's own letters, which certainly constitute the strongest part of the case in support of the general capacity. Letter "I" is dated the 20th of **[420]** December, 1818, and is addressed to Mr. Wyatt:—

"Sir,—This is to inform you, there has been a Letter sent to me at my former Lodgins, which I have long ago left, as you might not know this, I did suppose it was from you or my Bucks Tennant, which I should be glad to know, it was of course taken back to the Post Office, not finding me, my Address at present is at No 94 Charlotte Street rathbone place, where you direct in future and let Mr. Grantam know soon as you see him. Illness prevented my coming down as intended, but I mean it soon to spend the remainder of my days as I am quite tired of the Town, dont forget about raising the rent of the Bucks estate, as it ought to have been done long before this time, I shall expect to hear soon from you, and what Money you have paid in on my account—I am your Humble Servant, "J. INGRAM."

Here, again, the Buckinghamshire estate, Chetwode, is the burden of the song; not a word about Clopton, nor about the remittances to his bankers; for "paid in on my account" might have referred to the Chetwode rent, which was to be paid in Fleet Street or to his sister. It might certainly have some relation to the arrangement, but so little active and alive was he to his own concerns and business that he had not even sent his address, though he had changed his lodgings from Mead's to Carolan's six months before.

[421] Letter "K," annexed to Wyatt's general interrogatories, is pretty much of the same character: it is dated January 6th, 1819; and addressed to Mr. Wyatt:—

"Dear Sir,—I have received your long Letter; but you make no mention whether Grantham has paid his rent, which has been due, long before this time, when I was last at Martins with you I signed some paper, what it was I know not, perhaps that be a power of Attorney for him to receive my new Dividend, I have not been there since, I mean to call soon, as also upon your Agent as you wish me you will settle matters with the Bucks Tennant, that may be the means of making the estate more valuable

is what I wish, or else sell it, if a good purchaser is to be found, I suppose you come to Town in the Winter if you do shall be glad to see you, Mr. Severn has called twice, I have no more to say at present. "J. CLOPTON."

Here is the same harping on the Buckinghamshire tenant. Here is evidence that he had not been at his bankers for six months, and that he did not know what he had signed—"I signed some paper, what it was I know not"—this is strong proof of great inertness and weakness of mind, not amounting to absolute idiotcy, but rendering him liable to be much imposed on: it looks as if he would sign any thing which a person in whom he had confidence would place before him. The other let-**[422]**-ters go on very much in the same form: the next is dated on the 13th of January:—

"Dear Sir,—I have received the Game you sent up, but prefer any thing in the poultry way such as Capons or Ducks which I will be obliged to you to send soon as possible a Brace of Each, should they not be to be had send any thing you can catch, Pidgeons or wild rabbits, but nothing stalled fed, by which you will much oblige your very Humble Servant, "J. CLOPTON."

"L" is a letter addressed to Henry Wyatt:—

"My Dear Sir,—I have been favord with your obliging Letter, and inform you I shall continue in Town till your Father comes to settle the business with regard to the stamp office and when that is done I mean to pay a visit to Stratford—I am not quite so well in health as I could wish, but perhaps the country air may mend me, I do not know what Cash has been paid into the Bankers, but I find the Bucks Tennant, much behind Hand, he must be looked after being a Farmer who thinks of no bodys wants but their own, I shall be very glad to leave London, having been so long confined in it, and the noise and bustle does not at all agree with me, I like the Town of Stratford much as the roads about it are good, I can divide my time between it and Warwick, perhaps take a peep of Leamington spa which I hear **[423]** is increasing very fast in Building but it being a public place I should not continue long there I have no more to add at present, but remain your most obedient Humble Servant.

"London June 1st—19. "J. CLOPTON."

There is nothing in this letter sounding to folly, nor, on the other hand, which is most material, any thing to shew a capacity for managing or comprehending his situation and property, nor to prove that he had turned his attention to them. All, in that respect, relates to the Buckinghamshire tenant alone. It is a trifling letter, such as a schoolboy would write. He talks of leaving London and of going into the country: it indicates that degree of intellect which renders him neither idiot nor lunatic, but it does not manifest that knowledge of the world and of business which would guard him against circumvention.

"M" is addressed to Mr. Wyatt:—

"Dear Sir,—Your stay in Town was so very short, I had not time to make mention of all I wished to say, you know very well I have had none of Grantham's rent since you paid me last, and is now a year, I want to know, if he has paid in any since that time, and whenever he does in future you will be so good as to let me know, you paid me one half years rent at my old lodgings, last summer, none have I had to this time, when I call at the Bankers I in-**[424]**-quire if any of the Bucks rent is paid separate from any other stock, so you will let me know when any is paid in, and I shall know when I call, here has been nothing but foul weather since you left Town, I mean to be down soon as possible pray remember me to all your Family, I am yours,

"London June 29th—19. "J. CLOPTON."

This again is still confined to the Buckinghamshire tenant—his mind cannot get beyond that. If he had inquired at the bankers he would have learnt that £700 or £800 had been remitted to them, in addition to the dividends received on the stock, and he might have got any money he wanted.

"N" is in these terms:—

"Dear Sir,—I am sorry I have not been able to come down to Stratford, according to my promise, owing to ill health, I did not think it safe to Travell alone, but I made every preparation for coming down, to stay allways as I should not like to have my Bones laid in London when I depart this Life, the Bucks rent you must remit to me or pay it in to the Banker, as by this time there will be another half year Due, I have received the game you sent last, which were very good, I only wait for a Companion, going the same way, and I have met with one, who goes by the Birmingham six Clock Coach and stops at the White Lion **[425]** about Eight to Breakfast, this is the convey-

ance, I mean to come by, sooner or later, I shall add nothing more at present, only to say, I am at this time at the same No 94 Charlotte Street Fitzroy Square.—Your most Obedient Servant, "J. CLOPTON.

"London Oct. 29th—19."

"N 1" is also to Mr. Wyatt:—

"Dear Sir,—I have received both your letters, and you are here informed I give my consent to your filling up the place of the old Tennant, I am sorry to hear of your son's illness, but this winter has been so severe as to affect all ages, the Game he sent, I had safe, but wondered to find the conveyance not paid, as always has been before, so that in future, it must come carriage paid, I have not yet been after the Chancery Money, but will stay till you come to Town, I shall add no more at present, as writing is very troublesome to me, so remain your H St "J CLOPTON

"London Feby 23d.
"20."

This letter confirms Mrs. Barbara Ingram's evidence, that he was angry game was sent to him without the carriage being paid, and shews that he was not aware that if paid at Stratford it would form an item in his agent's account.

[426] "O" is addressed to Henry Wyatt:—

"Dear Sir,—I have received the papers with your letter inclosed, and will take care, what you mention shall be done, I should have seen you before now, had it not been for the badness of the weather for the very Day I had fixed for my departure, which was Monday week, turned out a complete wet one, and it has not been settled weather since, I mean to come yet, for I think September the pleasantest Month in year for Travel, if you remember, I told you when you was last in Town, I would not have you send up any Game, till it is wrote for, as I have no convenience of cooking it, if I come down I shall spend all this year with you, but you shall hear further from me, should I wish you to come and fetch me, but do not send any Game at present remember me to all your Familly, I remain Sr Your most H Servant

"London August 30h—20. "JOHN CLOPTON"

This letter raises the standard of his intellects no higher.

Letter "P" is written to Mr. Wyatt:—

"Dear Sir,—Perhaps you will think it strange, you have not received your papers yet, but I must beg leave to inform you I cannot chuse to put my signature to them, as I pay enough to Government, as it is, if I employ Gamekeepers, my outgoings will be so much the more, and I **[427]** do not receive any benefit by it, if I lived at the estate, it then would be proper, as to what others have done before me, is no rule for me to go by, I have seen Mr. Severn, who came up to Town in a great hurry owing to the death of a relation I meant to have been down before now, but I have been very unwell, and the weather has been very cold and changen, it may happen that I may come yet, should I not, I will send you the packet, but I do not mean to put my name to them, my Compliments to all your Familly—I am Sr your very Obedient Hbe St "J CLOPTON

"London Octr 3—20."

Exhibit "Q" is addressed to Henry Wyatt:—

"Dear Sir,—It is now a long time since I last heard from you, wherein you made mention, as to the incroachments made on my estate, which you might be assured I should give a negative to, as I consider it no better than a robbery, but as you have the management of the Estate, I did suppose you would settle it to my advantage, I thought you would have been in Town, before now, as I wished to see you, I will come down soon as I can, but I have been very poorly of lately, we have had a deal of cold weather in Town, but I hope it will soon change for the better, I shall add no more at present, only to remind you about paying in the rent, to the Banking House —I am Sr Your very HSt "JOHN CLOPTON

"London June 26—21"

[428] "Q" 1 is the last of this collection of letters, and is addressed to Henry Wyatt:—

"Dear Sir,—I return you thanks for your obliging letter, but tell your wife, never to send me a Goose in future, as it is what I dislike, any other will do, but that she could not tell, my pallet, I had none of it, I gave it to Mr. C" [Mr. Carolan I suppose] "and his wife who like it, You give an account of your journey, I did not suppose you would like that Country long, there has been nothing but wet Weather in Town

since I saw you last, you mentioned about coming up in Octr or November, which if you do, there will be no occasion to come on purpose for me, unless you chuse it, give my Compliments to your wife, and say I shall be glad to accept of any thing but Goose, I think you would like South Wales, but north is to much of mountain, tho the mutton is much finer.—I am Sr your very H St "J CLOPTON

"London Octr 4—21"

This shews frivolity of mind, that he was fond of eating and considered it of great importance. It begins with the goose and ends with the goose.

These exhibits though they negative idiotcy, or total incapacity, though they prove he was testable, provided it were shewn that in doing the act he really wished to dispose of his property, and clearly apprehended and understood what he was doing; yet they do not establish **[429]** that complete understanding and perfect capacity, that a mere bare act of execution shall infer full knowledge of the nature and contents, under such circumstances that the Court must require to be satisfied that no imposition was practised.

Two matters which would have been of the highest importance to the executor I have in vain looked for in these letters. First, some active attention to this great property which the deceased had acquired by his brother's death, or even some knowledge of its nature and extent and of his rights regarding it, but scarcely a reference to it is to be found: secondly, some trace of an intention to give this property to Henry Wyatt—or even of affection and particular regard and partiality for him, so as to render the existence of such a purpose in the deceased's mind probable; but there is nothing going to either point.

On the other hand, when I consider what obvious and natural acts are omitted to be done—there is no one matter of business, wherein he was engaged, that he takes such a part as indicates his ability to manage his concerns. I have already noticed the arrangement at the bankers, in which he appears a perfect cypher—a mere instrument; and have remarked on his subsequent inactivity in respect to that arrangement: further, he takes no share in the management or conduct of the Clopton estate; even after he goes down to Clopton he pays no attention to it, he takes no view of it, he makes no enquiries about it, he never asks whether the farms are advantageously let? **[430]** whether there are good tenants? who have paid their rents, or who are in arrear?

As little did he look after and manage his personal property while resident in London; he never informed himself whether the remittances were regularly made by his agent, whether the dividends were duly received, whether the surplus was properly laid out? he draws for his £36 half yearly just as before his brother's death—but as far as his acts and conduct go there is no one circumstance to establish that he was aware he had the right and power of using that great addition to his fortune; the remaining portion of Chetwode is the only part of which (so far as appears) he had any notion: he goes on as before in his lodgings at 8 shillings per week, haggling and disputing about paying for his weekly supplies at the tavern; discharging that account bit by bit; and going out of Town in 1822 leaving part of Fountain's bill—a pound or two—unpaid. From some frivolous obstacle or other he is four years making up his mind to go down to Stratford; the vis inertiæ was strong, but at last with great difficulty he induces himself to leave London.

The result of the evidence upon this head of capacity is, that he was a very weak man; that judging both from what he did, and from what he omitted to do, his understanding was much below par, and the legal standard of perfect capacity: that inertness, inactivity, indolence, torpidity of mind, inattention to his large property, were the leading characteristics and symptoms of his weakness; that he was **[431]** therefore (to take it no higher) a person so far liable to be imposed upon as to require the Court to look with vigilance and jealousy into the proofs of the factum; that he might possess a testable capacity; and that very strong and clear evidence of the factum and of free and active testamentary intention might establish the executor's case.

Is there such evidence?

First, is there any thing to lead up to the intention of making this disposition of his property? On the one side it is said that it is a probable disposition; while on the other it is as strongly maintained that it is an improbable disposition. In cases where there is any doubt of capacity or any suspicion of fraud, evidence of affection

and testamentary declarations are generally adduced to prepare the mind of the Court, and to conduct as it were to the testamentary act. It was argued that the sister was far advanced in life and was already amply provided for, that he thought himself ill used by his relations, and that it was not extraordinary he should take a liking to this young man and give him his fortune. And certainly in that statement there is nothing improbable if there were any proof of it: but, on the other hand, his sister was not his only relation; his cousin, Mrs. Mary Ingram, was living when these instructions were made; she did not die till the 14th of December, 1824; she outlived the deceased (Henry Wyatt's letter on the death of the deceased is addressed to her), and under her will Mrs. Barbara Ingram acquired a considerable addition to her fortune and was one of her **[432]** executors. The present will therefore not only cuts off his sister, but excludes his cousins and his whole family, and adopts a stranger in blood against the ordinary presumptions of law which favours those allied by kindred. In respect to complaints against his relations: it is true that he and his brother do not seem to have been upon terms of much cordiality or kindness; they were joint residuary legatees of their father, but the deceased had dissipated all his share over which he had any power, and might be angry with his brother for not affording him the means of indulging in his extravagance and eccentricities; but from his sister he did receive assistance even beyond her limited funds; through her he was furnished with supplies from his brother, who concealed from the deceased that the relief came from him; and as far as the deceased was capable of affection he did, to the last of his residence in London, make kind enquiries after his sister and send his kind regards to her: there is no trace of disaffection towards her before the will was made: he might, it is true, from some fancy or caprice take a liking to Henry Wyatt and adopt him as a son; but where is the proof of it previous to and in aid of these acts? If, in conversation with his bankers or with Mr. Gregory or with Mr. Fountain or with any other person, he had made frequent declarations to this effect, they might be important; but there is not a hint of the sort: there is no expression of affection for Henry Wyatt, no declaration of any kind, by word or by letter, even as to making a will disposing of his property at all, much less in favour of **[433]** Wyatt. On the other hand, here is not a mere declaration, but a formal act in his own hand-writing and attested, quite negativing any such intention up to a date long subsequent to his brother's death. I refer to that which has been denominated "the will of interment." It is rather a strange act, strangely expressed, but not unsuitable to the character, weak intellects, and feelings of the deceased:—

"The last Will and Testament, of John Clopton Esquire is when he departs this Life, he may be a Conveyed in a Hearse to the Town of Stratford upon Avon, in the County of Warwick, there to be interred, in the Family Vault of the Cloptons he being the last of that Family, if he absent from his Estate, as to his property it goes of Course to the nearest kin. Witness my Hand "JOHN CLOPTON.

"January 1st, 1820.

"Witnessed by H. Carolan 94, Charlotte St. Fitzroy Sq

"E. F. Bennett, 4 Edward St. Portman Sq."

This certainly proves that he knew what a will was; so far it is favourable to the executor's case. Its contents, as to the place of his funeral, quite agree with passages in several of his letters—it was an object that excited and roused him to some exertion—but as to any intention at that time of adopting young Wyatt, it directly negatives it—it declares his property is to go to his nearest of kin. This was his intention in January, 1820: his wishes in this **[434]** respect continued to May, for in that month he delivered this instrument to Barbara Ingram, with a strong expression of adherence to it.

On the 11th and 12th articles she says, "Upon the 10th of May, 1820, she called upon the deceased at Carolan's: he told her he had been wishing to see her; for he had been thinking that if he were to die in Charlotte Street they would bury him like a dog in Pancras parish; so he said he had made a will of interment of which he wished her to take charge! The deceased then delivered into her hands the paper writing, now shewn to her, open and unsealed. Deponent told him 'that if he had any papers of importance, she conceived that his sister as being his nearest relation was the proper person to have charge of them.' The deceased replied, 'Oh, that is only a will of interment; you will see by it that my property goes to my nearest of

kin;' deponent took charge of the said writing: the deceased then gave her a strict injunction that she should see he was buried at Clopton, which she promised: and that was all that passed on that occasion."

This brings down the intentions of the deceased to the 10th of May; negativing any intention of making Henry Wyatt executor and residuary legatee.

In the next month, June, 1820, Wyatt senior came to London, and the accounts for the two preceding years were passed and signed by the deceased, and by him in the manner already noticed: there is no proof of any other communication at that time, nor is it very clear that **[435]** Henry Wyatt was then in town, though he possibly may have been; but he admits that between that time and the following July, a few days before the will was made, he did not see the deceased; nor is there any thing in the letters which passed, marking particular affection or intended adoption. There is consequently nothing antecedent to the will in the way of affectionate intercourse and testamentary declarations shewing a previous intention and leading up to the will itself, but the "will of interment" is quite in opposition to the papers propounded.

An intermediate act, however, of some consequence occurs demonstrating the exposed condition of the deceased and his liability to imposition, and which is not wholly unconnected with the disposition under the present will, viz. Carolan's paper. It is dated on the 4th December, 1820, and is in these words:—

"Mr. Hugh Carolan.

"Sir,—Fearful lest the several conversations I had with you lately should be misunderstood I think it advisable to take this method of stating to you plainly my intentions on the subject.

"I John Ingram Clopton of No. 94 Charlotte Street Rathbone Place in the parish of St. Pancras and County of Middlesex Esquire do hereby charge my personal estate with the yearly payment of *two* (*a*)[1] hundred pounds to **[436]** Hugh Carolan of the same place Apothecary his heirs, executors, administrators, or assigns, provided the said Hugh Carolan shall be living at the time of my decease, being in consideration for his professional and other services rendered to me for many years. And I do hereby direct my heirs, executors or administrators, previous to any other appropriation of my personal estate and effects, to make provision therefrom for the payment of the said annual sum of *Two* hundred pounds *Bank Stock* by regular quarterly payments; the first payment to be made within three months next after my decease.(*a*)[2]

"*December the* 4*th* 1820 "*John Clopton*"

Here then he subscribes, fills up and interlines a paper professing to grant a perpetual annuity to Mr. Hugh Carolan in case he survives the testator. What is the consideration? No professional or other services are established. The deceased had lodged at his house two years and a half, in a back room, up two pair of stairs, at a weekly rent of eight shillings; he was at first allowed to dine in the parlour, was turned away, was admitted again, and again turned away, and attempted to go back to Mead's lodgings. Who prepared it? In whose hand-writing is it? No account is given, nor does the deceased ever in any manner recognize or refer to such an act. It has been said that "this paper does not concern Henry Wyatt;" but **[437]** Carolan comes with the deceased to dine at the Black Lion; Carolan is a legatee under this will for £1000. Carolan takes the deceased down to Stratford; surely, if it had not been a gross imposition on the deceased, Carolan would have enabled Henry Wyatt to explain it; not being explained, it affords a strong argument of the liability of the deceased to be imposed upon; it shews that he would acquiesce in, and lend his hand to fill up and to sign, an instrument so highly improvident as this grant of an annuity of £200 to Carolan. As to the interlineation of bank stock, no plausible explanation can be given to account for its weakness and absurdity, and yet, six months afterwards, this Carolan is made a legatee in the will to the amount of £1000. A considerable suspicion is thus excited that the legacy was not the act of the deceased, but was introduced into the will to secure the silence or procure the co-operation of Carolan. In both views, as shewing the deceased liable to imposition, and as creating

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(*a*)[1] The words in italics are in the deceased's handwriting.

(*a*)[2] This document was written on a sheet of letter paper, and bore a one pound stamp. Bank stock was interlined.

a suspicion in respect to this legacy, it adds force to the demand for clear proof of the factum.

I come now to the will itself. On the 25th of July Richard Wyatt, and on the 29th Henry Wyatt, arrive in town. On the 31st another year's account is passed and signed; and a copy of the bankers' book is made up to that day, which, with stock receipts and cheques in the pocket, was found in his box at Carolan's: but there is not a tittle of proof that this bankers' book was prepared or procured by desire of the deceased. A day or two afterwards the preparation of the will is commenced, and **[438]** on the 4th of August it is executed. In the mean time the deceased, who was penurious and fond of eating, sometimes accompanied by Carolan, regularly dines at the Black Lion with the Wyatts, except that, on one day, Henry Wyatt carries the old man up to Hampstead, and there they spend the day together. This conduct will bear two constructions; it might be in order to soothe and amuse this insulated, desolate old man, and it might arise from kindness, or from gratitude, if Wyatt knew his testamentary intentions; or, on the other hand, it might be for the purpose of coaxing and nursing and influencing him, and inducing a blind confidence preparatory to the formal execution of this will on the following day—it is open to that suspicion and adds to the burden of proof to be required. At all events, as far as that may throw light on the inquiry into the exercise or effect of undue influence, the deceased was in the possession of the Wyatts, his agents; and the transaction was as much behind the backs of any relations who might guard and protect him against imposition as when he was afterwards living in the little room at Clopton House with Mr. and Mrs. Wyatt.

Now then commences the most important branch of the case—the origin of the act itself—the proof of which act (from the view already taken of the history) requires to be clear and direct. There are indeed some subsequent grounds of suspicion which reflect back, upon this part of the transaction, additional reasons for examining the evidence with vigilance and for requiring strict proof.

The Court, under the circumstances already **[439]** referred to, cannot accept opinions and inferences and conjectures. It must have direct testimony from witnesses above exception, speaking from undoubted recollection of facts, and it must have the facts themselves stated, so as to enable it to judge for itself whether those facts shew volition and full understanding and knowledge of the act done.

In such a case the first requisite would be instructions coming from the testator himself: it is true that, if they cannot be proved, the defect may by possibility be remedied by something passing at the execution tantamount to instructions, or by subsequent recognitions so clear and direct as to supply the place of instructions. In this case there are before the Court the written instructions from which the will was prepared; they are in the handwriting of Richard Wyatt the father, a quarter as unfavorable, perhaps more so, as feeling a stronger interest, than even Henry Wyatt himself. It has been said that "Richard Wyatt was incapacitated by the state of his faculties from giving evidence; that he could not be examined; that he might have proved receiving these instructions from the deceased himself." That is mere conjecture, which cannot compensate for proof; if the evidence is by accident defective, the misfortune, especially in such a case as the present, must fall on the party upon whom the burden of proof lies. It has been said the deceased was very shy—he might prefer giving these instructions to Richard Wyatt; but that again is only conjecture; and ought Richard Wyatt to have accepted them? or would he, if acting fairly? Ought he not to have represented the **[440]** indelicacy of his receiving them? Would he not have forewarned the deceased of the difficulty which such a course might throw upon the proof, and the possibility that it might be the means of defeating his kind intentions? besides, the deceased had already some acquaintance with Adlington and Gregory to reconcile him to seeing one of them. If the deceased had not sense and understanding enough to agree, upon such representations and forewarnings, to give his instructions himself to the solicitor who was to be employed, he had less understanding remaining, and was under greater weakness of mind, than there is reason to attribute to him.

But there are appearances to induce a strong suspicion that the deceased never saw, nay, was never consulted either upon the instructions or upon the draft, and never was consulted respecting the will itself till carried to the solicitor's office to execute it. First, the instructions are not signed, a precaution which an old

experienced attorney like Mr. Richard Wyatt would naturally have taken under such circumstances of delicacy, if the deceased had been consulted: but, secondly, that which leads more strongly to a suspicion that the deceased was never even consulted with on the instructions or on the draft is that Carolan's Christian name is left in blank in the instructions, in the draft, in the engrossed copy, and is not filled up till the execution! Who is Mr. Hugh Carolan? The deceased had been lodging in his house for two years and a half, paying him for his lodgings repeatedly; it was a weekly lodging; he must have known his Christian name; nay, here is this paper leaving him the annuity **[441]** of £200, in which it occurs three times, and which even begins with the address, "Mr. Hugh Carolan, Sir." The blank then for the Christian name remaining till the very execution, renders it highly suspicious and probable that neither the instructions nor draft had ever been communicated to the deceased, and that he had not even been consulted upon them—at all events there is no proof that his opinion was ever taken upon them.

The act then originates (at least nothing appears to the contrary) with Richard Wyatt; it commences with his carrying instructions, written by himself, to his town agent, Mr. Adlington. The employing Mr. Adlington would not carry with it any suspicion, provided the deceased had gone or been taken there to give instructions himself. Adlington and Gregory had been before employed to procure the change of name and to receive money from the accountant general. The deceased had no solicitor of his own; he does not appear ever to have employed one. If the will had been the deceased's own act the house of Adlington and Gregory might therefore have naturally and properly been resorted to; and if the deceased had come or been brought to their office—if, being left alone with Mr. Adlington, he had himself given the instructions clearly and rationally—still more, if Mr. Adlington had probed his mind and satisfied himself (and in thus satisfying himself he would probably also have satisfied the Court) that the deceased was acting under no improper influence, but on his own unbiassed intentions and wishes, the case would **[442]** have been free from difficulty. Mr. Adlington, as far as the Court knows and must presume, is a respectable solicitor of unimpeached character, and sufficiently disinterested to be entitled to full credit, but the case presenting itself in the manner it did, it is possible that Mr. Adlington's professional caution may have been lulled and his vigilance surprised by his confidence in Mr. Wyatt, to whom he stood much in the relation of attorney to client. That Mr. Adlington was privy to any fraud or circumvention, or even suspected any, the Court has not the least reason to suppose. His evidence clears him of such an imputation, for he has no perfect recollection of any part of the transaction—he seems to have considered himself as a mere instrument to carry into formal execution an act which he was performing under the direction and at the responsibility of Wyatt, trusting to him that every thing was right; he never appears to have imagined that he was conducting business requiring the exercise of his watchful care as the testator's solicitor; consequently no portion of the transaction has left an accurate impression on his mind, otherwise some of his errors would be unaccountable lapses of memory. If the deceased had been a person of full capacity and Wyatt quite a disinterested party, Mr. Adlington's conduct would have been sufficiently correct: but surely had he been aware of all the circumstances to which the Court has adverted—the supine character of the deceased, the small extent of his capacity, the imposition to which he was liable and which Carolan had already practised on him, **[443]** the amount of the property he was giving to a total stranger in blood, and that person standing in the suspicious relation of his attorney and agent—he would without doubt—giving him credit for character and the professional caution belonging to such character—he would, I say, without doubt have pursued a different course: he would have said to Richard Wyatt, "All this, I have no doubt, is perfectly right; but recollect! you yourself stand in a delicate situation as attorney and agent of the deceased; the will is in favor of your son, and Mr. Clopton's family is absent; for your own sake, for your own character, and in order to insure the kind intentions of this gentleman against suspicion and against defeat, bring your principal to me. Let him give me the instructions with his own mouth, not from your written paper." If his caution had not been blinded by confidence in Wyatt, Mr. Adlington would surely have thus acted. His evidence appears to be given with perfect fairness and truth, naturally, however, with some degree of bias in favor of the validity of the will; and also under a great failure of memory.

At first, and in chief, he supposes that the deceased was, or at least is doubtful whether he was not, with Richard Wyatt when the instructions were brought to him; but on cross-examination, having in the mean time conferred with his partner, Mr. Gregory (which was not quite correct), he is satisfied that Richard Wyatt came alone. This is an error quite unaccountable, except on the reasons already stated: he has no recollection of any discussion or conver-**[444]**-sation that passed, or even of the exact time when the instructions were given: strange again, considering the nature of the instructions! he has made no entry, because he meant to make no charge, as he supposed Richard Wyatt would make none; so that he considered himself as acting completely as Richard Wyatt's agent and for his benefit; he supposes that the instructions were delivered on the third of August: that can hardly be accurate, for the subsequent note about the legacy to the poor is dated "Friday morning," and Friday was the third; he delivered the instructions to his clerk from which to prepare the draft; he corrected the draft; then a fair copy was made, which he says he sent either to Richard Wyatt at the Black Lion in Water Lane, or to the deceased at Carolan's: another strange failure of recollection! he could, however, only doubt while he was under the belief that the deceased attended: surely not after he discovered that Richard Wyatt only was present; but there is no probability nor trace that he sent it to the deceased, with whom at that time he had had no intercourse respecting the will. The first time, then, Mr. Adlington saw the deceased on this subject was the day of the execution, the 4th of August, and he thus deposes:—

"On the day of the execution of the will Richard Wyatt came with the deceased to the deponent's office: they brought with them the fair copy, and it being approved by the deceased, and no alteration having been previously made or then suggested by the deceased, it was executed in the deponent's **[445]** presence. Of what passed in conversation deponent has no recollection, and he has no memorandum of anything that then occurred; but it has always been his invariable practice to be careful and particular in every thing relating to and attending the execution of a will in his office, or to which he is a subscribing witness:" I have no doubt he took care there were three witnesses present; that the deceased executed it in their presence; that they attested it in the presence of each other, and so on. "He has a further recollection as to this particular will that his attention was more especially directed to it from the nature of its bequests. Whether deponent read the will to the deceased, or deceased told deponent that he had read it or not, deponent does not remember; but deponent undoubtedly satisfied himself that deceased knew its contents and approved them: deponent has no recollection of Richard Wyatt having left the room: to what passed in conversation he cannot depose, but he remembers that they had conversation together before clerks were called in: deponent can and does depose with perfect confidence that he was fully satisfied the deceased knew and approved of the will; that it was his own act, and the clerks being called in the execution would, and deponent has no doubt did, take place according to the usual form. Deponent well remembers that the deceased desired him to keep the will, and that he did so. The deceased might be with him on that occasion previous to the execution of the will for per-**[446]**-haps a quarter of an hour: the execution itself could have occupied but a short time. Either then, after the execution of the will or at a subsequent interview, when deponent saw him alone, and had a good deal of conversation with him; the deceased asked him 'if he might not make a codicil,' and deponent replied, 'Certainly, whenever he pleased.' Deponent does not remember on which occasion this occurred, or whether it might not have occurred on both: the circumstance deponent remembers well, and he would rather have thought that it was on the subsequent occasion, but that Mr. Henry Wyatt, on the deponent lately mentioning it to him, said that it was at the time of the execution of the will; from which circumstance it would appear, as indeed Henry Wyatt also stated, that he, Henry Wyatt, was present at that time; but of his being so present deponent had not the least and has not now any distinct recollection. From the name 'Hugh' and the word 'twelve' in deponent's handwriting supplying two blanks in the first side of it, deponent has no doubt he went over the will with the deceased and filled up those blanks from his directions. Certainly at such a time, and the deceased himself being present, deponent would not have taken any information or direction whatever from any other person: moreover, Richard Wyatt was very deaf, so much so as to make it troublesome to communicate with him; and it is

probable that he would hear but little of what passed between deceased and deponent."

[447] Now the whole of this is mere inference and conjecture—there is no recollection of facts, upon which facts the Court can form its judgment; "he must have made the deceased acquainted with the contents because it was his usual practice:" but this was an unusual sort of business, for the regularity of which Mr. Adlington seems to have pinned his faith entirely on Richard Wyatt. There were two slight blanks then filled up—one for the Christian name of Carolan—the other for the number of months at which the legacies were to be paid—"he must have applied to the deceased—he would not have applied to any one else—besides Richard Wyatt was deaf:" but the deceased also was rather deaf and shy and almost blind; and Henry Wyatt was present, who was neither deaf, shy, nor blind; why should he not for such a purpose have applied to him? it is quite as probable, when the blanks were not material parts of the disposition. But what reliance can be placed either on the recollection or the reasons of Mr. Adlington? At first he supposes Richard Wyatt alone was present; he then admits that Richard and Henry were both present—but what if he is mistaken in both? Now Henry Wyatt in his answers expressly states that his father was not present at all at the execution, and therefore his deafness was not a reason for applying to the testator. "To the sixteenth article respondent answering saith he admits that he but not his father was present when the said will was executed:" so that Mr. Adlington has forgotten the whole business—he is no bet-**[448]**-ter than a dead witness, whose character and handwriting are proved. Mr. Adlington's character stands unimpeached and he means to speak the truth—but the result of his evidence, in connection with Wyatt's answers, is that on August the 4th young Wyatt, the executor, to whom the great bulk of the property is left, after having taken the deceased to dine tête à tête at Hampstead the day before (for he will not say it was not on the 3rd that they went to Hampstead), carried the deceased to his (Wyatt's) agents, who had never seen the deceased on the subject of the will, which was ready drawn up for execution from instructions brought by Richard Wyatt; and Mr. Adlington cannot recollect any conversation, nor how far he probed the deceased's mind, nor what passed to shew that the will was prepared by his authority, or desire, or approbation, so as to enable the Court to form its own judgment—but he is of opinion that he must have ascertained the fact! The forms of execution according to the statute he may have attended to; but is that to overcome all the legal jealousy and all the difficulties of such a case?—of this will, not only giving Carolan £1000, but also revoking the "will of interment," without substituting any directions about his funeral; though to guard against being buried in London was an object of all others or rather was the only object resting on the mind of the deceased? These are considerable difficulties and suspicions, and, in my judgment, they are not removed by this evidence; and the clerks merely deposing to a formal execution, carry the proof of the factum **[449]** no further. But there is a codicil purporting to confirm this will.

The deceased remains in London nearly a year afterwards, though talking about going into the country, but being prevented by some frivolous cause or other. There is during this interval no intercourse personally with this executor, nor are there any letters recognizing, even by inference, that Henry Wyatt was his adopted heir. The only letter is that of October, 1821, disapproving of the present of a goose and desiring that no more goose may be sent. At length, in June, 1822, after endeavouring for four years to make up his mind to go to Stratford, he proceeds there, accompanied by Carolan, who pretends to be going to Liverpool; but who, after depositing the deceased at the Red Horse Inn at Stratford on the 24th June, early the next morning returns to London: so that whether Carolan did or did not persuade the deceased to go; yet it is necessary to practise a deception upon him, even according to Henry Wyatt's own account; and this deception awakens a suspicion that he is carried to Stratford by contrivance and preconcert, in order to place him the more completely and securely in the possession of Henry Wyatt—the latter had long before prepared the mistress of the inn, Mrs. Gardner, to expect "an eccentric old gentleman, and she must take care to keep the house quiet, for he did not like noise:" he did not come at the appointed time; however at last he arrives unexpectedly. The next day Henry Wyatt calls and Mrs. Gardner announces him to the deceased—What **[450]** says the deceased or how does he act? as one come to see an adopted son?

Mrs. Gardner thus deposes: "That the deceased, on deponent's telling him Mr. Henry Wyatt was come, desired to see him, and told her to bring a quart of ale: the deponent, thinking it more respectful to Mr. Wyatt, asked the deceased if she should not bring a jug and glasses—the deceased said, 'No, he is only my tenant, a quart will do.'"

This is the deceased's treatment of his adopted son, and of one who was the heir of his property!

The next morning the deceased is fetched away in a gig and is carried to Clopton House, and there he remains till his death. He had not left London with that view; he had retained his lodgings and left his boxes and their contents at Carolan's; and these lodgings he keeps till his death. He frequently talks of going back to London, and once has his clothes actually packed up; but at Henry Wyatt's he remains. He is treated with great kindness and attention; his taste in eating and drinking is consulted, he has the best bed-room at first, but that not being so convenient for some reason, either on account of the difficulty of getting him up stairs at night, or on account of his chilly temperature, Henry Wyatt's dressing room on the ground floor is fitted up as his bed-room. That room he inhabits, and uses it for all purposes—the same filthy purposes as formerly—so as occasionally to be offensive; there Henry Wyatt goes of a night to take his glass of brandy and water, and a servant sleeps in **[451]** an adjoining apartment, in order to attend to his wants in the night, and he occasionally heard him singing out according to his old habit, "Yehep, Yehep." All this may be quite equivocal: and to endeavour to make his benefactor as comfortable as possible in his declining years, and to give him the benefit of the cheering society of his friends and visitors, would appear, if the will was satisfactorily proved and nothing further done, to arise on the part of Henry Wyatt from a very proper sense of the debt of gratitude; but, on the other hand, this conduct and treatment might be for the purpose of more securely retaining him in his possession and under his influence, and from a fear that, if he should make his escape and return to London, some fortunate or fraudulent person might undo all that had been already done and get a new will from him; for the deceased apparently still retained a testable capacity. Indeed it might not be quite certain that some act had not been already obtained subsequent to the will. An attorney would well know that if there was any risk of that sort, a republication of the will by a codicil would be a great security, besides being a means of conveying an additional benefit to himself: and this is a further reason why the law looks with more jealousy and suspicion at the acts of an attorney in his own favour than those of other persons—because, possessing greater opportunities and better information for carrying his purposes to a successful issue, he is more likely to originate and to suggest them. What is the fact? Within three weeks after the deceased arrived at Clopton—ere yet **[452]** these kindnesses could have added much to his affection for Henry Wyatt, and before it was possible that any offence could be taken at his sister for not having been over to visit him (for she lived twenty-five miles off, was upwards of 80 years of age, and non constat that she was aware of his removal from London to Clopton), the making of a codicil is put in motion and has made great progress: for he reached Clopton House on the 26th of June, and the codicil was delivered to be copied on the 19th of July. Not one syllable from the deceased, in the way of declaration to any human being, that he wished to alter his will and confer a greater benefit on Henry Wyatt, appears in the evidence—he had been introduced to Mr. Lloyd, and Mr. Lloyd had called at Clopton; Mr. Pritchard was attending at Clopton, though not on the deceased; others may have been introduced; but there is not a trace of the least expression by the deceased himself of a wish to alter his will or to do any testamentary act—not the slightest proof of any instructions from the deceased; but this attorney and agent having this old man in his house, himself draws up this codicil and gets it copied, ready for execution, by a law stationer. Now what are the words of the paper? Here is a reference to the will cautiously by its date thereby republishing that will, and excluding any subsequent will made in the intermediate time: here is a revocation of the sister's legacy simply, and then here is a ratification and confirmation of the will and an attestation by three witnesses. It is in these terms:—

[453] "Whereas I John Clopton of the parish of Saint Pancras in the County of Middlesex Esquire did by my last will and testament in writing duly executed bearing date in or about the month of August one thousand eight hundred and twenty one Give

and Bequeath unto my sister Barbara Ingram the Sum of Two Thousand Pounds Now I do by this Codicil which I desire may be annexed to and taken as part of my said will Revoke and make null and void the said Legacy or Bequest of Two thousand Pounds so as aforesaid given to my said sister, and I do in all other respects ratify and confirm my said Will and every Article and Thing therein contained In testimony whereof I the said John Clopton have to this Codicil set my Hand and Seal this fifth day of August in the year of our Lord one thousand Eight hundred and Twenty-two. "JOHN CLOPTON (L.S.).

"Signed sealed published and declared by the said Testator John Clopton as and for a Codicil to be annexed to his last Will and Testament, and to be taken as part thereof in the presence of us—

"John Gam[l]. Lloyd.

"James Pritchard.

"Rebecca Twiggen."

[454] On considering this instrument three observations present themselves—

First. It was perhaps thought safer to revoke the legacy of £2000 to the sister, than either the legacy to Carolan, or that to the cousin, Miss Barbara Ingram.

Secondly. This republication of the will in the presence of three witnesses would completely set it up again, even if any intermediate instrument had been procured either by Carolan or by any other person.

Thirdly. So cautiously worded is this codicil that in reading it over in order to execution, no person—not even Mr. Lloyd, a barrister—would find out or be led to suspect that any imposition had been practised, because it does not appear to convey any benefit to the confidential attorney, Mr. Henry Wyatt; though that gentleman very well knew that, besides republishing the will, it would, by revoking the legacy, convey a benefit of £2000 to him as residuary legatee.

Exposed, however, as this codicil is to these suspicions, they might still by possibility have been removed by something passing at the execution, or even by subsequent recognitions. The deceased might have given such explanations of his will and such reasons for making this codicil, and all this might be proved by witnesses so far above all suspicion as completely to silence all objections: but what is the evidence? The executor first appoints the law-stationer, on two different days, to attest the execution, but that act is postponed: he then **[455]** thinks it better to apply to a respectable neighbour and acquaintance—a barrister at law, Mr. Lloyd—who had once seen the deceased with Henry Wyatt in his gig, and had called for about ten minutes at Clopton House and been asked by Henry Wyatt if he had any objection to attest the deceased's will. Henry Wyatt also applied on the same day to Mr. Pritchard, an apothecary (but who had never then attended the deceased professionally), to meet Mr. Lloyd on the following day—Rebecca Twiggen, Henry Wyatt's own nurse-maid, was merely called in at the moment to make a third witness, and thus the codicil was rendered a valid confirmation of the will of lands. Mr. Lloyd arrived first, and they waited for Mr. Pritchard about a quarter of an hour: Lloyd thus deposes:—

"That in the course of that time he believes nothing passed between him and the deceased beyond the usual salutation at meeting, and nothing passed, as he recollects, between Henry Wyatt and the deceased. Deponent remembers that, conceiving it to be a will that was about to be executed, he asked Henry Wyatt who was to be the third witness? to which he then replied 'that it was a codicil, and that it related only to personal property.' The deponent thereupon said 'that two would do very well.' Mr. Wyatt then observed, 'But there is a small freehold estate bequeathed in the will, and so we may as well have another witness; we can call in the nurse.' Deponent remembers that Henry Wyatt produced two or three sheets of paper (as it appeared to the **[456]** deponent) and proceeded to read, and read aloud, what purported to be a codicil to a will of the deceased of a date recited in the said codicil. What the said Henry Wyatt read was in substance simply to revoke a legacy which had been given by the said will to the sister of the said deceased. Whether Mr. Pritchard and the nurse, or either of them, were present at this reading or not he cannot depose: Henry Wyatt then said to the deponent, 'Will you ask Mr. Clopton if that is what he wishes it:' deponent did so, and the deceased in an angry tone replied, 'Yes, yes:' Deponent looked to Henry Wyatt, who then said to the deceased, 'I requested Mr. Lloyd to ask that,' or to that effect. It appeared to deponent as if the deceased thought that deponent was interfering with the disposal of his property. He appeared

to be satisfied with the explanation of Mr. Wyatt; and signed his name, Mr. Wyatt having placed the paper before him. The deceased was short-sighted, and deponent thinks he recollects that as he was poking about rather over the paper to see where to write his name the said Henry Wyatt pointed his finger to the place, and the deceased then freely signed his name."

In a further part of his deposition he says "he believes the deceased to have been of sound mind, memory and understanding, and capable of making and executing a will or codicil. The deponent had had at the time of the execution of the codicil but little opportunity of judging of the deceased's state of mind: he saw nothing then and had seen **[457]** nothing previously to raise a doubt as to the sanity and capability of the deceased; but considered him to be a reserved man of somewhat peculiar habits—certainly not the sort of man whom one would expect to meet as a member of an ancient family, and possessed of large property."

Here then is an execution in the presence of Henry Wyatt, a reading over by Henry Wyatt—an answer "Yes, yes," angrily by the deceased, but which anger is quieted on Henry Wyatt's explanation, and then follows the formal execution. The other witnesses carry the history no further—indeed not so far—they were not even present at the reading, though there is no doubt from Lloyd's evidence that that ceremony did take place; Lloyd, who gives honourable and fair evidence, is of opinion that the deceased was capable; but there was no probing of his capacity, still less was there any thing to prove volition and intention either then or afterwards to Lloyd, who was wholly uninformed that any benefit was conveyed to Henry Wyatt by this instrument. This appears from his answer to the forty-second interrogatory:—

"Respondent called at Clopton House, and there saw the deceased alone in or about the month of January, 1823. The deceased said upon that occasion that he should like to go to London. Respondent told him that if he were the deceased he, respondent, would go to London during the cold weather, and enjoy the company of his friends, and return to the country in the spring. The deceased had told **[458]** respondent that he found Clopton House very cold, and he expressed a strong inclination to go to London. Respondent said, what he has deposed, to the deceased, partly in consequence of his having understood from Henry Wyatt some time after the execution of the codicil that it was beneficial to the producent; and respondent therefore encouraged the deceased's idea of leaving Clopton House for a time, that he might have some intercourse with his family or friends. The deceased certainly replied that he should like very much to go to London. Respondent believes that such was the wish of the deceased at that time; and respondent has declared, and it is the fact, that he thought either Mr. Clopton had communicated that conversation to Mr. or Mrs. Wyatt, or that it had been overheard; for the next time he met them he observed a marked difference in their behaviour to him, the respondent, which he could attribute to nothing else."

This evidence does create a pretty strong suspicion that these subsequent attentions were for the purpose of keeping possession of the deceased; for possession and custody may exist without actual control and coercion.

It only remains to examine the recognitions that have been relied upon; and it is to be observed that, under the circumstances of the present case, mere remote references to something which by construction may be supposed to shew a kindness and intention to benefit Henry Wyatt will not be sufficient—there must be some direct reference to, and explanation of, **[459]** these testamentary acts, something going distinctly to their nature and contents in order for such circumstances to supply the want of instructions and the absence of explanations at the execution; less than that will not be sufficient to satisfy the demands of the law and to overcome the suspicions attaching upon these transactions.

Two witnesses, and two only, have been relied upon as speaking to any thing of the sort—Thomas Hunt and William Lewes. Now Hunt speaks only to one equivocal declaration, not directly alluding to any will—which declaration might have been insincere—or might mean future intention—or may have been misapprehended or misrepresented.

On the second article he says: "Deceased frequently told deponent that he had every thing at Clopton he could wish, and was never more comfortable in his life. I go where I like—I have what I like, he used to say, and they are very kind to me." . . . "He one evening said, Harry and his wife do every thing to make me comfort-

able: they are the best friends I ever had, and it won't be the worse for them: I have not forgotten them."

Now when this might easily be misapprehended or be a mere momentary ebullition of gratitude, and when it comes from an intimate friend of Henry Wyatt—from one who has made himself so far a partizan in the cause as to send for an adverse and important witness, Robins, and talk to him in the way he himself admits upon the additional interrogatories, this declaration goes but a little way, or rather goes **[460]** no way at all, to supply the want of instructions and overbalance the other defects and suspicions of the case.

The other witness is Mr. Lewes; he presents himself under circumstances exciting some degree of caution—he could not be examined under the commission because his place of residence could not be found—from embarrassed circumstances he could not be communicated with directly even by letter—a letter could only be sent through the intervention of a third person, a confidential friend—he has not been cross-examined, for he would not originally stay to be cross examined, and he has not been reproduced (vide supra, p. 94, et seq.). Mr. Henry Wyatt however appears to have been extremely anxious that his deposition should be received, thereby raising something of an inference that he expected him to speak to facts to which no other witness could depose; though several other friends and visitors have been examined to the same articles of the allegation, yet to them nothing of the kind was ever said, not even to Mr. Lloyd, though he had attested the codicil and held something of a confidential conversation with the deceased the following winter on his expressing a wish of going to London; but no recognition nor declaration was made to him or to any other person. Lewes does speak more strongly than others, and to some circumstances exclusively. He is a sportsman, coming from Carmarthen for a few months in winter to the neighbourhood of Stratford for the sake **[461]** of hunting—and, as such, visiting Henry Wyatt, who was fond of the same amusement; they were very intimate; Lewes went to Clopton House very frequently; he speaks strongly to general capacity—to Mr. and Mrs. Henry Wyatt's attention, but adds with cautious discrimination "that he never saw any thing, on their part, like fawning, or any attempt unduly to ingratiate themselves; and to his frequently visiting him in his little room." On the thirty-first article he thus deposes: "During the days deponent was at Clopton in the summer [of 1824], the deceased was living in the room below stairs; he did not then take his meals with the family, or indeed leave the room at all: deponent was alone with the deceased several times: sometimes Henry Wyatt was with them: deponent was with him both mornings and evenings.". . . "Henry Wyatt used to go to deceased in the evening, and deceased was pleased to have him there with him, and there they have chatted together, and very pleasantly too. Deponent has seen Henry Wyatt take a glass of spirits and water there with the deceased in the evening:" all this would be gratifying to the deceased without doubt; and the whole of it occurs in the little room which served the deceased for all purposes.

On the thirty-second article he says: "The deceased seemed perfectly satisfied with every thing, and expressed himself so. 'Where you go,' said he, 'do you ever find more comfort than there is here, good cooking, famous wine, and the like.'" These indulgences again, to which he was rather addicted, were all calculated to **[462]** make a pretty strong impression on a poor, weak, inert man who had not mind enough to resist fraud and influence, nor to have any will of his own.

Further on—"Deponent remembers one day the deceased asking him what he thought Wyatt's income was? deponent said he did not know: deceased said he did not think his father could give him much; but no matter, he said, he'll have enough one day." This must "have been during the former part of his acquaintance with him, as he believes" [this is not a very probable conversation to have originated with the deceased]; "but there was a former occasion, and it was the first on which deponent heard deceased speak upon the subject. Deponent had bought of Henry Wyatt a rather valuable chesnut mare: deponent told deceased of it. What (said he)! has Henry sold his favourite mare! deponent said, 'Yes, he has.' The deceased said no more then; but after dinner he renewed the subject, inquiring of Henry Wyatt if he had sold the mare. Wyatt said 'he had.' Deceased asked 'why?' Wyatt replied, 'I wanted the money, Sir.' Deceased said, 'It is a pity you sold her;' and turning to deponent said, 'If he wants money now, he won't want it when I am gone.'" [This

is one of the recognitions.] "At another time he said, 'I have made Henry quite independent of his father and every body else;' and again he said, 'His father has not much to leave him, but I have taken care of him.' To the particular times he cannot depose: he frequently spoke to deponent to that effect." [The de-**[463]**-ceased, who is a very silent man, talks, according to this witness, frequently on this subject.] On the thirty-third—"The deceased told him his sister was older than himself; and on one occasion he said, 'She won't survive me, I am a good man yet.' He said once that his sister, as deponent understood him, had brought up two bastards of a farmer; one, he said, had married a Sir Somebody (deponent forgets the name); the other, he said, had married Mr. Severne; and, he said, they should not have his money; but using gross expressions—'damned nasty stinking bastards:' when in particular he said this, deponent cannot remember."

Upon the evidence of this witness there arise some important considerations: upon two points in particular—the recognitions. The first is the recognition made upon the sale of the chesnut mare. This is either true or it is not true; if not true, there is an end of the credit of the witness, and he alone deposes to it; the deposition is suspicious in its whole tone: if true, it is exposed to a suspicion that the matter was fraudulently held out in order to work upon the deceased—it was "rather a valuable chesnut mare," so that no great price was given—she was a favourite, but so distressed is Henry Wyatt that he is obliged to part with her, because "he wanted the money." Was that true, or is it liable to the suspicion of being a false pretence, in order to work upon the deceased? Now it appears by the accounts that, of the rents becoming due after Michaelmas 1820, only £250 had been remitted before the **[464]** deceased went down in June, 1822, and only £650 in the whole. Three half years had intervened—Lady-day 1821, Michaelmas 1821, Lady-day 1822. By the accounts exhibited, No. 5 and 6, the whole rents due at Michaelmas 1819 appear to have been remitted when the account was settled in June, 1820, and the whole rent due Michaelmas 1820 had been remitted when the account was settled in July, 1821—and yet in June, 1822, only £250, and in August only in the whole £650—so that of the rents due Michaelmas 1821 (supposing nothing to have been received on the half year, Lady-day 1822) there was a balance in Wyatt's hands of about £900—it could hardly therefore be true that he was obliged to sell the favourite chesnut mare "for want of money." This story lies consequently under a considerable suspicion of being either the invention of the witness, or the circumvention of the executor in order to work upon the deceased's weakness.

The other circumstance is still more suspicious, that "his money should not go to those damned nasty stinking bastards;" for the witness undertakes to give the very words—though he will not venture to fix time or place—whether up stairs, or below stair in the little room. Now no other witness deposes to any allusion respecting the Severnes as bastards. Yet the executor has pleaded it as a fact, has inserted it in his interrogatories, has introduced into his answers that the deceased alluded to the farmer's bastards, when he gave instructions for the codicil: it is put prominently forward in order to account for cutting off the sister. Now that **[465]** they are bastards is not the fact—neither Mr. nor Mrs. Severne are illegitimate—there is no evidence that either of them was ever reputed or even supposed to be bastard. Mrs. Barbara Ingram, the cousin, who is very intimate and nearly connected with them, never heard it suggested—on the twenty-first interrogatory respondent answers: "She does not know, has never heard, and has no reason to believe, that either Samuel Amy Severne or his wife is illegitimate or reputed so to be."

The real history of Mrs. Severne is stated in Mr. Severne's evidence upon the twentieth interrogatory: "Respondent did intermarry with the daughter of a gentleman farmer of Barton and Long Compton, an estate in the former of which was his own property. The father of the respondent's wife and her mother also died when she was young, and she had been under the care of the late Mrs. Ann Ingram and of the producent, who were then living together at little Wolford. Mrs. Ann Ingram was not a lady of considerable fortune; she had a moiety only of the little Wolford estate, and Mrs. Barbara Ingram, the producent, was at that time and until the death of her brother, Edward Clopton, a lady of small fortune. 'Neither the respondent nor his family have derived any property real or personal from Mrs. Ann Ingram or the producent, except that Ann Ingram left him a gold cup.' Mrs. Mary Ingram did die on the 14th of December, 1824. She by will bequeathed to him and his children

specific legacies to the amount of about £2800; and in the October preceding [466] her death gave his eldest son an estate worth £700 per annum." Here then is the real fact proved: and as to this declaration, it either was or was not made—if not made, there is an end of the witness—if made, how came the deceased thus impressed that if he left any thing to his sister it would go to Severne and "the nasty stinking bastards?" There is no trace in the evidence of any anger or disaffection towards Mr. Severne before the deceased arrived at Clopton House; even afterwards no other witness hears of it than this Mr. Lewes; but Henry Wyatt makes it his case, and his witness deposes to it. Does not this circumstance create a new suspicion that this was an artifice resorted to in order to render the deceased more subservient to the wishes of Henry Wyatt; and in order that, if his torpid understanding and dull attention should catch the object of this codicil when the execution should be gone through, his mind might be impressed with a feeling which would induce him to acquiesce in its contents? His angry "Yes, yes," is not inconsistent with something of the kind.

But there are two other circumstances still further exciting suspicions of circumvention and imposition.

The first is—that of the rents received from Michaelmas 1820 to November, 1824, the time of his death—four years—only £650 is remitted to the bankers to be invested according to the arrangement; and Henry Wyatt sets up a donation of these rents by the deceased in his life-time, because, not having remitted them, he was bound in some manner to account for the [467] omission of following up the arrangement. In support of such a donation there is not a scrap of paper—no written authority to Henry Wyatt to retain it; no letter from the deceased to the bankers explaining why further remittances were not made; even Henry Wyatt omits to send, as on behalf of the deceased, any such explanation—at least there is no suggestion to that effect in the interrogatories. Any explanation attempted in the life-time of the testator would, perhaps, have been dangerous; it might have led immediately to some inquiry into the matter, and to an investigation of this pretended donation and of the state of the deceased by the sister, or by her friend, Mr. Severne, on her account. Silence was safest: so here is no declaration to any person; a gift by parol only is alleged, and to it Henry Wyatt alone is privy. The amount is £5000 or £6000—four years' rent—Wyatt rests upon the donation—he will not charge himself with those rents in his inventory. What! does an attorney and agent, with an old man seventy-two or seventy-three years of age, living in his house, in his possession, entirely separated from his own family, who has never done any one act of business respecting the management of his estates since he came into possession of them, accept the rents and profits of these estates—£1500 a year—and apply them to his own use under an asserted gift by parol, and yet expect that the law will not attach great suspicion to such a transaction, and to all other transactions between him and the deceased respecting his [468] property? The answer is too obvious, and the fact is not without its weight.

But the remaining and final circumstance is still more direct in its inference—the conduct of Henry Wyatt on the death of Mr. Clopton. The deceased died on Saturday, November the 20th, at 5 o'clock. On Sunday, the 21st, Henry Wyatt writes a letter to Mrs. Ingram of Thenford, the cousin of the deceased, desiring her to communicate to Miss Barbara Ingram, who resided with her, the death of her brother—the party deceased—Mr. John Clopton. By the evidence of the apothecary it appears that the deceased had been confined to his bed near a month, and had been in danger a week, if not a fortnight; yet no sort of communication was made to the relations—to the sister and cousin—who were residing within twenty-five miles of Clopton House, at Thenford, where also their friend Mr. Severne was, who might have gone over to see the deceased: but on the Sunday evening after the death Wyatt writes, announcing the death of Mr. Clopton after a week's illness, and stating that he was sensible to the last. This is not very correct conduct: it is suspicious, both as to the concealment and as to the falsehood in respect to the length of the illness; but on that very Sunday evening he sets off for London, is sworn to the will the next morning—Monday—gets probate under seal on the Tuesday morning, goes immediately to the bankers and obtains possession of the money there: but that is not all; he hastens, without a moment's loss of time, to the Bank of England, and attempts to have all the stock transferred [469] into his own name, but some difficulties occurring there,

he does not succeed, and that object is frustrated. This may by possibility have been the mere haste and eagerness of the heir, or it may have been that aware that, at all events, the possession of the property would give him considerable advantage in any subsequent contest about his right to it, he endeavoured to secure every thing before the family could interpose: but this conduct has a still more unfavourable aspect, and carries with it a strong appearance of a consciousness of fraudulent circumvention, and that these testamentary instruments will not bear investigation. Snapping a probate (as it is called) is always considered to create a suspicion of fraud. In the case quoted it is stated by Dr. Calvert that Sir George Hay, in *Ousley* v. *Wells* (vide supra, p. 398), laid the foundation of fraud in the executor amusing the next of kin in order to prevent the taking of administration till he had obtained probate—"it shewed a mala fides:" here it is stronger; he writes on Sunday evening; he knew the state of the cross-posts, and before it was possible that the sister could enter a caveat, he gets his probate; but not his probate only; he has got all the ready cash, and he would have got a transfer of the funded property if it had stood in the name of Clopton instead of that of Ingram.

Under these several circumstances of suspicion—for I carry it no higher—the proof of the factum is insufficient. The capacity of the deceased, though not intestable, was so far weak **[470]** and inactive as to require a cautious examination of any testamentary act, and proof beyond a mere formal execution—direct proof that the deceased clearly understood and freely intended to make that disposition of his property which the will purported to direct. Added to the difficulty arising from this weakness, it is a will in favor of an agent and attorney, in which case the law is jealous of influence on one side and of blind confidence on the other: the instructions, instead of being given by the deceased, come from the parties benefited, and the will is prepared under Richard Wyatt's directions, the codicil by Henry Wyatt himself: the execution of both instruments passes in the presence of the executor—is a mere formal transaction without any thing to probe the capacity or to supply the want of instructions: the suggested recognitions are insufficient in themselves, and were made, if made, at a time when the deceased was in possession of the executor, under his influence, and exposed to any impressions that might be made upon his mind.

I am, upon the whole, of opinion that the executor's case is not sufficiently established against all the presumptions and suspicions that attach to it. The Court therefore pronounces that the executor has failed in the proof of the will and codicil; but, as actual fraud has not been established, I shall give no costs.

[471] IN THE GOODS OF HUGH ROSS. Prerogative Court, Easter Term, 2nd Session, 1828.—The Court will not (on affidavits of capacity and final intention, and on consent) decree probate in common form of a paper writing in extremis, and confused, where the interest of minors and of an infant is affected.

On motion.

Hugh Ross, late of Bloomsbury Square, died on the 30th of October, 1827, leaving a sister, six nephews, and a niece (children of two deceased brothers) who would be entitled to his personal estate in case of an intestacy. Three of the nephews were minors, and the niece was an infant. On the day of his death the deceased, in the presence of three of his friends (one of whom was Mr. Roberts) and of his medical attendant, expressed a wish to make his will, and requested Mr. Roberts to prepare it from his dictation, which Roberts did, and then read the will over to him. The deceased approved it; and, in answer to a question "if he had any thing more to add," replied, "No, that is all." A pen was then placed in his hand, but he was prevented by bodily weakness from signing the paper, and shortly afterwards died. These four gentlemen had made an affidavit of the facts; and that they remained with Mr. Ross till his death: they also stated their full belief of his capacity, and that he perfectly understood the contents of his will.

The paper, after enumerating property to which the deceased considered himself entitled, and **[472]** giving various legacies; among others, £500 to each of his three eldest nephews—James, Alexander M'Kenzie, and Hugh, with his gold watch and appendages to Hugh, bequeathed "to Mrs. Hugh M'Intosh twenty guineas, and the remaining sum to his nephew Hugh Ross, on his attaining the age of twenty-two years." It then appointed an executor, with £30 for a ring, and gave to Mr. Roberts

fifteen guineas for a ring and seals; and there were some other small legacies; but there was no residuary clause.

The personal property was about £2500.

The deceased's sister, and the three minors, and the infant, whose interests were alone affected by this paper, consented to probate in common form: the consent of the infant was by her mother and guardian.

The King's advocate moved for probate.

Per Curiam. When this paper was written the deceased was in extremis: the paper itself is confused: it would be dangerous, on a mere affidavit of capacity and final intention, to decree probate of it in common form, especially as it affects the interests of minors and an infant, whose consent is not sufficient.

Motion rejected.

[473] AKERS *v.* DUPUY. Prerogative Court, Easter Term, 2nd Session, 1828.—Administration durante minoritate formerly granted to the mother, having ceased by the minor's death, and the mother having thereby become joint residuary legatee with another minor, administration de bonis non decreed to her; one executor having renounced and the other, who was abroad, being cited.

On motion.

Edmund Fleming Akers died on the 16th of February, 1821; and of his will and codicils appointed Richard Walter Forbes and Isaac Dupuy executors and residuary legatees in trust. The deceased left a widow and one child, an infant, who was to take two third parts of the residue of the testator's personal estate upon his attaining the age of twenty-one; the remaining third was left to a grandson when he should attain the same age. Forbes renounced probate and administration, and Dupuy, being abroad, was cited, after which administration was granted to Mrs. Akers, the widow (as the mother and guardian of the infant), for his use and benefit until he should arrive at twenty-one. The infant died in 1822: by his death the administration ceased, and the widow became entitled to a share of the lapsed residue; and, in order to supply a personal representative to the testator's estate, she had caused a second decree to be served on the agents of Mr. Dupuy (resident in the West Indies) and on the Royal Exchange.

Upon an affidavit to this effect Dodson, for the widow, applied for administration with the **[474]** will and codicils annexed of the unadministered effects of Edmund Fleming Akers.

Per Curiam. The widow is now a residuary legatee; the grandson is stated to be still a minor—about ten years of age; so that a third part of the residue is not yet vested. Let administration pass to the widow.

Motion granted.

IN THE GOODS OF LIEUTENANT-COLONEL READ. Prerogative Court, Easter Term, 2nd Session, 1828.—The Court at Madras—the competent jurisdiction—having granted probate to the widow as universal legatee and constructive executrix of an informal paper, in which character no security is required: this Court, considering that under the circumstances the widow may be called on to prove the paper per testes, or that the grant may be appealed from, will only decree administration with the paper annexed to her, as relict and principal legatee, on giving security.

On motion.

The deceased was Deputy Quarter Master General of the forces in India. On the 17th of September, 1827, probate was granted at Madras to his widow as the sole legatee, and as constructive executrix of his will. The will contained these passages:—

"The little property I possess being in household goods, plate, carriages, horses, &c. I give, after all my just debts in Madras are paid, to my dearly beloved wife Lydia to apply and dispose of as she may think proper."

And concluded in these terms:—

"I refrain from separating into small parcels the little property that may arise from the sale of my effects, but wish my dear and affec-**[475]**-tionate wife may enjoy the whole, after, as I before said, my just debts in Madras are paid."

Lushington moved for probate as granted at Madras.

Per Curiam. The deceased died on the 21st of August, 1827, leaving a widow

and two daughters by a former marriage. The will, of which probate is asked, is not executed, nor is the date, except of the year 1827, filled up; blanks being left both for the day and the month: there is also the word "witnesses," but of course it is not attested.

This Court however must presume that the Court of competent jurisdiction at Madras acted properly in granting probate of this paper as a valid instrument, and had evidence before it accounting for the want of execution and other imperfections: but I think it is very doubtful whether, according to the true construction, the widow is "sole legatee and constructive executrix:" for the deceased, when he wrote this will, was not, as it seems, apprized that he had any property in England to dispose of, whereas he had £330 in his agent's hands. It is possible that the wife may yet be called on at Madras to prove this will in solemn form of law, or that, from the decree already made there, an appeal to the King in Council may be prosecuted by the daughters of the former marriage. My difficulty therefore in granting probate to the widow as "constructive executrix" is, that she would in that character be exempted from **[476]** giving security; but I see no objection to allow administration with the paper annexed to pass to her as "relict and principal legatee," on her giving security. There is some difficulty in varying the form of the grant, but yet there is still greater difficulty the other way.

It is not fully decided whether this Court is bound, in all cases and under all circumstances, to follow the grant of probate made by a Court of competent jurisdiction. India stands in a very peculiar relation to this country, and instances are every day occurring when this Court is called upon to decree probates on exemplified copies of wills proved in that country, not always in the forms nor according to the rules which are recognized by our domestic tribunals. The more numerous however these instances are, the more important becomes the consideration whether some remedy should not be provided, and whether the object would not best be attained by a short act of Parliament. It may be said that there is an appeal to the King in Council from the decisions of these various Indian Courts: it may often however happen that but a very small part of the property is in India where yet the party may be domiciled, and then, according to the present practice, the probate in India would still regulate the grant here. In such cases therefore the party, in order to obtain that to which he is justly entitled, and which he would naturally obtain if this Court might follow its own rules, would be compelled to go to a large expence in appealing to the Privy Council from the irregular decision of a Court that has only original jurisdiction over a **[477]** small part of the effects, but which, by a sort of courtesy, eventually regulates the whole. It is an evil for which, I think, some legislative remedy should be provided, and which I recommend to the consideration of those gentlemen at the Bar whose attention may have been more immediately directed to such matters.

In the present case I decree administration with the will annexed to Mrs. Read as the relict and the principal legatee, the usual security being given.

IN THE GOODS OF WILLIAM HINCKLEY. Prerogative Court, Easter Term, 2nd Session, 1828.—Administration with a will (in which was no executor nor residuary legatee) annexed decreed to two aunts of the deceased, legatees in the will, and daughters of the grandmother—the next of kin—she being ninety years of age, and incapable.

On motion.

Lushington moved.

Per Curiam. The deceased's will contains no executor nor residuary legatee; it has only bequeathed some small legacies. He died in February last, and has left a grandmother and two aunts—her daughters. The aunts, as legatees, now apply for administration with the will annexed; and they state, in an affidavit jointly with a medical man, that the grandmother is ninety years of age, and incapable of taking the administration. Upon this affidavit the Court grants the administration to the aunts, who are interested as legatees and as the next of kin of the grandmother.

Motion granted.

[478] IN THE GOODS OF THOMAS VANHAGEN. Prerogative Court, Easter Term 2nd Session, 1828.—A paper having an attestation clause in the plural number, but only one witness and the date of the year written on an erasure (on affidavit of the executor to a recognition and from the attesting witness to the time and

intention of executing), probate of such paper, in common form, decreed, though one of four persons entitled in distribution refused to consent; but had entered no caveat.

On motion.

Thomas Vanhagen died on the 10th of January, 1828. His will, in his own handwriting, was dated on the 9th of October, one thousand eight hundred and twenty-three, and was attested and signed as follows:—

In the presence of *us* who have at his request signed our names as under. } THOMAS VANHAGEN. (L.S.) JOHN WEAKLEN.

The deceased left his property to his widow, who, with three sisters, was alone interested in case of an intestacy: two of the sisters had signed a proxy of consent, but the other refused. The widow and Mr. Hine—a solicitor and son-in-law to the deceased—were the executors; and Hine had made an affidavit as to a recognition of the will of the testator a short time previous to his death.

Lushington moved for probate to the executors, pointing out the informality that there was an attestation clause in the plural number, with only one subscribed witness.

[479] Per Curiam. From the appearance of the paper, and from the position in which the names of the deceased and of the witness are placed with relation to the attestation clause, it would seem that the deceased, at the time that these names were subscribed, had no intention of having more than one witness.(*a*) The chief difficulty is that the executors have not brought in an affidavit of the attesting witness; that the deceased intended what was done at the time the witness subscribed it to be an effectual execution of the paper as his will: for I observe that the word "three" is written on an erasure. On a satisfactory affidavit upon this point the Court will decree the probate, since no caveat has been **[480]** entered by the sister, who declines to give her consent; and a recognition of the will is sworn to by the executor.

On the 3rd Session, an affidavit from the attesting witness having been filed, fixing the date of the will and stating his belief that it was the intention of the deceased to execute it at the time it was subscribed, the Court decreed probate to the executors.

Motion granted.

PICKERING AND PICKERING *v.* PICKERING. Prerogative Court, Easter Term, 3rd Session, 1828.—Administration de bonis non with a will annexed, in which was no executor, granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or (on a proxy of consent from the other) beyond their joint interests, and an affidavit of no outstanding debts being made.

[Applied, *In the Goods of Elliott*, 1879, 3 L. R. Ir. 147.]

On motion.

Charles Pickering died in 1814. He left a widow, a son, and two daughters, Sarah and Sophia Pickering. By his will he made his wife universal legatee for life,

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(*a*) *In the Goods of George Wingfield Sparrow.* Easter Term, 3rd Session, 1828.—Probate in common form decreed of a paper with an attestation clause in the plural number and only one witness, on affidavit of an implied recognition.

On motion.

The deceased died in April, 1828. He left a will and codicil. The will was regularly executed; but the codicil, dated in February, 1824, which he had written at the foot of the will, with a clause of attestation—"in the presence of us"—was only attested by Mr. Denton, the deceased's solicitor. He was dead; but an affidavit was exhibited by Mr. Briggs, his executor (who was also a solicitor, and who had found the will and codicil among Denton's papers), stating that Mr. Sparrow had in February last, some time after the death of his solicitor, seen and inspected these testamentary papers, and had left them in his possession, saying "he would call again, and alter his will and codicil;" but he never came.

The Court upon this affidavit, on motion by Lushington, granted probate of the will and codicil.

Motion granted.

and upon her death he gave to each of his daughters £1000, and the residue to his son; but appointed no executor. On the 3d of May, 1814, the widow took administration, with the will annexed, in the sum of £3500; and upon her decease the son, being on military service in the East Indies, was cited with a decree to shew cause why administration de bonis non should not be granted to Sarah and Sophia Pickering, **[481]** jointly, as legatees. This decree with intimation was duly served.

Haggard now prayed the administration to be decreed to Sarah Pickering, singly, upon a statement that, since the issuing of the decree, the other sister had been, and still was, dangerously ill. He further moved, after mentioning that the testator's debts had been discharged, that the sureties might justify in the amount of the residue only, first deducting the amount of the legacies to the two sisters.

Per Curiam. The Court will allow this administration to pass in the form now asked; but it will first require either a proxy of consent from the sister, or else that security should be given to cover the £1000, the amount of her interest, as well as the surplus. An affidavit should also be exhibited that there are no creditors.

Motion granted.

[482] COOPER *v.* DERRIENNIC AND OTHERS. Prerogative Court, Easter Term, 3rd Session, 1828.—A legatee, whose legacy had been paid him, having been examined without releasing, allowed to be reproduced on his and the executor's giving mutual releases, and on the latter depositing in the registry, to abide the issue of the cause, a sum sufficient to cover the legacy.

On motion.

John Courtoy died on the 8th of December, 1818. On the 7th of January, 1819, his will and codicil were proved. On the 3d of November, 1827, a decree issued, under seal of the Prerogative Court (at the instance of William Henry Cooper, executor of the surviving executor of Courtoy), citing, among others, Mary Derriennic (resident in France), the sole person entitled to the deceased's estate under an intestacy, to see the will propounded and proved in solemn form of law. Upon the return of the decree the will and codicil were propounded in a common condidit, and the three subscribing witnesses examined. On the first session of Easter Term an appearance was given for Mrs. Derriennic, and the cause was concluded: it was then discovered by the proctor for Mrs. Derriennic that William Giles, the deceased's attorney, drawer of, and a subscribing witness to, the will, under which he had a legacy of £300, had been examined without giving a release. The legacy with interest had been paid to him in April, 1824, under an order of the Court of Chancery; and he stated, in his affidavit, "That at his production and examination as a witness in this cause, the circumstance of his being a legatee in the will was omitted to be **[483]** mentioned or alluded to by him or by any other person; and that in consequence thereof no release or discharge in respect thereto was then given; but that neither at the time of his production or examination as a witness, as aforesaid, had he any interest whatever under the will or codicil propounded, or any claim upon any person whomsoever touching the said legacy."

An application was now made to the Court to rescind the conclusion of the cause in order that William Giles might, on giving a release, be reproduced as a witness, and again repeated to his deposition.

In support of the motion Lushington and Addams, who mentioned the case of *Peachey and Merricks* v. *Woodyer*, before Dr. Calvert, as decisive of the question.(*a*)

(*a*) Prerog., 18th June, 1788. The editor has been favoured with a notice of this case. It was a cause of proving in solemn form the will of Charles Moxon: and was promoted by Dame Elizabeth Peachey and Elizabeth Merricks, the cousins german and only next of kin of the deceased, against Richard Woodyer, the executor: and at the hearing an objection was taken by Dr. Wynne and Dr. Scott to the testimony of Ann Ives (a legatee under the will, who had received her legacy and given a release to the executor), on the ground that she might be compelled to refund her legacy; that the release came from the wrong party; that it should have been given by the executor in order to release the witness from all future possible demands.

Dr. Harris and Dr. Nicholl, on the other side, argued that the executor could never compel Ives to refund;* that the legacy had been paid for the purpose of

* See the cases upon this point collected in White's edition of Roper on Legacies, vol. i. p. 396.

Phillimore and Haggard contrà.

[484] Per Curiam. The Court granted the motion, remarking that interrogatories on the part of Mrs. Derriennic might be administered.(*b*)

The following order was made:—

The Court rescinded its order assigning the cause for sentence on the second assignation, and gave leave that William Giles be reproduced for the purpose of being re-sworn and re-repeated as a witness; a release under the hand and seals of the said W. Giles and W. H. Cooper, and also the sum of £400, to abide the issue of the cause, being first brought in.

Note.—This sum of £400 was deposited in order to obviate any possibility of claim by the residuary legatee under a prior will, in case the will propounded should be set aside.

[485] IN THE GOODS OF CHARLES BRODERIP. Prerogative Court, Easter Term, 4th Session, 1828.—Probate, in common form, of two papers (one unfinished) granted on a proxy of consent and on affidavits accounting for their state, and shewing that the deceased intended them to operate.

On motion.

The deceased died on the 14th of April, 1828, a bachelor, leaving two brothers, William and Francis Broderip, his only next of kin, and the sole persons entitled to his personal estate in case of an intestacy.

The deceased had occupied apartments at the Salopian Hotel, Spring Gardens, for upwards of three years previous to his death; and on the 9th of April, while in bed, he requested Mr. Williams, his intimate acquaintance, to give him pen, ink, and paper for the purpose of making his will, by which he said "he should secure to Colonel Joseph D'Arcy the whole of his property by constituting him sole executor and residuary legatee." The deceased, having written his will to the extent of nearly two sides of a sheet of letter paper, was obliged from exhaustion to stop, observing, at the time, "that he should complete it when his strength was sufficiently restored:" he then sent for Mrs. Holland, the mistress of the hotel, and her daughter; and upon their coming to his bedside he requested them to bear witness that the paper, which he had just written in the presence of Mr. Williams, was his will; that he then deposited it in a purple portfolio, and that **[486]** he appointed Colonel D'Arcy sole executor and residuary legatee. Upon their quitting the room he requested Williams to commit to paper the purport of such his communications, and to insert some directions as to his funeral; when this was done the deceased further begged him to take it down stairs, to read it over to Mrs. Holland and her daughter, to obtain their signatures, and deposit it with Mrs. Holland, as instructions for her till the arrival of Colonel D'Arcy from Ireland. It appeared further, that on the 12th of April the deceased read over what he had written on the sheet of paper to Mrs. Holland and her daughter, repeated his intention in respect to Colonel D'Arcy, and expressed his conviction that the paper would take effect as his will. He made similar declarations to the waiter of the hotel.

Lushington, on an affidavit of the above facts, and on a proxy of consent from the deceased's brothers, moved for probate of the two papers, as together containing the

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making her a witness, and that she had performed her contract by being a witness: the executor had therefore received his consideration.

The Court (Dr. Calvert) admitted the evidence, and observed it was usual so to do, though the books rather incline the other way.*

(*b*) Prerog., 10 February, 1827. In *Booth and Hannam* v. *Hurd*, on its being alleged that Charles Read, an executor, had renounced previous to his examination as a witness; the Court on this day permitted a release to be brought in of his legacy of £100 as executor (bequeathed to him if he undertook the execution of the will), and on the same being brought in, that he might be reproduced as a witness, and again repeated to his deposition.

In *Callow* v. *Mince* (2 Vern. 472) a witness was examined before the hearing whilst she was interested, but after the hearing she released her interest, and was examined again before the master. Her depositions before the master were allowed to be read. See also *Needham* v. *Smith*, 2 Vern. 463.

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* Vide Harris' Justinian, lib. 2, tit. 10, s. 11, notis.

will of the deceased, to be granted to Colonel D'Arcy. The property, he said, would scarcely cover the debts, funeral, and testamentary expences.

Per Curiam. The affidavit fully states a case that would entitle these papers to probate if the executor should be called upon to prove them in solemn form of law; and with the consent of the two brothers, the only persons interested under an intestacy, the Court has no difficulty in decreeing probate to Colonel D'Arcy.

Motion granted.

[487] IN THE GOODS OF JAMES HARDSTONE. Prerogative Court, Easter Term, 4th Session, 1828.—On renunciation of a co-executor the Court will not grant administration with the will annexed, without justifying securities, to the daughter —the residuary legatee—during the lunacy of the mother—the other executor.

On motion.

The deceased of his will appointed David Jones and his wife, Mary Ann Hardstone, executors and residuary legatees in trust; and his daughter residuary legatee. He died in 1826. Mr. Jones had renounced; and it appeared that Mrs. Hardstone was a lunatic under confinement, and that there was no committee of her person or estate.

Lushington applied for letters of administration with the will annexed to be granted to the daughter (during the lunacy of the executrix) without the sureties in the bond justifying. He admitted the motion was rather out of the usual course; but that to grant it would be for the benefit of the lunatic: he further stated that in consequence of the daughter's minority, which only very recently ceased, no one had been willing to administer to the effects, and that she was unable to procure the necessary affidavit of justification. The property consisted of a policy of insurance for £1500, and a sum due from the business, in which the deceased had been a partner.

[488] Per Curiam. It is quite impossible, under the circumstances of this motion, that the Court can deviate from its ordinary rules; nor, even if it had the authority, could it safely make the grant without requiring the securities to justify. Suppose, for instance, this young woman should marry and the whole property be dissipated, what remedy could be afforded to the mother? No reason is assigned for the renunciation of Mr. Jones, the executor; nor is the Court informed that any obstacle exists to the formal appointment of a committee, to whom the administration for the use of the widow would regularly be granted; or the administration might go to the daughter as residuary legatee, but in that case the sureties would be required to justify. At all events the Court is bound to reject the present application.

Motion refused.

IN THE GOODS OF JOHN DUNN. Prerogative Court, Easter Term, 4th Session, 1828.—The deceased having, between instructions for, and the execution of, his will, delivered to his solicitor a letter of testamentary import to be put with his will; probate thereof decreed, as together with the formal instrument containing the last will of the deceased.

On motion.

John Dunn, late of Bedford Street, Covent Garden, died on the 22d of April, 1827. He left a son, a major in the Army, and two daughters. On the 7th of February preceding he called at the house of Mr. Ottywell Robinson; and gave him verbal and written instructions for his will: a draft was accordingly prepared, read over to, and approved of by, the deceased. On the 6th **[489]** of March the deceased delivered to Mr. Robinson a paper sealed up in the form of a letter and superscribed, "Major Dunn, by favor of O. Robinson, Esq., Argyle Street," which he desired might be put with his will. On the 11th of April the deceased executed his will; when it was sealed up and, together with the letter, enclosed in an envelope by Mr. Robinson, in whose possession it remained until the testator's death; when the same was opened by Mr. Robinson in Major Dunn's presence, who himself read the letter, but without imparting to any one its contents. Major Dunn, the sole executor and residuary legatee under his father's will, proved it on the 13th of October; the letter, however, he did not prove, though it contained bequests of different annuities, which he regularly paid.(*a*)

(*a*) The letter began thus:—

Bedford Street, 28th Feb. 1827.

My dear Son,—You will find I have left you my all, pray God send you may make good use of the same; and I trust for my sake you will be kind to my brother

In the month of December Major Dunn was accidentally killed: he died intestate, leaving a widow and one infant; and on the 9th of January, 1828, letters of administration of his effects were granted to the widow, who had since taken administration (with the will annexed) de bonis non of John Dunn, as administratrix of the residuary legatee therein named.

[490] Lushington prayed the Court to admit the letter to probate, as a codicil, though of a date anterior to the will.

Per Curiam. It clearly was the intention of the deceased that this letter, written prior to, but delivered for the purpose of being put with, the will, should form part of his testamentary disposition. The executor followed its directions without taking probate of it, but that would not be a safe course for his widow, who has only a joint interest with her child in the effects of her late husband. I shall therefore revoke the present administration de bonis non, and decree to Mrs. Dunn a de bonis non administration with the formal instrument, and also with the letter annexed, as containing together the last will of the deceased.

EDWARDS AND EDWARDS *v.* ASTLEY AND OTHERS, AND *v.* H. M. PROCURATOR-GENERAL. Prerogative Court, Easter Term, 4th Session, 1828.—The presumption of law that pencil alterations are deliberative, may be strengthened by circumstances; such as, that the paper was originally carefully drawn up, and shews the deceased to have been a very precise man, while the alterations are incomplete and inaccurate, rendering the sense imperfect and the meaning doubtful.

[Referred to, *Francis* v. *Grover*, 1845, 5 Hare, 47.]

Fitz-William Rosier was the party in this cause, deceased; and the question that arose upon his will was whether certain pencil alterations were cursory and deliberative or final.

A decree had issued citing Mrs. Astley as residuary legatee, and also citing different legatees; the decree was further served upon the King's proctor, as it was alleged that the deceased left no relation.

Lushington and Dodson for the executors, asked probate with all the pencil alterations.

[491] Phillimore and Nicholl contrà, for Mr. Rosier, a legatee.

The King's advocate on behalf of the Crown.

Judgment—Sir John Nicholl. The paper propounded in this case is drawn up with great form and accuracy: each legacy is first expressed in words at length and then carried out into two columns, one specifying the amount of the stock (for the property is almost exclusively stock), the other—of the annual interest: each column is cast up at the bottom of the page and carried forward: the pages are numbered and the words "in continuation" written at the top of each—and this plan is pursued throughout the whole instrument. Nothing then can be done with greater care, and the paper on its face exhibits in strong colours the cautious character of the deceased.

The will, as appears at the end, was originally intended to have been executed on the ninth of August, but the words "ninth day" are struck through, and the words "twenty-sixth day" substituted. The clauses "witness my hand" and "signed in the presence of each other" appear to have been written at the same time that "the ninth of August" was written: he afterwards signed his name and subjoined his place of abode; and from the appearance of the writing I infer that this was done when he altered the date—viz. on the 26th, though, as I have observed, originally proposing to execute it on the ninth—and the conclusion I draw is that when he **[492]** so formally signed it, not in the presence of any person, he had abandoned his purpose of having witnesses. That he wished the paper to operate in some form or other there is no doubt: indeed the only party claiming under an intestacy—the Crown—offers no opposition to the probate.

The real and only question then is whether the instrument is to operate without

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and my two sisters, and allow them each twenty pounds per annum during their life. Should Joseph Ramsey my nephew be living in my service when I am no more do what you can for him. You will find a deed with Mr. Binns wherein I am bound to give Mrs. Limbrey seventy pounds during her life.*

* The remainder of the letter was not of testamentary import.

—or whether the Court is to pronounce for it with—the pencil alterations. Part of those alterations is proved by the servant, Turner, to have been made on the first of September, 1827, the deceased having died on the fifth. And I see no reason to doubt but that they were all made subsequent to the 26th of August, 1826; it seems most highly improbable that they were there at the time of the execution, whenever that took place—and certainly there is no proof that they then existed. The conclusion deduced from probability is confirmed by a conversation between the deceased and his intimate friend, Mr. Shepherd, on the 15th of August, 1827, in which, speaking of the general contents of the will, he used this expression—"That he had made some alterations which he believed would not be material and that no difficulty could arise from them." Now I think the alterations to which he thus refers on the 15th of August could not be those in pencil; but there are some trifling alterations in ink to which the remark would apply: from being a man of such accuracy he might be under some alarm even respecting these slight erasures; though not material, it was natural enough for him to tell Mr. Shepherd that he had made them: but it is quite impos-**[493]**-sible to conceive that if these pencil alterations, which constitute the whole difficulty of the case, were then made, he should not have anticipated some confusion arising from them.

It is not unimportant that, in this conversation with Shepherd, the deceased expresses no dissatisfaction at what he has done—no opinion that his residuary legatee would have too little—but just the contrary—he had left her £10,000 stock—her children £24,000 stock—and he added "there would be some pretty pickings for Mrs. Astley after all;" so that on the 15th of August he had no thought of diminishing the legacies in order to increase the residue.

The question then is whether the alterations in pencil were final and decisive, or only deliberative and for further consideration: it must be remembered that they were made by this very accurate man, labouring under an acute and excruciating disorder—"an affection of the bladder of a most extensive nature" (as it is described by the medical man, Glen)—in the most depressed state of body, and within a short period of his dissolution; that when Glen was first called in, the deceased had symptoms of apoplexy, which were only prevented by cupping and other remedies; that the usual effects of this complaint, especially if attended by great pain and exhaustion, are confusion of mind and forgetfulness. All these circumstances tend to support the presumption in favour of the will as originally executed: for primâ facie all pencil alterations are deliberative, and for this obvious reason; if they expressed **[494]** the final intention of the deceased, why did he not resort to a more durable material? This presumption in the present case is further strengthened by the fact that there are some alterations in ink, and there was no reason why he should not have employed the same material; he was in his own house, undisturbed, with every convenience at hand, engaged on the paper for four hours, and having it by his side for five hours more: surely if he had made up his mind he would have resorted to ink. This presumption, like all other presumptions, may be still further strengthened by circumstances; for instance, if the interlineations and obliterations have rendered the sense incomplete and the papers unintelligible, it would require pretty decisive evidence to convince the Court that they were intended to be final, more especially by a person of extraordinary accuracy when in health.

Here, on the second side, the bequest to Swanton is struck through in such a way as to become unintelligible—not as to the effect, for the legacy would be pretty much the same as originally given, but as to the correctness of the language; it stands thus: the name and title "The Rev. Francis Swanton" is crossed out; and yet immediately afterwards "the said Rev. Francis Swanton" is twice repeated when there is no longer any such person; for the name has previously been struck through. Then again at the end of this bequest the words "together £600 3 per cent. Reduced Bank Annuities" are crossed out in the same manner: this is not at all intelligible; I cannot see why it was struck **[495]** through; the whole bears the character of confusion of mind.

On the third side, in the legacy to James Rosier, the variation is much more material. In the marginal columns the figures 1000 and 30 are struck through, and 500 and 15 are interlined, while the body, where are the dispositive words, remains unaltered: to which is the Court to adhere? Here again is something of a wandering and confused mind.

In the next clause there is a more extraordinary alteration. £1000 was given by the original dispositive words to each of James Rosier's children, and the sums carried out into the respective columns were 10,000 and 300. The body is now changed by an interlineation to 500 each, while in the margin the figures, instead of being 5000 and 150, are 500 and 15. This again shews confusion, and that he meant to revise, and is uncertain and unintelligible: an accurate man, if he had made up his mind to these alterations, would not have left them in that state. Then in the last clause of that bequest the words "lapse legacy but be equally divided among the survivors" are struck out, and the clause would now stand "I desire that the £500 3 per cent. Reduced Bank Annuities shall not be considered as a," which is perfectly unintelligible and a total want of sense. If any of the parties are dead what is to be done? are the legacies to lapse or not? Now originally, as I have said, after he had made the bequests and carried them out into the marginal column, he cast them up at the bottom of each page; but though the particular **[496]** bequests are here altered, yet the total is not. All this bears the character of wandering—it is a sort of day-dream, of waking confusion, to which persons in that state are very apt to be subject.

Again, on the fourth side, besides that what relates to the money being the separate property of the Misses Edwards and their sister Mrs. Paget during coverture is struck out; an interlineation of a legacy to their mother occurs; that insertion has more the appearance and stamp of consideration and fixed intention: because at the bottom of the page, in order to include it, he alters the total casting up from 78,000 to 79,000, but even here there is confusion, for where it is separately written at the side the figures are only 79: and moreover he does not add the dividend of this £1000 to the sum total of the interest, it remains £2547, 10, instead of being £2577, 10. Even when he has altered 78 to 79 he does not carry it on to the next page; there the sum still remains 78,000. This shews it was not finished but left incomplete.

Again, what becomes of the alterations in the former pages; for if they were permanent, the casting up in page 3 should, instead of 71,000, be turned into 61,000; or supposing the latter 500 to have been an error for 5000, then it should have been only 65,500 instead of 71,000; yet the total of that page is suffered to remain 71,000 and to be carried on and included in the next page, even where he changes the casting from 78,000 to 79,000.

All this shews either confusion of mind, **[497]** which from his long illness and the near approach of death might well be the case; or it shews that these were mere passing ideas for further consideration, and left in an incomplete and unfinished state, and afterwards abandoned altogether. This construction is further confirmed by what passed on the 4th, the day before his death. Shepherd and Glen had a conversation with him; he mentioned his executors, he told them where his will was: I do not infer from that that he intended it to operate with these alterations; if he had, he would so have expressed himself to Mr. Shepherd; but there was nothing of the sort; no allusion nor reference to them, no wish to finish them, no declaration that he had made and wished them to be acted upon in the state in which they were: "he hoped his testamentary dispositions would be satisfactory to his friends." Just, however, as Glen had left the room the deceased recollected himself, and when Shepherd had called him back the deceased said, "he thought he had not left sufficient for his servant Philip Turner; he wished him to have £500:" and he had before on the 15th of August mentioned to Shepherd that he intended to give him this increased benefit. If the alterations were not deliberative, and if he had not purposed again to revert to this instrument, he would have made this addition to Turner's legacy when engaged in the paper for four hours on the 1st of September: but he neither does that, nor does he on the 4th say one word about the pencil alterations, and therefore it is to be inferred that, incomplete as they are, he had abandoned them **[498]** altogether, and probably forgotten their existence. This is the legal presumption, and this is the probability of the fact deducible from the circumstances of the case.

Upon the whole, the paper appears to have been originally drawn up with great care and attention. The Court has every reason to feel certain what the intention was on the 9th of August—finally confirmed when he subscribed it on the 26th of August, 1826; but it has no satisfactory information that the changes which in the wanderings of illness, on the 1st of September, 1827, he projected, were any thing more than transient and deliberative. The Court therefore pronounces for the paper without the pencil alterations.

IN THE GOODS OF DONNA MARIA DE VERA MARAVER. Prerogative Court, Easter Term, 31st May, 1828.—Probate of the will of a married woman, a native of and domiciled in Spain, granted according to the law of Spain, to one of her sons as executor, on affidavits as to the law of Spain, and the identity of the parties.

On motion.

The deceased, a native of Spain, died at Seville in November, 1820. On the 22d of November, 1815, she executed her last will and testament; and therein, after stating that she had particularly expressed to Don Martin Saravia, her husband, every thing relating to her will (since, "in consequence of her numerous occupations, time did not permit her to ordain her last **[499]** will and testament so extensively and with such formality as was required"), she gave to him her right power and faculty in the most ample way according to law, either should he die before her or survive her, and in case he should be prevented from doing so, she then conferred the same power upon their lawful sons, collectively or individually, to declare her last will and testament, and order what she commanded. She appointed her husband and her sons executors.

In the month of April, 1821, Don Saravia, the husband, attended before the proper authority in Seville, and accepted, declared, published, and formalized the will of his late wife; and ratified her appointment of executors. He died in August, 1827. Upon his death a power of attorney, by which Messrs. Mastermans had, since 1819, received the dividends upon certain stock (now consisting of more than £3000 new £4 per cent. annuities) standing in the name of Donna Maraver (wife of Don Saravia), ceased; and in order to sell out that stock and receive the dividends that had accrued since the death of his father (Don Cayetano Saravia), one of the sons and a surviving executor had come to England for the purpose of proving the will.(*a*) Affidavits were exhibited as follow:—

[500] "Appeared personally Don Cayetano Saravia of Seville in the kingdom of Spain and (by the sworn interpretation of William Renell of London, merchant) made oath that by the laws of Spain, with which at least, in so far as they relate to the matters hereinafter mentioned, he, this appearer, is well acquainted, the fortune or property of a Spanish lady on the occasion of her marriage (unless she expressly declines having any settlement) is inventorized and valued, and such inventory and valuation is signed by her intended husband and the amount thereof remains vested in the wife, and must at her decease be made up and paid by the husband to her executors or heirs; that the husband and wife, during their joint lives, are with respect to their property in a state of co-partnership, and the husband, in case of his wife's decease, is also answerable to her executors or heirs for a moiety of such profits or increase of their joint property (called Gananciales) as may have arisen during their cohabitation; that the wife has full power and authority to make her will as a feme sole, or, as is frequently the custom in Spain, to empower any other person to make and declare the same for her; but in either event, if she leave a child, she cannot bequeath to her husband or to any other person a larger proportion than one fifth of her estate, and the remainder thereof must descend to her children: but that if she has no child she may bequeath her property to her husband or to others as she may choose. That in the event of a wife dying intestate the whole of her property, real and personal, **[501]** would go to her children, or in default of them, to her next of kin, to the entire exclusion of her husband. That the deceased, Donna de Maraver, in conformity with such laws, had and enjoyed a considerable fortune as a feme sole notwithstanding her coverture; and in November, 1815, duly made and executed her last will and testament in writing, and appointed her said husband to make and declare the same; that the utmost extent of the power which could be derived by him in consequence of such appointment was that he might annul, alter or revoke so much of the said will as related to the disposition of one fifth part of her property; but that having once made, declared and formalized the instrument to be the last will and testament of the deceased, he could not afterwards in any manner alter or revoke the same." The affidavit further stated "that Don Saravia had declared and formal-

(*a*) It appeared that Don Cayetano had a power of attorney from his co-executors authorizing him fully to act on their behalf, and to take any measures that might be requisite for receiving the effects of the deceased in England, and to appear for them in any Court for that purpose. This power of attorney was before the Court.

ized the instrument executed by his deceased wife to be and contain her last will and testament, and had confirmed the nomination of his sons as executors." (*a*)[1]

There was also an affidavit, as to the identity of Don Cayetano Saravia, from the Messrs. Renell of London, merchants, to whom about the end of March last he brought letters of introduction and recommendation. In conformity with the directions of the Court, when this case was first mentioned, the principal clerk in the **[502]** house of Masterman and Co. made an affidavit that Masterman and Co. had been satisfied (*a*)[2] that Don Cayetano Saravia, the present applicant, was authorized to receive the dividends that had become due upon the stock in the name of Donna de Maraver; and they had accordingly paid over the same.

Upon these affidavits and documents Addams moved for a general probate to Don Cayetano Saravia.

Motion granted.

KING AND THWAITS *v.* FARLEY. Prerogative Court, Easter Term, 31st May, 1828. —A testator having ten years before his death, when in perfect health, executed a will and subsequently a codicil conformable to his ascertained affections, and 2½ years before his death, after a paralytic stroke producing at least great bodily infirmity, having executed a second codicil materially departing from those instruments, and six months before his death a third codicil revoking the 2nd and reverting to the former disposition—probate of the will, 1st and 3rd codicils granted—there being no satisfactory proof of a change in his affections, and the evidence of volition and capacity being at least as strong in support of the 3rd as of the 2nd codicil.

This case was argued by Lushington and Dodson for King and Thwaits, the executors; and by King's advocate and Nicholl for Miss Farley.

Judgment—Sir John Nicholl. The deceased, George Lowdell, died on the 2nd of March, 1827, leaving one brother and the children of another; but he seems to have kept up no intercourse with any of his relations. His property, though the amount of it does not exactly appear, was considerable and of various kinds.

The present question arises on two codicils, and the Court must in some measure consider the factum of both. The former is revocatory **[503]** of part of his will; the latter, except as to a few small legacies, revokes the former and reverts to the will. The will is dated on the 6th of March, 1817, is all of his own handwriting, is carefully and formally drawn, is signed and sealed, and is attested by three witnesses, his neighbours at Great Bookham, one of them Bennet Hollobrook, who afterwards appears to have been his intimate friend: it appoints Watts, Lintott and Willard, his executors; it directs the payment of his debts; it gives legacies to servants and some others out of his long annuities, and then disposes of the rest of the long annuities; it gives legacies to other servants in addition to their wages; it bequeaths certain sums in trust for charitable purposes; it leaves his medical books and instruments to Mr. Baker; it gives certain joint property specifically to Watts: then, after enumerating several estates, it bequeaths them specifically to Mrs. and the two Miss Thorntons as joint tenants, and also gives them the residue as tenants in common: "The rest and residue of my property of what kind soever and wheresoever, I give to and bequeath to the said Sarah Thornton, widow, Elizabeth Mary Thornton and Mary Thornton spinsters share and share alike as tenants in common, and not as joint tenants to hold to themselves their respective heirs administrators and assigns for ever according to the nature of each respective estate or property."

Whether this latter part and these specific bequests constitute the bulk of his property, or whether the specific bequests exceed the re-**[504]**-sidue, I am not informed; but however that may be, the Thorntons are especially benefited. Mrs. Thornton afterwards died in the deceased's life-time; her third of the residue would consequently lapse and go to the next of kin.

This will, so carefully and deliberately made, leaves no doubt what the testamentary intentions of the deceased were in 1817; the Thorntons then were the objects of his

(*a*)[1] The above affidavit, so far as it related to the laws and customs of Spain, was certified by the Consul-General for Spain to be correct.

(*a*)[2] By the letters of introduction from their intimate friends at Seville, by the letters of Don Cayetano to his wife and family at Seville, and by the remittances to his relations there: all which had passed through their hands.

bounty; the Farleys, of whom we afterwards hear, were not even mentioned; his medical friend and neighbour Mr. Baker, had his professional esteem and regard; his old and intimate friend Mr. Hollobrook is one of the attesting witnesses of this will as well as of the last codicil. The will is in no degree in contest between the parties; here then is a safe and solid foundation of testamentary intention; a point of support on which to rest—a solemn declaration, which is in accordance with the deceased's history.

He was of a very advanced age—above eighty; had formerly been a medical practitioner in the borough, but for many years had resided at Great Bookham in Surrey; he had been married, but his wife had been dead several years without issue: during her lifetime and after her death he had been particularly intimate with the family of the Thorntons, who resided at Kennington. Mr. Thornton died leaving a widow and two sisters; one of whom afterwards married Mr. King, an executor; and the deceased, when he came to town to receive his dividends, used frequently to stay at their house at Kennington for a week at a time; and they were accustomed in the summer to spend some **[505]** weeks with him at Bookham. Under this long intimacy and no intercourse with his own family it is not extraordinary that they became the principal objects of the deceased's bounty, and accordingly these three ladies were his residuary legatees.

In the beginning of 1819 the deceased had a violent attack of paralysis, which nearly deprived him of speech and of the use of his right side; his testamentary capacity however must be considered to have remained, because there is a subsequent codicil not questioned. This codicil, dated on the 9th of November, 1822, revokes the appointment of Willard and Lintott, and substitutes William King (who I suppose in the meantime had married Miss Thornton) and Thomas Thwaits as executors, and gives to each of the latter £100: it is signed and sealed; and the name is so well written that he can hardly have been obliged, at that time, to use his left hand: it is attested by whom? by the Rev. William Farley, curate of the parish; by Hollobrook; by Bradbury, the tailor; and also by Baker, the surgeon. The validity of this codicil not being impeached, testamentary capacity up to that time, November, 1822, must be admitted; and here are in confirmation of it the Rev. Mr. Farley himself, Mr. Hollobrook, and Mr. Baker, besides Mr. Bogue, the drawer, and Bradbury, the attesting witness. It is, as executors under that paper, that King and Thwaits are parties before the Court opposing a codicil of December, 1824, and setting up a still further codicil of November, 1826.

To the end of 1822, then, the deceased (as **[506]** must be presumed) continued competent to the performance of a testamentary act notwithstanding the paralytic affection, and at all events the intention of giving the Thorntons, not only the property specifically bequeathed to them, but also the undisposed residue, remained unchanged: while on the other hand there is no intention, manifested up to this time, of benefiting the Farleys.

In March, 1823, he suffered a second paralytic attack; and from that period, if not before, his bodily infirmities were very great; he had lost the use of his right side and hand—he could barely sign his name, and that with his left hand; his speech was almost entirely gone—he could only utter monosyllables—yes and no: as persons in that state usually are, he was very irritable and nervous—irritable at being misconceived or not understood—nervous, so as to be in tears, when any agitating matter was going forward. Whether his condition was much changed by this second seizure from what it was after the first is not very clearly ascertained. Four years elapsed between the first and second attack, and four years more from the second to the time of his death; and it is to be observed, as a matter of experience in this Court, that when witnesses come to speak to the condition of a person some time afterwards, they are apt to confound what passes at different periods. It was however within the latter period—after the second paralytic stroke—that both the instruments in dispute in this cause were made.

On the 29th of December, 1824, a codicil was executed by the deceased and attested by three **[507]** witnesses, revoking the residuary bequest to the Thorntons, and giving to the Rev. William Farley £100; to Mrs. Bogue £200, and to Jane Farley the residue. On November 18, 1826, another codicil was executed by the deceased and attested by four witnesses, revoking the codicil of December 29, 1824, again giving to William Farley £100; to Mrs. Bogue £200; and to Jane Farley, instead of the residue, £200; and otherwise confirming the will of 1817—a confirmation this

of his testamentary bounty in favour of the Thorntons. Each of these instruments must be proved, for if neither is proved, the will of 1817 with the codicil of 1822 remains unaltered.

So far as respects the capacity of the deceased, these two codicils stand upon nearly equal ground: no material change in his condition had taken place—he was much in the same state in December, 1824, as in November, 1826, and he lived near four months after the latter period: true, he had lost the use of one side and could only utter monosyllables, but to the end of his life he was drawn about in his pony-cart, wherever he directed: he signed letters and drafts, he counted money, he understood questions and answered them, he played at cards; he certainly was in a very miserable state of body, but his mental faculties were not gone, he was capable of volition and intention; but it would require very clear proof of intention to support the first of these two codicils. If Baker is right, he had not capacity at either time, and then neither paper ought to be established; but that is not an opinion supported by a just view [508] of the facts, nor one on which, I presume, Miss Farley will much rely.

What, then, is the proof to establish this codicil of December, 1824, and to take away the residue from the Thorntons, to whom he had been so long attached? Mr. Farley had been curate of Bookham about eleven years—he kept a school there—and his sister resided with him: as a neighbour he attested the codicil of 1822, but his name does not occur in the disposition then made. During the latter years of the deceased's life (for so it is laid in the plea) Farley and his sister visited him, shewed him kind attentions, played at cards with him, and Miss Farley gave him her trumps. Hence, though the deceased seemed fond and pleased, though there was a growing partiality, particularly towards Miss Farley, yet all the intimacy arose, and the whole regard was acquired, after this poor creature became a complete paralytic. These kindnesses might account for giving them little legacies, as he had done to others; and here are two documents, E and F, which seem as if such a thing was intended. Paper E contains a list of sums from £100 to £1000: it is headed "Mr. Farley," and thus proceeds:—

Legacies to be paid in	3 months + 6 months
£100	12 months
Mr. Farley +	one hundred pounds
Mrs. Bogue +	two hundred pounds three hundred pounds
+	£400 Miss Farley.

[509] The remainder of this paper is immaterial. This instrument therefore proves that at the time it was drawn up he was unable to express or explain himself in any other way than by a cross, but it also proves that he did intend to benefit these parties to a certain extent, and consequently paper F, a draft of a codicil, is prepared in exact conformity with E; but it has no date, and does not appear to have been executed—

"This is a further codicil to the will of me George Lowdell of Great Bookham in the county of Surrey Esquire I give and bequeath unto the Reverend William Farley of Great Bookham aforesaid Clerk the sum of £100 Also I give and bequeath unto Jane Farley of Great Bookham aforesaid Spinster Sister of the said William Farley the sum of £400 Also I give and bequeath unto Elizabeth the wife of James Bogue of Guildford in the county of Surrey Gentleman the sum of £200 which said legacies of £100 £400 £200 I direct to be paid within 3 months after my decease And in all other respects I ratify and confirm my said will in witness &c."

There is not in the cause any account whatever of these preparations for a codicil: the Court is left quite in the dark when they were drawn up—why they were not executed—how and for what reason the deceased's purpose was changed and so material an alteration made. Mrs. Sheriff, his housekeeper, went with him in his pony-cart to Bogue's for the purpose, as she understood, of giving legacies to the Farleys; this is conformable to the last codicil and does [510] not support the codicil of December, 1824; and though these papers are strong to shew that the deceased intended to give away from the Thorntons pecuniary legacies, there is not the slightest symptom that a thought of revoking or transferring the bequest of the residue had ever shot across his mind.

To account for this departure from the original disposition of the testator's property, Miss Farley has introduced in her plea many charges of violence and of ill treatment on the part of the Thorntons towards the deceased, and has alleged a great quarrel in consequence: but it does not appear from the evidence that there was any great quarrel with which the codicil of December, 1824, had any connection—there was no separation—there were little bickerings, such as were natural with an irritable, penurious, obstinate, old man, between eighty and ninety, labouring under great infirmities and wearying out his attendants; but nothing that did not soon blow over, nor was the intercourse ever broken off. It is true that at one time the deceased gets up after he has gone to bed and insists on Peter's sleeping in his room instead of Quelet; he stands on the stairs in his nightshirt; they endeavour to persuade him to go to bed again, but persuasion being of no avail they carry him back: this is merely out of kindness properly exercised—a very fit interposition; but it does not shew that the deceased was not a free agent at other periods and on other matters. Again, it was said that the deceased, being very penurious, wished to reside at Kennington with the Thorntons, and that they de-[511]-clined to receive him; that in consequence he was exceedingly angry and offended; but the story is so blind and dark that it does not render probable this important variation: if it were true to the extent represented, if his affections were completely alienated and transferred to Miss Farley, he would have broken off all communication with the Thorntons and revoked the specific bequests as well as the residue, but no such thing; his intimacy still continues and the specific bequests remain part of his will.

If there is nothing then à priori to render the alteration probable, what is the proof of the factum? All that has been done in support of it is the production of the attesting witnesses—three tradesmen at Guildford called in by Bogue and who see the deceased subscribe—but nothing more. The codicil is not read over in their presence and the deceased scarcely utters a word.

This is a total failure of proof: it would be quite contrary to all experience and practice to pronounce this sufficient proof. If a man is in full possession of his faculties and the execution takes place in the presence of three witnesses, the presumption is that he knows and intends what he is doing; but when it is the act of a man in such a state and at variance with all his former ascertained intentions, such evidence weighs nothing at all. Bogue alone could have proved what would have been satisfactory to the Court, but Miss Farley has not ventured to produce and subject him to cross-examination: she has been content with her own cross-examination by one single interrogatory, and that is so general that it amounts to nothing; he [512] merely says that he drew the codicil from instructions given by the deceased and was satisfied that he intended to make this disposition. In ordinary cases perhaps this might be sufficient; but as the deceased was in so wretched a condition it was necessary to lay the circumstances before the Court to shew that such means were used that the deceased could not misapprehend the nature and purport of the instrument. The proof then in support of the codicil of December, 1824, supposing there were no revocatory codicil, is extremely slender, considering the infirmity of the deceased's faculties and the strong presumption against the revocation of the disposition contained in the will of 1817 as already set forth. It is pleaded that in 1825 the deceased delivered this codicil to the brother, William Farley; of that no evidence is offered; they have not ventured to produce him, though he has no greater interest under one codicil than the other: the history therefore of this codicil and of the possession of it is much in the dark.

In the summer of 1826, Mrs. Sheriff's health having been much impaired by nursing the deceased, she was absent for six weeks or two months; and Miss Thornton came to the deceased's house to superintend the family during her absence. Miss Farley, who was acquainted with this codicil of December, 1824, seems to have interfered in the domestic arrangements and to have had some quarrel with Miss Thornton, because Mrs. Sheriff states on her return she found matters in confusion. This part of the history is left rather in obscurity: [513] how the existence of this codicil was first known either to Thornton, or to Sheriff, or to the deceased himself, there is no evidence, but the fact is quite clear that there was a considerable quarrel between the Farleys and Miss Thornton: how brought about does not appear—whether the deceased remembered it and repented of the codicil, or whether it was suggested to him; but not only did intercourse with the Farley's cease, and were

they excluded from his house, but in the autumn he was anxious to do something about the codicil of December, 1824, and Peters, his servant, deposes that the deceased desired to be driven to the house of Mr. Hart: and while it is pleaded by Miss Farley that custody and controul were both exercised over him, the fact is clear that he drove out in his pony-chaise as before, that he passed Farley's door constantly and never called, and that (with the exception of the Farleys) his friends and neighbours —different families—visited him as before: so that he was neither kept at home in custody nor controlled as to where he should go; and the evidence is pretty strong that he was at no time a person who would readily submit to be controlled.

It is quite manifest that he became much dissatisfied with Bogue, and very anxious about some new testamentary act after finding out the contents of this codicil: he seems to have supposed that Mr. Bogue had at least misapprehended his intentions, if not too readily furthered the Farley's wishes; but assuming that he well knew and understood the contents of that codicil, and that it was executed under some **[514]** temporary impression, and that of this there was full proof, is it at all extraordinary that he should revert to his former will? Such a return would be much easier of proof than the former departure: it was natural enough that on reflection or explanation, or even on remonstrance, he should gladly and readily revert to it.

Accordingly on Saturday, October 24, he set off in his pony-chaise and made his servant drive him to Dorking to the house of Mr. Hart—a solicitor residing there—a witness produced by Miss Farley, and who has acted fairly and given fair evidence. The deceased could not articulate nor make himself understood further than that his visit had some reference to his will, and the interview ends by a proposal from Hart to call on the deceased at Bookham the following day. This visit to Dorking is not immaterial as shewing that the deceased had an intention to make some alteration when not in the presence of those usually about him, and that he was not a mere instrument in their hands.

On going the next day to Bookham and meeting Mr. Thwaits, Hart had no better success, and made but little progress in understanding the deceased. There the matter rested for a time; but Bogue, having been staying a few days with the deceased at Bookham, before he went away on the third of November, delivered to him copies of all the codicils he had ever drawn for him; and on the 16th of November Hart, being sent for again, went over to Bookham; and he did then arrive somewhat nearer to the deceased's wishes. A draft of the will of 1817 was produced **[515]** and read over to the deceased: when they came to the residuary clause he was asked if he had made a codicil giving Miss Farley the residue, and if it was agreeable to him; he appeared affected; he shook his head and cried, "No, no." Here then, from Miss Farley's own witness, is pretty strong evidence that the deceased—unless he was idiotic, which is contrary to all the evidence—was dissatisfied with the codicil of 1824; and that if he had possessed the power of utterance he would have got it revoked when he first went to Hart's. Hart then proposed, and the proposal was acceded to and adopted, that Bogue should attend on Saturday, November the 18th, as well as Mr. Baker, the surgeon, and Mr. Thwaits, the executor, all disinterested witnesses in respect to this codicil.

Accordingly on the 18th of November they met, and Mrs. Sheriff and Miss Thornton were also present. The papers D, E, F, and G, copies of the several testamentary instruments, were then produced, and Hart read to the deceased G, the copy of the codicil of December, 1824. He deposes that "the deceased listened very attentively till he came to the clause giving the residue to Jane Farley; the deceased then shook his head and hands, and, in a crying tone of voice, said, 'No, no,' and appeared to be affected and in tears." This is Hart's own account, and if the deceased had any intellect and was not completely deprived of understanding, this evinced a wish and intention to revoke that disposition of the residue. Mr. Hart very properly does not trust to his mere reading; he repeats it in the way of explanation, and again **[516]** asks "if it was the deceased's intention to give the residue to Jane Farley." "The deceased again shook his head, cried, and said, 'No, no,' appearing much hurt." Hart then enquired "where the codicil was;" and being told that it was in the hands of Jane Farley, asked the deceased "if it was his wish the codicil should be obtained from her. The deceased immediately nodded assent: deponent said he and Bogue would go to her; deceased again nodded, and, as deponent thinks, said, 'Yes, yes, yes.'" Here is the absence of speech, but here is

intelligent assent and dissent, approbation and disapprobation, as to what is read, to what is explained, and to what is proposed: he understands the drift of questions. Hart and Bogue go to Miss Farley and demand the codicil; she denies having it; the brother is present; but I will not rest on this part of the case; the codicil cannot be obtained, and they return without it. The Rev. William Farley overtakes and enters the house with them, and begins making an accusation against the parties present. A great altercation and much noise ensue; the poor speechless testator can do nothing but shed tears, and Farley at length retires. Hart expresses a wish to decline making the codicil, and goes away as he deposes, "having previously stated to Mr. Bogue that he or any other person who understood the deceased better might do so if they thought proper;" so that he does not protest against the deceased's capacity, and caution those present not to proceed; on the contrary, his objection only arises from his doubt of understanding the deceased; **[517]** and he quite negatives the very plea of Farley by whom he is produced: for on the next article he states: "He cannot depose that the deceased was incapable of the management of himself and his affairs, and was not a free agent. . . . The deceased did not appear at all intimidated—not in the least; and his understanding appeared to be good then as well as on the previous occasions on which he had seen him; for deponent saw him on three occasions prior to the aforesaid 18th of November."

Here then is Miss Farley's own witness, and a person whose conduct appears to have been cautious and sensible, proving from the conduct of the deceased, understanding and volition, and confirming with his own opinion and from his own observation, that the deceased was not intimidated or imposed upon, but was both a free and a capable agent.

Mr. Bogue gives nearly a similar account, varying in some instances as to particular circumstances, but in nothing that affects the credit of either. Baker also in part agrees with one, in part with the other; but all concur in substance, especially on the important point of the intention and conduct of the deceased. Bogue's evidence is, in some respects, even stronger than Hart's. For instance, he says the deceased himself pointed to Hart and the deponent as the two persons to go and demand the codicil of Miss Farley—that the deceased waived his hand to Farley to quit the room; and in some few other particulars: but it will be sufficient to revert to him for the sequel, to **[518]** observe what precautions he took after Hart's departure to ascertain the volition and capacity of the deceased.

Bogue deposes "that when Hart had left the room either Mrs. Sheriff or Miss Thornton or Mr. Baker, or they conjointly, requested deponent to make a new codicil revoking that of the 29th December, 1824."

There was no impropriety in their then requesting Bogue to make the codicil, for they had been present in the room all the time and knew what the deceased's wishes were. Bogue at first declined, because he thought he had offended him: they at length prevailed on him; and this is the account he gives of the transaction: "Deponent, taking either the copy of the codicil of the 29th of December, 1824, already on the table, or the draft of it, which he had brought with him, said to the deceased, 'Do you mean to revoke the legacy to the Reverend William Farley of the sum of £100:' to which the deceased answered distinctly 'No.' Deponent then asked him 'whether he wished to revoke the legacy of £200 to deponent's wife.' 'No.' 'Whether he intended to revoke the bequest of the residue of all his property to Miss Farley;' he replied in a distinct manner 'Yes.' 'Whether he would not give her something.' 'No.' Miss Thornton then asked the deceased to give Miss Farley £200, upon which he said 'Yes,' or by a sign signified his assent. She then asked him, 'Whether he would not leave something to his nephew:' to which he answered 'No.'"

[519] If a will can be made by interrogatories—unless there be something in law to prevent instructions being received in this manner—here is the strongest proof of volition, discrimination, and capacity, particularly, taking it in conjunction with the fact that the deceased's mind had been previously known. Bogue then asked the deceased, "Whether Thwaits should continue in the room while the codicil is prepared;" and he answered "Yes:" and in this there was no impropriety: Thwaits was a friend of the deceased's and perfectly disinterested. Bogue continues: "While he was drawing up the codicil he asked the deceased whether he intended to revoke the appointment he had by a prior codicil made of the deponent as an executor; the deceased answered thereto by taking the very codicil containing such appointment

and throwing it into the fire. When deponent had finished the draft he read it over to the deceased, and asked him 'whether it was right:' the deceased said 'Yes.' He afterwards read the copy all over to the deceased, and put the same question—to which the deceased replied 'Yes.'"

So here are two readings over. The witness then speaks to the execution of the codicil and to the testator's capacity: as to his capacity, in these terms:

"The deceased was unable to converse: he only uttered monosyllables or little more; but he had every faculty, as deponent believes, except the faculty of speech; that he recognized every person who came into the room; **[520]** and nodded when they inquired after his health."

At least this is as good evidence as on the former codicil, and his reverting to the disposition of the will is more natural than the departure from it. But I do not wholly rest on Bogue for this part of the case; here is Baker, the medical attendant, as I have already noticed, who, after speaking to the facts, says:

"He believes it was the deceased's intention to make an alteration in the disposition of the residue of his property, and to revoke the codicil of the 29th of December, 1824, and that the deceased understood and approved of the codicil of the 18th of November, 1826; but he does not believe that the deceased was on that day of sound, perfect and disposing mind, memory and understanding."

This opinion will not much serve Miss Farley's case: but looking at the facts stated by Mr. Baker, on which the Court must form its own opinion, the intelligence and volition seem sufficient for giving effect to the particular transaction. Considering the former disposition, his long affection for the Thorntons, his quarrel with and estrangement from the Farleys in the summer of 1826, it was to be expected that he would revert to his original purpose. His old and intimate acquaintance, Mr. Hollobrook, corroborates this detail of the facts:

"Bogue read the codicil in the hearing of all present, and then asked the deceased, 'Will you leave Miss Farley £200?' to which he answered in a firm tone 'Yes.' 'Will you leave Mr. Farley £100?' 'Yes.' 'Mrs. **[521]** Bogue £200?' 'Yes.' Bogue then enquired 'Whether he wished to leave any more:' to which he answered, 'No:'" that is, then, reverting to the will. The witness continues, "That on the day and at the time of the execution of the codicil the deceased was of sound mind, memory and understanding, and, as far as his mind was required to act, was as capable of doing that or any other serious act requiring thought, judgment, and reflection as ever he was."

Now, upon the evidence already quoted, there is sufficient for me to pronounce that the codicil of 1826 is proved: there is no clandestinity in the transaction: Hollobrook, who attested the will of 1817, is, the day before, requested to attend for the purpose of being a witness. Mr. Baker is also appointed to be present, and Bradbury is asked to be a witness: there is no appearance of any urgency in any part of the business. The Court ought also to recollect that the deceased was not then at the point of death; he lived four or five months longer, Miss Thornton staying with him, he acting as before, driving out in his pony chaise, signing letters, signing drafts, playing at cards.

Upon the whole, there can be no doubt that before his mind was in any degree affected, viz. when he executed the will in 1817, it was the fixed and decided intention of the deceased to give the bulk and residue of his fortune to the Thorntons; and that before any alteration was made in that disposition he had suffered two severe paralytic attacks. The codicil made in favour of Miss Farley is not sustained by any satisfac-**[522]**-tory evidence of a rational change of affection or of intention in that respect; but assuming that the evidence is sufficient, the codicil revoking the altered disposition of the residue and reverting to the former intention is at least as strongly, in fact much more strongly, sustained.

The Court therefore only grants probate of the will of the codicil of 1822, and of the codicil of 1826: but, under the peculiar circumstances of the case, I shall not give costs.

[523] BROWN *v.* BROWN. Arches Court, Trinity Term, 1st Session, 1828.—To found a sentence of nullity by reason of impotency, the impediment must be shewn to have existed at the marriage, and to be incurable: impediment not proved

incurable.—Semble, that an impediment not natural but supervening is no ground of nullity.

[See further, 2 Hagg. Ecc. 5.]

This was a cause of divorce, by reason of cruelty and adultery, promoted and brought by Elizabeth Brown, wife of John Brown, of St. Ives in the county of Huntingdon. The marriage took place on the 3d of November, 1825, and on the 12th of October, 1826, the parties separated.

A libel consisting of twenty-two articles, with two exhibits annexed, was admitted without opposition. To this libel a negative issue was given, and three witnesses were examined as to the fact of marriage. An allegation (of eleven articles with an exhibit) on the part of John Brown was after debate admitted as reformed. It alleged that although a marriage was in fact had and solemnized between the parties, they never lived and cohabited as man and wife, "by reason of some natural impediment and incurable malconformation and **[524]** bodily defects which cannot be removed by the art or help of physicians and surgeons [as by the judgment and inspection of matrons and other lawful proofs to be made in this cause will manifestly appear]." (*a*)[1] The prayer of this allegation was, "That the marriage might be pronounced to have been and to be absolutely null and void from the beginning." On behalf of Mrs. Brown this allegation was counterpleaded and contradicted: and witnesses having been examined on both sides, the cause at petition of both proctors had been concluded as to the fact and validity of the marriage.

Judgment—Sir John Nicholl. Mrs. Brown was past the age of child-bearing at the time of the marriage: therefore the primary and most legitimate object of wedlock, the procreation of issue, could not operate; and a man of sixty who marries a woman of fifty-two should be contented to take her "tanquam soror." But here there is a failure of proof on both the points which it was incumbent on the husband to establish: first, that there was an impediment to consummation existing at the time of the marriage; and, secondly, that that impediment was incurable.

It was pleaded, indeed, in the husband's allegation that the disease was natural and incura-**[525]**-ble: had it been stated that though incurable it was merely a supervening defect—the not unusual attendant of advanced age, and in a woman past child-bearing—I do not know that the Court would have admitted the plea at all: for I have yet to look for an authority that would set aside the marriage, even if these facts, now insisted on as sufficient to found a sentence of nullity, were held to be proved. But, in my opinion, they are not proved: more especially as to the disease being incurable. Mr. Copeland, ten months after the marriage, afforded her some relief; the cure was in progress when he ceased to attend her; and Mr. Okes, a surgeon of Cambridge, and two experienced women, who both have had large families, are of opinion that the obstruction is removed.

Without therefore deciding any thing as to the other branch of the case, I shall confine the expression of my opinion to this: that the husband has failed to prove the disease incurable: and shall leave the wife to proceed with the suit for adultery, recommending however that the parties should come to some arrangement. The legality of the marriage is established by the Court pronouncing that the husband has not proved his allegation.

[526] HAWKES *v.* HAWKES.(*a*)[2] Arches Court, Trinity Term, 2nd Session, 1828.—Alimony pendente lite is usually about one fifth of the annual income: but the proportion may vary according to the circumstances of the parties.

[Referred to, *Francis* v. *Grover*, 1845, 5 Hare, 47.]

This was a cause of divorce brought by the husband against the wife. The present application respected an allowance of alimony pendente lite.

The King's advocate and Haggard for the husband.

Lushington and Pickard contrà.

Judgment—Sir John Nicholl. The husband's income is admitted to be nearly £1700.

(*a*)[1] The passage between brackets was struck out before the plea was admitted: the Court observing that, as it appeared from the allegation Mrs. Brown more than once since the marriage had submitted herself to the inspection of surgeons, the Court would not direct a further examination.

(*a*)[2] Vide supra, p. 194.

Now, though the wife during the pendency of the suit must be presumed not to be guilty, yet she is not to live exactly in the same way as if she were exempt from any imputation: she is as it were under a cloud, and should seek privacy and retirement. These Courts have in such cases been generally disposed to consider as a fair medium about one fifth of the net income, but they have allowed their decisions to be regulated by, and to vary according to, circumstances: the husband, for instance, must have a larger proportion if his rank and condition require more to support them. Here the income arises out of pay; and consequently, first, it is of uncertain duration; the Court would therefore not grant so large an **[527]** allowance as if it proceeded from substantial property: secondly, it is given him expressly to compensate his services and to meet his expences (which must be heavy) as an officer—a captain of cavalry on an East India station: this furnishes another reason why a smaller proportion should be allotted. Again, he has three children for whose maintenance and education he must necessarily make remittances to this country—that is always a further circumstance that operates in the consideration of these questions.

It appears that, previous to the wife's alleged misconduct, the husband allowed £400 per annum for the maintenance of his wife and children: my mind has been fluctuating between £200 and £250 per annum; but I have decided on allowing her £250, considering that, during the progress of the suit, there has been no appearance of a disposition to proceed vexatiously: on the contrary, by admitting the answers of the husband's attorney, his brother, to the allegation of faculties, much delay which would have arisen, since the husband is in India, has been prevented. I allot alimony at the rate of £250 per annum from the return of the citation.

On the third session the Court pronounced the case fully proved, and signed the sentence of separation.

[528] DURANT *v.* DURANT. Arches Court, Easter Term, 3rd Session, 1826.—In a suit for divorce brought by the wife, repeated and profligate adultery being proved on the part of the husband (who, however, had to maintain and educate twelve children), permanent alimony at the rate of £600 per annum (in addition to £120 per annum separate property) out of a net income of £4000, allotted from the date of the sentence, three years before; the cause having in the interval been carried by appeal to the Delegates, but remitted, no steps being there taken by the appellant, and the remaining delay being occasioned by his absence from the kingdom.

[Discussed, *Dempster* v. *Dempster*, 1861, 2 Sw. & Tr. 438. Qualified, *Collins* v. *Collins*, 1884, 9 A. C. 205. Explained, *Russell* v. *Russell*, [1895] P. 315: affirmed, [1897] A. C. 395.]

This was a suit of divorce instituted by Mary Ann Durant against George Durant, her husband, by reason of his adultery.

The King's advocate and Haggard now applied to the Court for an allotment of permanent alimony under the circumstances stated in the judgment.

Judgment—Sir John Nicholl. The present application is for the allotment of permanent alimony. The suit has been long depending—the original citation having been taken out from the Consistorial Episcopal Court of Lichfield and Coventry in January, 1820. The husband, who had an interest in bringing the question to a speedy hearing, as during the pendency he had to pay his wife's costs and alimony, is the person who in every stage has opposed the most vexatious delays. The case came up here by appeal on an interlocutory matter (see 1 Add. 114); there was also an appeal to the Delegates on an alleged grievance; and the cause being remitted, a final sentence was given here in **[529]** Easter Term, 1825; (*a*) from this judgment the husband again appealed, but took no steps in the Delegates—did not even print the process: the cause was accordingly a second time remitted to this Court in December, 1827; and the present application has not been sooner made, because the husband has been resident abroad.

It is impossible to conceive a case in which a husband could have treated a wife more injuriously, or have conducted the suit more vexatiously: he has thrown every possible impediment in the way of her obtaining justice; he has evaded every attempt to bring the question of alimony before the Court. The only way has been to allot

(*a*) A report of this judgment is printed in the Supplement, p. 733, post.

certain sums by way of alimony—the whole, taken together, has not exceeded £140 a year—which, and £120 a year of her own, make the total amount of the income she has been receiving £260; but this is now brought still lower by the reduction of the five per cents., in which stock her small property was invested.

Out of this pittance she has been obliged to incur very considerable expences: being in very delicate health, she has been compelled to resort to the sea and to have the benefit of medical attendance, and, in addition to this, she will have to defray some extra costs in this protracted litigation.

The husband, it appears, is a gentleman of considerable fortune and consequence at Tong **[530]** Castle in Shropshire, where he possesses the manor and estate, and might move in the most respectable society. Though his wife has borne him fourteen children—twelve of whom are now living—yet he has been guilty of the lowest and most profligate adultery. Notwithstanding these circumstances the Court must not allow any indignant or vindictive feelings to operate in allotting to this lady her permanent alimony. It must take all the circumstances coolly and impartially into consideration.

An allegation of faculties having been given in, the husband's answers were taken; but, as they were not satisfactory, witnesses were produced to prove the annual value of the estates. Many of the tenants and occupiers of particular farms were examined, but the principal witness was Bishton, a surveyor, well acquainted with the property: it is not, however, necessary to ascertain very precisely the exact amount, a general rough guess, coupled with other considerations, will be sufficient. The annual value, according to the survey of Bishton (exclusive of timber amounting to £36,000) is £6380; according to the husband's answers £4400: and the particular witnesses make it more than the husband but not quite so much as the surveyor. If, deducting outgoings (but not the ordinary repairs nor improvements,(*a*) as I suppose the surveyor, in estimating the estate, would consider these), **[531]** mortgages, interest on debts, and his mother's annuity, I take the net income from the estates at £4000; it is the utmost that the husband can be supposed to possess. Here are twelve children, sons and daughters, some growing up, whom it is necessary to maintain, educate, and advance in life: a part of the income must necessarily be expended in meeting these demands. Possibly, if the wife has a liberal allowance, she would gladly take some of the children, particularly the daughters, and the Court would gladly remove them from the contagion of the father's example; but it can neither direct nor calculate upon that. The wife, however, is entitled to be subsisted in a state of comfort and respectability consistent with her station in society. The misconduct of her husband is not to deprive her of that to which she would be entitled as his widow (for she is to be looked upon as a widowed wife) and as the mother of this large family. It does not, however, appear if any nor what settlement was made for her in case of her widowhood: but it is stated that an annuity of £400 is paid by Mr. Durant to his mother, Mrs. Chapman. She has, I presume, re-married, and may therefore have lost part of the provision she would have enjoyed had she continued unmarried—in her widowed state. Mrs. Durant too appears in very delicate health: but, considering the largeness of the family Mr. Durant has to provide for, if, in addition to her own £120, I decree £600 a year to be paid by the husband as permanent alimony, payable quarterly and from the date of the sentence in **[532]** this Court, it seems to me that I arrive at the fair justice of the case between the parties: I am the more cautious not to go too far, as Mr. Durant does not appear by counsel. The arrears are justly due, and, if she can recover them, will assist in discharging any debts she may have contracted, and will enable her to live in comfortable retirement adapted to the enfeebled state of her health.

KEMPE *v.* KEMPE. Arches Court, Trinity Term, 3rd Session, 1828.—Permanent alimony is always larger than alimony pendente lite: out of an income of £750, the husband having no state nor family to maintain, £250 allotted to the wife, she taking charge of their only child.

This was a suit of divorce, or separation à mensâ et thoro, brought by letters of request from the Court of the Archdeacon of Cornwall, and instituted by Elizabeth

(*a*) In his answers Durant estimated "annual repairs and improvements"—£500; and "abatement of rent per annum for lime and underdraining"—£400.

Kempe against John Arthur Kempe, her husband, by reason of his adultery. The marriage took place on the 3d October, 1826; and the cohabitation ceased in April, 1827.

Phillimore and Lushington for the wife.

The King's advocate and Addams contrà, submitted, in respect to an allotment of permanent alimony, that the property wholly came from the husband.

[533] *Judgment—Sir John Nicholl.* It being admitted in this case that the guilt of the husband has been fully established, it is my duty to pronounce the sentence prayed by the wife, viz. a separation from bed and board on account of her husband's adultery. I proceed then to the consideration of the question of permanent alimony.

Undoubtedly the wife is entitled to a comfortable subsistence in proportion to her husband's income, and the allotment is always more liberal when the husband's delinquency stands proved than pending suit. In this case there is no reason why the allowance should be less than usual: the husband has neither state nor family to support; he is living in retirement on his half-pay and private fortune. His income is £729, besides personal property worth about £700, making altogether an income of rather more than £750 per annum. Alimony at the rate of £250 per annum will not be too much, as Mrs. Kempe is, I apprehend, willing to take the child. If she declines to take it, the Court may be induced somewhat to lessen this sum, but if the refusal proceeds from the husband; if he will not allow his wife the comfort of retaining her infant; the Court, though it cannot control a father's rights, would not be disposed to hold such refusal as a ground for reducing the allowance. His conduct has been highly reprehensible; he is not a very fit person to bring up the child under the tuition of the partner in his guilt—a girl, too, of low condition—his servant before marriage; and it is due **[534]** to the morals of society that a dissolute husband who so offends should contribute liberally to the support of an injured wife: and should also, at least, have no inducement to exercise his power as a father, by withdrawing the child from the care of the mother, and to bring it up in the scene of his own domestic profligacy. The child is under a year old, and as Mrs. Kempe has acted with great forbearance and very much with the feelings of a wife and of a mother on the occasion, the welfare of the child would probably best be secured under her maternal care.

I allot £250 per annum as permanent alimony, to commence from the date of the sentence: for though no alimony pendente lite was granted (because none was asked), the suit has not been long pending, and the present allotment is liberal. Besides, the question now solely regards the permanent alimony, and I should interfere with the usual course of practice if I decreed its commencement to date from an earlier period.

[535] GRIGNION *v.* GRIGNION. Arches Court, Trinity Term, 4th Session, 1828.—A sum of money being left to the executors, in trust to invest and pay the interest to A. for life, and after A.'s death to divide the principal among his issue on their respectively attaining the age of twenty-one, with benefit of survivorship till that age, A. being dead, his only three children majors, and the shares of two of them paid over, the Court will proceed, in a suit of subtraction of legacy against the executor, to enforce payment of the third's share, holding that the character of trustee is at an end, and that of executor alone subsisting.

[Referred to, *Perrin* v. *Perrin*, [1914] P. 137.]

On petition.

Judgment—Sir John Nicholl. The facts and proceedings in this case were stated when the protest was argued; (*a*) but it may be convenient briefly to repeat them.

It is a suit for subtraction of legacy brought by Andrew Biggs Grignion, one of the substituted residuary legatees in the will of Reynolds Grignion against Claudius Grignion, the surviving executor. The citation was personally served on the 7th of February, 1828: an appearance was given, but under protest, alleging, "that Reynolds Grignion, the testator, died in 1787, leaving a will dated in 1785, of which Isaac Webb and Claudius Grignion were executors; and that he thereby bequeathed to his executors £120 and one fourth of the residue in trust; that the executors had proved the will in the Prerogative Court and invested the £120 and the fourth part of the residue in their own names as trustees; and therefore that the matter is not within the jurisdiction of this Court."

(*a*) Lushington in support of the protest; Addams contrà.

It was replied, "That after payment of the debts and other legacies, one fourth of the residue and £120 were directed to be placed in Government securities in the names of the [536] executors, the interest thereof to be paid to the testator's son Israel for life, and on his death the principal to be divided among his children on attaining the age of twenty-one; that Israel died in 1813, leaving three children, Jane, James, and Andrew, the party in this cause; that the executors paid Jane and James each one third on attaining their respective majorities; that Andrew Biggs Grignion attained the age of twenty-one on the twenty-first of June, 1827, but that the executor refuses to pay his proportion; that he therefore submits that the question is subject to the jurisdiction of this Court."

The question then is, whether this Court has any jurisdiction to entertain this suit: if it clearly has no jurisdiction, the Court would not suffer the parties to proceed and to incur unnecessary expence. It would stop without waiting for an injunction; but, if the point be at all doubtful, the Court would be bound to proceed; for to refuse the exercise of a jurisdiction, which is competent to entertain the suit, and to which a party applies, is a "sort of denial of justice."

Is there then any sound principle or authority clearly shewing that this Court cannot and ought not to entertain the case? Causes of subtraction of legacy are undoubtedly of the cognizance of this Court: the executor receives his authority from the ecclesiastical jurisdiction—a part of his functions (which he is expressly sworn to perform) is to pay the legacies; if he omits to discharge this duty the jurisdiction from which his authority emanates is [537] naturally resorted to, in order to compel him to proceed. This Court then enforces payment where the legacy is subtracted. It is true that Courts of Equity exercise a concurrent jurisdiction; the principle upon which that concurrency has been assumed is that all executors are in the nature of trustees; the legal property of the effects is in the executor and must be collected by him, though he holds these effects in trust for the legatees. Speaking with all possible respect of past times, there does seem a little of refinement and fiction even in the foundation of this concurrency of jurisdiction; but that is now a point perfectly settled. It is equally settled that if there is an unfinished trust, or if the interests of third parties are to be protected, Courts of Equity have not merely a concurrent but an exclusive jurisdiction. On that ground, if in this case any proceedings had been attempted during the lifetime of Israel Grignion, the legatee for life, or during the minority of his children, this Court would have refused to entertain the suit; there being ulterior interests to protect, to which a Court of Equity, being the guardian of all trusts, could alone be competent. On the same principle, if a legacy is given to a married woman, this Court is incompetent, because it cannot compel the husband to make a settlement; it can merely enforce payment: so also at one time Courts of Equity required legatees to give security to refund, and on that ground they granted injunctions, though that ground would go nearly to annihilate this jurisdiction altogether, and to assume an exclusive jurisdiction: but [538] now Courts of Equity have themselves abandoned that rule of requiring legatees to give security to refund; and therefore allow these Courts to compel payment.

Now, what is the case in the present instance? The legacy is given to the executors in trust for Israel for life; then to his issue, with benefit of survivorship, till they attain the age of twenty-one, but, having attained that age, to each of them absolutely share and share alike. It is hardly necessary to read the will itself, but I will advert, for greater certainty, to the part which applies to the present question:

"And as and concerning the £120 and the remaining fourth part of the residue of my personal estate given to Isaac Webb and my son Claudius in trust—I do hereby declare that the same are and is so given to them upon trust that they shall and do place, lay out invest and continue the same at interest in or upon some or one of the public funds or government security, and also shall and do from time to time for and during the term of the natural life of my son Israel Grignion pay the yearly dividends interest and proceeds thereof unto my said son Israel or authorize and suffer him to receive and take the same when and as they become due and payable to and for his own use and benefit." [So it is given to Israel for his life.] "And as to the said sum of £120 and the said last mentioned fourth part of the rest residue and remainder of my personal estate and effects and the stocks funds or securities in or upon which the same shall or may be so placed laid out [539] or invested my will and mind is and

I do hereby declare that the said Isaac Webb and my said son Claudius their executors and administrators shall and do from and immediately after the decease of my said son Israel stand be and continue possessed thereof interested therein and entitled thereto in trust for all and every the child and children of my said son Israel equally to be divided between them share and share alike to be paid and transferred to them respectively when and as they respectively shall attain the age of twenty-one years."

These trusts are now all at an end. Israel is dead leaving three children; all have attained the age of twenty-one; each is entitled to his third; there is no resulting trust to be executed; each has a vested absolute interest in his legacy, to receive it and do what he pleases with it. Nothing remains to be done but to enforce payment. The executor, though not expressly called a trustee in the will (a fact that makes no real distinction), has had both characters, his function as trustee has been finished, his duty as executor remains, namely, to pay the legatees. This seems to be the substantial good sense and plain reason of the matter, stripped of refinement, and fiction, and technicality. As executor he is sworn to pay the legacies: this is a legacy now become absolute and due, simply to be paid; the executor subtracts it, he refuses payment: has this Court then the jurisdiction to enforce the duty which, when the office was committed to him, **[540]** he swore to this Court to discharge? or is it clear that a Court of Equity would grant an injunction to restrain this Court from proceeding?

The authorities quoted do not satisfy me that an injunction would be granted; the trusts under this will have never been subjected to the enforcement of any Court of Equity; there have been no proceedings had so as to put any other Court in possession of the case, supposing it a question of concurrent jurisdiction; the two elder children have been paid each one-third, so that there is not any question of construction: none is alleged. It was thrown out in argument, but it is not alleged in the protest, and perhaps need not be noticed, that there may be behind a question of the legitimacy of this younger child: but surely a question of legitimacy, of all others, is not one which the Court Christian is not competent to entertain; the point, however, is not raised for my consideration: but do the authorities shew that a Court of Equity would enjoin under the circumstances of this case? if they do, and clearly, this Court would not proceed.

The general proposition is that Courts of Equity have the exclusive jurisdiction of all trusts: the answer is, here is no trust remaining; here only remains the duty of an executor, the payment of a legacy absolutely vested in the legatee. Mr. Toller's book (*a*)[1] is only of authority so far as it is supported by the cases to which **[541]** it refers. In the case quoted from 1 Barnewall and Cresswell,(*a*)[2] it appeared upon the face of the writ de contumace capiendo that the suit had been brought against the party in the character of trustee: therefore the Ecclesiastical Court had no right to proceed; and he was discharged out of custody. Here the suit is brought against Claudius Grignion in his character of executor.

The next case is *Stonehouse* v. *Stonehouse* (1 Dick. 98). The whole of that report are the following words:—"Injunction granted to stay proceedings in the Spiritual Court for payment of a legacy until the hearing, and plaintiff to speed the cause." This is the whole; there was a suit depending, because the order was to stay proceedings till the hearing: such an order would be a matter of course. There might be existing trusts to execute, respecting which the suit in equity was depending; it might be a question of assets and of account; it might be a legacy to a minor or to a married woman: that case is much too blind, and not at all sufficient to influence me. On the present occasion it is not alleged that there is any suit in any other Court.

Smith v. *Kempson* (2 Dick. 769) is of the same sort. It is an injunction to stay suit for a legacy till the hearing, while there was a proceeding in Chancery between the executors for an account to ascertain assets. The same observations apply to this case as to the last; it was a very good **[542]** reason to stay proceedings that a suit was depending in another Court, where a question of accounts was under investigation. The decision in that case does not lead me to apprehend that this Court would in the present instance be prohibited, for it does not determine that the Ecclesiastical

(*a*)[1] Toller on Executors, p. 490, fourth edition.
(*a*)[2] *Ex parte Jenkins*, 1 B. & C. 655.

Court had no jurisdiction, only that the suit must be stayed there while the Court of Equity is proceeding in it for another purpose.

There are two cases in Price's Reports: *The Attorney General* v. *Lady Louisa Manners* (1 Price, 411), and *Hill* v. *Atkinson* (3 Price, 399). The question in both was whether money paid into the bank in trust for legatees was liable to the legacy duty and to what duty. There was no question of jurisdiction or injunction; they bear very remotely, if at all, on the present question: if at all, they bear adversely on this protest; for it was not held that the money was appropriated. The latter case is also reported in Merivale (2 Meriv. 54), and upon dismissing the petition (which was merely as to the payment of the legacy duty) the Lord Chancellor observed: "In the case of *The Attorney General* v. *Lady Louisa Manners* it was the opinion of the Barons that an executor, who is also a trustee, shifting a legacy from his hands as executor into his hands as trustee, does not thereby appropriate the legacy." So that merely investing in the funds, according to the opinion of the Ba-**[543]**-rons of the Exchequer, does not alter the character; but if paid into Court under a decree, and the trusts declared (this is the distinction), it would be an appropriation. That case goes thus far; that where there is a double character of executor and trustee, an investment under an interference of the Court is an appropriation: but in neither, as I have said, was there any question discussed as to the ecclesiastical jurisdiction.

The more direct and most important case is an *Anonymous case*, before Lord Hardwicke in 1738, reported in Atkyns (1 Atk. 491). It is expressly under the head "Injunction:" in which the counsel for the plaintiff, in shewing cause why an injunction should not be dissolved, relied on the case of *Knight* v. *Clark*, cited in *Noel* v. *Robinson* (1 Vern. 93), where the Lord Chancellor (Nottingham) said, "There was a difference between a suit for a legacy in the Spiritual Court and in this Court; if in the Spiritual Court they would compel an executor to pay a legacy without security to refund, there shall go a prohibition." The ground there is, then, that the Spiritual Court would not require any security for refunding, which in those days the Courts of Equity did. "Lord Hardwicke continued the injunction till the hearing, because the plaintiff is an executor in trust only, for where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in le-**[544]**-gacies, yet this Court will grant an injunction, trusts being only proper for the cognizance of this Court." Now if this meant that an injunction would be granted wherever the executor, though not expressly appointed a trustee, yet in effect was acting in trust for the legatees, this would tend to destroy the jurisdiction of this Court in all questions of legacy. But the Lord Chancellor proceeds: "Since the case in Vernon the rule is now varied, for legatees are not obliged to give security to refund upon a deficiency of assets." The rule, therefore, in a Court of Equity does not vary from the rule of this court in that respect. The reporter adds, "His Lordship mentioned a case where an infant was entitled to a legacy upon her marrying; the husband instituted a suit in the Ecclesiastical Court for it, which he might do, but upon the executors bringing a bill, and suggesting this matter to the Court, an injunction was continued to the hearing." In that case there was a ground for the injunction, because this Court could not compel the husband to make a provision suitable to the rights of the wife, and it was therefore necessary to resort to the Court of Chancery.

This is the whole of the case, and it leads to these results: that where there is a trust, or where the Ecclesiastical Courts cannot do justice, as happened while the demand for security to refund was the practice of the Courts of Equity, or where a married woman is to be protected, or where there are proceedings in account to ascertain assets, or where there is **[545]** any thing in the nature of a trust to be executed; an injunction will go—but not, as I understand, where there is the bare duty of an executor to perform—to pay legacies: for that would in all cases give an exclusive and not a mere concurrent jurisdiction.

In the present case, in my view, the simple duty of executor remains to pay the legacy. there is no longer any trust but that which belongs to all executorships. I have considerable doubts whether any Court of Equity would enjoin, and perhaps have reason to think that they would not. Times are changed—a more liberal and enlightened view of questions of jurisdiction is taken: on the one hand, these Courts have no disposition to encroach—ampliare jurisdictionem; on the other hand, Temporal Courts have no jealousy—no wish to resort to fictions and to technicalities:

they look (where not bound by former decisions directly in point) to the real substance and sound sense of the question—to that which is really most beneficial to the suitors —the public—and subjects of the country. There is quite as much business in all Courts as, under the increase of wealth and population, the institutions are able to discharge. The original jurisdiction in cases of legacy, to enforce payment and to compel executors to perform their duty, was in these Courts: Temporal Courts, however, interposed by injunction or prohibition when those Courts were already in possession of the cause, or when the powers of the Ecclesiastical Judge were defective or insufficient: but I find no **[546]** case in which Temporal Courts have stopped these Courts where no trust was existing (beyond the mere technical trust of executorship) which remained to be executed, where no legatee was to be protected by any special power, where a Court of Equity had not already been resorted to and was not in possession of the case.

The present case, as far as appears and is stated in the protest, is a mere subtraction of legacy—is a suit simply to enforce payment. The party who applies may have reasons for resorting to this jurisdiction—by the very fact of his suing here it must be presumed that he conceives it would be a more convenient and beneficial jurisdiction for him: whether he judges rightly it is not for this Court to decide; nor, unless it clearly appeared that the Court had no jurisdiction, has it any right to refuse to entertain the suit; it would be a denial of justice.

Thinking, then, that at least it is a matter of doubt whether Temporal Courts would stop this suit by injunction, I hold it proper to over-rule the protest. At the same time I should much regret misleading the parties and involving them in unnecessary expence, by taking an erroneous view of the subject through an insufficient acquaintance with the rules of a Court of Equity. I should therefore strongly recommend to the party who institutes the present proceeding (being now possessed of the view taken by this Court) to resort to the best advice he can respecting the rules of Courts of Equity. If under **[547]** that advice he should be satisfied that an injunction would be granted, he may immediately declare that he proceeds no further in this Court.

In respect to costs, it seems proper to reserve that consideration till the cause is finally disposed of.

Protest over-ruled.

[548] IN THE GOODS OF WILLIAM CRINGAN. Prerogative Court, Trinity Term, 1st Session, 1828.—A person dying in Scotland having by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate granted to the nominees as executors.

On motion.

The deceased, late a surgeon of H.M. Twenty-fifth Regiment, died in Scotland in January, 1828. By his will, dated "Antwerp 1st June, 1815," he bequeathed to his mother the interest of all his money for life; and at her death he gave to each of his brothers £100, and to each of his sisters £200: the remainder of his property he directed to be equally divided among his brothers and sisters and their lawful heirs. The deceased appointed no executor nor residuary legatee; but the last direction of the will was in these terms:—

"It is left to the Legatees mutually to appoint two intelligent and trust worthy persons to execute this deed, and I would earnestly recommend the money to be either placed in the English stocks or lent on good landed security with a guarantee for the regular payment of the interest."

The deceased left a mother, three brothers **[549]** and three sisters; all of whom (with the exception of two of the brothers in Canada) had, by their proxy, appointed "Thomas Hutchinson of Terswaldsmains, near Dumfries, and John Halliday of Sanquahar, merchant, to act as executors under the will of William Cringan, and to take probate thereof." The substitution of these persons, it appeared, had been admitted by the Court at Dumfries upon the appointment, solely, of the brothers and sisters in Scotland.

The property in this country was a sum under £200 due to the deceased for pay.

Addams moved for probate to the executors substituted by the majority of legatees.

Per Curiam. The provision in this will, as to the appointment of executors, I am

informed, is not very unusual in Scotland; and had the Commissary Court at Dumfries, which has allowed the substitution, decreed probate, I should have had nothing to do but to follow the grant on the production of an exemplified copy. However, understanding from the deputy-registrar that instances have frequently occurred of granting probate to persons nominated by those authorized by the testator so to nominate, I shall allow this decree to pass as prayed.

Motion granted.

[550] In the Goods of William Holder Jerram. Prerogative Court, Trinity Term, 1st Session, 1828.—Probate, in common form, of a paper with an attestation clause and no witness, decreed to the only person entitled under an intestacy, on affidavit of recognitions of it, as his will, by the deceased.

On motion.

The deceased died on the 27th of March, 1828, a bachelor. His will, written very fairly with his own hand, was dated on the 20th of January, 1825, and signed; but below the signature was the word "witness."

From a joint affidavit made by a brother and sister of the deceased it appeared that in January, 1827, the deceased informed his brother that his will was in a secret drawer of his writing-desk, which he then shewed him how to open, in case of his death; and having produced his will, he replaced it. It further appeared that about a fortnight prior to his death the deceased told his sister "he had made his will;" and that on the day after his death it was found by her in the secret drawer of his writing-desk. The deceased's father, who was also an executor, had been sworn to administer the effects under this will; and Dodson now moved that probate might pass in common form.

Per Curiam. The circumstances in this case fully rebut the presumption of law; and the father, the only person entitled under an intestacy, has been sworn as executor of the will.

Motion granted.

[551] In the Goods of Elizabeth Wenlock. Prerogative Court, Trinity Term, 1st Session, 1828.—A paper manifestly unfinished and imperfect cannot be proved on mere affidavits of finding, hand-writing, and the non-existence of any other testamentary paper.

On motion.

Elizabeth Wenlock, late of Brightlingsea, near Colchester, died on the 27th of March, 1828, a widow, leaving three nieces and two nephews, her next of kin, and the persons entitled to her personal estate in case she should be pronounced to have died intestate. These parties (if alive) were stated to be in obscure stations, and the whole of the deceased's property was of the value of £120.

At her death was found a paper, beginning thus—"This is the last will and testament of me Elizabeth Wenlock:" it concluded with appointing her cousin, Mrs. Hodder, of London, and Mr. Root, schoolmaster of Brightlingsea, "to be my whole executrix and executor of this my last will and testament, in consideration of which I beg his acceptance of five pounds." This paper was in the deceased's hand-writing; but it was not signed, nor dated; and there was no residuary clause: it was, however, stated to contain an entire disposition of her property. Mrs. Hodder was duly sworn as executrix: and [552] probate was applied for in the Prerogative Office, on an affidavit that the paper was in the hand-writing of the deceased. When the probate was presented for the signature of the deputy-registrar he directed an affidavit to the effect that no other paper of the deceased's of a testamentary import had been found.

William Root of Brightlingsea, schoolmaster, and Mrs. Hodder, the executors under the paper in question, accordingly made an affidavit, from which it appeared that, on the 21st of December, 1827, the deceased left with Root the said paper, and requested him to prepare from it a more formal will, which he did; that on the 13th of March, 1828, the deceased told Root that "as her father had recently died, she could not execute the will in the form it then stood; nor until she had ascertained what property she really had to dispose of;" that upon this occasion Root gave the will he had prepared to the deceased; after which he never saw, nor heard from, her; that upon her death this instrument prepared as a will was found among the

deceased's papers, but probate of it had not been asked, "because they believed that the deceased intended the paper which she delivered to Root should operate and take effect as her last will and testament in case of her death without executing one of a more formal nature."

Dodson now moved for probate of the paper in the hand-writing of the deceased.

[553] Per Curiam. This motion certainly affects me with some degree of surprise and alarm on account of the irregularity of the proceedings. The deceased died on the 27th of March, 1828. A paper is brought to be proved which, on the face of it, is unfinished, and more like a draft than a will. It has no concluding words, no date, no signature; and yet that paper is carried to the Prerogative Office for the purpose of probate in common form. This must have been done by a mere clerk, it could not have been by the proctor himself, an experienced practitioner.(*a*) But the Court is sorry to find that even a clerk should be so ignorant as not to know such a paper could not pass in common form, on a mere affidavit of hand-writing. What appears more extraordinary is that the clerk of the seat considered the probate of this instrument as a regular grant. I should wish to be informed who was the clerk of that seat; he ought to have known better; or if he was not better instructed, he should have carried the paper to the acting deputy-registrar, and requested his instructions thereon; but no such thing; it is laid before the deputy-registrar for his signature as a perfectly regular document. Fortunately, when **[554]** papers are carried to the deputy-registrars for their signatures, they are very exact in looking to the nature of the grant, and on the present occasion the imperfect state of the paper was discovered.

It is, however, a serious hardship that all responsibility should rest on them, for in a great press of business it is possible that an irregular probate might inadvertently pass them unnoticed; but it is hardly possible such a thing should occur if the public had, as they are entitled to have, a guarantee for the regularity of the grant in the careful examination of the proctor in the first instance; of the clerk of the seat in the second; and, ultimately, of the deputy-registrar.

It is stated that the deputy-registrar merely directed an affidavit as to the finding of the paper; this must, I think, have been a misapprehension, even from the face of the instrument itself, which is unsigned, undated, unconcluded, and appoints no residuary legatee. What now turns out to be the case upon the affidavit? that it was only a draft which was carried to Mr. Root to enable him to prepare a regular will. He, at the time, suggests an alteration, which is acceded to by the deceased; and Root prepares the will for execution. The matter, however, does not rest here: the deceased comes again, says, "No, I cannot execute this will in its present form; my father is lately dead; I must sell out some stock to pay his funeral expences and some debts; I don't know what property may re-**[555]**-main:" she then takes the will away with her, and leaves the draft; so that it appears probate of this paper, abandoned by the deceased, was on the point of passing in an ordinary way. This, of itself, is sufficient to excite considerable alarm; and still more so when I look to the statement that there are several next of kin—persons in very low and obscure stations of life—who, though they are the parties legally entitled to take the property, yet have not been informed of these applications for probate. Every practitioner here must be aware that an unfinished paper cannot take effect on a mere affidavit as to finding and hand-writing. If no other paper exist, that fact alone will not render such an instrument as this valid without some circumstances accounting for its imperfection, and without first citing the next of kin. It is then quite impossible that this motion can be granted; and I direct that inquiry may be made who was the clerk of the seat that would have allowed the probate to pass; and that he may be desired to act with greater caution for the future.

Motion refused.

(*a*) The proctor stated that he was, at the time, absent from town: and in an answer to a remark of the Court as to the motion being still persisted in, replied, that it was done partly to satisfy his client, who, as executrix, had been at expence respecting the funeral; and partly to afford himself an opportunity of explaining the matter to the Court: but that he had no hope that the Court would grant the motion.

[556] YOUNG, OTHERWISE MEARING *v.* BROWN. Prerogative Court, Trinity Term, 1st Session, 1828.—A testator, while at variance with his relations, having made a will in favour of a stranger in blood, being afterwards reconciled to his family, and his full capacity down to his death being admitted; a subsequent will in favour of his family (produced shortly after his death from the custody of the drawer, who took nothing under it, nor was acquainted with those benefited by it; the factum whereof, though occurring in secret and in a strange manner, was proved by the drawer and two unimpeached witnesses) pronounced for; and the executor of the former will condemned in £20 nomine expensarum, he having directly alleged the second will to be a forgery; but succeeded in shewing the drawer to be of doubtful character.—Dissimilitude of handwriting is very weak and deceptive evidence, and of slight weight only against evidence of similitude; but against positive evidence of witnesses attesting and deposing to a signature, as actually made in their presence, it can scarcely have any effect.

This case was argued by Phillimore and Addams for Mr. Young, and by Lushington and Dodson contrà.

Judgment—Sir John Nicholl. The evidence in this suit is sufficient to satisfy my mind. It is not a case involving a variety of circumstances inferring doubtful capacity, nor circumstances from which mere fraudulent circumvention is to be presumed; but it turns on a plain broad fact whether the instrument was executed by the deceased, or is an absolute fabrication and forgery. The case assumed that shape from its very commencement; for when the instrument was propounded in the condidit, the first article of the allegation opposing it contained a direct averment that the paper was not signed by the deceased, nor was his act, though it was admitted that at the time of the date he was of perfect capacity.

The history of the party and of the transaction may bear materially on the probability whether it was or was not his own act.

[557] The deceased's name was James Brown Unwin, and he died suddenly of apoplexy on the 20th of July, 1827, though seized two days before with cholera morbus; he was the only child of Walford and Elizabeth Unwin, and having been born in 1787 or 1788, was about 40 years of age: his mother's sister married one Kings, a coachmaker, and the two sisters afterwards lived together with their husbands in Duke Street, Bishopsgate; but Kings, for the last five years, resided in Southampton Street, Pentonville. About 1796 Richard Salter Young, then an infant of eighteen months (whose child he was does not appear), was placed at nurse with Mrs. Unwin; he was seven or eight years younger than the deceased, was brought up as one of the family, called Mr. and Mrs. Unwin father and mother, Mr. and Mrs. Kings' uncle and aunt; he and the deceased called each other brother, and they went to the same school. The deceased was afterwards apprenticed to Messrs. Savage and Taylor, apothecaries in Bishopsgate Street, and when out of his time was, principally by the assistance of Mrs. Kings, set up in business first in Widegate Street, Bishopsgate, from whence he removed to Bethnal Green Road: he took this brother, if so I may call him, to assist in his shop, not as an errand boy, as Brown pleads (though when the errand boy was absent he did occasionally carry home medicines), but in compounding drugs and in the ordinary business of an apothecary's shop. The deceased married a wife rather of an unfortunate temper; she brought about a **[558]** quarrel between the deceased and all his family, and having also taken a dislike to this lad, he and the deceased were at length forced to part; the immediate complaint of the wife seems to have been, that in weighing out three pennyworth of senna he had given too much weight: but it clearly results from the evidence that the separation took place, not on account of the misconduct of Young, not from an alienation of the deceased's regard, but owing to the influence of the wife. In consequence, about 1811, Young took to a seafaring life—went first as a surgeon, then engaged in the Mediterranean trade, and is now master of a vessel. The deceased continued on ill terms with his own family, and on that account Young's only communication, when in England, was with the father and mother and the Kings, and for fourteen or fifteen years or longer he had no intercourse with the deceased.

While matters were in this state the deceased, alienated from his own family through the wife, made two wills. The first, dated on the 28th of September, 1814, is all in his own handwriting and attested by three witnesses: it gives nothing to any part of his own family, but leaves every thing to his wife, and appoints her the

sole executrix. The second, dated on the 10th of February, 1819, gives to his wife the furniture, &c. absolutely, and every thing else for life, with remainder to John Brown, son of the Rev. William Brown; and appoints his wife and William Brown executors. Thus his wife and his friend Brown's family are alone bene-[559]-fited by the will of 1819; his own family and all his other friends are excluded, and that will was deposited with Brown. As executor of this will of 1819, under which his son is solely benefited (for the wife is dead), Brown now opposes a later will—the will in question in this cause.

Subsequent to the will of 1819 a material change of circumstances took place. The deceased's wife died about three years before him, and his mother appears to have died still earlier: his father, Walford Unwin, an old man of 74, who had lived with the Kings, and was entirely supported by them till the death of the deceased's wife, was, on that event, very naturally and very properly taken to reside with the deceased: the latter had quitted business, had agreed for the purchase of a cottage at Warminster, and was preparing to go and reside there.

That he should therefore continue to adhere to this will of 1819, giving every thing to John Brown, and leaving his own father wholly unprovided for, now that his wife was dead and his father had been taken to reside with him and was wholly dependent upon him, was not only extremely unnatural and improper, but highly improbable. In addition, he had taken offence at William Brown; he mentioned to some of his friends that Brown had insinuated that an improper intimacy existed between him and his housekeeper: he was much hurt; he felt it as an insult: and though this breach appeared in a short time to be made up, and though they were again outwardly friends, yet he said "he [560] should not forget it"—it rankled in his bosom: the way in which he mentioned it to Pocock, who was a gardener and saw him frequently, is this:

On the sixth article "the deponent says that the deceased and the articulate William Brown used to be very intimate; they were of the same party in parish disputes; but about four months or so before the deceased died there was a question in the parish about the appointment of a mistress to the workhouse, on which they took opposite sides, and a quarrel followed. Deceased told deponent that Brown, in the course of the dispute, had insinuated something improper about him and his housekeeper, which he could not stomach, and that he never would forgive him so long as he lived; that he ought not to have used him so; he had been such a friend to him. Deponent told deceased they should forget their disputes as soon as they left the vestry; but deceased said 'it was quite impossible; Brown had hurt him here, pointing to his breast, and he never could forgive him.' Before this deceased used to talk with deponent about William Brown as one of his friends."

Now though the deceased does here express himself so strongly, yet their differences were partly reconciled; still, however, he thus mentions the subject to Bigg:

"The deceased was giving deponent an account of what had passed at the vestry, and the deceased said, 'Bigg, Brown has injured me, and I won't forgive him; he has insinuated [561] that I and my servant maid are thick together.' The deceased was very much excited at the time, and in a great passion; but deponent knows that deceased and Brown were reconciled after this; and very shortly too, for a few days afterwards deceased dined at Brown's house—at least he told deponent so; and deponent joked him about his having said he never would forgive Brown, and about his having made up his quarrel so soon, and the deceased said between joke and earnest, 'Ah, but I shan't forget it.'"

The plain fact is that it was a quarrel which very much hurt the deceased, who at the time was highly indignant, but as he had always acted with Brown in parish matters, he did not entirely break off nor discontinue his intercourse with him: but this quarrel had its effect. Besides this, it is in evidence that though he was anxious that young Brown should succeed well in business as an apothecary, yet he made some little complaint of his want of attention to him. Hardingham says: "The deceased used to complain that John Brown did not call upon him, and had forgotten him." So there are some symptoms of dissatisfaction with the principal legatee.

In this situation of circumstances his old friend, his quasi brother, Richard Young, who had been excluded from his society during the lifetime of his wife, was in London, and an accidental meeting took place between them in May. All their former feelings and affections seem to have revived at this meeting; they spent a [562] long evening

together, smoked their pipes, took their wine freely, talked over former days, and, as is not very extraordinary, their meeting ended in intoxication. Hardingham found them smoking together in the deceased's garden, perceived they were on interesting topics, and soon retired: "The impression on the deponent's mind was that they were on the most cordial terms, and there appeared to have been an old and strong friendship between them." In continuation of this history, Pocock—who was very intimate with the deceased, had a garden ground adjoining his premises, and had allowed the deceased to open a door of communication into it for his own convenience, for he was something of a tulip fancier—states: "He remembers very well that about the latter end of May, before the deceased died, he came through deponent's garden; sat down at the door of the house and complained of a headache, and said 'he had had too much the night before; that a friend had come to see him whom he had not seen for sixteen years; that that friend (whom he called "Dick") had lived with him when he was in business; but that they had separated through the interference of his, the deceased's, wife.'" The deceased then gives him an account of the quarrel about the senna, which the witness details.

Here then is not a mere accidental meeting, but a complete renewal of their boyish attachment, though it was the only interview. The deceased and the Kings, from some difference about a money transaction, were not upon very **[563]** cordial terms, and did not see much of each other; but there had been no absolute quarrel. Mrs. Kings also, from knowing the deceased had some propensity to drinking, on hearing of this interview, and of the intoxication that ensued, advised Young not to go again, though several messages were sent to him from the deceased by his father. Now this renewal of the early affection, in addition to the circumstances respecting his father and the Browns, renders it not improbable that the deceased should make a new disposition, such as that contained in the will propounded.

That will is dated on the 18th of June, 1827, and bequeaths all his property to Richard Salter Young in trust to pay to his father, Walford Unwin, an annuity of £100; to his housekeeper, Hannah Turner, an annuity of £10, to whom is also left the cottage at Warminster (describing it as in Devon instead of in Wiltshire, an error to which I shall presently refer; in this cottage it appears Hannah Turner had some interest; I remark this because it shews the accuracy of information respecting the deceased's affairs); to William Gale, weaver, £50; to Charlotte Gale, his daughter, £200; the residue it gives to Young and appoints him executor; it is signed, sealed, and attested by three witnesses.

This is the will and such is the disposition it contains. Connected with the circumstances, it carries with it every presumption in its favour, and except that the mode of preparing it is rather singular, and that the person employed **[564]** to prepare it is, to no inconsiderable extent, attacked in credit, there would be nothing extraordinary in the case; for the time and manner of its appearance is the natural sequel of the mode of execution: but, on the other hand, the difficulty of supposing this a fabrication and forgery appears to be much greater than those objected in opposition to the will.

Plaisted, the drawer, is an old attorney, in embarrassed circumstances, and not in the most respectable practice. Witnesses have been produced against his character: five would not believe him on his oath—one of these only knew him in his youth—a second forms his opinion only on what he has heard; and some by their own shewing do not stand much higher in credit than Plaisted himself would, if their depositions were believed. On the other side, there are witnesses who entertain a favourable opinion of him—particularly Mr. Bates, a silk-weaver, who appears respectable and a man of property, and who has had some considerable experience of Plaisted's integrity. However, Plaisted is not omni exceptione major, and the Court would hear him with caution; particularly if speaking to that which was matter of opinion or which might be easily misrepresented—such as capacity, volition, or affection—but here the sole inquiry is a broad simple fact, whether the will was or was not executed at the asserted time: he says "he had a speaking acquaintance with the deceased for twenty years," and that accounts for the deceased employing him; though it has been observed that this was very singu-**[565]**-lar; and it has been asked, why he should not employ the vestry clerk, Brutton. If it were necessary to explain this, there are some manifest reasons: Brutton was in the constant habit of seeing Brown; it was not singular that the deceased should be unwilling to employ any person through whom it was possible

that Brown might be made acquainted with the change in his testamentary intentions: but he certainly was unfortunate in his selection of an attorney, for the individual was not the most respectable.

"He had been acquainted with the deceased for about twenty years, and in the habit of conversing together. About the middle of June, 1827, he met the deceased in or near to Gracechurch Street, who, after talking on some common topics, spoke to him about his will: deponent recommended him to make it immediately, on account of the bad results he had seen from delay." There was another reason perhaps: however he thinks it a good opportunity, and he takes the deceased with him to the Temple, where he knew Mrs. Cobbett, who had the care of some chambers, and she lends him a room. Plaisted states that "as they proceeded to the Temple in a hackney coach the deceased communicated to him, verbally, the disposition he wished of his property, so that he was at once able to write it out fairly, and fit for execution;" he also says "that while he was preparing it he read over each passage; and finally the whole together, previous to the execution."

[566] This is in substance Plaisted's account of this transaction: and considering that he had passed most of the last twenty years in a gaol, and was in a state of great poverty, it is not extraordinary that he should be anxious that the job should not escape him, and that he should propose an immediate execution; and as he says he was going to the Temple on other business, that accounts for his carrying the deceased to this woman's chambers rather than to his own office in Millman Place. The chief objection is, the paper itself is so correctly written that it has not the appearance of being composed without a draft, but rather of being a fair copy; but I am not able to say that this experienced practitioner of 64 years of age might not have prepared it off hand; and if his skill was adequate to the task, his penury would urge him to get the business thus far advanced, as it would entitle him to his fee, though he states he was not paid at that time: but even admitting that the Court cannot with safety rely on Plaisted singly, what is there to shake the credit of the other two witnesses, Mrs. Cobbett and Mrs. Craddock, who heard the paper read and with Plaisted attested the execution? and if their statement cannot be gainsaid, Plaisted's evidence may be blotted out of the case. The story they tell is quite plain, and the account given of Plaisted's acquaintance with Mrs. Cobbett, of his taking the liberty of applying to do the business in these chambers, and of the circumstances that brought Craddock there, is perfectly probable and natu-**[567]**-ral.(*a*) If either of these women are not what, upon interrogatories, they represent themselves, it might have been disproved after publication.

Now Craddock particularly fixes the time in confirmation of the instrument: she says "she called on Mrs. Cobbett when she came to London occasionally: that about a fortnight before last Fairlop Fair, which is held on the first Friday in July, about twelve o'clock of the day (but of the day of the month or week she has no recollection) she called on Mrs. Cobbett at her rooms in the Temple; that after she had been there about half-an-hour, two persons—quite strangers to deponent—came to the door: one was a little man, the other was a remarkably tall stout man; **[568]** and she thinks the smaller was called Plaisted." She then speaks to the execution of the will.

This witness, then, fixes the period by her reference to Fairlop Fair, which will bring the time back to the 18th of June, 1827.

(*a*) Mrs. Cobbett deposed "that she was introduced to Plaisted about September, 1826; and that she employed him to recover a small debt; that she never saw him upon any other occasion before the latter end of June last, in the forenoon of the day, when he came with a stranger to her apartments in Fig-tree Court, and asked her if she would let him come in and do a little writing, and she allowed him to do so; that the stranger and Plaisted conversed, and the latter wrote; that after they had been so engaged about an hour and a half, Plaisted asked deponent 'if there were any clerks,' and being told, 'None in the chambers,' he asked her and Mrs. Craddock (for they were both in the room, Mrs. Craddock had called in) to witness Mr. Unwin's will, pointing to the stranger, to which they consented, and Plaisted read the will over in an audible and distinct manner." On the fourth interrogatory she said: "She is employed by Mr. Walker to wait upon him and take care of his chambers: that she has been acquainted with Mrs. Craddock about five years, who had formerly lodged with respondent; but had since her marriage lived at Stratford in Essex."

It is said however they do not identify the deceased; but what reason is there to suppose that this paper was fabricated on the 18th of June? The deceased was then in good health—only 40 years of age—yet the Court is to believe that some person who represents the deceased and not the deceased himself executes this will! Can anything be more grossly improbable? but if this is a forgery, who are the parties? how was it contrived? what evidence is there to support the charge? when completed? Plaisted has no interest under the document, no inducement to fabricate it, if so inclined, no sufficient knowledge of the party and of his connexions to invent a disposition so natural and a description so exact in all its parts—for placing Warminster in Devonshire must be through Plaisted's ignorance or oversight, and the error might have easily escaped the deceased's notice on reading it over; for it is mentioned that he held his hand up to his face and appeared depressed in spirits—a feeling which the seriousness of the occasion might naturally produce, and which would not render him very accurately attentive to mere words of description. If Plaisted was the fabricator, he must have had some instructor as well as employer—Who are they? Young did not know **[569]**—never saw—him. Nor is there any proof that the other parties ever knew or saw him.

But further, the two women have been separately and unexpectedly called upon by interrogatories, not put to Plaisted, to give a minute account of the person and dress of the deceased, and they quite agree in that account. The description of him is singular; in person, they state him to be remarkably large—in dress, something like a clergyman. The very object of putting these interrogatories was to contradict the witnesses, if their statement had been incorrect and false, by an exceptive allegation, and thus diversity would have been proved. None such has been offered; and I take it therefore to be a true description. I presume he was a very large man, and that he was usually dressed as these women represent; and thus the identity is established in confirmation of Plaisted. If, then, this was the deceased who executed this paper, there is an end of the question. The two women at least are not discredited, the capacity of the deceased is perfect: here then is an execution by a capable testator, and not only that, but the instrument itself contains a disposition quite natural and probable.

These three witnesses speaking positively to the fact of execution, it is in vain for Mr. Brown to resort to that weakest and most deceptive of all evidence—dissimilitude of handwriting. If such evidence may have some slight weight where the case for its affirmative proof depends on handwriting, still, against the **[570]** positive evidence of witnesses attesting and deposing to a signature as actually made in their presence, it can scarcely have any effect. Here are a variety of exhibits produced in the deceased's handwriting, but in many of them there is manifestly a strong dissimilitude from each other. Here are several witnesses who disbelieve the genuineness of the handwriting. Here are several intimately acquainted with the deceased's character who do not hesitate to say it is genuine. Those who disbelieve, principally rely on the signature alone, and give their reason, "because in the signature the names are at length, whereas the deceased used only to sign the initials of his Christian names." In signing his name at public meetings, or to printed cards, or the like, every person (and the deceased does so) signs in a hurry and in the shortest way: a surrogate probably signs a jurat differently from what he would subscribe a bond or a deed or his own will. The deceased's papers, too, fell into Brown's hands, and he has had an opportunity of selecting those where the initials alone occur; but witnesses prove that the deceased did sometimes sign his names at length to a lease; or the like. It does so happen that here is one document which could not be kept back—the will of 1814—and it does also happen that the signature has the Christian names written at length. Nay, further, that it has rather a peculiarity—a comma or dash between each name, exactly as the will in question; so in the second will, and in the books before me, there is the same comma be-**[571]**-tween the initials. This takes away almost entirely the little weight which might belong to opinion of dissimilitude, and shews that those opinions were founded upon reasons which fail in fact, and that this species of evidence is of the most fallacious description; but to this is added, in the present case, the evidence of the two women proving that the will was signed in their presence, and by the deceased; no doubt therefore can be entertained of its genuineness.

I will, further, just observe on the manner in which the will was produced. It was left in the possession of Plaisted; he probably might have two reasons for retain-

ing it—first, he had not been paid his fee for drawing it; and, secondly, he might hope that a more formal and full will would be desired, and he might be unwilling to lose the opportunity of a second job. These would naturally operate; because I cannot lose sight of the fact that Plaisted was a needy man, and would take every care to realise whatever little profit he might have the prospect or opportunity of making. The fact that Plaisted (who had only a speaking acquaintance with the deceased and who had never seen his father, family, or Young) had the will in his possession accounts for its non-production immediately on the death; but it was produced very shortly after, and almost as soon as the other. Plaisted, on the 7th interrogatory, has committed himself as to the time of learning the deceased's death and the delivery of the will: he says "he heard of the death one Sunday (August the 19th) while dining at Bates', **[572]** and on the Saturday following found out Young and then saw him for the first time and delivered to him this will." He thus fixes himself on the interrogatory—and is this true or untrue? Bates corroborates him, though not exactly as to the day:

"In the beginning of August last—he thinks it was the 12th, but he is sure it was on a Sunday—Plaisted was dining with deponent, as he frequently did on a Sunday, but never on any other day; while talking after dinner, Plaisted asked deponent 'if he knew a man of the name of Unwin in his parish:' deponent said 'he had known him, but that he was then dead some weeks.' Plaisted was very much surprized; and, upon deponent's telling him that the report in the neighbourhood was that Unwin had left all his property to a Mr. Brown, Plaisted said that was not the case, for he had himself in his possession a will of the deceased, which gave his property in another way."

Now this is a full, at least a sufficient, confirmation of what was got out from Plaisted on interrogatories, when examined several months before. Plaisted having got the clue, finds out Young and the parties interested, and the will is delivered up in a manner quite natural and probable; and on this point he is thus confirmed by Mrs. Kings; for she states: "She cannot remember the precise day, but it was about three weeks after her nephew's (the deceased's) death, that Plaisted called on her in the afternoon, and asked 'where he could **[573]** find Mr. Mearing (the party in the cause)?' Plaisted was then quite a stranger to deponent; when he had inquired where Mearing lived, he said, 'I'll tell you what my business is with him, I have a will of a Mr. Unwin, and Richard Salter Young is the executor of it.' Deponent was much surprized at hearing him say so, and offered to accompany him to Young's lodgings."

This satisfactorily accounts for the will not being sooner produced, and repels any unfavourable inference on that score—nay, confirms in the strongest manner the truth of the earlier history and the genuineness of the transaction. It is true that at the funeral Brown read the will of 1819, but it appears from the evidence of Hardingham and William Kings, "that he was aware or expected that there was a will of a later date;" for, immediately on the death, he had made inquiries, and Gale then told him it was probable that there was such a will in existence, in consequence of the declarations of the deceased that he would take care of his father and housekeeper.

It has been asked how Brown got this information: it might have been mentioned by the deceased to Gale, his intimate friend, and so might have come round: however that may be (as I set out with remarking), the notion of fabrication is attended with such difficulties as hardly to be overcome: nothing could be more probable or less extraordinary than that he should have made this new will, and, moreover, the factum is established by direct and positive **[574]** evidence; I therefore pronounce for the will of June, 1827.

I have great doubt whether I should rest here. Brown, the executor of a former will, does not stand on the exact footing of a next of kin, who has by law a right to the succession unless the deceased has directed his property should go in a different course: but Mr. Brown's interest is derived alone from the act of the deceased, and, if deprived at all, he is deprived of that which the deceased no longer intended him to possess: Brown never, after the wife's death, and the consequent renewal of affectionate intercourse, could have thought the deceased would leave his father destitute. Besides, he has made charges of fraud—I should hardly then arrive at the justice of the case if I were to allow him to escape without the payment of some costs—but as he certainly has succeeded in damnifying the character of the drawer, I shall, in pro-

nouncing for the will of 1827, only condemn Brown in £20 nomine expensarum: this will sufficiently mark the sense of the Court.

[575] In the Goods of Samuel Harvey. Prerogative Court, Trinity Term, 2nd Session, 1828.—An engrossed copy of a will having been read over to, and approved by, the deceased, who intended to execute it shortly afterwards, but was prevented by death: probate in common form granted (with consent of the only person interested under an intestacy) of one of the originally engrossed sheets and of two fairly copied sheets substituted for, and (except as to some clerical errors not affecting the disposition) corresponding with, the sheets approved by the deceased.

On motion.

Dodson, upon affidavits, moved for probate of a paper, without date or signature, under the circumstances stated by the Court.

Per Curiam. Samuel Harvey died on the 4th of May, 1828, leaving a brother—the only person entitled to his estate in case of an intestacy. The deceased by his will, dated the 14th of January, 1825, after bequeathing £1000 4 per cents. to Harriet Boroman for life—then to her children—gave the residue to his brother, and appointed him an executor. Mrs. Boroman died in the deceased's lifetime, leaving ten children; and on the 8th of April, 1828, the testator took his will to his solicitor, and directed him to prepare a new one, and thereby to give—£100 to each of Mrs. Boroman's children, the residue to his brother, and to name him an executor as before. On the 16th of April he called to execute this will, when it was read over to, and fully approved of by, him: but he said he should postpone the execution of it till all the children were christened, which he would give directions to be [576] done. The execution being thus delayed, and there being in the first two sheets (for the will consisted of three sheets) several clerical errors, not affecting the disposition, and also an unnecessary clause respecting real property, of which the deceased had none, the attorney took the opportunity of having those two sheets reingrossed fair for execution. The children, it appears, were christened on the 20th of April; and the deceased died fourteen days afterwards, but without having executed the new will.

Probate is now asked of the substituted sheets, together with the remaining original sheet. In respect to these substituted sheets they would be valid as copies, for one of the original sheets is not forthcoming. The disposition of the property is clearly, in substance and effect, the same as the will of 1825; and the brother too—the only next of kin—is willing that probate shall pass. The Court, therefore, directs the grant to go to the executors of the will, without date or signature, and with the substituted sheets.

Motion granted.

[577] Williams, formerly Cook *v.* Goude and Bennet. Prerogative Court, Trinity Term, 2nd Session, 1828.—When the opinions of persons apparently intending to depose fairly are contradictory as to capacity, particularly if facts shew the deceased was occasionally capable, the Court will infer a fluctuating capacity. The will of a person in such a state, of which probate was taken out four months after the deceased's death and not called in for two years and a half, pronounced for; there being satisfactory evidence of instructions, and of capacity at the time of the factum; the disposition contained being consistent with his affections, and its variation from a will executed before his mind became impaired being accounted for by a change of circumstances.—The influence to vitiate an act must amount to force and coercion destroying free agency; and there must be proof that the act was obtained by this coercion.—A legatee performing the duty of an executor in proving a paper is entitled to his costs out of the estate.—Semble, that an executrix (the widow) who, after taking probate and acting for many months under a will, by which she takes a smaller interest than by a former will, causes the later will to be opposed by questioning the deceased's capacity, and then refuses to propound such will, is liable to be condemned personally in the costs of a substituted residuary legatee who propounds and establishes the will; and such refusal, being tantamount to renouncing, would justify the Court in revoking the probate, and decreeing the administration with the will annexed to such residuary legatee.

This case was argued at the sittings after Easter Term by the King's advocate and Dodson for Mrs. Williams: and by Lushington and Addams for Mr. Bennet.

Judgment—Sir John Nicholl. This case presents itself to the attention of the Court rather in a peculiar shape—a shape which, at the outset, forcibly directs the Court in the view to be taken of the evidence. It may be proper to explain this peculiarity by adverting to some of the general facts before I proceed to the examination of the evidence, which more immediately regards the factum and validity of the instrument ultimately to be decided upon.

John Goude, the deceased in the cause, died on the 24th of June, 1822; he had originally been a sawyer in the dock-yard at Plymouth, and in 1792 married Margaret, now his widow, and one of the parties in this cause. He continued his trade for some time, but in addition took a public house, which was managed by his wife, whence they removed to an inn called the Cross Keys, and finally entered upon the King's Arms Inn, or Goude's Hotel, the principal inn, posting house, and coach office at Plymouth **[578]** dock, now called Devonport. Having some time before his removal to the latter house abandoned his trade of sawyer and assisted in conducting the business of the inns, he selected as his department at the King's Arms the posting and the coaches, seldom coming in doors, except occasionally to carry in the first dish at dinners; but the management of the internal or house concerns was left entirely to his wife, the more active partner. The deceased was a good-natured, easy, rather indolent man, who loved his joke; his wife a bustling, managing woman, and probably the profits of the business resulted in no inconsiderable degree from her exertions and care: indeed, not only the domestic management, but a full share and proportion of the domestic authority also were exercised by her. The husband had a sister married at Devonport to one Cook, the carpenter of H.M.S. "Temeraire," and this sister had three children, one of them, the present party, now Mrs. Williams. The wife also had a sister married to one Bennet, a shoemaker, residing and settled at Witney in Oxfordshire; and she had at one period seven children, but at the death of the deceased only six—one of whom, John Bennet, is a party to this suit. For some time the daughter of Mr. Cook lived at the inn as bar-maid; but in 1813, in consequence of a misunderstanding, she left the situation, and in the same year Mary Bennet, a daughter of the wife's sister, came to assist in that capacity: she fell into ill health—a decline—and in the spring of 1816 she died. It is quite clear that the deceased was very fond of her, **[579]** was very anxious about her health and for her recovery, and much lamented her death. In October, 1816, he adopted a nephew of his wife, Thomas Bennet, a lad of eleven or twelve years old—became fond of him, put him to school, and played with him when at home. It also appears that about this time there was a misunderstanding with the Cooks: the quarrel might be principally between the wives, but whether the husband participated in the feelings, or only acquiesced in the wishes of his wife, the fact is, there was no interchange of family kindness. The deceased might occasionally call on his sister, more especially to take leave of her when she was about to quit Devonport and go to Chatham; but there was no cordiality, nor the ordinary intercourse of affection after 1816.

In 1817, with matters in this situation—the sister's daughter having quitted her situation in 1813, no communication being kept up with the sister and her family, one of the wife's nieces having died in the deceased's house, a lad taken of whom he was fond, and, what is unequivocal, about twenty letters written by the deceased to Bennet and his family in 1815 and 1816, shewing the strongest friendship and regard for them—it is under these circumstances, I say, that the deceased sets about making his will.

The contents of that will it may be material to state. To his wife he gives £1000 absolutely, and the residue of his property for life; after her death he bequeaths the residue equally between the children of his own sister Cook, and **[580]** the children of his wife's sister Bennet: at that time Cook had three children, Bennet six; so that after the wife's death the Cooks had one third, the Bennets two thirds: of this will John Bone and William Glencross were trustees and executors; it is formally drawn up, regularly executed, and attested by three witnesses, another person of the name of Bone, Burnet and Hearle, of whom we shall learn more hereafter. The will, then, of 1817 (the validity of which is acknowledged) is very favourable to the wife and to her family: and though it does not cut off the sister's family, yet it gives no interest nor benefit to the sister herself, not even a slight legacy as a mark of affection.

Attached to this will is a sort of codicil or direction in the deceased's own handwriting, signed, and attested by four witnesses; and the executors are those of the will. It is in these words:—

"Plymouth Dock, 11th May, 1819.

"This is to certify that neither brother or sister nephew or niece or any other person shall enter these or any other premises where my wife Mary Goude shall reside, or call her to account for any property or demand any keys or any other thing I shall leave after my decease. After my wife's decease my will to be acted up to by my friends Messrs. Bone and Glencross."

This codicil, written before the capacity of the deceased is attempted to be impeached, shews his great affection for and confidence in his wife, how anxious he was for her comfort and **[581]** gratification, and that she should not be disturbed in the enjoyment of the property; and whatever may have been her influence over the testator, it is not suggested that it was of a nature to vitiate the act: indeed, it would be extraordinary if the influence of affection and of warm attachment is to take away the power of benefiting the object of that regard. The influence to vitiate an act must amount to force and coercion destroying free agency—it must not be the influence of affection and attachment—it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act: further, there must be proof that the act was obtained by this coercion —by importunity which could not be resisted: that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. I state the principles here, though they will be more applicable to a later part of the case: but to return to the history.

Thus stood matters in May, 1819, except that in October, 1818, the deceased had taken another son of the Bennets, an elder brother, John Bennet (the present party in the cause), to assist him in his business. In the beginning of June, 1819, the deceased had an attack of apoplexy: medical attendance was called in on the second of June, but it was not required after the 22nd. The effects of that attack must be examined more particularly hereafter, but it is proved that before the end of June he was so far recovered that he attended a meeting of coach contractors at Bath, and appeared quite **[582]** restored, at least in mind. Between that time and his death he went from home to various places, for we find him in London, in Sussex, in Cornwall, frequently on visits at Exeter to his friend Church, a witness produced by Cook, on a visit to his friends at Witney and Woodstock in October, 1820, in March, 1821, and in September, 1821; in October, 1820, accompanied by his nephew Thomas, who took this opportunity of seeing his own family for the first time since he went to Devonport in 1816; in September, 1821, accompanied by his other nephew, John, who was in ill health and went for a change of air; but in March, 1821, alone and unattended. These excursions were natural and beneficial to a person who had been once attacked by apoplexy; especially as these young men, the Bennets, were very steady, assisting him, when at home, in that department of the business which he himself conducted, and taking charge of it during his absence.

Here are various acts done respecting his property, various transactions of business both for himself and others; in October, 1819, he executed conveyances and signed drafts for the purchase of certain dwelling houses in Princes Street, Devonport; about the same time, October or November, 1819, he became a trustee of Jackson's marriage settlement, and that upon the particular application of the parties; in 1821 he gave his consent as surviving trustee to an alteration in the property, and went himself over to Exeter and to Budleigh in June or July to transact in that character the necessary business; he continued to attend coach con-**[583]**-tract meetings, to correspond, to sign returns and warrants; but—a still more material fact, because it bears a testamentary intention—he contracted to rebuild his inn: the contract was entered into in February, 1821—the work was set about immediately—the first stone was laid about April, 1821—the work was going on during the summer of 1821, and in February, 1822, he executed a power of attorney to sell stock for the purpose of meeting the expences of this building. His ordinary habits, so far at least as his body was concerned, were the same as before his apoplectic attack—he was about the stables and the coach offices, and went occasionally over to Torpoint, where he also kept carriages and horses to expedite the mail; how far his mind was equal to give directions, or how far these acts were indicative of capacity, I will presently consider.

So again, as a commissioner for paving and lighting the town, he continued his habit of attending the meetings as before—but his speech had become rather thick and he was, at least occasionally, heavy and dull—so that he took no part in the discussion and might have made blunders in balloting—at present, however, I am only noticing the fact of his attending. So likewise in respect to public worship, he continued his habit of going there and attended on Sunday the 24th of June, 1822—the very day of the second fit of apoplexy, which proved fatal. All these facts are incontrovertible: the state of his mental faculties and his testamentary capacity will be the chief subject of the remaining inquiry; but I **[584]** must first state the further testamentary instruments and the subsequent proceedings.

Here is a paper before the Court, dated on the 7th of June, 1822, in the handwriting of one of the nephews, but subscribed by the deceased:—

"King's Arms Hotel Plymouth Dock
"7 June, 1822.

"I hereby give and bequeath to Thomas and John Bennet (the offspring of William and Sarah Bennet of Witney Oxon) after the decease of my wife Mary Goude the inn and premises in which I now live, with the furniture, plate, carriages, horses and every other thing contained therein and belonging thereto, as also the carriages horses, &c. at Torpoint and elsewhere. Also the houses, 6 and 7, in Princes Street with the stables and premises at the back. Likewise the coach house and premises over the coach house in Princes Street and every thing thereto belonging."

The signature is, as before observed, by the deceased, and primâ facie the paper is his act, but it is not attested. Here is another paper originally of the same date, all in the deceased's handwriting, first signed on the 7th, but again signed and attested on the 11th of June: in substance this paper is the same as the one I have just read, but the commencement is different. It begins: "I Francis Goude do here-**[585]**-by give, &c." and at the end there is this clause:

"Signed by Francis Goude this eleventh day of June in the presence of William Glencross and G. W. Hearle."

Looking at the paper itself, without the evidence of the subsequent attestation, there are strong marks that it is the act of a free and capable testator, for it is his own handwriting—an easy running hand. It is stated that the wife declared this paper was written by the dictation of the nephew, word by word and letter by letter: Foot, an attorney at Devonport, thus deposes on the 11th article:

"On the 27th of December, 1823, Mrs. Goude unexpectedly called at his office, and told him she heard that deponent had been taking examinations as to the state of the deceased's capacity for the purpose of setting aside the will now in question on behalf of the Cooks, and that she was anxious to inform him in what manner 'the wills were prepared.' Mrs. Goude, referring herself to the paper in the handwriting of the deceased bearing date the 7th of June, 1822, said that Thomas Bennet drew up a paper (of which that of the 7th of June is a transcript) and submitted it to her for her approbation: that it being thought right by her and the two Bennets that the paper should appear to be in the deceased's own handwriting, she and the two Bennets took an opportunity in private of getting the deceased to transcribe it: she said that Thomas Bennet stood over the deceased, who **[586]** was sitting at a table, and dictated each word and the letters contained in each word to the deceased one by one; spelling the word for him and telling what letter to put next, and the deceased did so as he was desired, but it was accomplished with great difficulty."

Now this is the account that Mrs. Goude gave to Foot at the latter end of 1823: it is no evidence of the fact as against Bennet, more especially considering the time and circumstances under which that declaration was made, because it was at a time and under circumstances when she had an inducement and an interest so to declare; but the instrument itself falsifies the declaration: not only is it not an exact copy of the other paper—not only are the words and expressions in some places varied, but the writing itself is so free and continuous—so manifestly written, as it is termed, currente calamo, that it is quite incredible it could have been written by an imbecile and unwilling person, having the letters dictated to him letter by letter—being unable to copy on account of his idiotcy and fatuity, it is manifestly the writing of one possessing at least a certain degree of intelligence; and this story of the wife's is therefore in my judgment utterly false.

Passing by then for the present the evidence of the execution and attestation of

this paper of the 11th of June, I will proceed to state the substance of the instrument now propounded. It is dated on the 14th of June, 1822, formally drawn on two sheets of paper, signed, sealed, and attested by two witnesses; it gives the [587] whole of his property to his wife for life—but for life only: the £1000 given absolutely to her by the will of 1817 is omitted, and therefore this instrument is so far less beneficial to her: it is an absolute loss to her of this sum—at her death it gives to his two nephews and his niece the Cooks £100 each—to William, Francis, and Charles Bennet £100 each, and to Sarah Ann Bennet £200; it bequeaths the residue to John and Thomas Bennet, and on the death of either of them without issue to the survivor; if both die without issue then to the other four Bennets; so that though the whole residue after the wife's death is to go to the Bennet family, yet the two nephews, John and Thomas, are selected for a much larger interest than the other four Bennets. Mrs. Goude, William Glencross, and John Bone are the executors of this will.

These are the contents, and the deceased died by a fit of apoplexy on the 24th of June, ten days after. Mr. John Bone, the executor, states on interrogatory, that on the day of the funeral "he read the will aloud in the presence of the party that had attended the funeral: he did not hear any remark or observation made on such occasion which expressed or indicated a doubt that the testator was not competent to make the said will at the period at which the same bears date:" this is not an immaterial fact in the cause.

On the 15th of October, 1822, Mrs. Goude was sworn as executrix, a power of being joined in the probate being reserved to the other two executors. On the 8th of March, 1823, about six [588] months afterwards, the two other executors renounced. Now I do not know in what way that renunciation was given; if in person, they must have sworn that they believed it to be the will of the deceased; if by proxy, then the proxy, unless specially framed, must have recited that it was the deceased's will.(*a*) So that after this renunciation Mrs. Goude became sole acting executrix of this will; she continued acting under it without any question being suggested till the latter end of that year, 1823, when either on some disagreement between her and the nephews, or on her attempting to sell money out of the funds too freely, a distringas was taken out to restrain her: then it was that Mrs. Goude found out that this will was good for nothing, that the deceased was incapable, and that it would be advisable to revert to the will of 1817, with the codicil of 1819, which were more beneficial to herself. The question whether the deceased possessed testamentary capacity or not, now became a subject of public discussion at Devonport, and on the 27th of December, 1823, Mrs. Goude paid the unexpected visit to Mr. Foot (who as a solicitor had taken up the cause of Cook—an old servant of his), represented to him the incapacity of the deceased, and told him the story about Thomas Bennet's dictating each word and each letter in the paper of the 11th of June, as already stated.

Still however the matter was not actively followed up: these parties did not feel their [589] courage and their sense of the justice of their case sufficiently strong to commence the suit; so that the probate was not called in till the spring of 1825, and then the wife brought it in, but refused to propound the will, though she had been sworn to and acted under it for two years and a half: Bennet, therefore, as the substituted residuary legatee, was obliged to propound it, and Cook (now Mrs. Williams), as the substituted residuary legatee of the will of 1817, opposed it. The suit—a very long and a very expensive suit—proceeded; and sixty witnesses have been examined, some at Devonport, and some (brought up on purpose) in London.

Before the first witness was examined three years and a half had elapsed since the death of the testator, and during a great part of that time this will and the capacity of the deceased had been a common topic of discussion at Devonport: here then is the explanation of what I meant by the peculiar shape in which the case presented itself for considering the evidence. Where a length of time has been suffered to elapse, witnesses even to facts will be inaccurate, and the Court must be prepared for variations in the relation of circumstances by the most credible and the most respectable, but what is the Court to expect upon matters not of fact, but of opinion, when parties have enlisted themselves as it were on one side or on the other? This case is

(*a*) It was here stated by counsel that the renunciation was by a proxy in the ordinary form.

peculiarly open to this inconvenience. In all cases of opinion as to capacity the Court invariably finds conflicting evidence; the person is seen at different times and under different circumstances: but on the pre-[590]-sent occasion the deceased's state of health would more especially lead to contradictory evidence. The very nature of an apoplectic habit is to produce fluctuation; it is a tendency of blood to flow to the head, necessarily affecting the brain and inducing lethargy. Cold, indigestion, fatigue, and various other causes will increase its operation and produce a more than usual dullness and stupor. Art, and sometimes Nature alone, will afford relief: bleeding, cupping, leeches, medicine, will restore activity to the brain; and it appears that in this case recourse was had to such and similar remedies. Lunn deposes thus: "One evening, a moonlight night in October next preceding his death, the deceased was standing at his inn door, when deponent, passing by, asked him how he did? deceased for a few seconds did not recollect him: at last he said, 'Is that Bill?' and in a silly half-witted manner" [that is his construction], "without other preface, said, 'They tell me I'm to be cupped to-morrow.'" If then, on a moonlight night, the deceased did not know Lunn, yet he remembers that he is to be cupped. Another witness, Bone, says: "After deponent ceased to attend, Mrs. Goude used herself to insist upon the deceased submitting to have a blister applied or to be bled with leeches."

These remedies would not have been resorted to unless they had afforded temporary relief and rendered the deceased different at different times; and almost all the witnesses describe him as subject to great fluctuation; sometimes he was dull and stupid, and hardly knew what [591] was going on, especially if there was nothing to excite him, as when he attended the commitees, at other times he was lively and boyish, sparring and playing at cudgels with this lad, Thomas Bennet, of whom he was so fond; sometimes he played his game at whist well, at other times he revoked frequently in the course of the evening: hence I am satisfied that the condition of the deceased varied materially.

There are a multitude of witnesses examined on each side to the article as to capacity—above twenty: there could be no difficulty in obtaining any number, for the deceased was the master of the great inn of the town, was constantly about the stables and coach office, and was living as it were under the public eye: but what does that very fact infer? that he was not in a constant state of stupor and imbecility. A great number of the witnesses however describe the deceased as being in a state of absolute fatuity and idiotcy; others assert that his mind was not at all deteriorated; others again take a middle course. Where opinions are so contrary, and there is no reason to suppose that they are not sincerely given, the Court can only reconcile them by supposing that his capacity fluctuated; but it may at the same time judge a little of the credit due to the different opinions, from observing how the facts are laid. Here is Cook's allegation stating a broad fact, which is either true or false. The fifth article pleads: "That in or about June, 1819, the deceased was attacked with apoplexy or some illness of that or a similar nature, so severely, that for the [592] space of about three months he was in a state of continued delirium and derangement, and being also at times violent, it was found necessary not only to watch him continually, but occasionally also to subject him to personal restraint." Again, in the tenth article: "The deceased was not at any period from and after the month of June, 1819, and more particularly during and after the winter preceding his death, of sound mind, memory, and understanding, capable of managing himself or his affairs, or of forming a judgment as to the disposition of his property by will, or of giving instructions for and making and executing his last will and testament or a codicil thereto, or of doing any testamentary act whatever."

Here then is made an assertion of actual derangement for three months, and of incapacity from that time till his death. This (if there be not some clerical error) is an assertion most directly falsified: for the attendance of the medical person ceased on the 22nd of June, and we find the deceased at Bath upon business and with his intellects quite perfect at the latter end of that month: here then is a completely false averment as to a matter of fact. Let us see again how the witnesses are carried away by their prejudices. Mr. Foot, for example, on the tenth article deposes that the deceased was for six months "quite an idiot;" and no doubt this was his sincere opinion; but on examining the grounds of his opinion the Court finds that he has literally none:

"He frequently saw the deceased in the course of the last twelvemonth of his life, and [593] within three or four months of his death, not frequently at the King's Arms, but generally out of doors, meeting him casually. Deponent commonly spoke to deceased when he met him, merely asking him 'how he did,' but not conversing with him: the deceased's memory appeared to be quite gone: from the vacancy of his look he does not believe he recognized him: the deceased, in his manner and appearance (for the last six months of his life) at the times deponent happened to see him, was quite an idiot;" and at the conclusion of his evidence on that article he says "his belief is founded on general observation of the deceased as aforesaid: he had not any opportunity of specifically determining on the powers of the deceased's mind during the time deposed of."

So that meeting this person in the street, merely from his appearance, without any opportunity of conversing with him or of ascertaining the state of his mind, Foot ventures to assert that the deceased was an idiot. This was the more incautious, for he himself has admitted that there were differences of opinion as to the testator's condition, and not, as was argued, that his imbecility was known to and believed by all Devonport. Dr. Magrath, on the 11th interrogatory, says: "As a reason for applying to respondent, Mr. Foot said that a difference of opinion had arisen respecting the capacity of the deceased."

Foot, therefore, instead of telling Magrath that he was a perfect idiot, says, as seems to be the truth of the case, there was a difference of opi-[594]-nion at Devonport: so there is in the evidence in this suit as in many others. Bone's evidence is still more extraordinary, and so utterly irreconcileable with his conduct, that I shall rely rather on the latter than on the former: he says on the fifth article: "The deceased was during the last year of his life in a state of absolute fatuity:" those are his words —yet this Mr. Bone, the medical attendant of the deceased, the executor of the will of 1817, who ought to have protected the interests of the Cooks under that will, after the funeral reads the will of 1822, makes no remark, suffers the widow to take probate, and again recognizes the validity of the latter will, by renouncing probate. It is true that the Cooks were at the time absent from Devonport, but they were natives and had long resided there, and must have had friends to apprize them of what was passing. "If the deceased were quite an idiot," as Foot represents, or in a state of "absolute fatuity," as Bone would make him—if he were incapable even for the last month (since he was about his inn-yard and the town, and at public worship as much during the last month as during the last year, his death being quite sudden from his second fit), it must have been notorious to the whole place; it must also have been notorious that his wife was committing a gross fraud: there could be no difference of opinion such as Foot mentioned to Magrath.

Without then minutely detailing the opinions of the witnesses on both sides and reasoning upon each, it is sufficient to state that here is a great conflict of opinion, which, I repeat, is no [595] novelty in such questions: some, as I have said, were of opinion that he was decidedly incapable; some, that his capacity was in no degree affected; others, that though capable, his mind was shaken: the just result is that his faculties were in a degree damaged and deteriorated, but that he was not intestable; that his capacity was so far impaired and fluctuating that the Court would require more than the mere fact of execution—would require satisfactory evidence of instructions, and proof of volition and intention.

In respect to the influence of the wife, there is little visible that would not equally apply to the will of 1817, or that was not equally in operation at both times: there was the general influence of an active, bustling, high-spirited wife over a good-natured, easy husband: in consequence of his attack it was necessary she should take a still more decided lead in the management of the concerns of the house: it was necessary she should, as a kind nurse and an affectionate wife naturally would, insist on his going to bed at his regular hour, on his not indulging too freely in liquor, on his putting on a blister or being cupped; when symptoms of a determination of blood to the head shewed themselves, it was fit she should desire he might not be contradicted nor irritated—and should encourage and press him to take little excursions from home to change the scene, and for the sake of exercise; but I can find no trace of any unfair importunity, on the part of the wife, to induce him to alter his will or to do any testamentary act. The general influence aris-[596]-ing from his affection and deference for, and from his wish, in the disposition of his property, to gratify and to

please, a wife who was the principal means of acquiring that property, she undoubtedly possessed; but that, as I have already observed, will not vitiate the testamentary act; there must be proof of something amounting to force and coercion in the obtaining of the act itself.

Proceeding then toward the testamentary act itself: is there any thing in it inconsistent with the deceased's probable mind and wish? so far otherwise that the change of circumstances since the will of 1817 renders the alteration in the disposition quite natural. In 1817, though he was partial to his wife's relations, there was no particular branch of them that he should select to favour, and therefore he gives the share of the residue equally among the wife's sister's children: but now these two nephews had been with him for four years; he was very fond of them—he speaks of their conduct as being remarkably good and very steady; they assisted him greatly in the management of his concerns, and relieved him from what in his state would become irksome; he placed great confidence in them, and though he liked to be about as if occupying himself, yet it was natural that he should be pleased with these youths releasing him from a closer attention to the real burthen and labour of his business.

But the case does not rest here—and on mere inference. It is clear that he proposed to introduce these youths into the business and to make them his successors: he had already [597] allowed their names to be put on some of his carriages as a reward of their past and an encouragement of their future attention and steadiness: it is pretty clear, too, that the rebuilding of his inn was for their benefit and with a view to their succeeding to it after his wife—and this was not, as asserted, the mere act of the wife, for declarations to this effect came from the deceased himself; he had talked of retiring from business and going to reside at Witney: at his time of life and with his infirmities it was not likely that he, or his wife for him, should undertake the rebuilding of this great inn unless with a view to the interests of these young men. What, then, is the evidence on this head? it is a material part of the case in support both of capacity and of testamentary intention, and leading up to this new will.

The first witness is Ann Dawe—who was a bar-maid in the house up to 1820. She states "that Mr. Goude was always extremely fond of the two Bennets: she has many times heard the deceased talk about retiring from business: he said he should not have remained in it so long were it not that he wished the Bennets to be quite qualified to succeed him."

The next witness is Mr. Ratcliffe, a wine and spirit merchant: "The deceased was very fond of the Bennets: he was most partial to Thomas, the younger one, who was a very sharp boy: the deceased seldom moved without him: deponent has heard the deceased talk about retiring from business, and he gave it to be understood that the Bennets were to [598] succeed him: he cannot fix the time when he heard the deceased so express himself: he recollects having seen the names of both the Bennets painted on the Fly Coach which ran between Devonport and Exeter, coupled with the name of the deceased."

Isbell, a statuary, gives his evidence in these terms: "Accidentally coming to the deceased's inn about dinner time he has sometimes dined with the deceased and his wife and the two Bennets in the bar: the deceased treated John and Thomas Bennet like his own children: deponent, from general expressions used by the deceased, made up his mind that the two Bennets were to succeed the deceased in business whenever he retired."

Welch, the agent of an insurance office, thus deposes: "The deceased said he had some thoughts of pulling down the inn, and was in treaty with Mr. Coles for an adjoining house in order to have an archway, or carriage entrance to his inn. Deponent replied, 'Mr. Goude, had you not better at your time of life reflect before you enter upon such a business, especially as you have what is very handsome; and no children to provide for.' The deceased answered 'that he had nephews whom he should bring into his business.' The conversation then dropped, the deceased having in the opinion of the deponent given a very sufficient reason for undertaking the alterations proposed."

Bennet, the father of the party, though not entirely to be relied on, yet not wholly to be left out of the question, says: "The deceased was [599] very much pleased with the deponent's sons John and Thomas whilst they were with him: he always

expressed himself to the deponent, both personally and by letter, as being much pleased with their steadiness and attention to his business, and used to say that it would be a nice business for them when he left it off."

A sixth witness, Mr. Waterhouse, the great coach proprietor living in Lad Lane, London, and therefore free from the party prejudices of Devonport, states: "That in or about July, 1819, the deceased, in speaking to deponent of the Bennets, described them as two nephews of his wife who were living with him, and that they were nice sharp lads, and very attentive and useful to him in his business: that on another occasion, a short period afterwards, the deceased spoke to him again of these two nephews, and of what he intended to do for them: he observed that, after taking care of his wife he had taken care, or should take care (deponent is not certain which), of her nephews."

Jackson, to whose marriage settlement he was a trustee, confirms the other witnesses: "He has repeatedly heard the deceased express his satisfaction with their conduct and attention, and say how well they conducted themselves: the deceased has mentioned to deponent that he intended to retire from business; he did not say when, but added that when he did he should leave his house and business to John and Thomas Bennet. The deceased, about the latter end of 1820 or beginning of 1821, obtained a renewal of the lease of his **[600]** house for the purpose of rebuilding and enlarging it; and he expressly told deponent at such time that he was doing it for the two boys."

Here then is a mass of declarations coming from the deceased himself, manifesting not only capacity, but an intention to select these two nephews as the principal objects of his bounty, and consequently to make a new disposition differing in some degree from the will of 1817, particularly as to the substituted disposition of the residue.

I come now, then, to the execution and attestation of the paper originally dated on the 7th of June, but which was again signed, and was attested on the 11th. Hearle, a bookseller, intimately acquainted with the deceased, his opposite neighbour, and one of the attesting witnesses, gives this account: "Early in June, 1822, the deponent received a message from the deceased that he wanted to speak with him: he accordingly went and found the deceased and his wife together in the bar parlour: he cannot now recollect whether Mr. Glencross was then there; if not, he came in shortly afterwards. The deceased himself produced to deponent and to Glencross a paper in deceased's own handwriting, and referring to it, said he wished deponent and Glencross to witness it: there was no other introduction of the business: the deceased then either read the paper over to them, or gave it them to read: he cannot recollect which, but he recollects the fact that, at such time, deponent knew the contents of the same. The deceased then **[601]** signed his name to the paper (which purported to leave his house, carriages, horses and furniture to his wife's nephews, John and Thomas Bennet), and afterwards deponent and Glencross. The deceased then requested deponent to take care of the paper, so he took it home with him, and enclosed it in an envelope and endorsed it as a codicil to the deceased's will: he so endorsed it, because in 1819 he and a Mr. Burnet witnessed the execution of a will made by the deceased, the tenor whereof he was not acquainted with, save that in the course of general conversation between the time of the execution thereof and of the paper or codicil aforesaid the deceased had several times mentioned that thereby he had left his property to his wife for life, and afterwards to his own and his wife's relations. During the time deponent and Glencross were with the deceased (as aforesaid) either deponent or Glencross recommended deceased rather to make a new will altogether, by which his intentions might be clearly ascertained, than to leave separate papers or codicils which might be contradictory to his will or one from another. No remark was at that time made in answer to such recommendation."

This is the account given by Mr. Hearle, and Mr. Glencross confirms it: "On the 11th of June, 1822, a message was brought to deponent, in consequence whereof he went over to the house of the deceased. He went into the bar parlour of the inn, and he found there (as he now best recollects and believes) the **[602]** deceased—his wife—the younger Bennet, and Mr. Hearle: deponent cannot recall to mind whether it was the deceased or Mrs. Goude who informed him of the business on which he had been sent for: he verily believes that the paper writing (to be deposed of) was taken —but by whom he cannot recollect—out of a bureau in the said parlour. The deponent cannot recall to mind the conversation that took place previous to the execu-

tion of the paper; but he recollects having expostulated with the deceased (and he believes on this occasion) on the subject of the disposition of the deceased's property to the prejudice of Mrs. Cook and her family; and that he also earnestly recommended the deceased to have his will drawn up by a professional man, which the deceased consented to have done, and he and Mrs. Goude authorized deponent to consult a professional gentleman on the subject: he so advised the deceased, not because he was aware there were other testamentary papers of his in existence (which he did not know), but because of the apparent informality of the paper then produced."

He says in a further part of his evidence: "The deceased on the 11th of June, 1822, was of sufficiently sound mind, memory and understanding, in the opinion and judgment of deponent, to give directions for the disposal of his property." This witness must be expected to speak cautiously, not only from the distance of time, but from the conversations at Devonport in regard to the capacity of the deceased. On a further article he says: "It **[603]** was either on the said 11th of June, or immediately afterwards (he rather thinks it was on the 11th of June), that he endeavoured to persuade the deceased to bequeath part of his property to Mrs. Cook and her family, who, on such occasion, gave deponent to understand 'that they had not behaved to him as they ought to have done, and they could not expect any thing from him.'" I may also notice that in the will of 1822 he does not give his sister, Mrs. Cook, even an honorary legacy, but passes her by altogether.

There are other parts of Mr. Glencross' evidence to which my attention has been called on both sides, but having considered them, I do not think they materially vary the effect of his deposition in chief.

This paper, then, of the eleventh of June and the evidence in support of it—the declarations of the deceased, at the time, of his intentions favourable to the Bennets and adverse to the Cooks—the intention also of having a more formal will prepared, are strongly introductory to the main instrument at issue: here is no appearance of any importunity or interference on the part of the wife—here is no appearance of fraud or clandestinity; Mr. Glencross was the last person to be sent for with such a view; he was the intimate friend of the deceased, the executor of the former will; he interfered in favour of the Cooks, though without success: and the facts which he states prove the deceased to have been a free and intelligent agent.

After what had passed on the 7th and 11th, **[604]** it was the natural and probable sequel that a formal instrument embodying the whole of the deceased's testamentary intentions should be executed. To save the expence of a lawyer, Mr. Hearle was requested to prepare a will, and he reluctantly consented. His account is: "Within a week (after the 11th of June) deponent, in passing through the inn-yard, was met by Mrs. Goude, who said 'she wanted to speak to him;' he accompanied her into the bar parlour where the deceased was: Mrs. Goude then asked deponent (no one else being present) whether he would draw up a will for the deceased according to the suggestion given them the other day; and the deceased then himself requested deponent to do so. The deponent said 'it was quite out of his line to draw wills, and as there was a good deal of property at stake, a professional man should be applied to.' Mrs. Goude replied 'that the making the last will (done by a lawyer) had cost so much money they would rather have deponent to do it;' he again declined; but the deceased and his wife again pressed him, and he at last promised to do it; deponent then asked the deceased 'how he wished to leave his property?' the deceased then answered 'that he wished his wife to have the enjoyment of the whole during her life, and at her death that it was to come to John and Thomas Bennet equally between them.'"

Now this comes entirely from the wife, and her benefit is much less under this will.

"Deponent enquired of the deceased 'who **[605]** he would name for his executors;' deceased asked him whether he would be one; deponent said he had rather not, but that as the deceased had appointed two very proper persons (Mr. Glencross and Mr. Bone) in his former will, he recommended him to name them again; the deceased said 'they should be his executors jointly with Mrs. Goude;' and upon deponent's asking him why he had not named his own relations, he answered 'that they had had enough already, and that they were not upon terms;' the deceased said he would leave £100 to each of his sister's children, which legacy to Margaret Cook, one of said children, at the suggestion of Mrs. Goude and the deponent, the deceased said he would increase to £200."

This certainly is a mistake of the witness, because only £100 is left to this Margaret Cook: there is £200 left to Sarah Bennet, which may account for his misrecollection. It removes one observation as to the influence of Mrs. Goude; but, at all events, is not sufficient to affect the credit of the witness. Hearle returns to his shop to prepare the will, in the course of which he is backwards and forwards communicating with the deceased. Thus, "finding the deceased had not provided against the lapse of the interest, deponent went over to inquire how, in case of the death of the Bennets, or of Mrs. Cook's children, their shares were to be disposed of. The deceased said, 'What was left to the two Bennets should go to the survivor in case of either dying in his [606] wife's life-time:' deponent asked, 'What if the one so dying should have married and left issue;' deceased answered 'that such issue should have the father's share, and that if both Bennets died in his wife's life-time, then what he had left them should go to the rest of the Bennet family:' the deceased at the same time said 'that the legacies left to Mrs. Cook's children should, in case of any of their deaths, come back to his estate; that is, should lapse.' Deponent cannot be certain during what part of the foregoing conversation (which all took place within three or four hours in the afternoon) Mrs. Goude was present: she was continually in and out, and when she was not there, deponent was the only person with the deceased. Two or three times John and Thomas Bennet came in, but they were by the deceased immediately ordered to leave the room. In the course of the same evening and following morning the deponent (with the assistance of a book which contained forms of wills) drew up, from his own memoranda of the instructions, the will; and after breakfast took it to the deceased, who, with his wife, together looked over the same, and both declared 'it was the very thing they wanted.'"

This witness afterwards goes on to the proof of the execution.

Unless, then, this witness is deposing with direct and wilful falsehood, here is full proof of instructions, approval, and execution, leaving no doubt of volition and testamentary capacity; Hearle could not be deceived—he had been [607] acquainted with the deceased for eighteen years—was his opposite neighbour, a respectable bookseller—had attested not only the paper of the 11th of June with Glencross, but the will of 1817. He speaks to capacity at the time of executing in these terms: "Deponent was very particular in satisfying himself, and did fully satisfy himself, of the perfect capacity of the deceased on the several occasions by him predeposed of, because between the period of the deceased executing a will in 1819, and deponent being called in to witness the codicil in June, 1822, the deceased had suffered a severe illness, the consequences of which caused temporary aberrations of mind; and this being known to deponent, he was very particular in assuring himself, which he did, that the deceased was quite free from any access of such complaint before he witnessed the said codicil, or took instructions for, or made, or witnessed the execution of the will aforesaid."

He is confirmed sufficiently to shew execution and capacity by the other subscribed witness, Symons, also a respectable person, a mercer, an intimate acquaintance of the testator, who has given his evidence with perfect fairness. There are those variations as to minute circumstances which a lapse of upwards of three years would naturally produce between honest witnesses, but Mr. Symons' evidence is quite effectual to that part of the transaction at which he was present. What he states previous to the execution is shortly this: "That on the evening on which the will was exe-[608]-cuted, Hearle called upon him and they went together to Goude's; that in the bar room they found the deceased, his wife, and a stranger; that in a few minutes they went with the deceased into a back parlour, Hearle bringing the will with him, who opened it and laid it on the table; that he does not recollect any conversation or remark upon the subject of the will previous to the signing; and that the will was not read in his presence." Here are certainly in this account some variations from Hearle, but not such as to affect his credit.(*a*) The witness then, after deposing that the deceased of

(*a*) Hearle stated, "That about 9 o'clock in the evening, in consequence of a message, he went over to the deceased and found him, Mrs. Goude, and several friends in the bar parlour. Mr. Symons was either there at the time or came in shortly afterwards. . . . The deceased asked his wife for the will, or for the keys of the bureau wherein it was kept, and the deceased (bringing the will with him), Symons, and deponent went into the old back parlour: the deceased then told Symons (who appeared to be a stranger to the purpose he was come about) that he had sent for him

his own accord signed each sheet (Hearle states that he had with a pencil written the names where the deceased and the witnesses were to subscribe); placed his finger on the seal of wax; repeated by Hearle's directions the form of publication; and that Hearle and himself then wrote their names, thus continues: "Immediately after the deponent had signed his name, he said to the deceased, 'Well, Goude, do you know what [609] you have done?' The deceased answered, 'Oh yes, man.' Deponent then said, 'Is it all right?' Deceased answered, 'Oh yes, my dear fellow, it's all right.' Deponent replied, 'So long as you know what you have done, it is of no consequence to me.' This short conversation took place in their way from the back parlour to the bar parlour, to which they returned immediately on the execution of the will being finished. After the will was so executed Hearle folded it up and took it with him back to the bar.". . . "At the time of the execution the deceased was of sound mind, memory and understanding: he founds his belief of his capacity on the manner and conversation of the deceased at the time of the execution of the will, and his behaviour and conversation subsequent thereto in the same evening; for deponent remained in the bar parlour for two hours more, and played a rubber with the deceased, during which time he discoursed rationally and sensibly, as much so as at any time during deponent's acquaintance with him."

This is the evidence of the factum and of the capacity, viz. these three witnesses, Glencross, Hearle, and Symons, speaking to these transactions on the 11th and 14th of June. There is no particular illness at this time, the deceased was going on just as usual, and Glencross, both in his evidence now and in a memorandum made at that time, records that on the 11th of June the deceased appeared in better health and spirits than usual; and here on the 14th, after the execution, he plays his rubber of whist with [610] Mr. Symons: he lives about ten days after, not in a gradually declining state, but on Sunday, the 24th, he goes to his usual place of worship, is suddenly struck with another fit of apoplexy, and dies; the funeral takes place, the will is read by Bone, no suggestion of incapacity is raised, the widow takes probate, acts under it for nearly three years, and if she had not been disturbed by the distringas it is probable that this suit would never have been heard of.

It will be obvious from what has been stated that the Court thinks itself bound to pronounce for this will. The substituted residuary legatee, Bennet, having performed the duty of an executor in proving this will, according to the ordinary rules of the Court is entitled to his costs out of the estate. If the costs are to be paid out of the estate they will in some measure fall ultimately upon him as substituted residuary legatee, though more immediately on the widow, the residuary legatee for life: she has acted a most improper part, and it is not improbable that she has been the occasion of this expensive suit: possibly in strict justice she ought to be condemned personally in the whole of Bennet's costs; at any rate, as she has repudiated the will by refusing to propound it; which must be considered as tantamount to renouncing probate, the Court is of opinion that it is warranted in revoking the probate granted to her, and may now grant administration with the will annexed to Bennet, the substituted residuary legatee, and decree his costs to be paid out of the estate. If the widow is content with that course I shall feel inclined not to carry my [611] sentence to the rigorous extent of condemning her personally in Bennet's costs, trusting that the decree I propose to make may be sufficient to check such a proceeding in future.

I therefore at present only pronounce for the will of the 14th of June, 1822, reserving the question as to costs; as to the probate taken by the widow; and to the grant of administration to a future day: but I must consider this as a most lenient course towards the widow.

On the 4th Session the Judge, on the motion of counsel, at the petition of the proctor for John Bennet, with the consent of Mrs. Goude, the widow, revoked the probate remaining in the registry of this Court heretofore granted to her, and declared the same null and void and decreed letters of administration (under the usual security) with the will of Francis Goude annexed, to John Bennet, the surviving residuary legatee therein named; and directed his expences to be paid out of the estate.

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to witness his, the deceased's, will. . . . Symons read over the will to himself, and afterwards, as deponent now best recollects and believes, read the same aloud to the deceased."

[612] DODGE *v.* MEECH.(*a*) Prerogative Court, Trinity Term, 18th June, 1828.—The asserted will of a person of fluctuating capacity (totally abandoning the principles of a former disposition made before the deceased's faculties were impaired, and long adhered to) pronounced against; and the executor, the person principally benefited, who, among other things indicative of fraud, had himself given the instructions, and whose son, a minor, alone spoke to the execution, condemned in costs.

Judgment—Sir John Nicholl. This case is so clear that I can entertain no sort of doubt as to any part of my sentence, and I should not be justified in taking any further time or putting the party to any further expence in respect of this will. The facts of the case are these:

Joseph Dodge died on the 21st August, 1826: he had made a will in 1820, which he copied pretty closely with his own hand and re-executed in October, 1824. The contents of that will are not unimportant; they give the history of the deceased and of his family, and explain the grounds on which the Court will proceed to the decision of this question.

"This is the last will and testament of me Joseph Dodge formerly a linen-draper, but now retired from business and residing at Marston Magna in the county of Somerset I give and bequeath all my money securities for money and personal estate of every kind and denomination whatsoever unto my friends Benjamin Vowell of Sherborne wine-merchant Thomas Fooks of the same place gen-**[613]**-tleman and Thomas Vaughan Meech of the same place ironmonger but nevertheless upon and subject to the trust hereafter expressed and declared concerning the same that is to say after they shall have obtained payment of the securities and reduced the whole into money and shall have fully paid and satisfied all my just debts, funeral and other expences and the cost of proving and otherwise relating to the due execution of this my will and the several legacies following that is to say £200 to my niece Martha How daughter of my sister Martha Coombs £200 to my niece Betty Baker daughter of my sister Betty Lawrence £100 to my niece Julia Wetherall daughter of my late brother John and the like sum £100 each to her sisters Mary and Betty. £50 each to my nieces Betty Hester and Mary daughters of my brother William which I give them as a token of my regard persuaded that their father has made a comfortable provision for them and the sum of £1000 to Elizabeth Martin who now lives with me provided she shall continue to be so residing with me at the time of my decease but not otherwise then the trust as to all the remainder of my money and personal estate to distribute and divide the same to my nephews Benjamin Dodge son of my late brother Benjamin Robert and Joseph Dodge sons of my late brother John Dodge and to William Coombs son of my late sister Martha Coombs and Joseph Lawrence son of my sister Betty Lawrence in equal shares and proportions and I hereby nominate and appoint my said three **[614]** friends Benjamin Vowell Thomas Fooks and Thomas Vaughan Meech joint executors of this my will," &c. &c.

He signs this document; there is the seal, the usual attestation clause, and two witnesses: at the bottom is written, "That there may be no mistake you are to understand it is the sum of one thousand pounds I have here given Elizabeth Martin;" and on the opposite side are these words: "That there may be no mistake;" so that he is particularly anxious that Elizabeth Martin his housekeeper, whom he had bred up from a child of six or seven years of age, and who had lived with him above thirty years, should have this £1000; nor is this all: he had, as I have said, executed in 1820 a will nearly the same, prepared by his confidential solicitor and executor, Fooks, which having recopied as his new will he cancels, and in the following clause written at the bottom in his own hand he assigns the reason of taking this step: "I drawd out my will afresh because the name Betsy Martin was put in this will and it should have been Elizabeth Martin."

Now nothing can more strongly shew that the former will was confirmed and copied, that he was not acting under any hasty impulse of feeling, but that the will of 1824 was the deliberate expression of his wishes; it shews also what was his general intention as to the testamentary disposition of his property; it shews that he had a great

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(*a*) Phillimore and Dodson in support of the will of the 12th of July, 1826, propounded by William Dodge.

The King's advocate and Lushington contrà.

number of nephews and nieces whom he meant to benefit in different [615] degrees and for different reasons; but William Dodge, the party bringing forward the present question, is not mentioned in this will, and takes no benefit under it. It is clear he had once been a favourite with his uncle, who conferred considerable benefit on him during his lifetime, and had turned over his business to him: William Dodge had not however conducted it with the same success as the deceased, nor in a manner likely to afford him much satisfaction; he was exposed to arrest, and was supporting his credit by accommodation bills; the deceased had also just before he re-executed this will given him up and discharged him of a bond for several hundred pounds which this nephew then stood indebted to him. These were the reasons why he was excluded under this will, admitted to be valid, unless revoked by a later instrument.

To this will there are several codicils, one dated on the 11th of January, 1822: "I hereby give unto Joseph Dodge son of my nephew William Dodge my watch and my large family Bible and the six volumes of Henry's Exposition upon the Holy Scriptures and I give unto William Dodge the son of my nephew William Dodge the eight volumes of the Rev. Mr. Romain's works.

"The Concordance return to Robt. Dodge."

There is another, dated on the 19th of October, 1824, which was originally signed on the 23rd of September: the date, I presume, was altered when it was witnessed by Hannah Taylor: "In addition to what I have already given to Elizabeth Martin (now living with [616] me) upon my will I hereby give her (if she lives with me till I die) all that is the whole of my household goods and furniture except one dozen of silver teaspoons." At the bottom is written—"I hereby give unto Jemima Gould formerly Jemima Maber one dozen silver teaspoons marked in the front J. D.

"October 19, 1824."

A further paper: "I hereby give unto Wm. Dodge son of my late brother Wm. Dodge the ten volumes of Dr. Hawker's Poor Man's Commentary upon the Scriptures.

"October 21, 1824."

Here are two further papers signed and dated: the first is dated January 27, 1825: "It is my desire and will that if I should be indisposed to act in life by any affliction I desire Elizabeth Martin may have the care of me but if Elizabeth Martin should not have the care of me, then allow her eight shillings per week for my life-time and at my death give her what I have given her upon my will."

This was after the deceased was ill, and after he had taken to the excessive use of intoxicating liquors, and after Gray had begun to attend him. It seems to refer to his illness and to express an apprehension that he should not be allowed to be attended by Martin: this is a little inconsistent with the averment that Martin was beginning at that time to use personal violence.

The other paper is after he got to Sherborne; and is dated March 8th, 1825: "If it should please God I should die in Sherborne as Mr. Vincent made my brother's coffin let him also make mine."

[617] Here, then, is this disposition of his property, most deliberately made and most firmly adhered to for five years, from 4th February, 1820, to March, 1825. The Court here gathering his intentions from his own acts and from these papers, all in his own handwriting, which speak much more decisively than mere depositions, can entertain no doubt what were his wishes; nor is there the slightest doubt that his faculties were unimpaired up to the end of January, 1824. To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it would require the clearest and most indisputable evidence.

William Dodge, the nephew, brings forward a will, or rather three wills, one dated in June, 1825; another on the 3rd of July, 1826; and a third on the 12th of July, 1826—the instrument propounded. It is singular that between the third and twelfth of July the annuity to Elizabeth Martin is increased: this, if the paper was fraudulently obtained, may be accounted for, because legacies are often introduced for the purpose of colour. Now what is the substance of the instrument propounded by William Dodge? "It bequeaths the whole of his property to him in trust—to pay Elizabeth Martin, if living with the deceased at his death, an annuity of £40 [under the paper of the 3rd of July, 1826, this annuity was £30]: it gives to Benjamin Dodge, son of his late brother Benjamin: to Robert Dodge, son of his late brother John: to Joseph Lawrence, son of his late sister Elizabeth—£100 each; these [618] legacies

to be paid at the end of a year from the testator's death, with a direction that if all or either of them should die before entitled to receive their respective legacies, such share or shares to form part of the residue; the will then provides for the payment of the deceased's debts, and appoints William Dodge sole executor and residuary legatee." This is the substance of the will of the 12th of July, 1826: it is technically drawn up, signed, sealed; and there are two subscribing witnesses, to whom I shall presently refer.

There are here, then, three legacies given to three nephews out of the great number the deceased had; and, as I have said before, some such might naturally be introduced if fraud had been resorted to: but the great bulk of the property is given to William Dodge, who had nothing under the repeated testamentary acts firmly adhered to for several years. This, then, is a will completely the reverse of his former disposition, wholly abandoning its principle, and therefore requiring clear proof of capacity and execution. It appears, and is admitted by Dodge's own evidence, that, prior to the first of this second class of wills, the deceased had resorted to the immoderate use of spirits and opium, the effect of which was to reduce him to a state of utter incapacity—whether he was encouraged to these excesses by Martin, or whether she could not resist the deceased's determination to gratify this vicious taste, is not material at present.

Early in 1825 William Dodge, with the assistance of Gray, the medical attendant, and **[619]** with the approbation of Fooks, the confidential solicitor and executor of the former will, himself with force and violence removed the deceased (notwithstanding that he made all the resistance he could) from Marston to Sherborne, where William Dodge resided, and placed over him John Warr, who is described as a male nurse, and under his care in about six weeks the deceased recovered. The removal to Sherborne took place in February, 1825, and in June of the same year the deceased made a will: but it is admitted that at the latter end of that year there was a relapse, when a similar remedy was resorted to; and that in April or May, 1826, he was a third time in the same condition, when Warr was again called in to superintend him, and continued in charge till the eighth of July, 1826.

Here, then, are repeatedly states of incapacity; no matter by what name they are called—whether derangement, or being out of his senses; nor from what cause they spring: if, as it is asserted, from the ill-treatment, personal violence, or control of Elizabeth Martin, what does it prove but that he was in a state of incapacity and non-resistance? though the Court certainly is inclined that the charges against Martin are a little exaggerated. Here, too, are alleged intervals of capacity; here is control by William Dodge and persons authorized by him, he himself assisting in bringing the deceased to Sherborne; here is the deceased, in a state of nervous excitement, going several times a day to Dodge's house—a very small quantity of liquor affecting his senses, and pre-**[620]**-venting his acting rationally and with judgment—yet wine is occasionally sent to his lodgings by Dodge and his wife in pretty liberal supplies; here is a will, alleged to have been made during an interval of capacity, totally departing from the former disposition, and principally in favour of William Dodge; under such circumstances, unless the Court is prepared to give up all the principles hitherto acted upon, it must demand the most decisive proof of the complete absence of influence and excitement at the preparation and making of this asserted will: it must require unimpeachable evidence of unbiassed volition and of clear capacity: it must expect to be shewn instructions coming from the deceased himself, and an execution in the presence of witnesses above all exception. What, then, is the proof offered?

The will propounded is the last in date—that of the 12th of July, 1826. For this will, it is admitted that there is no evidence of instructions coming from the deceased; but that is not all—the will is prepared, as is fully proved, by instructions and directions from William Dodge, the executor, the party agent, the party benefited—it is executed, or rather the name of the deceased is got to it, without even reading it over to him: I am now assuming that it was signed by the deceased, but the only witness to that fact is the son of William Dodge, at that time a minor, who attests the will, and who is brought to depose that the deceased, in his presence and in the presence of his (deponent's) father and mother, subscribed the paper. This young man certainly has been placed in a most distressing situation. **[621]** The other subscribed witness, Miller, did not see the paper signed, and consequently it was not attested by him; but this was his habit, for there is another instance of similar con-

duct on his part: he is a man who has been in the habit of accepting bills of accommodation for William Dodge, who is indebted to him nearly £300; and is called in on two different occasions, and nominally attests what was not signed in his presence.(*a*)[1] It is quite clear that no argument can sustain such a document prepared and executed under such circumstances and supported by such evidence; the very transaction itself proves that the deceased was in a condition unfit to execute any will; he was in such a state of excitement that he would not wait a **[622]** few minutes till the other witness arrived, and Warr, it must be remembered, had only ceased his attendance a few days. The proof then, thus far, is utterly insufficient to support this will.

It has, however, been argued that it is supported by collateral evidence arising from affection for William Dodge, and from declarations in his favour: and Burrow's evidence has been referred to: "That the deceased, six or seven years ago [he was examined on the 9th of January, 1828] used to speak very affectionately of his nephew William Dodge, and said, when he departed, he should leave him his property." Can that be true at that time? If this declaration was made then before the deceased's incapacity, it is contradicted by his former acts, and could only have been made in order to deceive and mislead: if after, what reliance can be placed on it? Besides, other declarations are opposed which are equally forcible, and neutralize the effect of this testimony of Burrow.

Again, here is evidence of the similitude of the deceased's handwriting: but supposing that all this species of evidence was on one side, and that the witnesses united in stating their belief that it was his handwriting, that would only prove it was not a forgery—it would not prove his capacity. There is, however, strong evidence of dissimilitude from persons speaking to their belief that it is not the deceased's handwriting. The banker's clerk says it is so unlike that "had a cheque with such a signature been brought to him, he should have hesitated before he would have paid it." But I do not rely on this: assuming it to be his handwriting, there is not **[623]** evidence to support it. Burrow's opinion only goes to prove that it is not a forgery; (*a*)[2] and he speaks in such decided terms of the deceased's faculties that his evidence standing alone would induce a belief that the deceased never was incapable, though Warr was in attendance at the very time of which this witness is speaking.

If, however, abandoning the will of the 12th of July, Dodge reverts back to the will of the 3rd of July, the proof is no better: Warr was also then in attendance; if still further back, to the will of June, 1825, there are the same defects or even greater: not only are there no instructions, but it is not even now disclosed in whose

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(*a*)[1] John Miller deposed: "He and William Dodge have always been on intimate terms; they reside not more than 50 yards from each other. On the 12th of July, 1826, Joseph (William Dodge's son) came over to him about 4 o'clock in the afternoon and said his father wished to see him; deponent went in about 20 minutes; Joseph Dodge shewed him into the little parlour, where deponent found William Dodge and his wife; there was a paper, pen, ink, and a candlestick on the table; William Dodge told deponent 'he had sent for him to witness his Uncle Joe's will—the old gentleman has been waiting for you some time, you know what a fidgety man he is, he would not wait any longer and is gone; here is his will—he wants you to sign it, and a blank is left for your name.' Deponent then examined the signature, and asked Dodge and his wife 'whether that was the deceased's handwriting;' they assured him that it was; and deponent being also acquainted with the deceased's subscription, had no doubt about it, and signed his name." On the 18th interrogatory: "Respondent, about a twelvemonth (as he believes) before the last will, attested a will of the deceased; the deceased was not present on that occasion."

(*a*)[2] Robert Burrow, of Sherborne, tailor, deposed: "That he knew the deceased for 14 or 15 years; that he often went to hear him preach; that upon an inspection of the names 'Jos Dodge' set and subscribed to the will propounded by William Dodge, he has no doubt whatever that the same is the genuine handwriting and subscription of the deceased; deponent has frequently seen him write his name exactly in that manner. Deponent saw the deceased during July and August preceding his death; on the 3rd of July, at the deceased's request, deponent witnessed his will; that a few days afterwards deponent conversed with him: and on both of these occasions deceased was of sound and disposing mind, and fully capable of giving instructions for and making and executing his will, or doing any act of that nature."

handwriting that paper is; and there again Miller attests without seeing the deceased sign. These two papers then are of no worth nor validity; these two noughts added to the other nought will not make an arithmetical number.

There are various other particulars which [624] throw a great cloud of suspicion over the whole transaction, to which I do not think it necessary to advert: it is quite sufficient for me to say that William Dodge has wholly failed in proving his case; and where, under such circumstances, a person will undertake to get a will prepared by his own agency, and have it attested by his own son, a minor, and by another who never saw it till after the signature was affixed; and will take upon himself, in suit, to prove it and therein fail, he must abide by the consequences.

Without therefore pronouncing that this will of July, 1826, is a forgery (which perhaps it would not be proper for this Court to do); without pronouncing even that a fraud upon an incapable testator has been proved, though I confess that is my view of the case; yet I do think that I should not reach the justice of the case, and should very much shrink from a discharge of my public duty, if I did not, in pronouncing against the will, condemn William Dodge in costs.

[625] SCARTH *v.* THE BISHOP OF LONDON, HIS VICAR GENERAL, SURROGATE, REGISTRAR OR ACTUARY IN SPECIAL, AND ALL OTHERS IN GENERAL. Prerogative Court, Trinity Term, 2nd Session, 1828.—The will of a party who died in Scotland, and all whose property within the province of Canterbury was in the diocese of London (some of it in the funds) having been proved in the Consistory Court of London, and the deputy-registrar of that Court having appeared under protest to a monition to transmit such will, the Court will not overrule the protest; holding a prerogative probate unnecessary, as the Archbishop and Bishop of London have by practice a concurrent jurisdiction in such cases: it will, however, in aid of justice, grant an additional probate, if required, limited to the property in the funds.

On petition.

Thomas Dickson, formerly of Drury Lane, Middlesex, but late of Northfield in the county of Dumfries, was the party deceased. On the 18th of March, 1828, probate of his will was granted, by the authority of the Consistory Court of London, to James Scarth, the surviving executor: and on his behalf a monition—reciting "that the testator was, whilst living and at the time of his death, possessed of goods, chattels, and credits in divers dioceses or peculiar jurisdictions sufficient to found the jurisdiction of the Prerogative Court of Canterbury"—had since been duly served upon the deputy- registrar of the Consistory Court of London enjoining him "to bring into and leave in the registry of the Prerogative Court the aforesaid last will and testament." To this monition the deputy-registrar appeared under protest, alleging "that the several parishes and places (in the province of Canterbury) wherein the whole of the goods, chattels, and credits were situate are within the diocese, and in all respects subject to the jurisdiction of the Bishop of London; that the Archbishop of [626] Canterbury hath not, by virtue of his prerogative, any jurisdiction over them; and that the probate, heretofore issued under seal of the Consistorial and Episcopal Court of London, was therefore legal and valid."

Phillimore for the executor, in opposition to the protest. The bank has refused to transfer, under a probate issuing from the Consistory Court of London, certain stock belonging to the testator, and standing in his name. The question then is whether, under the circumstances, the bank is not justified in withholding the transfer, and whether it is not the duty of the executor to apply for a prerogative probate?

Per Curiam. Was the testator at his death domiciled in Scotland?

Dr. Phillimore. I apprehend that he was; and that his will was also found in Scotland. The origin of the question is on the 93rd canon: (*a*) on reference to which it is manifest [627] that it is not sufficiently comprehensive for all cases; the present is not included in it. Gibson, in commenting upon this canon, observes: "There are

(*a*) The 93rd canon is headed: "The rate of Bona notabilia liable to the Prerogative Court." It enjoins, "that no judge of the Archbishop's Prerogative shall henceforward cite, or caused to be cited, ex officio, any person whatsoever to any of the aforesaid intents [viz. for the probate of wills or grant of administrations] unless he have knowledge that the party deceased was at the time of his death possessed of

several cases wherein no written law hath made provision, in which therefore we must attend to the declarations of the common law; as where one dies possessed of goods in London and Dublin; in that case the resolution seems to have been that the Archbishop of Canterbury by his prerogative was to grant administration for the goods in London; and the Archbishop of Dublin for those in Dublin" (Gibson's Codex, vol. 1, p. 472). However there is no adjudged case exactly in point with the one under consideration; but the nearest, that of *Daniel* v. *Luker*, is reported in 3 Dyer, 305 a., 1 Rolle, 908; it is the case upon which Gibson has founded the passage which I have just quoted; and it is also supported by the authority of Burn, and by a dictum of Sir William Wynne which is quoted by that writer, and is quite in unison with it.(*c*) In the case in Dyer there was, I admit, no decision; but the opinion of the reporter is that the deceased left bona notabilia both in England and Ireland; and that a prerogative probate was necessary in either country. Another analogous authority is to be found in Rolle's Abridgment, under the title of "Executor," p. 908, where it is said that if a party dies beyond sea, the archbishop grants administration. And no distinction exists, in this **[628]** respect, between an executor and an administrator.

That the Court of Chancery will not decree payment of money without a prerogative probate is established by a series of decisions. *Challnor* v. *Murhall*, 6 Ves. 118; *Newman* v. *Hodgson*, 7 Ves. 409; *Thomas* v. *Davies*, 12 Ves. 417, which last case is quite conclusive upon the point. In the case of *Yockney* v. *Foyster*, which occurred in this Court in 1789, the question of the prerogative jurisdiction was discussed; but that case, I admit, does not bear upon the present. All the cases indeed are collected in Lawton's treatise on Bona Notabilia, s. 4, where it is likewise stated that money cannot be received out of Chancery without a prerogative probate. I do not refer to this book as an authority binding upon the Court; but merely to shew the general impression that in Chancery a prerogative probate cannot be dispensed with.

Per Curiam. The question I have to decide is whether this Court has any authority to take away this will from the Court which is in possession of it? I have not to decide whether the Court of Chancery will pay under a probate of the Court of London.

Argument resumed.

The convenience of this rule, for which I am contending, being the established rule, is manifest. If probate is taken out in a Diocesan Court, and there are bona notabilia, the grant is **[629]** absolutely void; but if it issues erroneously from the Prerogative Court, the grant is only voidable, and all acts done under the authority of such a probate are valid until the grant is revoked.

The King's advocate in support of the protest. There is some doubt whether at the time of his death the testator was domiciled in Scotland; I am inclined to believe he was: that is, however, a circumstance of no importance. In considering what is the jurisdiction of the Prerogative Court of the Archbishop in probates and administrations, it is essential to look to the form of proceedings in respect to such grants. The instruments alone, by the form of their recital, sufficiently shew that the Prerogative Court exercises jurisdiction in these matters solely upon the ground of their being bona notabilia; for they allege that "A. B. had whilst living and at the time of his death goods, chattels, and credits in divers dioceses or peculiar jurisdictions sufficient to found the jurisdiction of our Prerogative Court of Canterbury." The foundation then of the archbishop's right is that the deceased left sufficient goods "in divers dioceses or peculiar jurisdictions:" that is, unless the party died worth property beyond the value of £5 in two dioceses, there is no jurisdicion of the prerogative. In other cases, where there are no bona notabilia, the right is in the diocesan. This is the general rule as to the respective jurisdictions of the metropolitan and diocesan.

It is objected in this case that the testator **[630]** did not die within the diocese of London: I admit that the death took place in Scotland; but that will not found

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goods and chattels in some other diocese or dioceses, or peculiar jurisdiction within that province than in that wherein he died, amounting to the value of five pounds at the least, decreeing and declaring that whoso hath not goods in divers dioceses to the said sum or value shall not be accounted to have bona notabilia," &c.

(*c*) Vide 4th Burn's Ecc. Law, 234 (Tyrwhitt's edition).

the jurisdiction; and reliance was placed upon Rolle's Abridgment; where it is stated that if a man die intestate in England and Ireland, the archbishops, respectively, shall grant administration.(*a*)[1] The case itself does not appear to have been acted upon; and immediately afterwards Rolle adds: "But this must be understood where the party hath goods in divers dioceses in each of their provinces, or in the diocese of the archbishop; for otherwise it ought to be granted by the ordinary where the goods are and not by the archbishop:" and this limitation has been adopted both by Bacon and Viner.(*b*) The jurisdiction then depends upon the goods. Viner,(*c*) citing from Freeman's Reports, is in direct opposition to the case from Dyer. "A man dies in France and hath goods in the diocese of Norwich, and the question was whether the Bishop of Norwich should grant administration or the archbishop? Per North, C. J. The bishop shall grant administration unless he hath bona notabilia; and his dying in France is no more than if he died in Norwich." (*d*) There must therefore be bona notabilia to found the archbishop's jurisdiction.

It has been argued that in Chancery money **[631]** is decreed not to be paid out, except on a prerogative probate; and that in all cases. Now if this position be correct, it is worthy of consideration; but from a review of the decisions it does not appear to me that if a party dies in the diocese of London (having no bona notabilia) a prerogative probate would be required by the Court of Chancery. The cases cited only determine that where there are bona notabilia, the Court will not dispense with a prerogative probate, merely because of the smallness of the sum.

Per Curiam. The cases do not touch the present question.

Argument resumed.

In *Yockney* v. *Foyster* (*a*)[2] a very broad proposition, as to the necessity of a prerogative probate to carry on proceedings in Chancery, was certainly advanced in the pleadings; but **[632]** the sentence of the Court did not bear out the terms of the allegation. The present case, too, is easily distinguishable from that; for here the will is already proved. The Consistory Court is in possession of the grant, and the

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(*a*)[1] 1 Rol. 908, citing *Daniel* v. *Luker*, Dyer, 305 a.

(*b*) Bacon's Abridgment, Executors, E, No. 3. Viner's Abridg. Executors, G, 1.

(*c*) 11 Viner's Abridgment, Executors, G, No. 16.

(*d*) *Cecill* v. *Darkin*, Freem. Rep. 256, pl. 273.

(*a*)[2] Prerog., 27th May, 1789. This was a suit promoted in the Prerogative Court of Canterbury by Elizabeth (wife of Samuel Yockney), a legatee named in the last will and testament of Caleb Foyster, late of Kingston in the island of Jamaica. The executor, Foyster, having appeared under protest to the jurisdiction, it was propounded on the part of Mrs. Yockney, in an allegation.

The first article, in substance, pleaded that the deceased died in 1777, having whilst living and at the time of his death goods, chattels, and credits in divers dioceses or peculiar jurisdictions within the province of Canterbury to the value of £5 and upwards sufficient to found the jurisdiction of the Prerogative Court of Canterbury.

The second, that Foyster, the surviving executor and residuary legatee, proved the will in Jamaica; that he is now resident within the province of Canterbury, and since his having taken upon him the execution of the will, he hath had remitted to him by his agents from Jamaica divers effects amounting to more than the sum of £5 in value; and that he is in possession of them and of divers other effects in the province of Canterbury.

The third recited the bequest.

The fourth pleaded that the legatee, in order to compel the executor to the due payment of the legacy, "hath been advised to file her bill of complaint in Chancery, but is prevented from so doing on account of there not being a representative to the deceased in the Prerogative Court of Canterbury: that by the constant and invariable practice of the Court of Chancery no proceedings can be had or instituted therein against an executor for rendering an account, or for the recovery of a legacy bequeathed by the will of any testator, unless such will shall have been first regularly proved in the Prerogative Court of Canterbury, and a legal personal representative appointed to such testator by the said Court."

This allegation was rejected. Vide infra, p. 636.

In Tyrwhitt's edition of Burn's Ecc. Law, vol. iv. p. 234, the case of *Yockney and Foyster* is noticed.

application is to take it out of that registry. I apprehend this Court will not interfere.

Per Curiam. Is not the principle of all prerogative probates to save the necessity of two grants? Where a party dies with goods in two provinces, there must then be two grants. If a will had been proved in Jamaica, would a probate of the exemplification of that will be granted in the London Court? There must, I think, be some instances, where persons dying in the British colonies and having no other personal property in this country, except in the **[633]** English funds, that probate of their wills are taken in the Consistorial Court?

The deputy-registrar of the Commissary Court of London stated that there were instances of probates in such cases in both the London Courts.

Judgment—Sir John Nicholl. This question was argued on a former Court day, and from the nature of it, and from the number of authorities cited, the Court thought proper to take time to deliberate. The facts are these. Thomas Dickson died in Scotland, having made his will of which he appointed Scarth executor. He was possessed of personal property in Scotland and also in London: the latter consisting of some leasehold premises in Drury Lane; some bond and other debts in Westminster; and £10 long annuities in the funds. Probate of this will was taken out in the Consistory Court of London; but Mr. Scarth has since extracted a monition against the deputy-registrar of that Court to transmit the will to the Prerogative Court, because (as has been stated in argument, though this does not appear in the act on petition) the bank has refused to transfer the long annuities on a consistory probate. The deputy-registrar has appeared under protest, alleging that all the property out of Scotland lay within the diocese of London, and that there were no bona notabilia in any other diocese within this province. This is not controverted, unless money in the **[634]** funds be not considered to lie within the diocese of London.

The question, then, is, not whether the Prerogative Court has concurrent jurisdiction, and might, in the first instance, or even now, grant probate of the will of a party dying out of the province, but whether a monition to transmit the probate to this Court shall issue on the ground that the Bishop of London has no jurisdiction, though there are goods in no other diocese within the province. If there was a concurrent jurisdiction, that is, if in the first instance either or both Courts might have been applied to, the prerogative would not take the grant out of the hands of the Bishop of London, the probate having already passed.

In respect to concurrency, there is a fact to commence with, admitted on all hands: that it is the practice to grant probate in either jurisdiction where a party dies out of the province having no goods in divers dioceses, but only in the diocese of London, though part of those goods is money in the funds. It would, then, require clear and decisive authority to shew that such jurisdiction, so sanctioned by practice, is to be disturbed, and that this grant made by the Diocesan Court is illegal and void—and to justify the enforcing of this monition.

In aid of such a position I have not been referred to any case. The strongest semblance of the bishop having no jurisdiction, on the present occasion, arises from the party not dying within the diocese; but though there may be some dicta to this effect, yet the authorities, to prove that the death of the party within the **[635]** diocese is essentially necessary to found the jurisdiction of the bishop, are not sufficiently clear to induce the Court to overturn the established practice which exists as to parties dying out of the province. The concurrency of jurisdiction is then recognized in practice and is also intelligible in principle. By the general canon law it should seem that the metropolitan had original jurisdiction throughout his province. Many authorities to that effect may be found: the exercise of this jurisdiction was restrained, in respect to suits, by the Statute of Citations (23 Hen. 8, c. 9), and, in respect to probates and administrations, by the ninety-third canon; but the metropolitan has still the right of visiting his bishops and of inhibiting them during his visitations, in the same manner as bishops visit and inhibit their respective archdeacons; and a general concurrency of jurisdiction may have been reserved by composition or otherwise.

Proceeding then to the consideration of the cases cited, and the arguments addressed to the Court on the former day, I am of opinion that there is not sufficient to authorize a departure from the ascertained practice in instances where the party

dies out of, and does not possess bona notabilia in different dioceses of, the province. Though the authorities to be found in the books afford some countenance to the doctrine that if the death happens out of the province, and there are only goods in one diocese, a prerogative probate is still necessary, yet they are extremely loose and vague: many are mere dicta; **[636]** some when investigated do not support the position; some are inconsistent with others; some assert that if a person dies abroad, or in Dublin, a prerogative probate is to issue; but the position is stated so generally that it may, if the authorities could be traced up, only mean that the archbishop shall have concurrent, not exclusive, jurisdiction, unless there be bona notabilia. So a note of a case decided in the Prerogative Court in 1714—*Green* v. *Wigmore* (Prerog., 1714)—states, "A person dying in the East Indies and goods in London, prerogative probate." That is the whole of the note which I have; and this again may only refer to a concurrent, not an exclusive, right: but still it is a strong case, because it is known that formerly, for certain purposes, the East Indies were considered to be within the jurisdiction of the diocese of London.

I may here remark, as to the rule of the Court of Chancery, that the cases referred to, when examined, only establish that that Court requires a competent probate, and will not direct money to be paid out on a diocesan probate, when the money itself in Court shews that there are bona notabilia in divers dioceses, and consequently that a prerogative is the competent probate.

In the case of *Yockney* v. *Foyster* (Prerog., 1789, vide supra, p. 631), in which I was of counsel, the party applied for a prerogative probate: the jurisdiction was denied, and was propounded in an allegation. The only effects within the province were brought **[637]** there after the death of the party. Sir William Wynne rejected the allegation upon the ground "that such goods did not found the jurisdiction;" and said, "though it was stated in argument that the probate was necessary in order to file a bill, yet he could not grant it upon such an assertion: but if the Court of Chancery had actually decided that the prerogative grant was necessary, this Court 'in aid of justice' might allow the grant to pass." I do not know that that case throws much light on the present question: it only shews that for the sake of furthering justice the Court would not withhold its probate. This may be of some use however, for a purpose to which I shall presently allude.

The canon itself (the ninety-second) perhaps is the safest authority for this Court.(*a*) Its **[638]** provisions should seem, generally, to import that the Prerogative Court originally exercised a concurrent jurisdiction in all cases, and that the officers of that Court and of the Diocesan Court were running a race—having a sort of scramble—to get first possession. To remedy this inconvenience the canon restrains the inferior Court from interposing where there are goods in divers dioceses within the province, or as it may seem to provide, where there are goods in another diocese besides in that wherein the party died: and though the notice required to **[639]** be given by the registrar of the inferior Court to the apparitor of the Prerogative Court is now obsolete, yet still the rule remains that a probate granted by a Diocesan Court is absolutely void, and null ab initio, where there are bona notabilia.

The canon, however, does not distinctly refer to the case of a person who dies out

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(*a*) The 92nd canon is intituled—"None to be cited into divers Courts for probate of the same will;" and after reciting that "Forasmuch as many heretofore have been by apparitors both of inferior Courts, and of the Courts of the Archbishop's Prerogative, much distracted, and diversely summoned for probate of wills, or to take administrations of the goods of persons dying intestate, and are thereby vexed:" it directs "all chancellors, commissaries, officials, &c. to inquire of all persons appearing before them for probate or administration whether they know or believe that the deceased had, at his death, any goods or good debts in any other diocese or peculiar jurisdiction within that province than in that wherein the party died, to the value of £5. And if the person cited, or voluntarily appearing, shall upon his oath affirm that he knoweth, or firmly believeth, that the said party deceased had goods or good debts in any other diocese or dioceses, or peculiar jurisdictions within the said province, to the value aforesaid, then shall such chancellor, &c. &c. presently dismiss him, not presuming to intermeddle with the probate of the said will, or to grant administration of the goods of the intestate: but shall openly and plainly declare that the cause belongeth to the prerogative of the archbishop of that province, willing and

of the province, but who has goods in a particular diocese, and the construction put upon the canon by the practice appears to be that in such case the concurrent jurisdiction remains, and that either the metropolitan or the bishop of the diocese, in which alone there were any effects, may make the grant. At all events this Court, finding such a practice at present existing, does not feel warranted in disturbing it by taking this probate out of the hands of the Consistory Court. This Court is always unwilling to break in upon an established practice; more especially would it be unwilling in a case where this Court and its officers may have some sort of interest. Any alteration in such matters would more fitly proceed from a different authority.

It can hardly be expected that, because the bank has now, and not for the first time, started a difficulty, this Court is to set up a new rule without some decisive authority to justify it. If any authorities or sound principles exist, which may have escaped the diligence and research of counsel or the knowledge of the Court, resort must be had to the supreme tribunal or to the powers of some other Court; or if there exist any strong reasons of public expediency requiring, as a protection and neces-[640]-sary safeguard to the public funds, that none but a prerogative probate should be received to found a transfer at the bank, recourse must be had to the Legislature. The difficulty in this particular case may probably be removed by the proviso stated in the latter part of the ninety-second canon, viz.: If a party voluntarily desire it, probate may be granted both out of the inferior and Prerogative Court: "Provided that this canon or anything therein contained be not prejudicial, &c. to any inferior judge that shall grant any probate of testament or administration of goods to any party that shall voluntarily desire it both out of the said inferior Court and also out of the Prerogative."

Upon this authority, and in order to "aid the ends of justice," if the executor now applies here for probate, this Court might grant it, limited as far as the necessity of the case requires. It would be unfit and improper to grant a general probate, because a general probate has been already granted by what is to be considered a Court of competent jurisdiction; but I should be disposed to grant a probate limited to the property in the public funds, which is all that the necessity and justice of the case require. The party may choose voluntarily to make this application rather than engage in a contest with that great and powerful body, the bank, which may possibly have strong and substantial reasons for the rule they are contending for, and from which other Courts might hesitate to compel them to depart. This course, however, must be left to the [641] consideration of the parties themselves: but upon the grounds already stated, the Court thinks itself bound to allow the protest, and to dismiss the deputy-registrar from the monition.

Protest sustained.

Note.—The editor is informed that since the judgment of the Court was delivered in this case the Bank of England has acquiesced in the transfer of the £10 long annuities upon the original probate taken in the Consistory of London.

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admonishing the party to prove the said will, or require administration of the said goods in the Court of the said prerogative; and if any chancellor, &c. &c. shall offend herein, let him be ipso facto suspended from the execution of his office, not to be absolved or released, until he have restored to the party all expences by him laid out contrary to the tenor of the premises; and every such probate of any testament, or administration of goods so granted, shall be held void and frustrate to all effects of law whatsoever.

"Furthermore we charge and enjoin that the registrar of every inferior Judge do, without all difficulty or delay, certify and inform the apparitor of the Prerogative Court, repairing unto him once a month, what executors or administrators have been by his said Judge, for the incompetency of his own jurisdiction, dismissed to the Prerogative Court within the month next before. Provided that this canon be not prejudicial to any composition between the archbishop and any bishop or other ordinary, nor to any inferior Judge that shall grant any probate of testament or administration of goods, to any party that shall voluntarily desire it, both out of the said inferior Court, and also out of the Prerogative."

IN THE GOODS OF JAMES TAYLOR. Prerogative Court, Trinity Term, 3rd Session, 1828.—Execution being only prevented by death, the Court will decree probate in common form on a proxy of consent from all in esse interested; but those not in esse will not be bound by the grant.

On motion.

The deceased died at Birmingham on the 19th of November, 1827: he left a widow, a son, and a daughter (Elizabeth, wife of Henry Beaumont). His will, regularly executed, was dated in March, 1822. On the day preceding his death, while very ill, he sent for his solicitor, Mr. Ingleby, to alter his will; who immediately attended (in company with the deceased's surgeon) and drew up a codicil. When the codicil **[642]** was prepared, it was, at the testator's request, read over to him in the presence of witnesses, and he approved of it; but deferred signing it till the next morning, when he died without having executed it.

The son and daughter of the deceased and their respective issue were the only persons who could be prejudiced by the codicil: the son was since dead, unmarried and intestate: the daughter had no children.

Upon a special proxy of consent from the daughter and her husband, and from different legatees (whose interests were varied by the codicil), and a full affidavit of the facts,

Lushington moved for probate of the codicil in common form.

Per Curiam. This is an ordinary case of prevention by death: there was no hesitation as to the contents; the execution only was postponed till the following morning. All at present in existence who are interested consent, and the issue that may be hereafter born will not be bound by this decree. Probate may therefore pass.

Motion granted.

[643] IN THE GOODS OF ELIZABETH ROBINSON. Prerogative Court, Trinity Term, 3rd Session, 1828.—The Court will not grant probate, in common form, of a paper formally drawn up, but unexecuted, and which the deceased clearly intended to alter; nor of a subsequent paper in the deceased's handwriting, but undated, unsigned, and apparently unfinished, and with nothing to ascertain that it was written shortly before the death, or that it embodied the final intentions of the deceased; the deceased being an illegitimate spinster, and the Crown opposing the grant.

On motion.

Elizabeth Robinson, formerly of Tregunter, Brecon, but late of Sunbury, Middlesex, died suddenly on the 23rd of May, 1828, a spinster and illegitimate, having personal property exceeding £4000; but no real estate.

Upon her death were found in a box containing her papers of importance, three papers of a testamentary nature; they were enclosed in an unsealed envelope, which was tied round.

Paper A was in the handwriting of the deceased: it was not signed, nor dated, and did not dispose of the residue: but contained an appointment of executors.

Paper B was a will on parchment, prepared for execution.(*a*)

Paper C contained some memoranda in the handwriting of the deceased.

Upon affidavits from the deceased's solicitor, and from the medical attendant; Lushington moved for probate of paper A as the last will and testament of the deceased.

The King's advocate, on the part of the Crown, opposed the motion.

[644] Per Curiam. The deceased, a spinster, and illegitimate, died on the 23rd of May, 1828; and there are several documents of a testamentary nature before the Court: one of which, B, written on parchment, is ready prepared for execution; but in the concluding part are these words: "All the rest residue and remainder of my personal estate and effects subject to the payment of the last mentioned legacies and my funeral and testamentary expences I purpose disposing of in such manner as shall be expressed in a codicil or codicils to this my will;" so that she intended to make an

(*a*) Mr. Powell, of Brecon, the deceased's solicitor, stated on affidavit that this paper was forwarded to the deceased on the 23rd of February, 1825; and had been drawn up from her own verbal instructions: and that it had evidently been used as the model of paper A.

addition to the will even if she had executed it, but in fact she never did finish it. On the 5th of April she wrote to Mr. Powell, who prepared B: "I received the parchment agreeable to my desire and intend to fill it up and to make a few alterations but think to leave it for the present." She did not then merely suspend the execution, but she proposed to make some alteration. A, another of these papers, has nothing in it to shew when it was written, except that it appears to have been subsequent to, because manifestly drawn up from, B. The water-mark, being 1824, affords no clue. It is in her own handwriting, but has no concluding words, no signature, no date, no distribution of the residue; and the affidavits only go to finding and handwriting, but do not fix the date, nor contain anything to prove that the paper embodied her final intentions. It therefore is not entitled to probate unless with the express consent of the Crown. **[645]** The parties interested may endeavour to convince the Crown that it was the deceased's intention that this paper should have effect, when some arrangement might probably be made for the payment of the legacies by the nominee of the Crown; but as far as this Court is concerned the present motion must be rejected.

Motion rejected.

WOOD *v.* MEDLEY. Prerogative Court, Trinity Term, 1st Session, 1828.—Two papers having been propounded by an executor in an allegation which was rejected, and administration thereupon taken out by the next of kin; on a legatee under one of those papers calling in the administration, and the administrator appearing under protest; the protest allowed to stand over, in order that the legatee, on shewing he was not cognizant of the former proceedings, &c. &c. might bring in an allegation: the appointment of the executor being in one paper, the interest of the legatee entirely under the other, and the two papers not necessarily connected.

On petition.

In Michaelmas Term 1827, an allegation propounding, on behalf of the asserted executor, two papers as together containing the last will of John Medley was rejected. (Vide *Cundy* v. *Medley*, supra, p. 140.) Letters of administration then issued to Ann Medley (a sister and one of the next of kin of the deceased), the party who now appeared under protest to a decree served upon her at the promotion of Peter Wood, a nephew, and a residuary legatee named in one of the aforesaid papers, in order that, on his behalf, the papers might be re-propounded. The averments, on **[646]** either side, were set forth in an act on petition.(*a*)

(*a*) In support of the act on petition Peter Wood made an affidavit, dated on the 12th of May, as follows:—"Peter Wood, the younger, of the city of Antwerp, but now in London, maketh oath that he is one of the residuary legatees named in the last will and testament (as contained in two paper writings) of John Medley the deceased; that he hath been informed and believes that the said John Medley died on or about the 12th of August, 1827, and that soon after his death certain proceedings arose between J. W. Cundy the executor named in one of the said paper writings and Ann Medley and Priscilla Medley, two of the natural and lawful sisters and two of the next of kin of the deceased, with a view to establish the said papers as the last will of the deceased, the validity of which the said Ann and Priscilla Medley contested: And this deponent further saith that he was not informed of the said proceedings, as he was then labouring under a very severe and dangerous illness, until on or about the latter end of January or the beginning of February last past, when he was informed and believes that letters of administration of the effects of the said deceased had been granted to the said Ann Medley: he further saith that a short time since, having been informed by his agents in England that sufficient evidence hath now been obtained to establish the validity of the said paper writings, he did on the 22nd of February last instruct and authorize proceedings to be commenced on his behalf against the administratrix for the purpose of establishing the said paper writings as the true and original last will and testament of the deceased; and he further saith that he did not in any way consent or make himself a party to any acts done by James Riddel Wood or John William Cundy, either during the dependance of the said proceedings or subsequent thereto, as he during the dependance of the same was wholly ignorant thereof."

Lushington and Nicholl in support of the protest.

Two points arise on this petition. First: whether it is not true as a general rule, though possibly liable to exceptions, that when an executor has propounded a will, and no collusion is **[647]** suggested, all persons claiming under that will are bound by his acts. Secondly: whether, if this be the true rule, any reasons are here offered to take the present case out of such general rule.

In the first place, the Court, we apprehend, would be much disinclined to allow these proceedings to be revived, and the next of kin put to the fresh expence of opposing these papers a second time, unless it were bound so to do, either from a conviction that the rights of third parties had been improperly and lightly sacrificed in the former attempt to substantiate these papers; or unless it were required by the principles of law, or by a constant stream of authority. Now collusion is quite out of the question; for it is admitted that Mr. Cundy, the executor, fully discharged his duty; that he was assisted and furnished with information by Riddel Wood, the brother of the present party, who has exactly the same interest; and that a caveat entered by the proctor of that brother was withdrawn by the advice of his counsel, on the ground that the papers could not be supported.(*a*)[1] This affords the strongest possible disproof of collusion or of neglect; and indeed the act on petition abstains from suggesting any such charge.

That all parties and all interests are bound by **[648]** the act of the pars principalis is a principle universally recognised. On this principle it is that, in cases of marriage, whether void or voidable, and in which the wife is the only party proceeded against, the decisions of this Court are held to bind the children. Indeed, to what manifest inconvenience and injustice would any such practice, as that now attempted, necessarily lead? When would a next of kin be safe, if allowed to be attacked by every legatee in succession? It may, however, be said, the objection is easily obviated by citing all parties interested to see proceedings: but if this were done much useless expence would be incurred in every common suit; and it would render all property, where such a course had not been adopted, insecure. In *Colvin* v. *Fraser* (supra, p. 107) a doubt was raised whether the next of kin had a right to take out such a decree, and though the Court overruled the objection, it at the same time seemed to be of opinion that the decree was unnecessary; as the legatees, unless collusion were shewn, would be bound by the acts of the executor. The principle that "res inter alios acta aliis nec nocet nec prodest" cannot be disputed: but this rule, we contend, is limited to the person having the chief and primary interest, and that those whose claims are dependent upon, and deduced from, and through, the pars principalis, are bound by his acts; that, after a sentence against the legitimus contradictor, none other has a right to contest the same question.

Who, then, is the legitimus contradictor of the will?—the hæres scriptus—the executor—the person to whose especial care the testator, if tes-**[649]**-tator he be, has committed the trust of carrying his will into effect—whom he has selected to watch over the interests of his minor legatees, and of his creditors, and, generally, over his estate; and who is called the very foundation of a testament. Such is the rule adopted by the Courts of common law, and of Chancery, by the civil law, and by these Courts.

In the first place, it cannot be pretended that at common law the act of the executor does not bind the legatee: he may confess as many judgments as he pleases, and they cannot even intervene, or in any way interfere to prevent him. In Chancery, though they may intervene, yet they are not—not even the residuary legatee—necessary parties to a decree against the executor. Hargrave's Law Tracts, pp. 475-6, in notis; *Lawson* v. *Barker*, 1 Bro. C. C. 303. *Brown* v. *Dowthwaite*, 1 Madd. 448. This doctrine is only gathered by inference from the Digests; (*a*)[2] but the commentators are express

(*a*)[1] In the act on petition, and in the affidavit of James Riddel Wood, it was stated to be the opinion of counsel that, "although the additional facts" [that James Riddel Wood had then discovered] "afforded strong grounds of presumption towards establishing the testamentary papers, yet that those facts as stated, or such at least of them as were supposed to be capable of proof, did not amount to what the Court would require."

(*a*)[2] Si hereditatis judex contrà heredem pronunciaverit non agentem causam, vel lusoriè agentem: nihil hoc nocebit legatariis. Dig. lib. 30, tit. 50, s. 1. Again—Si ex causâ de inofficiosi cognoverit judex, et pronunciaverit contrà testamentum, nec

upon the subject. Scaccia, after stating as a general rule that "sententia inter alios lata aliis non nocet," gives the following among other exceptions, "Quando sententia est lata cum legitimo contradictore, id est, cum eo cujus principaliter interest, et à quo alii **[650]** jus habent consecutivum; quia tunc illa sententia facit jus quoad omnes, etiam non intervenientes et non citatos." Again: "Sententia lata contrà hæredem nocet fidei commissario etiam ignoranti litem et non citato;" and, after stating that this doctrine is confirmed by many passages in the Digest, he concludes: "Ex quibus legum Doctores communiter videntur colligere quod sententia lata contrà hæredem, seu contrà testamentum, noceat etiam legatariis." (*a*)[1] Covarruvias is to the same effect. "Ubi lis tractatur cum legitimo contradictore, à quo aliorum jus in eadem re derivatur et oritur; et qui primas obtinet in eâ controversiâ partes, sententia lata facit jus quoad omnes, etiamsi nec litigaverint, nec vocati fuerint ad judicium, nec scientiam litis controversæ habuerint." (*b*) This principle is equally supported by Novarius,(*c*) by Heraldus,(*d*) by Peregrinus,(*e*) and by Mauritius.(*f*)

[651] What is the practice here? A legatee is not allowed to propound a paper till he has cited the executor to propound, or to refuse so to do. This was decided in the case of *Da Silva* v. *Henriquez.*(*a*)[2] Could then Mr. Cundy again propound this will? And if he could not be allowed, what a contradiction it would be to allow the person whose claim is subordinate to and deduced from his; and who is only allowed to propound on his refusal. There are no cases, that we are aware of, in which such a course has been permitted. The cases where the question has been raised by the next of kin against the executor, in possession of a probate, are completely distinct: the interest of all these are equal; none are secondary or subordinate; none are paramount; there is no legitimus contradictor. And the practice of always citing the next of kin rests upon this ground, that no one next of kin represents another next of kin: but to cite, regularly and formally, all the legatees under a will, who may be resident in different parts of the world, would be an impracticable attempt; and if it could be resorted to, much inconvenience would result from the number of parties that might thus be introduced into a cause.

The effect of a sentence of the Ecclesiastical **[652]** Court was much discussed in *The Duchess of Kingston's case* (State Trials, vol. xx. 8vo edition); and the result was, that all parties and interests are concluded by it, as much as if it were a sentence in a proceeding in rem; and it is established that in a suit of salvage, or wages, parties, though not cited, are bound by the decree (*Attorney General* v. *Norstedt*, 3 Price, 97).

In the case of *Lewis* v. *Bulkeley* a similar application to the present was rejected

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fuerit provocatum, ipso jure rescissum est, et suus heres erit, secundum quem judicatum est: et bonorum possessor, si hoc contendit; et libertates ipso jure non valent, nec legata debentur; sed soluta repetuntur aut ab eo qui solvit, aut ab eo qui obtinuit. Dig. 5, 2, 8, 16.

(*a*)[1] Scaccia, in his "famous book" (as Mr. Hargrave in his Law Tracts, p. 483, calls it), De Sententiâ et de re Judicatâ, p. 349, gloss. 14, quæstio 12, n. 77, n. 78 (Ven. 1629, F.).

(*b*) Covarruvias Pract. Quæst. c. 13, n. 5, p. 854, and in another place, tom. 2, c. 13, n. 3.

(*c*) Novarii Decisiones, 29, n. 1, 2, 3, and Decisiones, 68, n. 10, p. 83 (1637, F.).

(*d*) Heraldus de Rerum Judicatarum Auctoritate, pp. 20-1 (8vo, 1640).

(*e*) Antonius Peregrinus de Fidei Commissis, art. 53, n. 49, p. 1504 (4to, 1606).

(*f*) "A writer of great authority on the civil law, in explaining where 'res inter alios acta' shall bind third persons, says, 'suâ naturâ ac propriâ vi nocet vel prodest sententia aliis, quam inter quos lata est, quoties lis tractatur cum legitimo contradictore, à quo cæteri jus suum tanquam à fonte derivant ac recognoscunt.' Erici Mauritii Dissertatio de Jure Interventionis. Vid. sect. 15." Harg. Law Tracts, p. 475.

(*a*)[2] 1793, Prerog. East. Term, 1 sess.

Caveat entered by next of kin. Legatee, named in a paper, declared he propounded it, and gave an allegation.

Dr. Swabey, counsel for the legatee, suggested that, as there were executors named in the paper, they ought to be cited to appear and propound. The Court (Sir William Wynne) agreed that the legatee ought to cite the executors; and directed a decree to issue.

by the High Court of Delegates.(*c*) It may be said **[653]** that, in that case, there was a regular sentence against a will. We admit the distinction; but how does it bear? That in a case where the question is so nicely balanced, that the Court allows it to go to proof, there the legatees are bound; but in a case so feeble in its circumstances that the Court rejects the allegation, the legatees in succession may revive it, and vexatiously pursue the next of kin ad infinitum. So that the worse is the case of the parties the better is their situation.

In respect to the second point—whether there is any thing to remove this case out of the general principle, and to support the present application—we submit that the affidavits are scanty, and quite insufficient to induce the Court to re-open the cause. The allegation was rejected without doubt or hesitation. On the part of Mr. Wood there is much appearance of vexation and delay. The names of the persons who inform him that the evidence, now in his possession, is sufficient, are not given; nor the names of the witnesses; nor the facts that can be established; nor when they came to his **[654]** knowledge. The party should have been ready with an admissible allegation; or at least the Court will require, before it over-rules this protest, that such facts be laid before it as, if pleaded, would constitute an admissible allegation. *Dabbs* v. *Chisman*. *Jennens* v. *Beauchamp*, 1 Phill. 158.

Phillimore and Addams contrà. The general principle we may admit to be correctly stated. If, for instance, a will had been bonâ fide opposed by the next of kin on the ground of fraud, insanity, collusion, or force, and established, the Court, after an interval of many years, during which the sentence had been acquiesced in, would not be inclined to re-open the proceedings; but great hardships would result if, in all cases, this course were pursued. One example will shew it. Suppose a party, unadvisedly, propounds papers, and the allegation is rejected; could such a proceeding be conclusive against all persons interested under those papers? We admit that, under the circumstances, the allegation offered by Mr. Cundy was properly rejected; but we contend that, with reference to the facts disclosed in our affidavits, and to the character of the deceased, the arguments adduced against this application are, in a

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(*c*) *Lewis & Lewis* v. *Bulkeley*. Delegates, 1732.

This was an appeal from two concurrent sentences of the Court at Bangor and of the Court of Arches, both which Courts had pronounced for the validity of the will of a married woman made previous to a second marriage.

The original citation at Bangor issued at the instance of Rowland Williams and Dorothy, his wife, and also of William Lewis and Anne, his wife—the next of kin of the deceased—calling upon William Bulkeley, tutor or guardian of his daughter Maria Bulkeley (during her minority), executrix in the will of Maria Williams alias Hampton, to appear and prove the said will per testes; and further to do and receive what may be just.

There was no citation against the legatees, either personally or viis et modis, nor a citation against all persons in general to see proceedings.

On 17th February, 1732–3, the Delegates reversed both sentences. On 19th April, 1733, before the Con-Delegates, Hill exhibited for Dorothy Williams, sister and next of kin of Mary Hampton, otherwise Williams, and prayed administration to pass the seal. Sayer exhibited a special proxy under the hand and seal of Owen Lewis, and alleged him to be a legatee in the will of the deceased in this cause, and now remaining in the registry of this Court.

Upon the petition of each proctor, the act to be delivered three days before, and to shew precedents on the last Court of this term.

On 7th May the cause was assigned for informations and sentence at Serjeants' Inn whensoever.

On 1st June, before the whole commission at Serjeants' Inn, Hill prayed that administration of the goods of Mary Hampton, otherwise Williams, as dying intestate, be granted and ordered to pass under the seal of this Court to his client—the sister and next of kin of the deceased. Sayer prayed liberty to propound the will, in the name of his client, and to prove the same by sufficient witnesses.

The Judges, by their interlocutory decree, rejected the petition of Sayer, and ordered the administration to pass the seal in the name of Dorothy Williams—the sister and next of kin of the deceased.

Note.—This is the case cited as *Mrs. Lewis' case*. 4 Burn's Ecc. Law, p. 51.

great measure, irrelevant and insufficient. The two papers are not necessarily connected: the principal one has no executor named in it. Is then a person, so much interested as Mr. Peter Wood, to be bound and precluded by what has already passed in respect to these papers? It has been argued, as a broad [655] proposition, that under no circumstances (unless fraud or collusion be shewn) where an executor has propounded a will, can another party come in and revive the proceedings? and it may be generally true that lis pendens is a notice to all parties interested: yet the doctrine of this Court has never been that, in every possible case, a party is bound by the acts of an asserted executor. What is said in the civil law as to the pars principalis strongly favours our case; for, by the civil law, the pars principalis means the heir who answers to our next of kin. In the Court of Chancery it is true that an executor represents all parties, because it has been previously decided here who is to represent the testator. There is no analogy whatever between matrimonial and testamentary causes. Sententia contra matrimonium nunquam transit in rem judicatam is well established as a general principle; and there are instances where, to a certain degree, a sentence in a matrimonial suit may be again put in issue.

Per Curiam. In the case of a voidable marriage, where the parties are dead, could the question be agitated incidentally by children? I am not aware of any case where that has been allowed.

Argument resumed.

In *Newell and King* v. *Weeks* (2 Phill. 224) the principle upon which we rest this application was acted upon by the Court; and the same doctrine has been maintained in *Jennens* v. *Beauchamp* (1 Phill. 158), *Braham* v. *Burchell* (3 Add. 243), and a variety of ad-[656]-judged cases. No precedent has been brought forward that will support the argument on the other side. *Lewis* v. *Bulkeley* is easily distinguishable; for, in that case, there was a regular sentence after the pleas had gone to proof. The question then is reduced to the circumstances; for it is admitted that the general rule is open to exception. We contend that Mr. Peter Wood was not cognizant of the former proceedings, and that enough is established not to preclude him from being allowed to plead his interest.

Per Curiam. Is he a party in distribution?

Argument resumed.

Yes, he is. If, however, the Court should prefer that this matter, as to the protest and bringing in of the administration, should be suspended till an allegation is offered, and the Court has an opportunity of judging whether it is admissible, we see no objection to the adoption of that course.

Judgment—Sir John Nicholl. A person of the name of John Medley died on the 12th of August, 1827, having left three sisters, and several nephews and nieces, entitled in distribution. After his death two papers, described as together containing his will, were propounded by Mr. John Cundy, the asserted executor: they were opposed; and an allegation given in support of them having been rejected by the Court (*Cundy* v. *Medley*, supra, p. 140), administration was de-[657]-creed to two of the deceased's sisters. The administration, after some delay occasioned by a caveat, having been entered by one of the nephews, James Riddel Wood, seems to have passed the seal to one of the two sisters on the 28th of January; and is now called in by a process dated on the 20th of March, and taken out by Peter Wood, another nephew, and a residuary legatee, under one of the papers. An appearance has been given thereto under protest, which, having been extended into an act of Court, refers to a variety of opinions, given by counsel of this bar, respecting the validity of these papers, and also enters into a statement of certain facts and occurrences, from which, on the one hand, it is contended that Peter Wood ought not to be allowed again to propound these papers; and on the other, that nothing has happened to debar him from that right. Though the opinions given on either side concur that the papers are of no validity, yet, as Peter Wood has not been proved to have consented to be bound by those opinions, and as they cannot therefore be decisive of the present question, I shall not further notice them.

The question then is, whether Peter Wood, either as a matter of right or of equitable indulgence, ought to be permitted to set up the validity of these papers. In the first place, two papers are propounded, and if it were quite clear that Cundy was nominated executor of that under which Peter Wood claims, the Court would be justified in holding that, as appointee of the deceased, Cundy's act (unless collusion, of [658] which there

is not a shadow of suspicion, could be shewn) would bind all persons interested under the asserted will: because the executor is not to be considered merely as the pars principalis or legitimus contradictor, but as the person especially selected by the deceased to carry his wishes into effect. But how does the fact stand on reference to the instruments themselves? [The Court here described the papers. Vide supra, pp. 140-2, and then continued]:

Now Peter Wood's claim is wholly under the first instrument, and the appointment of Cundy is made in the second scrap of paper; and it appears from both that the deceased clearly intended to appoint more executors than one. That this second paper has any reference to or connexion with the first, non constat; and unless that connexion is established, Mr. Cundy would not be the legitimus contradictor; for he would not be the executor of the former paper, under which alone, as I have said, Wood is interested. True it is that the decree extracted by Peter Wood calls on the administratrix to shew cause why Mr. Cundy should not be assigned to take out probate as executor; but that is the mere form in which he has been recommended to extract the process, and it may still be established that Mr. Cundy is not the executor. Mr. James Riddel Wood, who furnished information, and was consulted respecting the former suit, and was cognizant of, and privy to, every part of those proceedings, would unquestionably be bound by what then occurred: but the question with respect to Peter Wood is, whether he was legally [659] or de facto privy to the suit between Cundy and the Misses Medley. Not legally, because though one of the opinions recommended that a citation against all persons interested under the papers should be taken out, that course was not pursued; but the parties thought to go a shorter way to work. It remains then for him to shew that he was not de facto privy. If the intervention has not taken place at the earliest period, I should hold the party bound by the lis pendens; and as there was no reason why he should have intervened, his father and brother being both on the spot, I should not consider his bare non-intervention and non-citation sufficient grounds to justify the Court in permitting him to re-propound these papers, unless he can also shew that he was de facto and bonâ fide ignorant that there was a suit depending. He does not state when he was informed of the actual lis pendens. There is in his affidavit much room for mental reservation. The Court does not exactly arrive at what is his meaning; he does not state that he did not know, at the time, of his uncle's death; he does not state when, nor under what circumstances, information of the facts on which he now relies reached him, nor who are the agents from whom he received that information, nor what the facts are, so that the Court might judge for itself; nor does he even state that they have been laid before counsel as all the other facts have been: he says "that he did not in any way consent or make himself a party to any acts done by James Riddel Wood or John William Cundy, either during the dependance of the said pro-[660]-ceedings, or subsequent thereto;" but I rather collect from some other parts of the affidavits that he was aware of the proceedings. Now if it is quite clear that Peter Wood did know there was a suit pending, and chose to trust the protection of his interest to his father, to his brother, or to any other friend or adviser, he would be in strictness perhaps bound; still, as the Court in its discretion exercises a degree of indulgence towards parties out of the kingdom, and as what appears is not sufficient quite to convince me that he knew what was going forward, I do not feel imperatively called upon to uphold the protest without allowing a further opportunity of establishing his claim to the equitable consideration of the Court. I shall therefore allow the protest to stand over for the present, and adopting in some measure a suggestion of the learned counsel who spoke last, shall permit Peter Wood to bring in an allegation, on his making an affidavit shewing that he was ignorant of, and abroad during the pendency of, the former proceedings, and stating the time when the facts relied on to substantiate the validity of these papers first came to his knowledge: but he must understand that he does this at the certain peril of the full costs of calling in the administration, if he should ultimately fail in proving these papers entitled to probate.

The allegation might, and perhaps, indeed, ought to, have been brought in this day; but I direct it to be brought in on the next Court day. Perhaps, too, if Peter Wood had not been a party in distribution, the Court would have required from him a security for costs.

[661] Trinity Term, 3rd Session, 1828.—An executor having propounded papers in an allegation which was rejected, and administration being thereupon decreed to the next of kin; a legatee cannot be allowed to call in such administration, in order to repropound the same papers, unless he can bring in an admissible allegation, and shew by affidavit that the facts have come to his knowledge since the rejection of the former allegation: in which case semble that even the executor might repropound them.—An allegation repropounding two unfinished papers rejected, the facts not being sufficient to rebut the adverse presumption of law: and the administrator who appeared under protest dismissed with costs.—When an instrument is unfinished, its state must be accounted for; either by shewing completion prevented, or that the deceased, abandoning his intention of finishing it, meant it to operate in that form without any further act.

On admission of the allegation.

This allegation was, in substance, as follows:—

1. "That John Medley died on the 12th of August, 1827, a bachelor; leaving Ann and Priscilla Medley, spinsters, and also Susanna, wife of John Frost, his sisters and only next of kin; and together with several nephews and nieces, children of two deceased sisters, Mary, wife of Benjamin Jefford; and Elizabeth, wife of Peter Wood, the only persons entitled in distribution to his personal estate and effects, in case he had died intestate. That the deceased left no real property, and that his personal estate and effects consisted of £17,000 in the funds."

2. "That he was a person of very eccentric and retired habits; extremely penurious and reserved in respect to his affairs, and kept up very little intercourse with any of his relatives; that during the latter years of his life he resided entirely either at taverns or lodgings; and, when at the latter, he took his meals almost daily at some neighbouring tavern."

3. "That he for many years previous and up to the time of his death allowed to his sisters, Ann and Priscilla Medley, the yearly sum of £80 each; that he frequently expressed his intention of leaving them annuities for life only (they being elderly unmarried ladies), and that such his intentions were at all times known to the said two sisters, who were and **[662]** expressed themselves to be perfectly satisfied therewith."

4. "That for many years and till his death the deceased entertained a very unfavourable opinion of the conduct of John Frost, the husband of his sister Susanna, in consequence of his extravagant habits; and the deceased frequently declared that the said John Frost should not have the spending of any of his property."

5. "That the deceased at all times had a great affection for his nephews and nieces (Jefford and Wood); and frequently declared to divers persons that they would eventually come in for all his property, but not in equal proportions, as he intended to make a distinction in that respect in favour of one or two of them, without however, at such time, specifying which one or two in particular."

6. "That in October, 1824, the deceased wrote No. 1; and that not having named any executor thereof, he did some time afterwards, but when more particularly the party proponent is unable to set forth, with his own hand draw up No. 2. That the said paper writings contain together the last will and testament of the deceased, and were meant and intended by him to operate as and for his last will and testament. And that by such last mentioned paper he appointed John William Cundy sole executor of his will."

7. "This article pleaded the handwriting of the testamentary papers."

8. "That the deceased employed Capel, Cuertons, and Cundy as his stockbrokers; that he **[663]** placed great confidence in them (particularly in J. W. Cundy, his executor); and that he frequently deposited large sums of money in their hands, which they held as his bankers."

9. "That on the 10th of September, 1823, the deceased took up his residence at the Princess Charlotte Tavern, at which he wholly lived until July, 1825, when he quitted in consequence of its then proprietor retiring from the house. That during such his residence the deceased became much attached to, and took into his confidence, George Caines, the principal waiter in the tavern, and frequently expressed himself as extremely thankful to Caines for his kindness and attention, especially during several serious attacks of illness. That in August, 1826, the deceased, then resident in Arundel Street, having accidentally met Caines, proposed he should enter into

his service in order constantly to attend upon him and accompany him in his walks; which Caines did, but shortly quitted the service from a want of suitable accommodation."

10. "That in the latter end of 1824, and whilst the deceased was living at the Princess Charlotte, he, being very unwell, requested Caines (as he had frequently done on former similar occasions) to come and sit with him after the business of the house was over, which Caines did, and remained talking with the deceased for a considerable time. That the deceased who, on such occasions, was and complained of being unusually ill, stated expressly to Caines, 'that happen what would to him, or die when he might, he had made **[664]** his will, or settled his affairs, and that his mind was quite easy in that respect.'"

11. "That in the beginning of June, 1825, he informed Caines it was his intention to go for a short time into the country, as he found his health still declining; and at the same time assured him that 'in the event of any thing happening to him (the deceased) his will was made, and his affairs finally settled.'"

12. "That he for many years previous to his death was on terms of the greatest intimacy and confidence with ——— Edwards, Esquire; that during the last two years of his life they met almost daily, and dined together at the Constitution Tavern. That, on very many of those occasions, he informed ——— Edwards 'that he had made his will, and thereby eventually bequeathed all his property to his nephews and nieces, but that one or two of them would take more than the rest.'"

13. "That in the latter end of May, 1827, the deceased was suddenly taken ill and deprived of his mental faculties; and that in consequence of such illness the said Ann and Priscilla Medley came to London; that, whilst at the deceased's lodgings, they wrote to Mr. Henry Edwards, a solicitor, and acquaintance, to request he would immediately come to them for the purpose of preparing a power of attorney to be executed by the deceased for receiving his dividends at the bank. That Henry Edwards accordingly attended at the deceased's lodgings; and that on such occasion Ann and Priscilla Medley brought down, from the deceased's desk, the paper-**[665]**-writings, No. 1 and 2, pleaded as aforesaid, and requested him to inform them 'whether it was a legal instrument?' That he replied 'they were imperfectly executed, and recommended that a more formal instrument should be prepared.' That Ann and Priscilla Medley well knew the contents of the said papers, and expressed themselves satisfied that such were conformable to the wishes of the deceased; and at the same time informed Henry Edwards that should the deceased be restored to a proper state of mind they would urge or recommend him formally to execute the same, or to make such or a similar will. That Henry Edwards again saw the said paper-writings on the following day; and that, on both occasions, they were pinned together. That the deceased continued, until his death, in a state both of body and mind which totally disqualified him from attending to, or comprehending, his affairs."

14. "That the said papers, when taken possession of by Ann and Priscilla Medley, were discovered in a pocket-book in the deceased's writing desk, wherein all his papers of value and his securities were deposited: that the pocket book contained two receipts signed by the deceased's sister Susanna (now Frost), the one dated 16th December, 1817, the day previous to her marriage, for £487, 10s.: and the other for £25. Also an acknowledgment from James Wood, a nephew, of the gift of £800, subject to 5 per cent. interest during the deceased's lifetime, bearing date the 7th of May, 1827."

[666] Lushington and Nicholl in objection. The party still persists in propounding No. 2, and probate is prayed to Cundy exactly as before: but the only ground of allowing this cause to be revived was the disconnexion of the two papers; yet, throughout this allegation, recognitions, custody, finding, are pleaded as applicable to both: all facts support the latter as well as the former. The expressions of intention go no further than the papers themselves; and it has already been decided that the papers shew only a passing intention, à fortiori then, declarations, which are much weaker, inasmuch as they may be more easily misunderstood, and more easily made. The affidavit is unsatisfactory. Wood does not state that he was abroad, which was required to be set forth. He says that the proceedings were instituted and conducted without his knowledge, but he does not say that he was ignorant of the pendency of the suit. It is perfectly consistent with the affidavit that he knew there was a suit, though he might not be aware of the parties to such suit, nor of the particular steps that were taken in it.

[The objections taken to the substance of the allegation were those referred to in the judgment of the Court.]

Phillimore and Addams contrà. The paper is certainly imperfect, but what is the doctrine of the Court in cases of this description? that the degree of proof must be in proportion to the imperfection of the instrument: it may, therefore, be more or less difficult of proof according to the circumstances. This **[667]** paper is capable of being sustained by extrinsic evidence, by the answers of the adverse party, and by the testimony of the witnesses who are vouched to establish the allegation. It is, in itself, more than a mere inception of a will; it disposes of the residue; and the heading of it, "This is the last will and testament of me John Medley," is very generally considered and adopted as tantamount to a signature; Burn, in his Ecclesiastical Law, and Blackstone furnish authorities to that effect; (*a*) and if it is so laid down in respect to real property, à fortiori it may easily be regarded as sufficient in a case of personalty only; and here there can be no doubt as to the fixed and final intentions of the testator. The character of the deceased was eccentric, and that may account for his having written his will on a passport. The affidavit has been objected to as not sufficient; it might easily have been drawn more specifically, and, no doubt, it would have been fully borne out by the facts.

Judgment—Sir John Nicholl. I am not clear that the Court ought to consider this allegation at all; for it appears that the papers, which are now brought forward, have been before propounded by Mr. Cundy, who then was, and still is, alleged to be the executor. Generally speaking, a legatee is bound by the act of the executor, and perhaps, **[668]** in the present instance, Mr. Wood might more especially be held bound, because in the former proceedings Mr. Cundy was assisted by another legatee, the brother of the present party. Thus the executor, who primâ facie is to be considered the pars principalis or legitimus contradictor, having failed in his endeavours to establish these papers, another legatee could not be allowed to assert their validity a second time, except on some special grounds: I say "except on some special grounds," because I do not mean to assert that an executor even, after having once propounded a paper, and been unsuccessful in shewing its title to probate, would in all possible cases be barred from re-propounding it, on proof that since its former rejection material facts had come to his knowledge.

The express condition then (as it also was the principal ground) on which the Court permitted, in this case, an allegation to be offered before it decided on the protest, was, that it should be accompanied by an affidavit that the facts were newly discovered, and that the party believed he should be able to make due proof of them.

The affidavit brought in, however, is extremely slight and loose, and does not at all satisfy the exigency of the case: but, passing over this preliminary objection, it would perhaps be more satisfactory to the party if I proceeded to consider the allegation. In so doing, the Court can have but little doubt as to its decision, more particularly as it must bear in mind that the application being special, the facts to support it must be special also.

The averments do not, in substance, differ **[669]** very widely from those contained in the original allegation. The only additional circumstances which could possibly be esteemed material, or have any weight, are certain declarations made to a waiter and to a tavern friend. The first eight articles, besides stating the number of the deceased's relations, the amount of his property, his habits, his mode of life, and the making and handwriting of these papers, plead the state of his affections and regard for the different parts of his family; all which were to be inferred from, and do not go beyond, the papers themselves, and must, I presume, have been known when the former allegation was given in: if indeed they have come to the party's knowledge since he was bound, under the circumstances in which they are offered, to have specified the time and place at which he became first apprised of them.

The paper itself does prove what his testamentary intentions were at the time it was written, and is evidence of the disposition then contemplated: it is, as has been observed, fairly written, and contains a full disposition of his property, but it is not without some erasures, and there is a blank for the amount of his annual income, which it is a little singular he should not have ascertained, if he had finally determined

(*a*) See 4 Burn's Ecc. Law, p. 77 (Tyrwhitt's edition), and the cases there cited: and 2 Black. Com. p. 376 (Coleridge's edition).

that this disposition should take effect. It is, however, pretty fairly written, but it is not subscribed: it is said that is not necessary; and, for some purposes, that may be so: but where there is no subscription there is the absence of one of the strongest proofs that the paper is finished, and that is the [670] reason why the circumstance always has effect in this Court. The paper upon its face is not a will, but a writing preparatory to a will—a draft to be copied: it is written on the back of a passport—whether new or old is of little importance, but it does certainly appear rather of a fair colour. It is hardly credible—at all events it is highly improbable—that a man, however eccentric or however penurious, would choose such a material of which to form the very instrument that he intended to operate: the presumption would be strong against it even if more finished. It must be considered as a preparatory draft: it is manifestly imperfect: it concludes "I appoint my executors," and none are appointed: this is most decisive that he intended to do more—that he proposed to name more than one executor.

Here is another paper—a little scrap: supposing it to have been pinned to the first, what does it shew, but that he intended to appoint executors, of whom Mr. Cundy was to be one: who the other was to be, the deceased was still deliberating; he might even be undecided about Mr. Cundy, for it does not appear that he ever spoke to that gentleman on the subject. I cannot consider that this was any recognition of the first paper, amounting to proof of his having finally made up his mind. The papers then are clearly upon the face of them unfinished, and not only unfinished, but are merely preparatory to some other instrument.

The rule of the Court, which is clearly established, and which I think ought to be most carefully followed, is, that where an instrument [671] is unfinished, you must account for its state, either by shewing that the deceased was prevented from completing, or by shewing that he had abandoned the intention of finishing it, meaning that it should operate in that very form, without any further act.

The paper No. 1 is dated two years and a half before the deceased's death: it is quite obvious, therefore, that he was not prevented from finishing it; he might at any day or hour during these two years and a half have appointed executors, have signed it, and, if he wished, have had it attested. That he was prevented from so doing, however, is not the case set up: but it comes to the other point, that he did not mean to appoint executors, except as by paper No. 2, but intended the instruments to operate in their present form. Now that they were found in his pocket-book, in conjunction with other papers, some bearing date as far back as 1817, some as recently as May, 1827, in no way accounts for his not intending to give them a more formal and complete effect, nor affords any ground to believe that he wished, meant, or considered them to be operative, and to take effect as his final will. This is so contradictory to the papers themselves, and so highly improbable, notwithstanding his eccentricity, that nothing short of the most positive and direct circumstances would be sufficient to establish that such was his intention.

These declarations, that he had made his will, would be utterly insufficient and extremely unsafe grounds on which to proceed. Declarations at all times, unless coupled with acts, [672] are very loose and dangerous evidence—are liable to be insincere—liable to be misapprehended—liable to be misrepresented: but in this case, as has been observed, these declarations do not apply, and have no direct reference to this instrument in particular. If this paper had been produced to his friends and he had said he did not intend to appoint executors, and wished this instrument in its present form to operate, the case would have borne a different aspect; but the declarations pleaded might as well apply to some other instrument which the deceased may afterwards have thought proper to destroy. The first declaration, as pleaded in the tenth article of the allegation, was made about the time of writing the paper, that is, three or four years ago: and on this the Court is asked to believe that the deceased had finally settled his affairs. The other, in the eleventh article, is pretty much to the same effect. The remaining declarations are those made to a person of the name of Edwards, of whom Mr. Wood is able in this allegation to set forth neither the Christian name nor residence. This declaration does bear a reference more connected with the substance of this paper, but it does not identify it, for it is probable enough that if he had made a will, it would be something of this effect: but it would be unsafe in the extreme to the rights of property, and to the interests of the next of kin if upon these general declarations, not applying to a particular instrument, and made to a

waiter or tavern acquaintance, the presumptions of law relating to an instrument so manifestly unfinished could be repelled.

[673] The other circumstance, the impressions of the sisters at the finding, does not supply the defects. Even supposing the affidavit to have been completely satisfactory, that the facts were noviter perventa, or, putting the case still more favourably, supposing the circumstances had been laid in an allegation tendered immediately after the deceased's death; still this plea would not compose a case sufficient to sustain the instrument propounded; and I am still of opinion that the deceased is dead intestate.

I therefore reject the allegation and allow the protest.

Lushington prayed that Mr. Wood might be condemned in costs.

Per Curiam. I can see no reason why, after the executor had been before the Court, and the other brother also had been watching the proceedings, the administration which had gone out should have been called in. No affidavit of stringency has been laid before the Court to justify the proceedings. If the case had been brought forward at first, the expences of it would, as in the original cause, have been allowed out of the estate. I do not think that I can, consistently with what is due to the rights of those in possession of an administration, now refuse to condemn Mr. Wood in costs; but I leave it to the discretion of the other parties to decide whether they think fit to press for them.

Allegation rejected with costs.

[674] DRAPER *v.* HITCH AND OTHERS. Prerogative Court, Trinity Term, 30th June, 1828.—A married woman having under a certain settlement and also under her mother's codicil made a will, and, under her mother's codicil, specifically and under "all and every other power," &c. &c. generally, made a second will with a general revocatory clause; the Court of Probate will grant a general administration with the latter will annexed, but not pronounce against the former will; leaving it to the Court of Construction to decide whether the former will is thereby revoked.—In the Court of Probate an ambiguity on the face of a paper as to the factum: e.g. whether a revocatory clause was intended to operate as a general or only as a partial revocation, lets in parol evidence.—In order to the admission of parol evidence in a Court of Probate, to explain an ambiguity upon the factum of an instrument, the ambiguity must be on the face of the paper; and the facts to be proved must completely remove that ambiguity.

This was a cause (promoted by Carter Draper, an executor in a will dated the 9th of April, 1824) of bringing into and leaving in the registry of the Prerogative Court certain letters of administration (with the will, dated the 19th of October, 1824, annexed) of the effects of Ann Branen (wife of George Branen), deceased, heretofore granted (with the husband's consent) by the authority of this Court, to Elizabeth Hitch, spinster, the sole executrix; and of shewing cause why the administration should not be revoked, and probate granted to her, limited only to the estate and effects of which the deceased had power to dispose by virtue of her mother's, Ann Jordis', second codicil (and which she had by her said will disposed of accordingly), or under such limitations as the Court might appoint; and of proving in solemn form of law the will bearing date the 9th of April, 1824.

On the part of Draper an allegation, consisting of seven articles, was given in. The first pleaded in substance as follows:—

1. That Ann Branen died on the 30th of August, 1825, without issue, leaving her husband; Elizabeth Lee, spinster, her sister; and Mary (wife of George Wilson), formerly Freeman, her niece, the only persons who would have been entitled to her personal estate in case she had died intestate and unmarried.

[675] 2. That by a settlement, dated the 20th of October, 1817, made between Ann Jordis, widow; her daughter Ann Branen (the deceased); and divers trustees, it was witnessed that certain stock should be held in trust for Mrs. Branen during her life, for her separate use independent of her husband: and from and after her decease upon further trust for her issue; but if no issue, then subject to her appointment by will for any person other than her husband; and in default of such appointment, or of a complete disposition of the trust money, then as to such part thereof, to which such direction, limitation, or appointment should not extend upon trust for the next of kin, who should be then living, of Ann Jordis; to be divided between them according to the statutes of distribution.

3. That Ann Jordis duly executed her will with two codicils; and by the second codicil, dated the 24th of December, 1817, after reciting a certain disposition of her property under her will, revoked the bequest, and directed, in case Mrs. Branen died without issue, that the same should be subject, but in exclusion of her husband, to her appointment by will, notwithstanding coverture. This article further pleaded the death of Ann Jordis in the lifetime of her daughter without having altered or revoked this codicil, and that probate of the said will and codicils had been granted by this Court.

4. That the will, pleaded on behalf of Carter Draper, was duly made and executed by Ann **[676]** Branen in exercise and by virtue of the powers and authorities vested in her as already set forth in the second and third articles.

5. "That Ann Branen, some time after the execution of her said will (as pleaded in the next preceding article), did, under the advice of her husband, consent to revoke the disposition which she had made by it, so far as respected the bequest to her under her mother's second codicil, and to make a further appointment thereof; that the conveyancer, to whom instructions were delivered to prepare a will therefrom, not being aware that the deceased was empowered to dispose of any other property besides that bequeathed to her by her mother's codicil, inserted in the will of the 19th of October, 1824, a clause that the deceased did thereby revoke and make void all former wills by her made; (*a*)[1] that she did unwittingly execute the said will without understanding the effect of the clause, and without having any intention to revoke the disposition which she had made by her former will, save and except so far as respected the property which she was authorized to dispose **[677]** of under the second codicil to the will of Ann Jordis, deceased." (*a*)[2]

Dodson for Mrs. Hitch, the executrix.

Lushington and Addams for Miss Lee and Mrs. Wilson, the next of kin of Ann Jordis, on the death of Mrs. Branen.

The King's advocate and Phillimore for Mr. Draper.

[678] *Judgment—Sir John Nicholl.* When the allegation in this case was admitted the Court did not in the slightest degree intend to depart from the principles recognized in *Lady Bath's case:* (*a*)[3] viz. that in order to justify the admission of parol evidence to explain an ambiguity upon the factum of an instrument the ambiguity must be on the face of the paper; and further, the facts alleged and to be proved must completely remove that ambiguity. The Court therefore cautiously reserved all questions, and said, with reference to the asserted ambiguity, that it would be more satisfactory to have the evidence laid before it. I am very glad that I took that course; because, as far as the Court can rely on the evidence, it was decidedly the intention of the deceased to revoke the former will: whether the instrument, which purports to be her last will and testament, will have that effect and will give Mrs. Hitch all the property, it is not for this Court to decide.

(*a*)[1] The will, after reciting the second codicil of Mrs. Jordis' will, contained these passages: "Now in pursuance and exercise of the power and authority given to or vested in me in and by the said codicil, and of all and every other power and authority powers and authorities whatsoever enabling me in this behalf I do by this my last will and testament," &c., &c. "and I do hereby nominate, constitute and appoint the said Elizabeth Hitch the sole executrix of this my will, and I do hereby revoke all former and other wills by me at any time heretofore made and declare this to be my last will and testament."

(*a*)[2] This allegation was debated on the 7th of May: and, on the part of Miss Lee and Mrs. Wilson, the 1st, 2nd, 3rd, 4th, and 6th articles were admitted; except as to the 1st article they stated, that Elizabeth Lee was the lawful aunt, and not the sister; and that Mary Wilson was the cousin-german, and not the niece of the deceased. The fifth article alone was opposed.

Per Curiam. The Court was of opinion that there was on the face of this will such an ambiguity as opened the door to parol evidence; and—considering that it was made under a power by a married woman, and prepared through the immediate agency of her husband and without her having direct communication with the conveyancer—allowed the allegation to go to proof, reserving all questions.

Allegation admitted.

(*a*)[3] *Fawcett* v. *Jones and Pulteney*, 3 Phill. 434.

What are the circumstances? The deceased and her husband go to the office of Mr. Chapman, a conveyancer, near Chancery Lane: he is out of town; but the husband introduces Mrs. Branen as his wife to one of the clerks who was well known to him. The clerk receives the instructions, admitted to be in the handwriting [679] of Mrs. Branen, and which are of the following tenor:—

"In the name of God Amen—I Anne Branen of 24 Canterbury Place Lambeth being in perfect health sound mind memory and Understanding Do make and publish this as and for my last Will and Testament In manner following. I give devise and Bequeath unto my friend Eliz^th^ Hitch of John Street Islington her Heirs Exor. Admors. and Assigns for ever all my Property of whatsoever nature or kind it may be In the Publick Funds or elsewhere and all my goods Chattels Moneys and Estate whatsoever and wheresoever whereto I am entitled either at Law or equity And I do hereby revoke all former Wills by me at any time heretofore made Declaring this to be my last Will and Testament And I do hereby appoint the said Elizabeth Hitch Sole Executrix of this my Will. "ANN BRANEN."

Nothing can be more clear and distinct than that, by this instrument, she did intend to revoke the former will, and to give to Mrs. Hitch the whole of that property over which she had a power of disposal.

Myers, the clerk, has been examined; and he says: "When he had looked at the instructions he observed 'that Mrs. Branen being a married woman she could not make a will;' whereupon Mr. Branen said to his wife, 'You have a power to do so,' which she acquiescing [680] in, he added, 'You must give it to me.' Deponent said it would be necessary for Mr. Chapman to have the power. That in a few days the husband called and left with deponent a copy of the will and codicils of a Mrs. Jordis by which Mrs. Branen was enabled to make a will."

The copy of the will and codicils of Mrs. Jordis then are only produced to satisfy Myers' demand: no allusion is originally made to them as the authority under which this will is to be executed: so that the case stands as if the instructions had been given without reference to any particular instrument, and for no other possible intention but with a view both to a general disposition and to a general revocation.

In the course of these communications with the conveyancer's clerk no mention is made that Mrs. Branen had executed a former will; but from the written instructions and from Mrs. Jordis' second codicil a draft is prepared, which is given to Branen, who, after some days, returns it, and says his wife had approved of it, and would call and execute the will when it was ready. At the execution the clerk says: "He read the whole contents of the will over to Mrs. Branen, including the clause of revocation, and that no observation was made upon it:" and on an interrogatory he states: "That nothing passed to lead him to believe, either previous to the execution or in allusion to the will, dated the 19th of October, 1824, that it was, at that time, the intention of the testatrix to make a will limited in its operation to part only of the property over which [681] she had a disposing power; but, on the contrary, he firmly believes that she fully intended it to be her last and only will, and to operate over all her property."

How can this Court say that here is such an ambiguity as will authorize it to set aside the revocatory clause? It is bound to confirm the general grant. What may be the decision of other Courts, to which the construction of the due execution of such powers properly belongs, I cannot undertake to say. It will appear upon the face of the papers that the revocatory instrument does not specifically refer to the power under which the former will was made.(*a*) On the effect of that circumstance I do not decide. This Court will be governed by the ordinary principles of testamentary law and the manifest intention of the testator, in the absence of any clear authority establishing a different rule applicable to this case.

I therefore direct the general administration with the latter will annexed to be delivered out, but I do not pronounce against the former will.

(*a*) By the former will, viz. that of the 9th of April, 1824, Mrs. Branen disposed of the property under the settlement, as well as under her mother's codicil; but the will only recited generally, "Whereas I am enabled, notwithstanding my coverture, to dispose of my property by will I do hereby," &c. For the revocatory clause in the will of October, 1824, see ante, p. 677, note (*a*).

[682] In the Goods of Sarah Blakelock. Prerogative Court, Trinity Term, 4th Session, 1828.—The executors having died in the deceased's lifetime, a joint limited administration, with the will of a married woman under a power annexed, granted to five residuary legatees, to whom a similar grant had been made at York, the forum domicilii, and who were all parties to a suit in Chancery.

On motion.

Sarah Blakelock, late of Chapel Allerton in the parish of Leeds, by virtue of her marriage settlement made her will, and thereof appointed her husband and John Charlesworth executors: she also appointed five residuary legatees.

The King's advocate, after stating that the executors died in the lifetime of the deceased, and the five residuary legatees had been admitted joint administrators, with the will annexed, by the Court at York, the forum domicilii of the deceased, and were parties to a suit in Chancery, moved, under the circumstances, for a limited administration to the same parties, though it was contrary to the ordinary practice of the Prerogative Court of Canterbury to join more than three in an administration.

Motion granted.

[683] Loton *v.* Loton. Prerogative Court, Trinity Term, 4th Session, 1828.—A diocesan administration obtained by one next of kin directed to be brought in, and pronounced null and void on the prayer of another next of kin who had taken out a prerogative administration: the diocesan administrator being personally cited and shewing no cause to the contrary.

On motion.

John Loton, late of Acton Beauchamp, in the county of Worcester, died in July, 1827, a bachelor, without parent, and intestate. On the 31st of August his brother John took out letters of administration in the Consistorial and Episcopal Court of Worcester; and on the 26th of April, 1828, administration of the deceased's effects was granted by the Prerogative Court of Canterbury to Edward Loton, another brother: and at his instance a decree had issued from this Court, which, after setting forth "that the deceased had, at the time of his death, goods, chattels and credits in divers dioceses or peculiar jurisdictions sufficient to found the jurisdiction of the Prerogative Court of Canterbury, cited John Loton to bring into and leave in the registry of this Court the pretended letters of administration which had been granted to him; and to shew cause why the same should not be declared null and void, as having been unduly obtained."

This decree was personally served on the fifth of June, and on this day, at the motion of [684] Dodson, the Court desired the diocesan administration to be brought in, and pronounced it null and void.

Motion granted.(*a*)

Peddle *v.* Evans. Prerogative Court, Trinity Term, 4th Session, 1828.—The Court will not direct the deputy-registrar to allow the solicitor of a party, who has a new proctor, to be present at the examination by consent of the bill of costs of his former proctor: such an attendance being unusual and unnecessary to the purposes of justice.—Bills of costs between a proctor and his party are of common law cognizance; the Ecclesiastical Court has no jurisdiction over them; the examination of such bills by the deputy-registrar is only by consent and ex gratiâ; and neither party is thereby bound as to the amount.—The Ecclesiastical Court can enforce the payment of costs where one party is condemned in costs to the other party; and such costs are then taxed by the Judge, in open Court, on the report of the deputy-registrar, subject to objection from either party.—When a party regularly complains of gross extortion by his proctor, the Court may punish the proctor by suspension or otherwise.

On motion.

(*a*) This motion had been previously made on the third session; but on the statement of the defendant's proctor, that the Stamp Office invariably requires both administrations to be produced before it will restore the duty on an erroneous grant, and that it will not make the allowance upon a certificate from the registrars of the Prerogative Court, the Court permitted the motion to stand over, in order that the prerogative administrator might be applied to for the use of his administration to enable the defendant to recover the amount of the stamp on the diocesan grant. The prerogative administrator, however, refused to accede to the defendant's application.

Lee moved; referring to the 2 Geo. 2, c. 23, § 10, 21, 23; (*a*)[1] to the case of *Garnett* v. *Ferrand*, 6 B. & C. 611; and to the 134th, 135th, 137th canons.

Per Curiam. The nature of the present application seems to be totally misapprehended by all the parties concerned in it. Here is no suit depending; **[685]** here are no parties amenable to the Court. The application is, that the Court shall direct the deputy-registrar to allow a solicitor employed by Mr. Peddle to attend the taxation (as it is called) of his own proctor's bill. It is a matter ex gratiâ to allow a bill of costs between proctor and client to be examined by the officer of the Court: this Court cannot enforce the payment of any one item, nor has it a right to take off and disallow any one charge: it has no jurisdiction in respect to the payment, and if it attempted to exercise any, Courts of Common Law would interfere by prohibition. For what is the case? A suit was depending in this Court, described *Peddle* v. *Evans;* in Trinity Term, 1824, sentence was given; an appeal was prosecuted to the Delegates; the sentence was affirmed, and the cause remitted: (*a*)[2] each party had to pay his own costs, except that, on some intermediate step in the Delegates, Peddle was condemned in costs: thus the suit was ended. Some question has since arisen between Peddle and his own proctor as to the amount of the proctor's charges. This Court cannot decide that question. The proctor, if his bill still remains unliquidated, must sue for the amount at common law: if the bill has been already paid, the party, Peddle, must also proceed in the Temporal Courts to recover back any overcharge. This Court, I **[686]** again repeat, has no jurisdiction whatever to compel payment between a proctor and his client.(*a*)[3]

Where a party is condemned in costs to the other party, and it is a question between party and party, this Court can then enforce the payment of such costs; and accordingly it refers the matter to the deputy-registrar for his examination; the deputy-registrar, after hearing the parties or their proctors on both sides, reports the amount to the Judge in open Court, who himself, unless one or both of the parties prays to be heard on his or their petition in objection to the deputy-registrar's report, taxes the bill at that amount: then whether the party is liable to costs and to what extent, when condemned, forms a portion of the suit between the two parties; but costs between either party and his own proctor do not stand on the same footing: they are no part of the suit, nor within the jurisdiction of the Court. But if it is intended to sue for the costs at law, or if any dispute arises on the application of either party, the Court will, in aid of justice, allow the bill to be taxed, or, more properly speaking, looked over and examined by the deputy-registrar; for, in that case, he makes no report to the Court. The proctor will then better know what to sue for, and the client what to tender, as the proper amount of compensation: it is a matter of convenience to all parties.

[687] To proceed then to the present case. There seems to have arisen a dispute between Peddle and his own proctor as to the amount of his bill. The proctor consents to refer his bill to the deputy-registrar; the deputy-registrar is ready to undertake the trouble in the usual way. The Court and the deputy-registrar do this for the guidance of the parties rather than strictly as a part of their duty in administering the functions of this Court; for, as before stated, the Court has really no authority to allow or to disallow, nor the deputy-registrar to report; nor is either party legally bound by such report. It is rather a business in camerâ than in curiâ; it is a mere private voluntary reference. I do not say that in an attempt at gross extortion by a proctor against a client the Court (upon a regular complaint in proper form by the client) has not such an authority over one of its practitioners, as for such an act, to correct the practitioner by suspension or otherwise, as the justice of the case might require; (*a*)[4] but that is not the shape of the present applica-

(*a*)[1] This statute, "for the better regulation of attornies and solicitors," is explained by 12 Geo. 2, c. 13, and made perpetual by 30 Geo. 2, c. 19, s. 75.

(*a*)[2] Deleg. 20th May, 1826. The Judges were—Mr. Baron Hullock, Mr. Justice Littledale, Mr. Justice Gaselee, Dr. Arnold, Dr. Stoddart, Dr. Phillimore, Dr. Pickard.

(*a*)[3] *Gifford's case*, 1 Salk. 333. *Davies* v. *Williams*, Bunb. 170. *Pollard* v. *Gerard*, Ld. Raym. 703. *Johnson* v. *Lee*, 5 Mod. 240.

(*a*)[4] Prerog., 19th March, 1823.—In *The Goods of Gillart*, on complaint that a proctor's charge for a de bonis non administration was exorbitant, the bill was referred to the deputy-registrar, for examination; and on their report that £10, 14s. 8d. had been

tion is only that the deputy-registrar may be directed to permit a solicitor's attendance at what is improperly termed the taxation. The proctor is willing to have his [688] bill examined by the deputy-registrar. The deputy-registrar is ready to undertake the duty; but the party desires that this examination may be conducted in an unusual and unprecedented way: he has a proctor, a new proctor, to attend the examination; but he insists that his solicitor may also attend. All the deputy-registrars say that this is unusual, and they decline adopting this novel course.

This Court knows nothing of a solicitor in a cause; he has no more right to appear or to do any act in a cause in these Courts than a proctor has in Courts of Common Law or of Equity. The solicitor has no more to do with the examination of the items of a bill than any other stranger or witness. The deputy-registrar is only to hear a party or his proctor. And when acts of Parliament are quoted to shew that attorneys of one Court may practise in another Court, or that other persons, besides the parties, may attend at taxation, it should be remembered that these acts apply only to the Courts in Westminster Hall, and that the very enactments shew that it was an accorded privilege, and not of common right.

I think the deputy-registrar, therefore, acting in concurrence with the other two deputy-registrars, did what he had a right to do in not admitting this claim, and in refusing to set up such a precedent.

It is said, however, that the solicitor is also Mr. Peddle's witness: but then he must be content to be treated as any other witness: he must give his evidence by making his affidavit; [689] he is only to be heard upon oath; he may put his proctor in possession of all facts and objections, and if the proctor wants proof of facts he may consult the solicitor and get his affidavit. It is further said that Peddle's ignorance, and that his proctor's delicacy towards the former proctor, would prevent the charges being thoroughly sifted. As to the former, the question is merely one of facts whether such and such business has been done as to which the solicitor might make an affidavit; or of figures, to which surely Peddle, an exciseman, is not incompetent; and as to the proctor's delicacy, this Court trusts that no proctor would be prevented from the discharge of such a duty to his client by delicacy towards any member of the profession.

The new proctor has allowed his party and the attorney to make a long affidavit, going into much extraneous matter, and has put his client to much unnecessary expence.(*a*)[1] No costs have thereby, however, been occasioned to any other person, otherwise I might give the costs [690] of the present application against the party making it, or against the proctor framing and tendering such an affidavit.(*a*)[2]

On the whole, the party must be content to have his bill examined in the usual mode: it is not a case where the Court is warranted in deviating from the established practice and in setting up a new rule, by compelling the deputy-registrar to admit the solicitor. I therefore reject the application.

Motion refused.

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taken off from a charge of £19, 14s. 4d. the proctor was directed to attend in Court and shew cause why he should not be suspended; and the Judge, having heard his explanation, suspended him for a year.

(*a*)[1] The Court refused to allow the affidavit to be read in open Court, as it contained irrelevant and improper matter. The Judge, however, stated that he had read it himself, and said that the counsel might make use of such parts of it as were limited to the real question before the Court: viz. whether the deputy-registrar was justified in refusing to permit a solicitor's attendance at taxation.

In *Le Heup, Ex parte*, 18 Ves. 223, the Lord Chancellor said: "No doubt is expressed at the Bar upon the jurisdiction to direct a reference to the Master to inquire into alleged scandal in an affidavit filed in the Court and offered to the Master; whether read or not I am not informed. I have reason to believe that in my own decision, *Ex parte Simpson*, and so in lunacy, I am sanctioned by precedents of Lord Hardwicke; but without that authority I should have thought it right to make the precedent."

In *Ex parte Simpson*, 15 Ves. 476, the affidavits were ordered to be taken off the file as irrelevant and scandalous, with costs against the attorney. See also *Anonymous*, 3 V. & B. 93.

(*a*)[2] See the case of *The Frederick Hearn*, 1 Haggard's Admiralty Reports, 225.

By-Day.—The Court will not hear, on an ex parte motion and on affidavits, a case where offences are charged and punishment prayed.

Sir John Nicholl. Before the regular business of the day is entered upon, I wish first to dispose of a matter that has been brought under my notice. A paper has been sent into the registry and thence transmitted to the Judge; and it is entitled *Peddle* v. *Evans; In the Goods of Evan Evans, Deceased.* There is no such cause outstanding. Evans, at all events, is in no way before the Court. A proctor has no right to send in a motion in a cause not existing. This paper is accompanied by an affidavit attested by the same proctor. I have read that affidavit as I read the former affidavit; but I shall not [691] permit it to be read in Court; because I will not allow the Court to be made a vehicle of publishing unfounded imputations upon its officers or practitioners. An application is now made which is extremely irregular. I must censure the proctor for having made it. A proctor is not to make an application merely because a dissatisfied suitor and his solicitor desire it: the proctor is responsible; he owes a duty to the Court, to his profession, and to his own character. If censure will not stop him, and he again repeats such an improper application, the Court must resort to stronger means, viz. suspension.

I have read the case; and the motion, in my judgment, is not fit to be made: for which opinion I will assign my reasons publicly. The case suggests charges of offences and prays punishment, viz. "that the principal registrars may be suspended as well as the deputy-registrars for their offences [as set forth in the affidavit], and that fit persons may be appointed to tax the bills of proctors for the time to come; and that the said registrars or their deputies be condemned in the costs of this application." If these persons have been guilty of any offences for which they are liable to punishment, it is not by an ex parte motion on affidavits that they are to be proceeded against: such a step would be an act of gross injustice. This application is so irregular, that, if granted, it would, I conceive, infer malice in the Court, and render it liable to an action, even though acting judicially. At present I only consider this motion as a pretext for making attacks on [692] the officers of the Court. I have no difficulty for these reasons in refusing to hear the motion argued by counsel. If the Court is wrong the party must seek his remedy elsewhere; but I will not allow the regular business of the suitors to be interrupted by such a matter.

Let the deputy-registrar call the first cause.

IN THE GOODS OF MARY KEANE. Prerogative Court, Trinity Term, By-Day, 1828.—Administration granted to the nephew on the renunciation of his father, the brother, and sole next of kin of the deceased.

On motion.

The King's advocate moved "that administration be granted to the Rev. Charles Edmund Keane, the nephew, upon the renunciation of Benjamin Keane (his father), the brother, and only next of kin of Mary Keane, the intestate." The nephew had no interest; yet to whom else could the grant be decreed? the deceased's brother, the sole next of kin, had waived his right; and being resident within the province it could not pass for his use and benefit to his attorney.

Per Curiam. Let the administration issue in the terms of the motion.

Motion granted.

[693] VALLANCE *v.* VALLANCE AND OTHERS. Prerogative Court, Trinity Term, By-Day, 1828.—The original will being lost and no copy in existence, a limited administration with the will (contained in an affidavit) annexed granted to the widow, as executrix and residuary legatee for life, on her giving justifying security: the eldest son having being personally cited; two other children, minors and abroad, cited by a service on the Royal Exchange, and the remaining five consenting.

On motion.

William Vallance, late of Bermondsey, Surrey, died in October, 1814; he left a widow and eight children, the only persons entitled in distribution in case of his intestacy.

In the beginning of October, 1814, the deceased, in the presence and hearing of his wife, of one of his four younger children, and of two other persons, dictated his last will to his medical attendant, who immediately committed the same to writing, and then read it over to the deceased, when it was duly executed.

By this will, after bequeathing a suit of mourning to his eldest son, he left the residue of his estate and effects to his widow for life, and upon her death, in equal proportions, to his four younger children. He appointed his widow and John Hosier executors.

Upon the death of the testator his widow delivered the will to Mr. Hosier; but in his lifetime, on account of the embarrassed state of the deceased's affairs, no steps were taken to prove it. Mrs. Vallance was now anxious to take probate; she had recently been informed that the sum of £112, to which her late husband was [694] entitled, might be recovered; and had applied to the solicitor of the representative of the late Mr. Hosier for the will; but it could not be found; there was no copy in existence; and the attesting witnesses were dead.

Upon an affidavit of these circumstances a decree with intimation had issued against the children to shew cause why probate of the substance of this will, as contained in the affidavit, should not be granted, under the usual limitations, to the lawful relict and executrix. This decree was personally served on the eldest son; it was also affixed to the Royal Exchange, as two of the children were minors and abroad.

A proxy of consent had been signed by all the children in England, except the eldest son; and Phillimore now moved that probate should pass according to the decree.

Per Curiam. It would be dangerous to decree this probate merely on the affidavit of interested parties without requiring security; but the Court sees no objection to the grant of an administration with the will, as contained in the affidavit, annexed, limited until the original is produced; provided the widow gives justifying security.

Limited administration decreed.

[695] IN THE GOODS OF JAMES THOMAS. Prerogative Court, Trinity Term, By-Day, 1828.—In order to the grant of probate, in common form, of an unfinished paper, there must be, first, affidavits stating such a case as if proved by depositions would establish the paper; and, secondly, consent, implied or express, from all parties interested.

On motion.

James Thomas died on the 13th of January, 1828, and left a widow and seven children. By a testamentary paper he appointed his wife universal legatee, sole executrix, and guardian of his children during their minorities. He left no real estate; and the personal property did not exceed £160. Of this instrument, as the last will of the deceased, Pickard moved for probate.

Per Curiam. This paper, in the deceased's own handwriting, giving every thing to the wife, is written on a small octavo half-sheet; and begins in a formal manner: "This is the last will and testament of me James Thomas of Topsham:" it is signed, has an attestation clause, but no subscribing witnesses; and the paper concludes in these terms: "In witness whereof I have hereunto set my hand and seal this," &c. There is, however, no seal, nor date; though it is clear that the deceased intended there should be both, as well as that the paper should be witnessed: it therefore is unfinished. An attempt is now made to take probate of this instrument simply on affidavits. What do they establish? Challis, a neighbour of the de-[696]-ceased, and in habits of intimacy with him, says "that he, some time about the end of October, 1827, in speaking with the deceased about wills, informed him that, as he had no freehold property, there could be no occasion for any witnesses to his will:" this then takes place three months before the death of Thomas, and, according to the wife's account, before the paper was written. The remainder of this affidavit is made jointly with Pledge, and is merely to handwriting. The other affidavit is sworn by the wife, a party greatly interested: she says "that the will was written by the deceased on the 30th of December while he was confined to his bed-room; that he gave it to her to read, when she requested him to send for two witnesses, and that he replied, 'Challis had told him no witnesses were required;' that the deceased then signed the paper and put it into his desk:" she further says "that on the day before he died he lamented to her that his will was not witnessed, but trusted from what Challis had told him that it would do as it was."

This is a dangerous affidavit: the party is interested; the paper perhaps was written to please the wife; the Court cannot exclude the children on her evidence: there is not sufficient to satisfy the regular demands of the Court, viz. first, affidavits

stating such a case as if proved by depositions would establish the paper; and, secondly, consent implied or express from all parties interested: (*a*)[1] here **[697]** no consent can be given for the minor children; and if the Court were to grant probate, the executrix would give no security; and the children would be entirely at her mercy: while if the deceased were held to be dead intestate, administration might be granted to the widow, and she would then give security.

Motion refused.

TALBOT *v.* ANDREWS. Prerogative Court, Trinity Term, By-Day, 1828.—Administration granted to one creditor, a decree, with intimation, having issued in the name of another.

On motion.

Robert Andrews died in January, 1828, intestate; he left an only daughter, solely entitled to his personal estate.

A decree having been personally served upon her, to shew cause why administration should not be granted to Mr. Talbot, a creditor, it was discovered that it would be of no avail for him to take the grant, as he was already party to a suit in which an appearance for the administrator of Andrews' estate was required. In consequence of this, an affidavit of debt was made by Robert Kipling, another creditor of the deceased's estate; and Pickard, referring to *Maidman* v. *All Persons in General*,(*a*)[2] moved for administration to be granted, on the original decree, to Mr. Kipling.

Motion granted.

[698] IN THE GOODS OF JOHN EDMONDS. Prerogative Court, Trinity Term, By-Day, 1828.—The Court will not on affidavit grant probate of an imperfect paper unless all parties interested are consenting or cited.

On motion.

The deceased died on the 4th of June, 1828, a widower, leaving fourteen cousins-german (two abroad) his sole next of kin. A testamentary paper, in his own handwriting, dated the 19th of April, 1828, was found at his death: by this paper he had appointed Elizabeth Smith (his niece by marriage, and who resided with him) and Isaac Hanson executors: they were also the only legatees, and there was no disposition of the residue. This paper was signed, but there were no signatures to the attestation clause.

Curteis moved for probate, upon the affidavits of the executors, and of Mr. Goddard, a solicitor, that the deceased was ignorant of the effect of an attestation clause; and that he expressed, to the latest day of his life, an anxiety that his will should take effect. Annexed to the affidavits was a letter from Mr. Goddard to the deceased, informing him that, in a will merely of personal property, subscribing witnesses were not absolutely required.

Per Curiam. Here is a slight presumption against this paper which it is necessary to remove: the affi-**[699]**-davits, however, shew fully that the deceased intended it to operate without being attested, having been informed that no witnesses were necessary. But these affidavits are made by parties interested, and there is no proxy of consent, nor notice to the next of kin; and the Court cannot depart from the rule that when application for a probate is made on ex parte affidavits, all parties interested must be consenting or cited.

Motion to stand over.

Note.—On the second session of Michaelmas Term, no appearance being given to a decree duly served in respect to the next of kin, who were abroad; and a proxy of consent, from the next of kin who were in England, being exhibited; the Court granted the probate.

Motion granted.

SKEFFINGTON *v.* WHITE. Prerogative Court, Trinity Term, By-Day, 1828.—Where administration was granted in 1791, on the renunciation of the next of kin, to a creditor who died in 1806; when no de bonis grant was taken out till March, 1827, and when an administration, limited to certain leasehold property, and

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(*a*)[1] Vide *In the Goods of Herne*, ante, 225; and *In the Goods of Hurrill*, ante, 253.

(*a*)[2] 1 Phill. 51. See also *Law* v. *Campbell*, supra, p. 55.

granted at that time (without citing the next of kin) to a nominee of the persons in possession of such property, was in February, 1828, called in by the representative of the next of kin; such representative held barred by time and circumstances, and the administrator, who appeared under protest, dismissed with costs.

[Reversed, 1829, 2 Hagg. 626.]

On petition.

Lushington and Addams on behalf of Sir Lumley Skeffington.

Dodson and Haggard contrà.

[700] *Judgment—Sir John Nicholl.* This is a very long petition going into a variety of details and accompanied by numerous affidavits, though a few only of the circumstances and dates are sufficient for the decision of the present question. The facts are these:—

Thomas Hubbert died a bachelor in August, 1790, nearly forty years ago, leaving two sisters solely entitled in distribution: they renounced, and probably had very good reasons for such renunciation; and in February, 1791, administration was decreed to Alexander Hubbert, his partner, as a creditor. Alexander administered the estate for sixteen years, till his death in 1806: and, as was truly stated, the sisters might then have come in and taken administration de bonis non: but they did not; and from that time until last year no further representation was taken out. The deceased's estate, I have every reason to be satisfied, was insolvent; for it appears that the administrator entered into a composition with the creditors, who agreed to take fifteen shillings in the pound. As an additional circumstance it should also be remembered that during the lifetime of Alexander Hubbert no account was called for by the sisters, who were entitled to the surplus, if any surplus remained.

The deceased was possessed of some leasehold property at Bermondsey. The beneficial interest in these leases passed through several hands by arrangements and mortgages; but it is not necessary for the purposes of the present [701] question to trace out all the different transfers, nor is this Court competent to decide in whom the title to these premises, legal or equitable, is vested: but the property having been sold by auction a little time ago, the purchaser (under the difficulties arising from the modern system of conveyancing) insisted that it was necessary, in order to make a good title, that the deeds should be executed by the personal representative of Thomas Hubbert, who had died thirty-seven years before, in 1790: Alexander Hubbert, the creditor administrator, having also been dead twenty-one years. It was at length ascertained that Sir Lumley Skeffington, as the son of one of the sisters, was the next of kin, and entitled to the grant of administration. Application was made to him to facilitate the business, either by taking out a general, or a limited, administration.

Sir Lumley, who was in distressed circumstances, referred the parties to his attorney, who expressly stipulated that his bill should be paid by the sellers and not by Sir Lumley Skeffington. All the documents were laid before the attorney; and a very long correspondence took place between the two solicitors; nor am I competent to decide which was right or which was wrong; but considerable difficulties were, as appears, raised to this consent. An account was required of Alexander's disbursements and administration, though I cannot but think that Sir Lumley Skeffington's solicitor ought to have been satisfied that the deceased's estate must have been insolvent. The negociation, however, [702] failed, and the sellers were left to their remedy. They, accordingly, applied to this Court for a grant to their nominee, Mr. White, of administration de bonis non, limited to these premises at Bermondsey. In March, 1827, the administration limited as prayed was granted. In December, 1827, the interests were assigned; the deeds were executed; and the conveyance was completed: and it was not till the end of Hilary Term, 1828, that a decree was taken out against White to bring in this administration, to shew cause why it should not be revoked, and a general administration granted to Sir Lumley Skeffington. White appeared under protest, and stating that, under the circumstances, he was not bound to bring in the administration, prayed to be dismissed with costs.

Taking all that has occurred into my consideration, I think there is not sufficient ground of irregularity, either as to the want of title in the parties, or in the neglect of citing or serving Sir Lumley Skeffington with a process "to accept or refuse," to induce the Court to take the grant out of Mr. White's hands, and to decree a general

administration to Sir Lumley Skeffington. I am of opinion that the citation under the circumstances was not necessary; but that he was barred by time, by events, and by his own laches.

What are the periods to which the Court must look? First, at the original grant: those entitled to the administration, renounced; and though that does not, in ordinary cases, bar next of kin who, on the expiration of such a **[703]** grant, may come in and claim; yet they did not apply on the death of the creditor administrator, who lived sixteen years. It is not suggested that there was any surplus, or that the next of kin ever set up any interest or demanded any account: and the composition with the creditors, the incumbrances on the estate by mortgage and by annuity, besides other circumstances, do not leave the slightest reason to suspect that there was a surplus.

What is the next period? The creditor administrator dies in 1806, and for twenty years and upwards no application is made for a representation. This lapse of years is tantamount to a fresh renunciation. Time must operate as a bar, or the business of the world could not proceed. Looking to all these circumstances, I do think the Court was fully warranted in granting the limited administration without citing the next of kin, for that creates an additional expence. I do not enter into the circumstances minutely; the strong fact is, that for twenty years there was no application for a de bonis grant; and after such an interval a specious title even would form a ground for a limited administration. If it was now clear that the administration had been obtained surreptitiously, or for fraudulent purposes, the Court would have, and would exercise, the power of revoking it: but the facts prove directly the reverse.

Application was made to Sir Lumley Skeffington in June, 1826. I will not say his refusal was malicious or vexatious, but it has **[704]** somewhat of that character and appearance: the negociation was broken off, and his solicitor's bill was paid in September, 1826. What does Sir Lumley Skeffington then do? he does not take out administration; he does not enter a caveat. It is said that he had no funds, that he was advised it would require £150, that he borrowed that sum of a noble lord, but that another solicitor defrauded him of it. This may be an excuse for himself, but it attaches no blame or imputation of fraud on the other party. The administration was taken out in March, 1827; he says he was not apprized of it till July, 1827—but what does he do? he lies by, and does not call it in till February, 1828. In the mean time there is no undue haste on the other side. The conveyance is not executed till December, 1827; and when all the deeds and the letters of administration have been handed over to the purchasers' solicitor, and when the administrator is functus officio, then Sir Lumley Skeffington calls in the administration, and prays it may be revoked.

I do not think it necessary, under these circumstances, to enter into the question in whom may be the legal, or in whom the equitable, title; for I am yet to be informed that whoever claims it cannot go into a Court of Equity and there assert his right. No step was taken here to stop the administration, and I cannot now revoke it, nor disturb the present bonâ fide purchasers for a valuable consideration. It is sufficient that there is no ground to impute any fraud, nor indeed any irregularity, in obtaining **[705]** this limited administration; the representative of the next of kin having forborne for twenty years, and even after he was apprized of all the circumstances, having abstained from applying, till the limited administration had executed its purpose. I shall therefore allow the protest, and dismiss Mr. White with his costs.

Protest sustained.

TALBOT AND OTHERS, BY THEIR GUARDIAN *v.* TALBOT. Prerogative Court, Trinity Term, By-Day, 1828.—Marriage and birth of issue is not an absolute but a presumptive revocation of a prior will; the law presuming an intention to revoke, arising from a change of condition and new obligations; if such change of condition and new obligations are provided for, and the intention to revoke cannot be presumed, the revocation does not take place. Therefore a will, in favour of the issue of a former marriage, is not revoked by a subsequent marriage and birth of issue; such marriage and issue having been provided for by settlement.

[Discussed, *Israel* v. *Rodon*, 1839, 2 Moore, P. C. 66.]

Richard Talbot, late of Portsea, victualler, is the party deceased. By his last will and testament, bearing date the 19th of December, 1812, he appointed his children

residuary legatees.(*a*)[1] Upon his death, a caveat on the part [706] of the widow having been entered and warned, it was alleged on her behalf that, according to law, the deceased had died intestate. An appearance was then given for the deceased's three daughters (minors) by their guardian; and an allegation on either side was offered to the Court.

For the daughters it was pleaded:—

1. That the deceased died on the 15th of November, 1827, leaving Mary Ann Talbot, his lawful widow—three daughters and a son (all minors), children by Rebecca, his first wife; also leaving by his widow (who at his death was pregnant) an infant son.(*a*)[2]

2. That the will, dated 19th December, 1812, was duly executed.

3. That on the 24th February, 1823, his first wife died; and that on 5th October, 1824, he intermarried with Mary Ann Arnold, widow, who was possessed of freehold and personal property; that by settlement dated the 4th October, 1824, her freeholds were put in trust for her to receive, during life, the rents and profits, with remainder to the children of the intended marriage; that out of her personalty, £800 was to be raised and immediately after the marriage paid, upon trust to apply the interest towards the maintenance and support of [707] her daughter, Ann Arnold, until she should attain twenty-one, and then for her absolutely; and if she should die under age, the interest to the separate use of her mother for life, and upon her death the £800 to be paid to the children of the intended marriage.

4. That the deceased at the time of executing his will was possessed of freeholds of the value of £6700; that at his death he had acquired freeholds to the amount of £16,000; that there were mortgages on the estate purchased since the date of his will to the amount of £5133, and an arrear of £650 for interest; that his simple contract debts amounted to £2280, and that his personalty was of the value of £7000.

5. That on the 29th of January, 1827, the deceased, having agreed for the purchase of a freehold house, declared to his friend, John Vick, "I will tell you, Vick, when I married my wife she had a certain property of her own, I have a family by my first wife, and I do not intend to injure them, but I shall buy a little estate in the country which I will make sacred to my wife and her family."

6. That the deceased, on Monday, the 12th November, 1827, was thrown from his horse; became speechless and apparently senseless, and so continued till he died on the following Thursday; that the will was found in his iron chest, together with deeds and other papers of importance.

For the widow it was pleaded:—

1. That the deceased, in conversation with Archibald Low, his solicitor, repeatedly told him "that he must make his will, and that the [708] will he had made would not do;" and that in or about September last he made use of the following declaration:—"I made a will about 16 or 17 years ago (thereby meaning the will propounded in this cause), but that will not do; now I must have another; you shall make it, and I will fix an early day for the purpose."

2. That on or about Saturday previous to his death, the deceased, informing his wife that Mr. Nicholson intended to be at Portsea on the following Thursday, inquired of

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(*a*)[1] The testator, after charging a certain messuage and premises with an annuity of £150 per annum to his wife, Rebecca, for life, devised the same in these words: "Unto such children as I may leave or my said wife be ensient with at the time of my decease, their heirs and assigns, for ever, as tenants in common." And, after giving a certain dwelling house to his mother for life; and, at her death, to his brother and his heirs, &c. for ever, thus went on: "I further devise all other my messuages, lands, and hereditaments whatsoever unto such children as I may leave or my said wife be ensient with at the time of my decease their heirs, &c. I also bequeath all my household goods, furniture, &c. to my wife for her own use and benefit, and £50 to be paid to her within one month after my decease. I likewise give £50 to each of my two sisters, and the residue of my personal estate in trust to apply the interest and dividends thereof for the maintenance and education of such children as I may leave or my wife may be ensient with at the time of my decease until they shall severally attain the age of 21, then upon trust to be equally divided among them."

(*a*)[2] This son died before the hearing of the cause; and a posthumous child was born.

her "what she wished settled on her;" and on her saying "£200 per annum in addition to her own property" (of the annual value of £200), he replied "he did not consider it too much," and that he would call upon his attorney that the will might be ready for Mr. Nicholson, who was to be a trustee.

On the by-day of Hilary Term these allegations were admitted; and the cause now came on for hearing.

Lushington in support of the will. The question is, whether a will made during the lifetime of the testator's first wife, and after the birth of children, is revoked by a second marriage and by the birth of issue? Under this will, I apprehend children by a future wife are not excluded; and they, as well as the widow, are provided for by settlement. There is not, then, a total disposition of the property exclusively in favour of the children of the first marriage. If the will be admitted to [709] probate, a question may then arise whether the children of the second marriage are not entitled to take under it; but whether the will be established or not, the widow in neither case will be benefited, for the personalty is absorbed by the debts. A presumptive revocation is in this instance rebutted by the circumstances. The declarations shew the deceased's knowledge of the existence of his will; and that he would not injure his children by his first wife; and the wife and issue of the second marriage are provided for. The settlement of itself rebuts the original presumption of revocation: for it was held by Lord Mansfield in *Brady* v. *Cubitt* (1 Doug. 31), and by Lord Chancellor Eldon in *Ex parte Ilchester* (7 Ves. 365), that, where there was not a total disposition of the testator's property, the presumption would not operate.

Phillimore for the widow and infant, contended that the will, primâ facie, was revoked, that revocation being founded on a change of circumstances in the deceased; and that in this case the facts were not sufficient to repel the presumption of law. The declaration to Low proved that the deceased intended to make a new will; by the will in existence the widow was totally unprovided for; and that in respect to the settlement, it was solely of her own property, and which was secured to the daughter of her former marriage. *Hollway* v. *Clarke* (1 Phill. 339), *Emerson* v. *Boville* (1 Phill. 342), and *Sullivan* v. [710] *Sullivan*, which is there cited, all established that this Court requires some recognition or some act to shew that the deceased's intention was that his will should take effect.

Judgment—Sir John Nicholl. When the allegations were admitted the Court reserved the whole consideration of the question which arises on this will. The will was made by the testator, then a married man, on the 19th of December, 1812; and no dispute is raised as to its factum; by it he provides for his wife for life, gives a few legacies, and then bequeaths the residue of his real and personal property among his children. In February, 1823, his wife died, leaving four children—three daughters and a son: but there was no reason on her death to alter his testamentary disposition, because his property would go among his children exactly as he had intended in the event of his dying before his wife.

On the 5th of October, 1824, he married a second wife, Mary Ann Arnold, a widow, who had a daughter by her former husband, and was also possessed of property of her own, both real and personal. Before their marriage a settlement was entered into by which her real property, amounting to about £200 per annum, was secured to the wife's separate use for life, and then to the issue of this marriage with Talbot; and £800 was settled on her daughter by the first marriage, the interest to be applied to her maintenance and the principal to be [711] paid to her at the age of 21; and if she died before she attained that age, then the interest of this sum was to belong to the mother for life, and on her death the principal to go to her children by Talbot: so that, by this settlement, provision was made for his wife and the children by his second marriage; and it does not appear to me materially to vary the case whether the provision was out of the husband's or out of the wife's property.

On the 15th of November, 1827, Richard Talbot died, leaving his second wife pregnant, and also one child by her. His four children by his first marriage likewise survived him. His will of 1812 he left in an uncancelled state, in his own possession, in his iron chest; and though he might talk of making, he never had made, a new will, nor taken any measures for that purpose. The question then is, whether this will of 1812 was revoked by his second marriage and by the birth of issue? Now marriage and birth of children have never been held to be an absolute revocation;

never more than a presumptive revocation, and the presumption may, under all the circumstances, be either not raised or repelled. The principle is this, that marriage and the birth of issue create such a change in the condition of the deceased, such new obligations and duties, that they raise an inference that a testator would not adhere to a will made previous to their existence, considering it an act of moral duty to revoke that disposition, in order to make provision for his new wife and new issue: but, on the other **[712]** hand, if there does not arise such a state of circumstances as to produce new duties, if the change is provided for, there is no reason to presume a revocation. The question, after all, is one of presumed intention—whether to die intestate, or, notwithstanding the change of circumstances, to leave the former will existing and effective.

Here is a settlement providing for his second wife and providing for the issue of his second marriage; that settlement must take effect notwithstanding the will and in exclusion of the children of the first marriage, while the property of the second wife must go to her own children; and if the deceased shall be held to be dead intestate, she and her children would share with the children of the former marriage; she, as widow, would take one-third, and her two children a third of the remainder; that is, in addition to the settlement, they would take five-ninths of the whole between them; excepting the realty, which forms the greater part of the deceased's property, and would go to his eldest son.

Under these circumstances there is no breach of moral duty—no neglect of new obligations in adhering to the former will. I am then of opinion that no presumptive revocation did take place: the marriage and issue were provided for by the settlement; the previous acts therefore repel the presumption. And to me it seems that this view is in no way altered by the parol evidence. The deceased might have thought of making a new will or of increasing **[713]** his wife's jointure; and if he had used a part of her property, might intend to make her some compensation; but there is no reason to suppose he intended to die intestate. Inasmuch, then, as there is a provision regularly made for the second wife and her issue, I am of opinion that the will of the 19th of December, 1812, is valid; and I accordingly pronounce for it.

Costs out of the estate were decreed.

[714] ASTLEY *v.* ASTLEY. Consistory Court, Trinity Term, 1st Session, 1828.—In a suit for separation à mensâ et thoro, the wife's adultery being fully established, but she having, on a recriminatory allegation, proved facts antecedent to her adultery, from which the Court necessarily presumed the husband's adultery, this amounts to compensatio criminum, and the wife is entitled to be dismissed.—Semble, going to a brothel, and remaining alone for a considerable time in a room with a common prostitute, is sufficient evidence from which to infer adultery.—A married man going to a brothel, knowing it to be a house of that description, raises a suspicion of adultery necessary to be rebutted by the very best evidence.

This was a suit of divorce brought by Sir Jacob Astley, Baronet, against Georgiana Caroline Astley, his wife, by reason of her adultery.

The parties were married on the 22nd of March, 1819; and cohabited together till the elopement of Lady Astley with Captain Garth on the 24th of July, 1826.

A libel having been admitted, an allegation, on the part of the wife, charging Sir Jacob Astley with improper familiarities and adultery with abandoned women, was also admitted. The second, third, and fourth articles of this allegation, to which the witnesses, relied upon by the Court, deposed, were in substance as follows:—

2. That in March, 1826, Sir Jacob and Lady Astley (being resident in Leicester during the hunting season) went in an open carriage to the race-ground to witness a race in which a horse of Sir Jacob's was to run; that Sir Jacob, leaving Lady Astley in the carriage, walked on the course with Mrs. Richardson, Lucy Burbidge, Charlotte Spawforth, and Mary Ann **[715]** Webster, women of abandoned character; that he conversed immodestly with them, and drew up the petticoats of Burbidge, upon which a fear was expressed that Lady Astley would see and observe what passed: that after Sir Jacob had returned to Lady Astley's carriage he sat at the back part of it, and kissed his hand to the women, and said, "Girls, I will be with you at night, and I will give you a treat."

3. That in the evening of the same day Sir Jacob introduced into a dining-room

of the Bell Inn at Leicester several women from the street; that he gave them spirits and wine, after which he and the women made so much disturbance, and their conduct towards each other was such, that the women were sent out of the house.

4. That on the next evening Sir Jacob, accompanied by some gentlemen, went to Richardson's; that he gave her money to procure wine and spirits for Burbidge, Spawforth, Webster, and other women who were present; that he continued in company with these women for some time; that indecent familiarities passed between him and Lucy Burbidge, and at length they retired to a bed-room, in which they were alone for about half an hour (with the door locked on the inside), when they committed adultery.

Upon the depositions taken on these pleas the cause was argued by the King's advocate, Phillimore, and Addams for Sir Jacob Astley; and by Burnaby and Dodson contrà.

The libel was admitted to be fully proved; **[716]** and the only question raised was whether the evidence on the allegation was sufficient to establish the guilt of the husband.

Judgment—Dr. Lushington. This is a suit promoted by Sir Jacob Astley, Baronet, against his wife, Lady Astley, for separation by reason of her adultery. The marriage of the parties in 1819, their subsequent cohabitation, and the birth of children are admitted to be fully established: nor is any objection raised to the proof of the adultery with which Lady Astley is charged. It is perfectly clear that in July, 1826, she quitted the house of her husband in Grosvenor Street, and eloped with Captain Garth, with whom her cohabitation is very distinctly proved and admitted. There is no question, therefore, that Sir Jacob Astley will be entitled to the remedy he prays, unless the recriminatory allegation of Lady Astley—for she has replied to this suit, not by denying her own adultery, but by charging her husband with a similar offence—is so proved as to call upon the Court to dismiss her from all further observance of justice.

It is unnecessary to consider the terms upon which the parties lived previous to the month of July, 1826; there is nothing sufficiently established in the cause to enable the Court to form any judicial opinion on this point anterior to that period. In the beginning of the year 1826 these parties went to Leicester; and it is during **[717]** their residence in that town that Sir Jacob Astley is accused of having there formed a connexion with divers women of bad character; of resorting to a house of ill fame, and of committing adultery. This is the substance of the charge. There are other accusations of a minor nature, but they are of weight only as tending to corroborate those of a graver character.

The evidence in respect to these charges in part consists of the testimony of Mary Richardson, who kept this house of ill fame, and of three common prostitutes. Now the testimony of these witnesses requires the most vigilant and accurate examination; for, independent of their character, their manner of giving evidence, and their mutual contradictions, ought to put the Court on its guard where their depositions are not confirmed by more credible testimony. There is throughout their examinations a manifest disregard of truth. The discrepancies are numerous and have been pointed out. It is quite impossible to look at the testimony of Mary Richardson without perceiving that she has deposed with very little sense of the obligation of an oath; and, as to the three other women, they would probably be as willing to bring their evidence to market as they were ready to offer their persons to sale. But there is, in addition, the testimony of other persons of a very different description, upon which the Court can more safely rely.

The facts appear to be as follows:—It is proved that Sir Jacob Astley had asked one of his acquaintance, a witness in the cause, to shew **[718]** him the house of Mary Richardson; and that he went there. It is clear that nothing criminal took place on the occasion of that visit; but, at the same time, it must not be forgotten that Sir Jacob Astley was then perfectly aware of the character of this house. The next fact is an occurrence on the race-course on the day of the race. It is impossible to reconcile all the evidence on this point; but it is sufficiently proved that Sir Jacob Astley said to the three women, to whom I have already referred, "If I win the race, girls, I will give you a treat to-night." The evidence also establishes that Sir Jacob Astley, while on the race-ground, hooked up the petticoats of a woman of bad character. None of these facts import the degree of criminality necessary to debar the husband from the

relief he prays; yet they ought not to be left out of the consideration of the Court, because they shew that, even at that time, he had some acquaintance with these women.

The decision, however, in this case, must depend on the occurrences which took place at the house of Mrs. Richardson, either on the evening of the race, or on the evening after. This part of the case is proved by three gentlemen, associates of Sir Jacob Astley; leaving out of consideration the testimony of the other witnesses. It is proved that Sir Jacob Astley went to Mrs. Richardson's from a dinner party at the Bell Inn; that he went up stairs with one of the women, and that he remained alone with her at least a quarter of an hour. These facts are demonstrated: they are undenied and un-**[719]**-deniable. It has been urged that the going to this house was unpremeditated and accidental, and was in order to protect one of the party who had been assaulted. This may be possible; yet I cannot help thinking there was something in the nature of an anterior appointment on the race-course; or, if the visit were unpremeditated, it would lead me to a conclusion that Sir Jacob Astley had been at this house on more than one occasion, as asserted in the evidence of the women. I am not, however, disposed to conclude positively, either that this visit was in pursuance of an actual engagement, or that it was accidental. I take the fact as I find it, that Sir Jacob Astley was there, and remained alone in a room with a woman of notorious character for a considerable space of time, as already stated; and on this state of facts the questions are: first, whether or not a legal presumption of the commission of adultery arises; and, secondly, supposing that it does arise, whether it is sufficient to bar the husband of the remedy he now seeks?

It cannot be denied that Sir Jacob Astley could not have a more ample opportunity of committing an act of adultery than at a house of ill fame and alone, at least for a quarter of an hour, in a room with a common prostitute.

If these facts are not sufficient to raise a presumption of adultery, what facts would be sufficient? All the probabilities unite in this conclusion, that Sir Jacob Astley would not have placed himself in this situation except for a criminal purpose. But even if the conviction of the Court did not lead it to that inference, there **[720]** are authorities which bind it to conclude that, in such circumstances, adultery has been committed. In *Eliot* v. *Eliot*, mentioned by Lord Stowell in *Williams' case*,(*a*)[1] it was held "that a woman going to a brothel with a man, furnished conclusive proof of adultery." Now, if a married man goes to a brothel, he being perfectly aware of the nature of the house, I will not say that it does not supply an equal presumption of guilt as in the case of a woman; but supposing the Court not inclined to push this presumption so far as to hold the proof conclusive, still it cannot be denied that such conduct furnishes a violent suspicion—a suspicion that must be rebutted, if rebutted it can be at all, by the very best evidence.

Now what is the evidence to rebut the suspicion in the present case? As to the testimony of Lucy Burbidge, with whom Sir Jacob Astley was shut up, it is impossible that the Court can give any credit to her denial: she is a witness not to be listened to; and in respect to the opinion of the three gentlemen, who were also in this house at the time that no act of adultery was committed, it is, I apprehend, the duty of the Court to draw its own conclusions, and not allow itself to be led away by the abstinence of the witnesses. In *Elwes* v. *Elwes* (1 Hagg. Con. 278) Lord Stowell said: "If the facts are of such a nature as justifiably, and almost necessarily, lead to a conclusion of guilt, the scepticism of a wit-**[721]**-ness, even if it really exists, signifies nothing. The Court, representing the law, draws that inference to which the proximate acts unavoidably lead; and therefore if the witnesses, even in this case, hesitated and paused about drawing that conclusion, I should not conceive myself in any degree limited by their hesitation." To this opinion I entirely accede; and it does appear to me that the circumstances of this case raise so strong a suspicion of adultery that it is scarcely possible to be rebutted by any evidence; but manifestly not by the evidence before the Court. And when I consider that Sir Jacob Astley is the party proceeding against his wife for a divorce, and that this matter is merely recriminatory and set up to bar his remedy, I also feel myself bound by the reference, in the argument, to the case of *Lord and Lady Leicester*: (*a*)[2] "That where adultery is pleaded by

(*a*)[1] 1 Hagg. Con. 302. See also *Popkin* v. *Popkin*, infra (Supplement), 765, notis.

(*a*)[2] Cited in *Forster* v. *Forster*, 1 Hagg. Con. 153. See also *Durant* v. *Durant*, infra, Supplement), 733. *D'Aguilar* v. *D'Aguilar*, ibid. 773, and *Beeby* v. *Beeby*, ibid. 789.

way of recrimination, and as a bar, it is not necessary to prove such strong facts as are required to convict the other party." It was said this is a loose doctrine; I will not stop to consider it, but shall pass it with this observation; that the doctrine has received the sanction of Lord Stowell, and is binding on this Court. I am, then, of opinion that the charge against Sir Jacob Astley is sufficiently established. If, however, he is really innocent, I can only regret that he has voluntarily exposed himself to such an accusation; but if a man will **[722]** associate with common prostitutes, as Sir Jacob Astley is proved to have done, whether he be guilty or innocent, every court of justice must, I think, come to the same conclusion to which I have arrived in this case.

The only remaining question is, whether, as there is no proof of further adultery, the husband is debarred by this single act from the remedy he seeks?

Many arguments have been urged as to the hardship that Sir Jacob Astley will incur from the refusal of a sentence of separation: but this is an inconvenience which he has brought upon himself, and which the law imposes upon him. Similar arguments were also strongly urged in the case of *Proctor* v. *Proctor*, but were overruled (2 Hagg. Con. 295-6). It is also to be remembered that the wife will equally suffer inconvenience if a sentence be given against her, and she be turned loose upon the world.

Now, in support of the argument that one act of frailty is not sufficient to bar a husband of his remedy, only one case has been cited, viz. *Naylor* v. *Naylor* (Consistory, 1777, Trin. Term, 4th Sess.). I have obtained a note of that case, and since it is desirable that misapprehension should not exist as to the doctrine there held, nor as to the opinion of the judge, I will read that note. Dr. Bettesworth, who then presided in this Court, said: "This is a cause of restitution of conjugal rights brought by the wife against the husband: in bar he pleads adultery: she recriminates. **[723]** There are no less than thirteen witnesses to prove the adultery of the wife. She has not only committed the crime of adultery, but a series of adultery is proved, so that of her guilt there cannot be a doubt. On the other side, the counsel rely that they have made full proof of adultery by the husband; and that according to the law of the Ecclesiastical Court, if they have fully established his guilt, that will prevent his obtaining the effect of his prayer. But here is only a single witness to a fact, and all circumstances are against her; it would not, therefore, be sufficient even if her evidence were without exception. She, then, being a single witness, must be laid out of the case. It might be a question if a wife left her husband and lived many years from him, and in a course of adultery, whether, if the husband in one frail moment should be faulty, it would be a compensatio criminis? The words imply, 'You have been as guilty as I have been:' but in this case it is not necessary to consider; for two persons have deposed in a way not to be relied upon; and Mrs. Naylor has bribed witnesses—a circumstance alone sufficient to repel their credit."

In this case, then, of *Naylor* the learned Judge stated that it might be a question whether, when a wife left her husband, and lived in a long course of adultery, it would afford a compensatio criminis, and whether a husband ought to suffer for one frail act? but it will be observed that the case itself was decided on a totally different ground; the learned Judge decided there was **[724]** no proof of adultery; he merely put an hypothetical case, which is materially distinguished from the one before me. In that hypothetical case the wife was supposed to have quitted her husband, and lived for several years in adultery; now here the wife had not quitted her husband, and continued in adultery previous to his guilt: on the contrary, the husband is charged with adultery anterior to the separation and to her criminality. The cases, therefore, are quite separate and distinct; but at the same time I must be permitted to say, on the authority of *Proctor* v. *Proctor*, a case to which I have already referred, that a compensatio criminum is effected by the guilt of both parties.(*a*) But the present case does not alone depend upon an act of adultery committed in one frail moment; for, here, it is distinctly proved that, on one previous occasion at least, he had gone to this brothel, and that he had taken liberties with these women, and with other abandoned females.

I, therefore, come to this decision, that the conduct of Sir Jacob Astley bars him of the remedy he prays, and that Lady Astley be dismissed from this suit.

(*a*) See *Beeby* v. *Beeby*, infra (Supplement), 789.

[725] POLLARD, FALSELY CALLED WYBOURN *v.* WYBOURN. Consistory Court, Trinity Term, 2nd Session, 1828.—In a suit of nullity by reason of the impotency of the man, a certificate (twelve years after marriage) that the woman was virgo intacta and apta viro, coupled with two several confessions by the man of his incapacity to two medical witnesses, and with proof that the woman's health had suffered; though the man had not given in his answers, had removed into France, and refused to undergo surgical examination, held sufficient.

[Discussed, *M., falsely called D.* v. *D.*, 1885, 10 P. D. 75.]

This was a suit of nullity by reason of the man's impotency. The de facto marriage took place in April, 1815, the man being of the age of forty-one; the woman, seventeen.

A month after marriage the man took to a separate bed: afterwards, from October, 1815, to the spring of 1816, she resided with her father; and the man, though generally absent on military duties, occasionally slept in the same bed; but from the spring till October of 1816 he abstained altogether from cohabitation; and then the parties again lived together as man and wife for two months, after which he volunteered to St. Helena. He returned in 1819; but concealed his return from the other party for three weeks; but there was regular matrimonial cohabitation, with slight intervals, from that time till April, 1823. At that time her health having greatly suffered, she by the advice of her medical man took to sleep separately, and never afterwards returned to Mr. Wybourn's bed. About May, 1826, they finally parted, and towards the close of that year this suit was instituted. A medical certificate fully proved that **[726]** the marriage had never been consummated, and that, though virgo intacta, she was apta viro. The man had been personally served with a monition at Cassel, in France, to submit himself to medical inspection, but had not obeyed the process.

The King's advocate and Nicholl for the woman.

Phillimore and Pickard contrà.

Judgment—Dr. Lushington. In this case a de facto marriage was celebrated in August, 1815, and the parties continued to cohabit together at intervals, as man and wife, till the spring of 1823, when, as appears by the evidence of Mr. Parkin, a medical man, they ceased by his advice to occupy the same bed, in consequence of her health having suffered. They, however, lived under the same roof till May, 1826, when Mr. Wybourn quitted the country.

The Court has been put upon its guard against collusion. I am well aware that the Court should be very cautious, if collusion could reasonably be suspected; but there is no circumstance in this case to lead me to imagine that any thing of the sort exists. I cannot presume collusion, without something to raise such a presumption. The question then is, whether the evidence is sufficient; whether there is an absence of what is essential to the final adjudi-**[727]**-cation of the cause. I am of opinion that there is satisfactory evidence that the cohabitation lasted considerably longer than what the law generally requires; much more than three years. The ground of the separation is not to be laid out of the case; it is part of the res gestæ. Now, that it arose in consequence of the loss of health, and from her sufferings, appears from the evidence of Mr. Parkin: he says, "That about six or eight months after Christmas, 1822, they, by deponent's advice, ceased to occupy the same bed: it was on her account, and in consequence of her health having suffered, that the deponent gave this advice." Again, on the 14th article, he says, "He was attending Mrs. Wybourn professionally in 1823, and having ascertained the cause of the deplorable state in which she was, the deponent advised she should withdraw from the bed of her husband."

The Court always requires a certificate of medical persons as to the state and condition of the woman. In the present case that certificate has been given by Mr. Parkin, who appears to be a surgeon of eminence, and by Mr. Blagden, who undoubtedly is. It has been argued that the test on which the certificate is framed is too vague and uncertain; that the Court cannot rely on it. Now the present certificate is according to the practice invariably adopted—not to give reasons; and I should be extremely reluctant to depart from that practice. In the first place, it is a received maxim "cuilibet in arte suâ credendum est." Secondly, if the grounds were given, how could the Court com-**[728]**-prehend the reasons, and decide between conflicting opinions? besides, the introduction of the grounds would lead the Court into minute inquiries about matters, the discussion of which the Court would be most anxious to avoid unless it were imperatively called upon to pursue the investigation.

Here are the very strongest grounds to presume the impotency of the man. If the parties lay together in one bed for so many years, of such ages, and the woman is certified to remain virgo intacta, there cannot be a stronger presumption that impotency existed, and that it was incurable. Such a lapse of time satisfies the Court that in all human probability he was incapable of consummating the de facto marriage: but this is not left to inference from these facts only; for two direct admissions by him to two different surgeons are proved. I never can think that these lead to any thing but a direct acknowledgment of his incapacity. The first of these admissions was made previous to his departure for St. Helena in 1816, "that he was then incapable of performing marriage rites:" and the second confession was in 1823, "that he was impotent; that whenever he had made the attempt to have connexion with his wife he had failed." These confessions were made at periods so long anterior to the institution of this suit that there could have been no inducement to fabrication.

It is said that the law requires that the party's answers should be given in, or that he should submit his person to medical inspection. If this were the true rule, the man would only have to withdraw out of the reach of the process **[729]** of the Court, and thus defeat the ends of justice, and defraud the woman of her remedy. The law never imposed such difficulties upon any Court.(*a*)

It being perfectly clear that the monition was personally served, and that the party consequently has had fair notice of these proceedings, he surely would have come forward and rebutted the charge, if he had had the power. The Court, however, cannot refrain from going still further in this case; for suppose the party had appeared, and the certificate from his inspectors had been couched in the same terms as in *Greenstreet* v. *Cumyns* (Consistory Reports, 332; S. C. 2 Phill. 10), which rather supported his capacity than proved his impotency; even in that case the Court would not go the length of saying that the woman's remedy would have been barred.

In this case I am satisfied there is no collusion, and that there is as much evidence as the law requires; and I therefore pronounce the libel fully proved, that the lady is entitled to the sentence she prays, and that the defendant must be condemned in the costs of this suit.

[730] THE OFFICE OF THE JUDGE PROMOTED BY NORTH AND LITTLE *v.* DICKSON. Consistory Court of London, Trinity Term, 22nd July, 1828.—Provocation is no defence to a criminal suit for brawling in a church at a vestry meeting. On proof of the offence, the defendant suspended for a fortnight ab ingressu ecclesiæ, and condemned in costs.

Judgment—Dr. Lushington. This is a cause of office brought by the churchwardens of the hamlet of Mile End, Old Town, in the parish of St. Dunstan, Stepney, against Robert Dickson of the said hamlet, "for quarrelling, chiding, and brawling by words, and for creating a riot and disturbance in the parish church." Three witnesses have been examined on the part of the promoters, and their testimony fully establishes the charge.

The first says he was present at the vestry-meeting, when "Dickson called out to Little (who was chairman) in a loud voice and angry and passionate manner, 'Why do you not call that wretch to order;' and upon Hall inquiring of the chairman who Dickson meant to call 'wretch,' Dickson, in a still more angry and passionate manner, called out very loud, 'I mean you, you wretch, Bob Hall;' at the same time pointing with his hand to Hall, and added, 'Now bring your action as soon as you like.' Deponent says that in consequence of Dickson's behaviour the business **[731]** of the meeting was for a time entirely suspended."

Now this witness is corroborated by the evidence of the two other persons who have been examined. By way of defence an allegation has been given in, charging Little, one of the churchwardens promoting this suit, with being in a state of intoxication, and with addressing Dickson in a boisterous and insulting manner, on the occasion; and by way of further defence it is alleged that some provocation was given to the defendant by a person named Robert Hall; and some provocation from Hall is proved: but there is no satisfactory evidence to support the imputation against

(*a*) "Quamvis utroque conjuge fatente impedimentum, ac triennio lapso, sanum consilium sit facere conjuges inspici; at id non est necessarium." Sanchez, De Matrimonio, lib. 7, disp. 108, No. 6.

Little.(*a*)[1] Such provocation, however, would not justify the defendant's conduct. It must be understood that people who go into a church, whether for the purpose of attending divine service, or of being present at a vestry, must keep themselves under restraint, and not depart from that decorum which should always be preserved within consecrated walls.

It is clear that Dickson has outraged the sanctity of the place. I must observe at the same time that had Hall been guilty of similar misconduct, I trust the churchwardens would have proceeded against him. Churchwardens must deal out impartial justice between the two parties. I do not say that they have acted **[732]** improperly in this instance, but there is proof that this parish is divided into two parties.

The sentence of the Court is that the defendant shall be suspended ab ingressu ecclesiæ for one fortnight, to be computed from Sunday, the 27th instant, and be condemned in the costs of this suit.

SUPPLEMENT.

[733] DURANT *v.* DURANT.(*a*)[2] Arches Court, Easter Term, 1825.—In a suit for divorce on account of the husband's adultery after a condonation of former adulteries, there must be, in order to establish condonation of subsequent adultery as a bar to the wife's remedy, evidence that she was aware of this renewed misconduct; nor can such knowledge be inferred from slight facts, and from cohabitation, but it must be clearly and distinctly proved.—If a wife forgives earlier adultery upon condition and assurance of future amendment, on the husband's again committing adultery that previous injury revives.—When the husband's adultery is to be proved by pregnancy and acknowledgment of children it is not necessary to plead particular acts.—Evidence extracted upon cross-examination (in order to shew condonation, compensatio criminum, or to discredit one adverse witness by another) if relied on as the sole ground of defence has far slighter effect than when a defensive, recriminatory, or exceptive plea is given in and examined to.—In examining evidence and proofs, the Court must not take the charges insulated and detached, but the whole together, and must consider what has been the admitted conduct of the party under similar circumstances.—Quære, whether condonation, unless as far as is admitted by the adverse case, can be set up without being pleaded. Semble that in no case has it been held to estop a party where not pleaded.—Condonation is not presumed, as a bar, so readily against the wife as against the husband.—Entering into a voluntary deed of separation and bringing an action on that deed does not bar a wife from proceeding for a divorce in the Spiritual Court: nor bear unfavourably on her case.—Condonation is forgiveness with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness: on breach of the condition the right to a remedy for the former injuries revives.—A groundless and malicious charge against the wife's chastity followed up by turning her out of doors, and not attempted to be pleaded nor proved, may be alleged with other acts of cruelty as a ground for separation. Quære, whether it would not revive condoned adultery?

This was a suit for divorce, à mensâ et thoro, brought by the wife against her husband by reason of his adultery. The facts of the case are fully detailed in the judgment; and it is unnecessary to state more than that it was admitted that the adultery of the husband was fully proved; and that on this fact coming to the knowledge of the wife she, on two occasions, separated herself from her husband, but afterwards returned to cohabitation; first, on a promise of future good conduct; and, secondly, from want of means of subsistence when near her confinement. The husband afterwards accused her of adultery, and turned her out of his house. Further acts of adultery on his part, subsequent to her return to cohabitation, and also subsequent to his

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(*a*)[1] A responsive allegation denying the charges was admitted. The cause at the hearing was undefended.

(*a*)[2] Vide supra, p. 528.

having forced her to leave his house, were alleged. No charge was brought forward in plea against the wife: and the questions of fact principally were, whether the later acts of adultery were established; and whether the wife, at **[734]** her return to cohabitation, was aware of all the earlier acts of adultery?

In the course of the argument the Court read the following note of

Worsley v. *Worsley.* Consistory, Mich. Term, 3rd Session, 1730.—Cruelty revives condoned adultery.

"In this case several facts of cruelty and adultery were charged by the wife in an allegation offered by her, which were laid to have been committed some years ago; since that there had been a reconciliation between the husband and wife; and since that reconciliation he was charged in this allegation with fresh acts of cruelty, but with no new acts of adultery.

"Dr. Cotterell for the husband said, that as he was charged with fresh acts of cruelty since the reconciliation, they would indeed revive the former acts of cruelty before the reconciliation, but since no adultery was pretended, the former acts of that kind did not come within the rule, therefore all the articles of the allegation relating to the adultery were irrelevant, and ought to be struck out.

"The Court (Dr. Henchman) held clearly that the new acts of cruelty would revive the whole, as well the acts of adultery that were committed before the reconciliation (though there were no new acts of that kind), as also the acts of cruelty, and that the wife was now as much at liberty to charge her husband with those former acts of adultery, notwithstanding the reconciliation, as she **[735]** would have been if there had been no reconciliation at all." (*a*)

After reading this case the Court said:

I wish to hear a full argument on the doctrine of condonation; its principles, and the authorities respecting it. What takes off its effects, and revives a former charge? Will any offence, short of subsequent adultery, namely, an approach to adultery, set aside condonation as a bar? Will solicitation of chastity have that effect? Must the injury be ejusdem generis? Will cruelty revive adultery? If so, will any thing short of what would substantively and separately establish a case of cruelty? Will an unfounded charge of adultery, of which there is not a tittle of proof, against a mother with twelve living children, and an unjust dismissal of the wife from her husband's house, be sufficient to revive condoned adultery? Can condonation be set up as an effectual bar without being pleaded?

[The arguments on the facts of the case have been omitted; and those only which apply to these questions inserted.]

Lushington and Dodson for Mr. Durant. We do not find that the questions put by the Court have received judicial consideration.

1. Whether condonation is necessary to be pleaded? It is not absolutely necessary, but it may be convenient and proper; because otherwise, as the party applying for a divorce **[736]** should have a knowledge of the defence, we admit the party would be at liberty to plead after publication, or the Court ex officio might order further proofs. *Elwes* v. *Elwes* (1 Hagg. Con. Reports, 292). That condonation ought to be pleaded may perhaps rather be inferred from Oughton.(*b*) But this is on the general ground that there should be notice of the intended defence; but that reason does not hold here, because the wife herself pleads condonation—"qui ponit fatetur." Neither Ayliffe nor Sanchez lay down that it is necessary to plead condonation. If on cross-examination it appeared clearly that there had been subsequent cohabitation, the Court would allow the other party, at any period of the cause, to deny condonation.

2. Condonation is where a husband or wife, cognisant of the adultery of the other, is voluntarily reconciled. Ayliffe's Parergon, 226. In that case the party is barred from complaint. Mere residence in the house without actual conjugal cohabitation is no condonation. "Si enim," says Sanchez, "essent in eadem domo non se alloquentes, divisique à mensâ et lecto, non censeretur condonatum adulterium."(*c*) But here there is no doubt of conjugal cohabitation.

3. A repetition of the same injury, no doubt, revives condoned adultery; and we

(*a*) See some further information on the case of *Worsley* v. *Worsley*, post, p. 762.

(*b*) "Si pars rea allegaverit et probaverit partem agentem, ante litem institutam, habuisse notitiam saltem probabilem criminis libellati," &c. Oughton, tit. 214, s. 2.

(*c*) Sanchez, De Matrimonio, lib. 10, disp. 14, s. 17.

admit that something short of it may possibly have that effect; as, for instance, solicitation of chastity, [737] or whatever indeed would bar a husband from complaining of his wife's adultery: but it must be an offence ejusdem generis: and if that be so, the proof here is of adultery or of nothing. The only reported case in which the doctrine of revival was discussed is *D'Aguilar* v. *D'Aguilar* (1 Hagg. Con. Reports, 135, notis). It is there laid down that, to revive cruelty, the subsequent facts must be such as would be sufficient to found a sentence. It may be said that a harsh course of treatment ought to revive, but if any thing short of legal cruelty is admitted, there would be no certain rule. By analogy this rule should apply to adultery: then nothing short of adultery would revive; certainly nothing less than solicitation of chastity.

4. It is impossible, we submit, to maintain that cruelty would revive adultery. We cannot find any case to that effect, except the note of *Worsley* v. *Worsley*, which is very unsatisfactory as a precedent; nor are we aware that it is so laid down in any authorities. It is not necessary to revive the adultery, for cruelty would of itself be a ground for divorce: it is not ejusdem generis. It is laid down that "condonation is a conditional forgiveness which does not take away the right of complaint in case of a continuation of adultery."(*b*) Even Sanchez does not suggest that condoned adultery could be revived by any thing short of adultery. If cruelty would not revive it, à fortiori, harshness, or less than legal cruelty, would not suffice.

[738] 5. Would an unfounded charge of adultery revive? It is true that adultery on the part of the wife is not pleaded, and that Mr. Durant did charge her with that crime. Though he might be misinformed, yet he acted bonâ fide, for he employed a solicitor, collected evidence, and laid it before a friend. A case might easily be supposed in which there were good grounds of suspicion, and for requiring explanation, such as loose conduct, and indecent expressions; and yet not sufficient to offer a plea.

W. Adams and Jenner for Mrs. Durant. [After going fully through the facts of the case.] The adultery, both prior and subsequent to the renewed cohabitation, is fully proved, and the condonation of the previous adultery is not established, inasmuch as Mrs. Durant is not shewn to be cognisant of the birth of Bradbury's third child. The books require a notitia probabilis, meaning by that phrase pretty full proof, as the three instances in Oughton shew.(*a*) These instances all refer to condonation by the husband, which has always been held to be more easily presumed than condonation by the wife. We proceed then to examine the questions proposed by the Court, though we dis-[739]-claim the necessity, as we deny any condonation.

The cases as to condonation are few, and the books not specific.

1. As to its nature. It is a conditional forgiveness: it may be made by a wife, but does not necessarily result from a continuance of cohabitation only.

2. Condonation is hardly possible to be presumed against a wife without being pleaded, as it is capable of many explanations. It is said the wife has pleaded it herself: we deny it; she has only pleaded facts from which it has been argued that condonation is to be inferred. It is admitted the husband could not rest on it if brought out by interrogatories alone; here the knowledge of Bradbury's third child is attempted to be shewn only by interrogatories. If the wife had had notice that condonation would have been objected, she might have pleaded her ignorance. It is said that in *Elwes* v. *Elwes*, condonation by the husband was not pleaded; but the Court there lays down that it must be admitted with extreme caution if not pleaded. In that case too the alleged condonation was on the part of the husband; and the Court does not notice it as a plea in bar but as a circumstance requiring explanation. If then, with the dictum "Causa nunquam concluditur contra Judicem," the Court is so cautious of noticing unpleaded condonation, surely it cannot be competent for

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(*b*) *Ferrers* v. *Ferrers*, 1 Hag. Con. Reports, 130.

(*a*) "Probabilis scientia dicitur, si maritus, suspectam habens uxorem de adulterio, eam de eodem accusaverit, et illa hujusmodi crimen confessa fuerit. Vel testes illi, quos maritus in judicio contradictorio ad probandum adulterium objectum produxit, significaverint marito, ante litem institutam, se posse deponere ex propriis eorum visu et scientiâ de hujusmodi adulterio. Vel si maritus uxorem suam in ipso actu adulterino deprehenderit." Oughton, tit. 214, s. 3.

the adverse party to take advantage of it. In *Beeby* v. *Beeby* (*a*)[1] condonation is further observed upon by Lord **[740]** Stowell in the same guarded language: "The Court would not say that condonation might not come out in evidence, though unpleaded, but the Court would not help it out." In *Ruding* v. *Ruding* (*a*)[2] it was said: "The Court has never gone the length of holding mere delay as a bar against the wife. If it could be shewn that the wife's conduct amounted to licence, it would be matter of defence; but it must be pleaded." A plea in bar cannot then be treated as a matter of defence if not pleaded, though the Court may notice it. Oughton speaks of condonation as necessary to be pleaded and proved: "Si allegaverit et probaverit;" this is conjunctive and not disjunctive: the proof will not do without **[741]** the plea any more than the plea without the proof. Sanchez and Ayliffe may not notice the necessity of pleading condonation, because they suppose that of course it must be pleaded.

3. It is not denied that condoned adultery may be revived by subsequent adultery. The law is not explicit that minor acts would be sufficient; but there is nothing to shew that the husband's return to the mens adultera et rea is not sufficient. The implied condition is that he shall not return to impure practices. It is said in *D'Aguilar* v. *D'Aguilar* that to revive forgiven cruelty there must be legal cruelty; but even if that were true to its full extent there is a distinction between the relief for cruelty and adultery. In the former the protection is from present danger, and the extent of the offence must be known to the complainant. The latter is secret, and therefore evidence of the mens rea may be sufficient. Here is the mens rea at least by solicitation of chastity.

4. Where there is harshness or any thing short of legal cruelty the Court will at least be very cautious of inferring condonation from cohabitation alone; and even as to removing undoubted condonation it cannot be correct that the subsequent cruelty must be of itself sufficient to found a sentence. Suppose serious cruelty during cohabitation; a separation and return; would it be necessary to prove actual cruelty for separation afterwards? Would not the former conduct give colour to threats or harshness? The wife must be able to enjoy the consortium vitæ; that must be the implied condition, and any thing that would destroy the consortium, and drive her from cohabitation, **[742]** would revive cruelty or adultery. The case of *Worsley* v. *Worsley*, as stated, seems to confirm this, and to shew that cruelty would revive adultery.

5. The accusation of adultery with the tutor of her children comes under the head of the most aggravated cruelty. The husband had no business to make, still less to insinuate, charges of this nature. If he withdrew the allegation he ought to have withdrawn the interrogatories; but he has persisted in them at the very hearing.

(*a*)[1] Consistory, Mich. Term, 1799. For the judgment in this case, see post, p. 789.

(*a*)[2] Arches, 1819, Hil. Term, 2d Session.

This was a suit of separation brought by the wife for the husband's adultery: the parties were married in 1796. In 1802 they went to reside in France, and were there detained on the commencement of the war. Mrs. Ruding returned to England in 1806. In 1808 the husband was pleaded to have commenced an adulterous intercourse with a French lady, by whom he had five children: he returned to England in 1815, and continued to live in open adultery till the commencement of this suit, on the first session of Michaelmas Term, 1818.

Per Curiam (Sir John Nicholl). It is admitted, in limine, that the rejection of the libel would be a strong measure, but it is contended that the circumstances would justify it. It seems to be admitted that while the husband was in France there was no improper delay. Since his return three years have elapsed, but I am not aware of any case where the Court has gone the length of saying that a mere lapse of time is a bar to the wife. If it could be shewn that the wife, for three years, had connived; that her conduct amounted to licence, it would be defensive, but must be pleaded. I admit this libel, as on the face of it there is nothing which amounts to a bar to the wife's prayer.

Note.—The case of *Ruding* v. *Smith, falsely calling herself Ruding* (2 Hagg. Con. 371), was between the same parties.

We are not aware of any cases allowing the wife to retire from cohabitation upon such an accusation alone; but here the Court must look at all the conduct of the husband, and all the circumstances of the case. What remedy can the wife now have? Is it possible for her to bring a suit of restitution? Such an accusation is a ground of divorce by the civil law. Thus Huber, in treating of divorce, says: "Contra virum mulieri proditæ sunt quatuor causæ," and mentions as the second: "Si uxorem de adulterio temerè accusaverit." (*a*) And the Novellæ, in the chapter "De justis divortii causis mulieri concessis," furnish this passage: "Si vir de adulterio inscripserit uxorem et adulterium non probaverit, licere mulieri volenti etiam pro hac causâ repudium destinare viro, et recipere quidem propriam dotem, lucrari autem et antenuptialem donationem" (Novell. 117, c. 9, s. 4). Though not a substantive ground of divorce here, these principles may well be applied, under all the circumstances, to this case.

[743] *Judgment—Sir John Nicholl.* This is a suit for separation by reason of adultery brought by the wife against her husband, and begun in the Consistory Court of Lichfield; from whence it came up here on an appeal from a grievance (vide 1 Add. 114). It is unnecessary to state more of the proceedings than that they commenced in January, 1820, and have been depending five years. This delay is attributable alone to the husband, but I shall not particularly refer to it further than may bear upon the proof of the facts applying to the merits of the question.

The libel states the history of the parties, and the grounds of the present charge.

The parties were married in February, 1799; George Durant being a gentleman of fortune, the proprietor of Tong Castle, Shropshire; and Mrs. Durant, then Mary Ann Eld, a spinster of age, whose family resided in the same neighbourhood. During their cohabitation the parties lived at Tong Castle, and had fourteen children, twelve of whom are now living. The facts thus far are proved, and are not controverted.

The libel proceeds: and Mr. Durant is charged with having formed, in 1807, an adulterous connection with Mary Bradbury, and with having had three children by her; the first born in July, 1808; the second in March, 1810; the third in December, 1811; and he is alleged to have acknowledged and supported these children. He is also charged with having formed **[744]** another adulterous connection with Elizabeth Cliffe, by whom he had a child born on the 19th of June, 1809: both these persons were nursery maids in his family. In 1816 he is charged with an adulterous connection with Mary Dyke, his dairy maid; of that connection no child was born which he acknowledged, but it is alleged that in June, 1816, he was seen with her in the criminal act. In 1818 he is charged also with an adulterous connection with Jane James, a labourer's wife, and on the 4th of November with having been caught in the fact on the floor of her cottage. In 1820 there is a similar charge with another labourer's wife, of the name of Starkey; and, on the 26th of April, 1820, it is asserted that he was caught in the fact in a room in her cottage called White Oak Lodge. These are the several adulteries charged.

The libel further pleads: that in January, 1808, in consequence of the preceding adultery, Mrs. Durant withdrew to the house of her father, Francis Eld, Esq. at Seighford, in Staffordshire. Durant, upon that occasion, wrote a letter to her brother confessing his misconduct, expressing contrition, and promising future good conduct. That letter is exhibited, and I shall have occasion hereafter to refer to it (vide infra, p. 770).

The libel then pleads that in consequence of the assurances contained in this letter Mrs. Durant was induced to return; but in 1810, Durant continuing his adulterous conduct with Bradbury and with Cliffe, Mrs. Durant again withdrew to her father's house: Durant went there; and she agreed that if he would leave Tong, break off **[745]** his connection, and go to reside in Devonshire, she would again cohabit. They accordingly went to reside in Devonshire, and afterwards removed to Bath. Durant then proposed to return to Tong, but she refused, because Bradbury lived in the neighbourhood: accordingly, at the latter end of 1810, they separated; he returned to Tong; she went to reside in London, accompanied by one of her daughters. She remained there till near her confinement (for during these cohabitations she had become pregnant), when, being in want of necessaries, and obliged to sell part of her clothes, she returned in August, 1811, to Tong Castle to lie in. From that time till 1817 she continued to live with her husband at Tong, when he, without any just

(*a*) Huberi Prælectiones, lib. 24, tit. 2, s. 11.

cause, quarrelled with her—insisted on her leaving his house, which she was obliged to do, and to go to her father's, where she has ever since resided, and has never cohabited with her husband since April, 1817.

This is the substance of the libel, and on account of what passed in the argument it is necessary to consider the effect of these, her own averments. Upon this statement, if proved, she is undoubtedly entitled to the separation prayed; for though she had forgiven the earlier adultery upon condition and assurance of future amendment, yet, if he again committed adultery, even that previous injury would, in point of law, revive. Here is no appearance of being indifferent to her injuries, so as to give her husband a licence for his profligate course of life; but she resents them; she withdraws from his society; she only returns on condition of amend-**[746]**-ment: and when she a second time consents to be reconciled, she takes the best course to reclaim him, by insisting on quitting their residence and on going to live at a distance: she refuses to accompany her husband back to Tong Castle; but being pregnant and in distress she is obliged at length to return. Unless, then, there was a knowledge of the adultery after the latter end of 1810, and during their subsequent cohabitation, no condonation can be inferred so far as the libel itself lays the case.

Against this charge, so made, what is the defence set up? In plea, none: the husband has given no allegation whatever; but he has administered very long interrogatories. In these interrogatories various grounds of defence are suggested, but he has not ventured to plead any thing responsive; here is no allegation contradicting and denying the charges of adultery; no allegation pleading condonation later than 1810, or knowledge of his subsequent adultery; no allegation exceptive to the general character of a single witness; no allegation recriminatory against the wife, though he compelled her to quit his house.

It is said that a defensive allegation was not given, because the charges of adultery were pleaded so indefinitely that they could not be counterpleaded: but that is not so. The adultery with Bradbury and Cliffe was to be proved, not by acts seen, but by their pregnancy, and by Durant's acknowledgment of the children: it was not necessary, therefore, to lay particular acts; besides that, adultery is admitted, and a different defence is set up; viz. condonation, **[747]** not innocence. But the adultery with Dyke, James, and Starkey is specifically pleaded: that with Dyke among the trees near the avenue in the month of June; and of that with the other two the time and place are both fixed: yet no contradiction by plea is tendered. It is said, "These charges are not proved, because the witnesses are discredited;" but though all the witnesses were well known dependants at Tong Castle, yet no exception is offered against their character, but Mr. Durant is content with administering interrogatories and cross-examining one against the other, and is not wholly clear of an attempt to tamper with them.

The same observation applies as to the condonation; though he admits the adultery with Bradbury and Cliffe, yet there is no allegation to state Mrs. Durant ever knew that Bradbury had this third child; but he has made an attempt to prove it by interrogatories alone. So, also, with respect to the imputation on account of which he excluded Mrs. Durant from his society, some interrogatories have been addressed to the witnesses, but there is no averment in plea. Now, though he was at liberty to cross-examine to all these points, and evidence thus got out would be admissible, and might be material in aid of what he might plead and examine to; yet the effect is very different, if what is thus extracted be relied upon as the sole ground of defence, because it places the other party under very unfair disadvantages, and might defeat justice. If, for example, he had contradicted the adultery in plea, Mrs. Durant might have adduced other circumstances to corroborate her **[748]** former charge: if he had attacked the character of her witnesses, she might have supported their character, or have produced other witnesses to confirm and prove the facts: if he had alleged knowledge of the adultery, yet that she forgave it, she might have given a responsive allegation to prove her total ignorance: if he had made any charge of misconduct, she might have repelled and shewn it to be utterly groundless and malicious.

In proceeding, then, to examine the evidence and proofs, I am bound not to lose sight of these considerations, nor to take insulated and detached charges, but the whole together for one part may throw an important light on the probability and credibility of other parts.

That Durant carried on a criminal intercourse with Bradbury and Cliffe is not attempted to be denied. It is admitted he had three children by Bradbury and one by Cliffe: it was prudent on his part to wrap up this series of misconduct in one general admission; but the Court is bound to look at the character of these adulterous connections. He had been married about eight years, had nearly as many children, and his family was further increasing; Bradbury was about sixteen, his nursery-maid, attending on his children, and on that account it is probable she was decent and modest. This young girl, in this situation, does this husband and father of daughters seduce and debauch. Bradbury has been examined, and Mr. Durant's counsel have relied upon parts of her evidence. She entered his service about May, 1807, and staid in the family about eight months, when she went [749] away pregnant. Her account of the commencement and particulars of their criminal intimacy is—

"That when she had been some months in the service, being one day in a room on the ground floor, adjoining the stables, which was unfurnished, Durant came therein and pulled her about: whether he had connection with her at that time she does not recollect, but several times when she was in the back premises, as the brew-house, laundry, and other apartments, and no other person was observed to be about the same, he prevailed on the deponent to have connection with him: at Christmas she was discharged—went first to the house of Cooper at Galey, and thence removed to Newport in Shropshire to lie in."

This, then, is the mode in which this father of a family seduces this poor girl—the attendant upon his own children—almost a child herself; and these are the sort of places in which he carries on his criminal intercourse—in a brewhouse, laundry, or unfurnished apartment adjoining the stables—watching when the other servants were out of the way. I agree with what was said in argument that this wholly takes off the improbability that he was connected with his dairy-maid in the fowl-yard or shrubbery; or with labourers' wives on the floors of their own cottages.

After her confinement at Newport, Bradbury was brought back to the neighbourhood of Tong Castle—to "the house in the wood" inhabited by Doran, and there Durant kept and visited her, and she again became pregnant: she was [750] then sent away to a place at or near Wolverhampton, and in March, 1810, she had a second child—about a year after the other. After the birth of the second child Bradbury returned to her former residence at Doran's—"the house in the wood"—where she remained about three months. There Durant again kept her, and she again became pregnant: she then removed to Oker, near Wolverhampton, and was there delivered of a third child in December, 1811.

It might seem that this profligate adultery hardly admitted of aggravation, but it is aggravated. Between the birth of Bradbury's first and second child, when she went away to lie in, he formed a connection with her successor; the then nursery-maid, Elizabeth Cliffe: she also became pregnant, and she was brought to bed of a male child in June, 1809. Durant carried on this intercourse in his own house, almost in the room with his children: he was discovered one evening on a bed with this girl in one of the spare rooms opposite the nursery, without the door even being locked; and so barefaced was his conduct towards his servants (for Mrs. Durant was then absent), that the nurse, Boycott, in the presence of Rider, the witness, reproached him, telling him that "he is always after her," and pulled him away from the bed and from Cliffe. Conduct more immoral, more degrading, and more disgraceful—making a brothel of his own house with the attendant upon, and in the apartment adjoining that of, his children, scarcely disguising his guilt from his servants—can hardly be imagined.

The fact of these adulteries is fully estab-[751]-lished: the defence set up is condonation. I proceed then to consider the proof of the condonation, not deciding the question whether it can be set up as a bar without being pleaded, unless so far as it is admitted by Mrs. Durant's case.

Mrs. Durant, in her libel, states that after having returned in consequence of Durant's contrite letter in 1808, yet upon discovering the renewal of the adultery with Cliffe she again, in 1810, withdrew to her father's house at Seighford, where she remained a month; but having had an interview with her husband there, she admits that she agreed to cohabit with him upon condition of his quitting Tong and going into Devonshire: they went into Devonshire, and she never again returned to Tong till 1811, as already stated.

Here then is an admission of condonation after the second adultery with Bradbury, and after that with Cliffe: it is not, however, a condonation evincing an unfeeling disregard of her rights and insensibility to the injury; she deeply feels her wrongs; she duly resents them, and she properly takes the most prudent means of reclaiming her husband. Even her return in 1811 was under circumstances which almost amounted to compulsion and necessity: here also is an admission of subsequent cohabitation, but here is no admission of a knowledge of the fresh adultery with Bradbury.

To establish condonation of that third adultery, and thereby to bar her of her remedy, there must be proof that she was aware of her husband's renewed misconduct; for the mere fact of subsequent cohabitation does not imply for-[752]-giveness, nor operate as a bar, unless knowledge of the adultery be shewn. I know not of any case where condonation has been held to estop a party when it has not been pleaded. It may not be necessary to decide whether, if there were clear indisputable evidence of a condonation, it might, or might not, operate as a bar even against a wife without being pleaded or directly admitted: but all the authorities shew that it is not so readily presumed as a bar against the wife as against the husband. All lay down (and the common feelings of mankind confirm them) that it is the very reverse; that the injury is different; that the forgiveness on the part of the wife, especially with a large family, in the hopes of reclaiming her husband, is meritorious; while a similar forgiveness on the part of the husband would be degrading and dishonourable. Without, therefore, advancing, as a clear rule, that condonation to deprive a wife of redress must actually be pleaded; yet I may venture to say that, in order to be a bar, it must be clearly and distinctly proved. Knowledge and forgiveness are not legally to be presumed.

How then stands the proof of this condonation? In the first place, Mrs. Durant was not at Tong during any part of this third adulterous intercourse with Bradbury: she was either in Devonshire, at Bath, or in London: for the child was born in December, 1811. Bradbury was at the house in the wood only three months, so that she was in the neighbourhood of Tong only during the spring of 1811, and long before Mrs. Durant's return in August, 1811, had been removed to many miles distant, where she after-[753]-wards resided, and continued to reside. Durant was so cautious to keep the birth of this child from the knowledge of his wife that he never afterwards would allow Bradbury to come into the neighbourhood; and Bradbury swears, and it is relied upon by Durant, "that she never had intercourse with and never spoke to him after the birth of this last child." Rider deposes "that Bradbury wished to see Durant, but that he said it would be his ruin if he was seen talking to her." Rider by error states the time to be about 1816 or 1817, but it must have been considerably later. Doran, the wife, describes Bradbury as coming to the wood and wishing to see Durant much later, for she says "she had left her house ten or twelve years before:" so does Doran, the husband; and the warrant against Bradbury is dated in 1820. So that there is no trace of Bradbury's having been in the neighbourhood of Tong after Mrs. Durant returned there in 1811, or of Mrs. Durant ever afterwards having seen her, before the final separation: and yet the whole relied upon to prove the most important fact—namely, Mrs. Durant's knowledge of this subsequent adultery—is a single passage in Bradbury's evidence, when in answer to the sixty-ninth interrogatory she says "that Mrs. Durant did upbraid her with the birth of the children mentioned in her deposition in chief:" not stating when, where, nor in what terms. In her deposition in chief she has mentioned having had three children, and it is assumed that Mrs. Durant must have referred to all three, and must have upbraided Bradbury for having had all those children by [754] Durant, and that this took place before the separation. This alone is to prove Mrs. Durant's knowledge of the third adultery, and to prove, without pleading it and against every probability, that Mrs. Durant ever saw Bradbury after her return to Tong in 1811, before the final separation; for if this happened after it would be no condonation. If I was obliged to decide the case on this point alone, I should be strongly disposed to hold that there was not that proof of a knowledge of the subsequent adultery upon which condonation could be bottomed as a bar to the relief sought by the wife from as profligate and degrading an injury, of the nature complained of, as could well be brought before any tribunal.

But the case does not rest on this point alone. Here are subsequent adulteries

charged, to which it is not suggested that condonation applies: and if either of these subsequent adulteries be proved, it is clear that the earlier adultery revives and forms an aggregate upon which relief must be granted to the injured wife.

The parties continued, as has been already stated, to cohabit till April, 1817. The next adultery is laid in the seventh article of the libel to have been committed with Mary Dyke, and on that article two witnesses have been examined, Jane Rider and Esther Hampton. Their own evidence is to this effect: "Jane Rider was born on Mr. Durant's estate; she and her husband (who was a tailor, and to whose evidence I have referred) were employed by, and rented two cows of Durant; these cows used to come with Durant's to be **[755]** milked near the fowl-yard. Mary Dyke was the dairy-maid; she was a neighbour's daughter whom the deponent had known from her childhood; one day the deponent was told by Durant's upper servant not to milk her cows by the fowl-yard, but at another spot near an elm tree in the park; a day or two after she saw Dyke for the first time fetching the cows out of the park; a thought struck her to go and see what was going on at the fowl-yard: looking through a hole in the wall she was much surprised to see Dyke standing against the wall with her face to her and Durant very near her with his back towards her, the witness; they were quite alone, the witness was frightened, and came away directly, and went again to the elm tree." Such is Jane Rider's evidence.

Esther Hampton was the cook at Tong Castle: "She often saw Durant behaving in a familiar way and toying with Dyke, throwing his arms round her neck when they were alone in the dairy. One day, a few days before she left the service, which was on the 8th of July, about three o'clock—the usual dinner-time—she had dished up dinner; the servant said 'his master was not at home;' she said 'she would find him' —having a few minutes before seen her master pass the window, and a short time before that having seen Dyke at some distance, each going in a direction to meet at a particular point; she went to an avenue at the back of the castle, where she suspected she should find them together; she did find them in the act of adultery;" which she describes.

[756] If these witnesses are believed, here is adultery proved. In considering the probability of the story and the credit of the witnesses I must take the whole case together; and then, looking at the connection with the two nursery maids, is this account of his adultery with the dairy-maid improbable? Not in the least. Remembering the order for Rider to milk her cows in a different place—this order conveyed by the upper servant, who afterwards fathers Dyke's child, and who might be a very convenient person to Mr. Durant on this and other occasions for various purposes—has any person much doubt what was the object of Durant's meeting Dyke in the fowl-yard? though, if that were the only circumstance, it might not be sufficient proof of adultery being then and there committed. But let us look at the rest of the history.

It was argued that the time and place spoken to by Hampton are improbable. As to the time: not calculating it perhaps very nicely, he would select it, supposing that the servants were engaged in preparing for dinner, for with Bradbury in the laundry and brewhouse he watched his opportunity when the servants were out of the way; as to the place; on other occasions he was not very choice—among the trees in a summer's day with the dairy-maid is not more improbable than in out-of-doors' offices with the nursery-maid: as to the credit of the witnesses; Durant, though well knowing them, has not ventured to except against their general character; Hampton has had a child; but, with the example of Durant to countenance her, that is **[757]** no great discredit at Tong Castle—chastity was not there, with such a pattern as the master and head of the family afforded, a virtue much to be expected or in high estimation; and the fact of Dyke's having had a child, which was laid to this convenient upper servant, does not go far to shew that the master had no criminal intercourse, whoever might be the actual father. After, then, considering fully all the observations made by counsel, I find it very difficult to withhold my belief and conviction of the truth of this individual charge. If this be so, it becomes unnecessary to enter into much detail of the other two charges with the two labourers' wives in their respective cottages, for of this adultery with Dyke there is no attempt to allege condonation, and the former adulteries therefore would be revived.

The three Blakemores do certainly not stand high in point of credit, but their characters have not been fairly attacked and put in issue by plea: had that been

done, they either might have been supported, or the accusations themselves might have been corroborated by other witnesses. The improbability of the conversation between James and the female Blakemore is not very great, considering the lax morals of the neighbourhood, considering that James herself had a child before marriage, and the sort of vanity which she, being of loose character and habits, might feel in being so noticed by the squire of Tong Castle: she might think it matter rather of boast than of concealment and shame. As to the place, again—the floor of the cottage—Mr. Durant might be as well satis-[758]-fied with that, as with the floor of the brewhouse or laundry.

The circumstance that makes the most impression on my mind, as affecting the truth of these charges, is that Blakemore should upon both occasions happen to come into the cottage just at the exact time: such a coincidence may possibly have happened, but it raises considerable doubt as to the reality of a story, coming from witnesses not wholly unshaken in credit. If this were the only proof of adultery; if there were no other charges established; if up to this time Durant's conduct had been unimpeached as a father and a husband, I should not have ventured to pronounce a sentence on the evidence of the Blakemores; but the whole history, standing as it does, makes it scarcely necessary to place much weight, or to come to any decisive opinion, upon these two charges; they may or they may not be true; but being spoken to by such witnesses and of such a person, I should be more disposed to say "not proven" than "not guilty;" for I am far from being satisfied that it is fabricated, still less that it is suborned evidence. If Blakemore has been to Seighford, he has also been to Tong Castle, for his account on the thirty-sixth interrogatory of the agents of Durant, and of Durant himself having him together with Starkey up to Tong Castle, though not adding to the credit of the witness, does not exhibit conduct quite proper in the party against whom he was about to be produced as a material witness. The influence which Durant must have over the class of witnesses, who alone could be the persons capable of proving the adultery [759] charged, renders their evidence not the less credible. It is true that Mrs. Durant did not separate herself on the ground of his adultery: she was not aware of the extent of it; and this brings me to the account of the separation and the subsequent history.

In the latter end of April, 1817, Mrs. Durant being at Seighford with her father, who was ill, and her sister, Miss Eld, and another lady being at Tong Castle, Durant charged his wife with impropriety of conduct with the tutor of his children. Mrs. Durant on hearing it immediately returned to Tong Castle, accompanied by her two brothers; and Mr. Slaney, a friend of Durant's, being called in, the matter was investigated, and Durant declared himself perfectly satisfied; but the tutor left the family. Notwithstanding this, Durant in a few days afterwards ordered his doors to be shut against his wife, stated to Slaney that he had proofs of her criminality, and desired she would attend at Slaney's house, not at Tong Castle, to exculpate herself: she indignantly declined, and by Durant's orders his doors continued to be shut against her. He has ever since persisted in the same insinuations, inquiring in his interrogatories whether she has not kept up an intercourse with this tutor and supplied him with money; and even at the hearing has instructed his counsel to persevere in the same species of suggestions; but he has never brought forward the charge in any specific and tangible shape, and the Court is bound in common justice to consider it as perfectly groundless, and to say in the words of Lord Stowell, in the case of *Soil*-[760]-*leux* v. *Soilleux* (1 Hagg. Con. 378), when observing on similar conduct on the part of the husband, "This is a continuation of the atrocious conduct which has marked the character of this man throughout." The terms are not inapplicable on the present occasion.

Upon these events in 1817 the wife did not immediately resort to the present suit. A deed had been executed by Durant in 1809, by which he bound himself to allow his wife £500 a year in case she should at any time choose to live separate, and to support one of the children. An action was brought in the name of the trustee upon this deed to recover the allowance: in the first instance a verdict was obtained, but upon a writ of error the decision was reversed (*Titley* v. *Durant*, 7 Price, 577); she then resorted to the present suit. The proceeding under that deed was no legal bar to this suit, nor does it appear to bear unfavourably upon the case of the wife, After this charge, after an exclusion from his house and his society, could she wish to return degraded and insulted to her twelve children and her servants? Her object

could alone be to procure a subsistence in a state of separation, either under the deed or by the present suit: there was no other alternative; and if that object could at once be obtained under the deed it was natural and not improper that she should try that method, rather than proclaim the misconduct of the father of her children by a detailed disclosure of it in such a proceeding as the present. It is no bar to the suit; it is no acquiescence in her injuries; it was rather meritorious [761] to abstain from the exposure of her husband's domestic profligacy till driven to it by necessity as her only remaining remedy.

In the course of the argument the Court threw out whether, if the condonation took off the effect of the admitted adultery and the subsequent adultery were not proved, this groundless charge against the wife and shutting his doors against her would not do away the effect of the condonation and revive her title to legal relief: it may perhaps be unnecessary to decide upon the point, as I am satisfied that adultery subsequent to the established condonation is proved; but it may not be fitting wholly to pass by this point.

Some propositions seem to be admitted—

First, that condonation is accompanied with an implied condition.

Secondly, that the condition implied is that the injury shall not be repeated.

Thirdly, that a repetition at least of the same injury does away the condonation and revives the former injury.

So far the propositions are clear: but must the injury be of the same sort—proved in the same clear manner—be sufficient per se to found a separation? If nothing but clear proof of actual adultery will do away condonation of adultery, the rule of revival becomes nearly useless, for the revival is unnecessary. The only possible way in which the former adultery could bear would be in, possibly, inducing the Court to give some slight additional alimony: but it could not bear even in that way when the suit is brought by the husband; in which case, [762] of course, there would be no question of permanent alimony. It appears, therefore, hardly to be consistent with common sense, that clear proof of an actual fact of subsequent adultery should be necessary to remove the bar: something short would be sufficient, and it seemed almost admitted, though no direct authority was adduced in support of the position, that solicitation of chastity would remove the effect of condonation of adultery, but still it was maintained that it must be "an injury ejusdem generis."

It is difficult to accede to the good sense even of that principle, or to suppose that the implied condition upon which the forgiveness takes place could be, "You may treat me with every degree of insult and harshness—nay, with actual cruelty, and I bar myself from all remedy for your profligate adultery—only do not again commit adultery or any thing tending to adultery:" the result of the argument is, that this must be supposed to be the condition implied when condonation of adultery takes place. The plainer reason and the good sense of the implied condition is that "you shall not only abstain from adultery, but shall in future treat me, in every respect treat me (to use the words of the law), 'with conjugal kindness'—on this condition I will overlook the past injuries you have done me."

This principle, however, does not rest wholly on its own apparent good sense, but the Court has authority to support it. It has been held that cruelty will revive adultery. The case of *Worsley* v. *Worsley* (vide supra, p. 734, and infra, p. 764) was read by the Court [763] in the course of the argument, and the Court has no reason to doubt the correctness of the note. If this cause had turned upon that authority alone, I might have thought it necessary myself to look through the original papers, but knowing the accuracy of the quarter from which this note came, and, still more, finding that case fully investigated, and the principle recognized by another very high authority, in the case of *D'Aguilar* v. *D'Aguilar*, I have contented myself with what I have already quoted respecting the decision of *Worsley*.

I advert to the case of *D'Aguilar* also for another purpose, viz. to set right a misconception which seems to have arisen, that it was there laid down by my Lord Stowell that the reviving cruelty must be sufficient per se to be the ground of a sentence; and if that great Judge had solemnly laid down such a proposition I should have much diffidence and hesitation in dissenting. The passage to which I am about to refer is to be found in the Consistory Reports, a collection of most valuable judgments; but it is not in one of the cases reported in the body of the work; it is only stated in a note. The passage stands thus:

It is said "that though condonation might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence: this is the true rule. But I think the facts pleaded are such as might avail substantively, and therefore revive the ancient facts." (*a*)[1] This was merely on debating a plea, when dicta may be **[764]** stated with less precision, and are more easily misapprehended, more especially as the point did not require decision, there being actual subsequent cruelty pleaded: but, upon looking at the sentence, I find that distinguished individual lays down a different doctrine, namely, that less will revive former acts than would found a sentence.

He says, "A question has been raised in argument whether acts of adultery revive acts of cruelty; and a case has been cited in which it was decided by Dr. Henchman, who I always understood was one of the most judicious practitioners who ever presided here, that acts of cruelty revived acts of adultery before condoned. The case is *Worsley* v. *Worsley*. I have had it looked up. It never proceeded to sentence; but the allegation was admitted after an opposition. It alleges that the parties were married in 1712; that the husband treated the wife with cruelty; that he committed adultery in 1720; and in 1728 the parties were living together, for acts of cruelty are then stated. I presume, then, the objection taken was that after 1720 they were living together, and the only ground on which the Court could admit the act of adultery was that it was revived by the cruelty. The Court, however, overruled the objection. It has then been considered in this Court that circumstances may take off the effect of condonation which would not support an original cause. Facts of cruelty revive adultery, though they would not support an original suit for it. The condonation in this case is such that it is **[765]** hardly necessary to resort to the authority of *Worsley*, but it confirms the doctrine that facts would revive which would not be a sufficient ground for an original proceeding. It is held that words of heat and passion, of incivility or reproach, are not alone sufficient for an original cause; nor harshness of behaviour: but I cannot but think that their operation would be stronger in condonation. Words otherwise of heat receive a different interpretation if upon former occasions they have been accompanied with acts; if it is apparent that the party was in the habit of following up words with blows: and on these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit." (*a*)[2]

Under these authorities I am inclined to hold: first, that cruelty will revive adultery: and, secondly, that less is necessary to revive than to found an original sentence.

The same doctrine is maintained by the same eminent judge in *Popkin* v. *Popkin*.(*b*)

(*a*)[1] *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Con. 134, notis.

(*a*)[2] *D'Aguilar* v. *D'Aguilar*, Consistory, Mich. T. 1794. See a note of the judgment in this case, post, p. 773.

(*b*) In *Popkin* v. *Popkin* (Consistory, Hil. Term, 2nd Session, 1794) the libel, after pleading the marriage in 1778, charged the husband with general intoxication; habitually frequenting brothels; associating with common prostitutes at Bethune and at Lisle; attempts to debauch his women-servants in his own house; an act of adultery "on an evening happening in 1787, or the beginning of 1788, with a young woman, the servant of a milliner at Lisle, and that he afterwards continued his improper intercourse with her, and confessed the same to Mr. Montgomery;" two specific violent acts of cruelty in January and June, 1784; and general cruelty from April to August, 1784; venereal disease in 1789; and up to December, 1790, and his confessions; his attempts to sleep in the same bed with his wife, and that on her refusal he became violently enraged, made use of many outrageous and dreadful menaces to compel her, and, on one occasion, at Lisle, in September, 1790, "he seized her in his arms, and forcibly dragged her along towards his bed; that she disengaged herself, and immediately ran down stairs, undressed, into a room where was a gentleman sitting, her husband's relation; that her husband followed her into the parlour, when she fell on her knees, intreated him to desist, promising to return to his bed as soon as he would satisfy her he was cured." The libel further charged similar conduct on several successive nights; and that in consequence of such conduct, she, on the 6th of January, 1791, while he was absent in England, quitted his house (which he had hitherto prevented) and had never lived or cohabited with him since August, 1790.

Dr. Arnold and Dr. Swabey in support of the libel.

"The [766] principal objection raised is that a condonation appears on the face of the libel. But it is [767] not proved that acts of adultery will not revive cruelty, nor that acts of cruelty will not revive [768] adultery. It may be true that, under a citation for adultery, you might not originally [769] plead facts of cruelty, nor vice versâ; but I do not know that it has been held the two are so slightly connected that one will not revive the other (see *Barrett* v. *Barrett*, supra, 22). No such case has been cited: nor do I know that such has been the doctrine of this Court. I have rather understood otherwise; and the case of *Worsley* v. *Worsley*, quoted by Dr. Swabey, is an authority in point. It is not necessary to give a decided opinion here, as the fact of revival is of a mixed nature, partly cruelty and partly evidence of adultery, and would revive either."

To apply the principle to this case. Here is not cruelty which would support a sentence "propter sævitiam;" but here is an act which might be pleaded as such in conjunction with other circumstances. If a person who had ill-treated his wife, and had been guilty of acts of violence and words of menace, had finally made a charge of misconduct and criminality which he had not attempted to allege nor to prove, and under that pretence had shut his door against her, it cannot be doubted that such conduct would be admissible matter in a suit for separation by reason of cruelty. By some authorities in the civil law this was held to be a distinct ground of separation, and passages were quoted in the argument to that effect which it is unnecessary again to state. These Courts and the law of this country have not gone the length of recognizing it as a substantive ground; but it is a fact, among others, "per quod consortium amittitur." Making [770] this charge, and excluding her from his residence without provision, is a species of malicious desertion; but neither is malicious

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Dr. Nicholl and Dr. Laurence contrà.

Per Curiam. Sir William Scott (Lord Stowell). "This libel is offered in a suit for the adultery and cruelty of the husband. It is objected to in toto: but I can reject in toto only on one of two grounds:—1. That the story, on the face of it, shews a false case which cannot be proved. 2. That it evidently appears, from the facts pleaded, that the party complaining has barred herself.

"A plea cannot be rejected as false unless it is manifest that it is impossible to prove it. Improbability is not sufficient: it must be shewn it cannot be proved by any possibility. It is not here contended that proof is impossible, but that it is improbable. The delay is accounted for by facts suggested by themselves, viz. the absence of the husband out of the kingdom and the derangement of his circumstances. This is sufficient of itself; but in fact there has been no delay; for the citation was taken out long before it could be served. But mere time is no bar in the case of a woman, as various reasons may induce her to submit. Mere flux of time is no condonation; neither on the face of the proceedings nor on the libel does it appear that there is any impossibility of proof.

"The principal objection raised is that a condonation appears on the face of the libel; but it is not proved that acts of adultery will not revive cruelty, nor that acts of cruelty will not revive adultery. It may be true that, under a citation for adultery, you might not originally plead facts of cruelty, nor vice versâ; but I do not know that it has been held the two are so slightly connected that one will not revive the other. No such case has been cited, nor do I know that such has been the doctrine of this Court: I have rather understood otherwise; and the case of *Worsley* v. *Worsley*, quoted by Dr. Swabey, is an authority in point (*Worsley* v. *Worsley*, supra, 734). It is not necessary to give a decided opinion here, as the fact of revival is of a mixed nature, partly cruelty and partly evidence of adultery, and would revive either.

"It is said the only specific act of adultery is charged in the 8th article, in the year 1787. It is not shewn this was known to the wife: it might be secret; of course, then, she could not forgive it. It would be matter of defence to prove that she was acquainted with the fact, and forgave him. The 12th article states that he was violently afflicted with venereal disease, and attempted to sleep with his wife, and thus communicate it to her. Whether this disease is evidence of adultery may depend upon circumstances, such as length of time since the marriage. If it shews itself soon after the marriage, it might be hard to say that it would be proof of adultery. Here the parties have been married twelve years; and though possibly it might be lying in the blood so long, yet this would be matter of defence, and to be proved. Under such circumstances it is primâ facie evidence of adultery.

desertion by the law of England a ground of separation (see *Forster* v. *Forster*, 1 Hagg. Con. Reports, 154).

What, however, was the situation of this lady at that moment, and what does it now continue? Here is the wife and the mother turned out of doors in the face of her neighbours, her family, and her twelve children, under the heaviest of all imputations—a charge of criminality with her children's tutor. Is there any woman who would not have considered an act of personal violence, inflicted in passion or even deliberately and maliciously, trivial and pardonable in comparison with this accusation? Who would not have considered an act of casual adultery, nay, the deliberate seduction of a nursery-maid, trivial—not really in itself, but as affecting the feelings of a wife—trivial in comparison with this charge? a charge made not in the haste and error of the moment, but kept up and persevered in to the present time? And yet this severest of all injuries is not to wipe away the former condonation; but that condonation is to bar the wife of a remedy on account of all the profligate adulteries previously committed. This is not treatment in conformity with the promises and conditions on which she forgave; promises not left to implication, but expressed in Durant's own letter:

"My dear Sir,—I am again obliged to apply to you in my distress; I am the most wretched man alive; **[771]** my poor dear Marianne has behaved like an angel, but it is impossible she can ever forgive me. On Friday last she heard of the brutal passion which had hurried me on to commit what I shall repent of to my last hour. One of the women confessed to her that I had been criminally connected with her. As I might have expected, she insisted on leaving the house instantly, and the carriage took her on the road to London: but as I could never bear the idea of parting with her, I followed it on horseback, and she most indulgently consented to return. I

"But it is said, 'here is a condonation; for the wife promised she would return to his bed when she was satisfied he was cured.' This declaration, however, was made under force and violence, and to relieve herself from his attacks. The promise was merely conditional, and that condition was never fulfilled. The husband has a right to the person of his wife, but not if her health is endangered. It is impossible to say that this is such a condonation as will bar adultery charged on the husband.

"On the charge of cruelty it is said that there are only two acts of cruelty in twelve years: if only one act, and that was of an inflamed nature, and was sufficiently gross to excite terror in the wife, she would not be barred (see *Holden* v. *Holden*, 1 Hagg. Con. Rep. 458-9). It does not follow there are not other intermediate acts which the party might plead if necessary; but she would be advised only to plead sufficient facts without loading her case with supernumerary circumstances.

"The acts of violence are not objected to; but it is said she consented to live with him. It is not, however, necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct. It is legal and meritorious in her to submit to no inconsiderable degree of ill treatment; to be patient as long as possible. Such forbearance is not permitted to weaken her title to relief. But here cruelty is carried down to the latest period of the cohabitation; the husband forcing his wife to his bed when he was violently affected with venereal disease. It is not necessary, when there is an attempt at violence by an overt act, to wait till it is actually put into execution. Here he attempted to draw her to his bed when infected with venereal disease; an injury of a most malignant kind, and attempted in the most improper and violent manner. It has been said that he was unconscious of this malady: that is for him to shew; though it is improbable at present that he should succeed in establishing his ignorance. I am clearly of opinion that as this disease continued to December, she quitting cohabitation on the 6th of January, it brings the charge down sufficiently, revives former acts, and repels the suggestion of condonation. I overrule without hesitation the general grounds of objection."

In remarking upon the particular objections to the libel the Court said: "The attempts to debauch his own women servants was a strong act of cruelty; perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife's feelings. The attempt to make a brothel of his own house was brutal conduct, of which the wife had a right to complain."

Libel admitted.

cannot object to the present determination of being some time at Seighford, as I hope she will there recover the tranquillity I have so miserably destroyed: would she but once consent to return here I would relinquish every thing in the world to her guidance, and if I ever prove ungrateful for her kindness would willingly live on bread and water to give her possession of all my property. Your kindness will, I am assured, send me an answer by my servant, and I hope bring her leave to come to Seighford to fetch her home. I trust nothing will induce you to let her leave Seighford, as I know she would rather suffer any poverty than let her family know where she retired to, and in her present disposition I fear she might make away with herself."

Such are the promises on which she returns: these he breaks by repeated subsequent adulteries, and consummates his unworthy treatment by these cruel accusations. If the case turned **[772]** upon this point, I cannot say how I might feel compelled to decide: but if I were bound to leave the wife without remedy, I should deeply lament the hardship and cruelty of the law which demanded such a decision.

And what is the present situation of this lady according to the husband's prayer to be dismissed? His counsel say her remedy is a suit of restitution. Does then the husband pray that he may be compelled to take home and to treat with conjugal kindness the wife whom he has for years been charging as criminal? that he shall take back to the society and to the management of his children the mother whom he has so branded and degraded by his imputations? Is this wife, who has suffered the grossest injuries, in point of law, from the profligate adulteries of her husband, and the still more distressing insults, in point of feeling, from his groundless charges, to ask the assistance of the law to compel him to take her home to be held up by him as an object of scorn and aversion to her own children? Is this the "consortium vitæ," which she can alone seek? The Court cannot but feel relieved that its duty does not drive it to place her in this miserable and humiliating condition.

On the grounds already stated, that her knowledge of the last adultery with Bradbury is not proved, and that the husband's adultery with Dyke is proved; and without deciding on any of these other points, I think I am warranted in pronouncing the wife entitled to the sentence of separation which she prays.

[773] LADY D'AGUILAR *v.* BARON D'AGUILAR.(*a*) Consistory, Michaelmas Term, 2nd Session, 1794.—The husband's conduct is legal cruelty, if by cohabitation the wife is exposed to bodily hazard and intolerable hardship. On proof of such conduct and the husband's adultery with three different women a sentence of separation à mensâ et thoro pronounced at the wife's prayer, and the husband condemned in her costs.—All persons (ex. gr. Jews) who stand in the relation of husband and wife in any way that the law allows have a claim to relief on the violation of any matrimonial duty.—The remoteness of facts deposed to accounts for the witnesses relating them with less precision and distinctness. All that the Court can require is to be satisfied that the evidence is substantially true.—A wife's delay in applying to the Ecclesiastical Court for redress from cruelty does not infer that there is no ground for complaint, nor even raise a presumption against the truth of the charge.—An intermediate separation so approximates two periods of cohabitation that acts of cruelty, happening before the separation, are to be looked upon as if they had happened recently.—The mode in which after a separation a return to cohabitation was effected is material to shew whether there was or was not condonation.—All condonations by operation of law are expressly or impliedly conditional; for the effect is taken off by repetition of misconduct.—Circumstances may take off the effect of condonation which would not support an original cause.—The wife's unwilling acquiescence in a return to live in the same house, but without connubial cohabitation, does not amount to a complete forgiveness.—To domestic conduct friends, dependants, and servants can alone speak; they must have some bias, and the Court must receive their evidence with some drawbacks.—Cruelty may be relative, and depend on the age, habits, &c. of the party.—The husband's rights that may legally be insisted on by the due exercise of marital authority must not be enforced by indignity, brutal violence, nor by threats.—If a wife proceeding against her husband for cruelty

(*a*) Vide ante, p. 765.

and adultery was not originally justified in withdrawing from cohabitation, the Court must pronounce her under the obligation to return.—If the Mosaic law as at present received allows concubines, such a privilege could not be noticed without being specially pleaded. Quære whether it could be noticed at all in the Courts of this country?—Conjugal cohabitation after an act of adultery, avowed by the husband to the wife, may be condonation; but if a wife overlooks one act of human infirmity, it is not a legal consequence that she pardons all other acts.—Condonation is not held so strictly against a wife as against a husband.—In general the husband is bound to defray the wife's costs, and also to provide alimony pendente lite; but when the wife has separate means, which the Court deems sufficient for her defence and subsistence, she is not intitled to alimony nor costs during suit; she then stands on the common footing of a litigant party, and on proving her case has a primâ facie right to costs. It is however discretionary with Courts on a consideration of all the circumstances to relax the rule.

[Discussed, *Russell* v. *Russell*, [1897] A. C. 395. Referred to, *Moss* v. *Moss*, [1916] P. 159.]

Dr. Nicholl and Dr. Swabey for Lady D'Aguilar.

Dr. Arnold and Dr. Laurence contrà.

Judgment—Sir William Scott (*Lord Stowell*). This is a cause of separation for cruelty and adultery brought by the wife against the husband. The marriage took place in March, 1767, according to the rites of the Jewish nation, both parties being Jews. The Court does not remember any proceeding between such parties in a case of this nature: there may have been such, but whether there have been or not there is no doubt that the suit may be entertained.(*b*) The marriages of Jews are expressly protected by the marriage act;(*c*) and persons of that persuasion are as much entitled to the justice of the country as any others; for I take the doctrine to be that all persons who stand in the relation of husband and wife in any way the **[774]** law allows, as by a foreign marriage, or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty. Jews in this country have the same rights of succession to property, and of administration, as other subjects; and they come to the Ecclesiastical Court in order to have such rights secured. Many of them are possessed of considerable personal property; and they have the same right to transmit it as others. It would be hard, then, if they had not the same mode of securing the legitimacy of their children, and consequently if the same rights of divorce did not belong to them. I have therefore no doubt that it is the duty of the Court to entertain such a suit between Jews as between others of a different persuasion.

The case comes before me simply upon the evidence on the libel: nothing has been pleaded by the husband in contradiction or explanation. On the admission of the libel the Court directed the part relating to the property to be reformed, thinking that it might embarrass the Court by leading to an inquiry into matters impertinent, and not within its cognizance.(*a*) **[775]** Other parts were ordered to be struck out

(*b*) See the cases of *Lindo* v. *Belisario*, 1 Hagg. Con. 216; and Appendix, p. 7; and *Goldsmid* v. *Bromer*, 1 Hagg. Con. Rep. 324.

(*c*) 26 Geo. 2, c. 26. Marriages of Jews are also excepted out of the operation of the marriage act now in force, viz. 4 Geo. 4, c. 76, s. 31. For an account of the legal state of the Jews in this country, see the Addenda to Jacob's edition of Roper's Husband and Wife, vol. 2, p. 476, and the references given.

(*a*) The eighth article of the libel, in substance, pleaded "that in April, 1773, when the wife withdrew from cohabitation, she was possessed of jewels, and had in her own house jewels, plate, household furniture and other effects, to the value of 8000l., all which were her own sole and separate property; that the husband entered upon the premises and possessed himself of all the said effects, her wearing apparel, and ornaments of her person, except the clothes she had on." On this article the Court said, "It has been objected that this will lead to a discussion upon which the Court may find it difficult to satisfy itself: the husband primâ facie is entitled to the property of the wife: it is only by stipulation that it can be taken from him, and it is discretionary what part shall be communicated to the wife. The Court would be under great difficulty in interposing in such an inquiry: the consequence of admitting

as too minute and particular, not because I thought [776] that debarring the wife of her fair indulgences was irrelevant, but because facts, when too [777] minutely pleaded, carry a ridiculous appearance. To consider then what appears in evidence.

Mr. Pereira, the executor of the first husband of the wife, is a witness to whom there is no objection. His account of the manner of their cohabitation gives a striking picture of habitual harshness and incivility. "He observed that in the first week after their marriage he treated her with great harshness; spoke in a loud impe-[778]-rious tone; his manner was so disgusting that witness ceased to visit them; his manner was contemptuous; it brought tears into her eyes." Mrs. Kahlen confirms this account. It is true that in 1770 this witness was very young; and it is a long time ago: and much observation has been made on her minute testimony; but looking at the facts to which she deposes, I think it not improbable they may have made that exact and lasting impression to which she swears. It is truly said that her evidence as to a fact which occurred when she was nine years old would be received with caution even at the moment. But all the Court has to consider is, whether the witness gives an account on which it can judicially depend. Her account of his general treatment is: "She was often at the house; he treated his wife so cruelly as at that time to impress her mind with the idea that he was an ill-natured man: he treated her in the harshest manner. 'Bitch,' and 'damnation seize your blood,' were frequent expressions. She at length avoided going." These two witnesses together describe such general ill-treatment and behaviour as to be highly improper, and which amount to a great degree of harshness; though perhaps not alone sufficient for the Court to take hold of.

But there are two facts on which the Court is bound to interpose. Mrs. Kahlen

this article would be an averment in justification of the husband, that it was not the separate property of the wife. The husband has a large discretion over joint property. How is the Court to discriminate and determine on such matters? This part of the article would lead, I think, to an inconvenient inquiry: I shall therefore limit the article to pleading that he deprived her of her wearing apparel, together with the ornaments of her person. A wife has always a right to have her clothes; the law shews a special indulgence to a wife's rights in her paraphernalia and ornaments.

The only part of the ninth article objected to is that which pleads, "That the husband lay in a separate bed." This should not be pleaded as an act of cruelty; it would be too much for the Court to declare it cruelty.

The tenth article pleads, "That he abused her very much, cursed and swore at her bitterly, called her whore, and other opprobrious names; that he held his clenched fists to her face, and declared that he would do for her; that he would be the death of her." It is said these are mere words; but these are acts amounting to an assault at common law, for which he would be bound over to keep the peace. Words of abuse and of reproach create only resentment, and are not legal cruelty; but words of menace intimating a malignant intention of doing bodily harm, and even affecting the security of life, are legal cruelty. The Court is not to wait till the threats are carried into execution; but is to interpose where the words are such as might raise a reasonable apprehension of violence, and excite such fear and terror as make the life of the wife intolerable. If rendering life intolerable be the true criterion of cruelty, what can have that effect more than continual terror, and the constant apprehension of bodily injury? It may be shewn that these were mere words of heat; but primâ facie, it is to be understood that a man means what he says. Until I am instructed by superior authority, I shall hold that the Court is obliged to interpose where words of menace are used. I should feel my responsibility sit uneasy upon me if, in consequence of rejecting a plea charging such an act, harm should happen. But, to interpret such words, the party has a right to refer back to violence formerly used.

The article proceeds to state minute acts: I think they may better be stated in a general way; they throw a levity on the business when pleaded, and are more proper to come from the witnesses. As to spitting on her, nothing can be more gross cruelty, and there is a case in Hetley in which a prohibition was denied, the only act of cruelty pleaded being spitting on the face; and that was adjudged sufficient.(*a*)

The 11th pleads, "That by imposition and threats he compelled her to execute a deed of assignment of 3560l. South Sea stock." Here is a general averment that this was not only obtained by threats but by imposition also. I cannot, consistently with

(*a*) See *Cloborn's case*, Hetley, 149.

says, "That one day at dinner D'Aguilar quarrelled with the servant; was then sulky; then flew into a passion with his wife without provocation; and, pushing the deponent aside, he threw the fire-screen with violence at his wife, saying [779] 'Damnation seize your blood.' Deponent believes it would probably have killed if it had struck her: she was alarmed and ran to her aunt's house." The fire-screen then was thrown with an intention to strike, and with a violence which would have endangered the person. It is said that no other witnesses have been examined: but it does not appear that any were spectators, or, if spectators, that they are alive. This, therefore, is an act which the law considers direct cruelty, and I see no improbability that it should make an indelible impression on the mind and memory of a child; and the account corresponds with the husband's character.

Another fact is spoken to by Pereira and Linneard. The former says: "In December, 1772, Lady D'Aguilar came to his co-executor; complained that her husband had beaten her; she shewed her arm; it was bruised; he advised her to swear the peace against him, which she did; and bail was given." Linneard deposes: "At the end of 1772, or in the beginning of 1773, she came to her aunt complaining that her husband had beaten her; her arm was bruised from the shoulder to the elbow; and black as if mortified. She continued ill a considerable time." I am at least satisfied that articles of peace were exhibited against him, and that bail was given.

It is said these facts are remote: they are so; but the Court is to consider that as a fair reason why the witnesses relate them with less precision and distinctness. If I am satisfied the evidence is substantially true, that is all I can require. Again, it is objected that there is [780] no evidence but the declarations of the party herself, and

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general principles, admit this as cruelty: it would be improper to inquire into this transaction, if the parties did not resort to Courts which can invalidate the act. I, therefore, reject this part of the article. The latter part, which pleads "The mode of compelling her to attend at the office of the accountant general by threats, and by holding up his clenched fists," I shall admit; but I shall not inquire into that part which states "that the object of going there was to receive her separate property; and that he snatched the draft received from the accountant general from her hand, and kept it for his own use against her will."

The 12th pleads, "That she had gone out on a visit with the sister and nieces of the baron; that on his return home he became enraged, swore he would play hell with her, and do for her: servants were alarmed and went out and told her; she did not return." It appears to me that, if words of serious menace importing bodily harm be legal cruelty, it does not differ much whether they be addressed to the person herself or to a third person: the test is, if they raise reasonable apprehension; indeed, they carry with them something of additional strength if they raise apprehension in others, for that shews the wife was not alarmed upon any unreasonable grounds.

The 13th pleads, "That this cruelty affected her health, and that she still remains in an unimpaired and weak state of health."

To the 14th the objection taken is, to the want of specification in point of time. It is alleged, "That he kept certain specified houses to which he took divers women, from 1790 to 1793." The want of specification as to time is supplied by the specification as to places. These are pointed out; the scene of guilt is specified; he will have the opportunity of calling servants to shew that he did not habitually carry home these loose women to these places; he will not be unprovided with defence.

The 15th pleads "an adulterous intercourse for the last fourteen years with Susannah Lewen, and the birth of a child thirteen years ago, maintained and brought up by the baron, and lately acknowledged by him."

The 16th, "That Lewen lived at a small house in the City Road, belonging to the baron, till seven or eight years ago; that he then took her to reside in his own house in Broad Street Buildings, where she has ever since resided as housekeeper; that during the years 1790, 1791, 1792 and 1793, Baron D'Aguilar and Susannah Lewen have slept in the same bed; but the same was not made known to his wife till after the commencement of this suit." There is nothing that necessarily affects the wife with the knowledge of the fact; she has pleaded the contrary; and that his acknowledgment of the child was lately made.

The 17th, 18th, and 19th plead further adultery with other women. Libel admitted as reformed.

that there might be other cause for her bruises; but these declarations are supported by the appearance of the body, and by her act in going to the magistrates. The conduct of the husband likewise confirms this representation; for he might have made a defence before the magistrates, and might have given an allegation in this Court, shewing that the bruises were the effect of another cause; but no such explanation has been offered. From the conduct of both I think I am well founded in drawing the inference that this act did happen as she described at the time. This fact, then, was such gross violence as would entitle the wife to that security which this Court can give.

But it is objected that as no application was made to the Ecclesiastical Court, the inference is there was no ground for complaint. The subsequent history proves that she would have consulted her own interest better if she had resorted here; but it has never been held that a woman's not coming raises even a presumption against the truth of such an occurrence; there may be many reasons against such a course; and here the conduct of this lady is accounted for by the voluntary separation being acquiesced in.

A very indistinct account is given of a subsequent cohabitation for a short time; but there is sufficient to satisfy me that they did again shortly separate; and a witness proves that this lady was then in ill health, destitute of clothes, and he believes that the reason of their separation was the husband's ill-treat-[781]-ment. The separation lasted for nearly twenty years; and this has at least one effect, viz. that it approximates the two periods of cohabitation. If they had lived together the Court would have considered the former acts as pretty much obsolete, and that the husband was emendatus moribus; but as there was a separation it is to be considered as if the intermediate years had not elapsed; and the Court has a right to look at former acts as if they had happened recently.

It is material to observe how the return to cohabitation was brought about, as it will weigh whether there was condonation, and what was the effect. In December, 1792, the wife received some letters which agitated her: they signified an intention of the husband to return and live with her. Accordingly he came; and the wife is heard to say "she could not live happily with him twenty-four years ago, and could not expect to do so now." It was not a voluntary return on her part but it was his determination and his act: and the utmost consent shewn on her part, was a passive acquiescence after considerable resistance. It is said that no charge of former ill-conduct was then produced; but I think the extreme submission and resignation of this lady, which she appears by the evidence to have shewn in the whole of their cohabitation, account for her not expressing herself more strongly than "that she could not live happily with him before." If this acquiescence is a condonation, still it is only conditional. She must have had promises that no ill-treatment should take place: indeed all condonations, by operation of law, are expressly [781*] or impliedly conditional; for the effect is taken off by repetition of misconduct. Condonation is not an absolute and unconditional forgiveness.(*a*)

(*a*) "Condonation is merely retrospective; if the offence forgiven is afterwards renewed, the party has a right to revert to former facts; if she brings them in conjunction with later. . . .

"The second consideration is whether there is any bar to this suit, as the wife would be entitled to relief if there is none: here it is said there is something of a condonation; that she suffered the visits of Lord Ferrers after a knowledge that he was cohabiting with another woman as his wife; that this was a sort of compromise. It has been truly said that the doctrine of condonation is not exactly defined as to the time of its taking place; I know no case where it has been held that the mere abstinence from bringing a suit would operate as a legal bar to a suit when brought; and many cases might be put where it would be very hard that it should: the wife may be poor; inops consilii: such a rule would be imposing a cruel necessity tending to deprive the party of a legal remedy. Abstracted from the letter there is nothing like condonation. By the evidence it appears that it was a marriage of continued uneasiness to her, that she remonstrated with and applied to him in every way without success: there is nothing like an offer of acquiescence; on the contrary, there is honest indignation expressed as strongly as it could be without coming to the Court to complain. What is the import of the letter? 'That provided Lord Ferrers would

A question has been raised in argument whether acts of adultery revive acts of cruelty? and a case has been cited in which it was decided by Dr. Henchman, who, I always under-[782]-stood, was one of the most judicious practitioners who ever presided here, that acts of cruelty revived acts of adultery before condoned. The case is *Worsley* v. *Worsley*. I have had it looked up. It never proceeded to sentence; but the plea was admitted after an opposition. It alleges that the parties were married in 1712; that the husband treated the wife with cruelty; and that he committed adultery in 1720; and in 1728 the parties were living together, for acts of cruelty are then stated. I presume, then, the objection taken was, that after 1720 they were living together, and the only ground on which the Court could admit the act of adultery was that it was revived by the cruelty. The Court, however, overruled the objection. It has then been considered in this Court that circumstances may take off the effect of condonation which would not support an original cause. Facts of cruelty revive adultery, though they would not support an original suit for it. The condonation in this case is such that it is hardly necessary to resort to the authority of *Worsley*, but it confirms the doctrine that facts would revive which would not be a sufficient ground for an original proceeding.

It is held that words of heat and passion, of incivility, or reproach, are not alone sufficient for an original cause; nor harshness of behaviour: but I cannot but think that their operation would be stronger in condonation. Words, otherwise of heat, receive a different interpretation if upon former occasions they have been accompanied with acts—if it is apparent that the party was in the habit of following up words with blows: and [782*] on these grounds I am of opinion much less is sufficient to destroy condonation than to found an original suit.

The parties returned to live together—not voluntarily on her part—and I cannot consider her acquiescence as amounting to a complete forgiveness: it was almost an extorted consent. There was no return to connubial cohabitation; for though she slept in the house for a few nights, it was in a separate bed, and though it is suggested that the separate bed was not aired, yet the contrary is proved, and the husband has only insinuated this defence in interrogatories.

As to the manner in which the party lived after this return to cohabitation, four witnesses have been produced: and objections have been taken to them which must necessarily attach in all such cases: for, to domestic conduct, friends, dependants, and servants alone can speak. They must have some bias, and the Court must be on its guard against it; and I shall therefore receive this evidence with some drawbacks. Linneard, a servant, says: "The baron took every opportunity to quarrel; he dined at another house, he did all he could to prevent her eating—to vex her; he threw pieces of meat which fell on her clothes, her plate, or the table-cloth; said 'she might eat or be damned;' quarrelled and abused her every day—swore at and terrified her."

I must never forget that the lady was above seventy, and that there may be relative cruelty: and what is tolerable by one may not be by another. "He took the keys of the closets; [783] deposed her from the management of the family, locked up the tea, cakes, &c." These things would be necessary to persons used to such indulgences, and at such a time of life. "The deponent feared he would do her a mischief; she asked leave to go out—he swore and spit at her several times; made her go and undress; she was terrified at him, and her health was much impaired: he prevented her going to pay a visit to his own sister."

It is said the husband has a right to restrain the visits of his wife, and so he has; but his rights may be enforced in an illegal manner. It is not insinuated he had any just ground to restrain her; and it may be true that it is not necessary to shew such: but the Court is to consider whether he exerted his right in a proper manner. In my opinion he has taken off the effect of any such justification by the manner in which he has exercised his marital authority.(*a*) The witness continues: "He told her to get

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return to his lawful bed, she (Lady Ferrers) would not reproach him more;' but to interpret it that if he would divide his pleasures she would be satisfied, is a construction I cannot put upon it: that letter could never amount to a condonation; and if it did, it was a conditional offer which, not being accepted, is to be taken as actually withdrawn." Per Lord Stowell in *Ferrers* v. *Ferrers*, (MS. note), Consistory, 5th March, 1791.

(*a*) See the observations in *Waring* v. *Waring;* and the note, 2 Hagg. Con. 159.

ready to go to the Court of Chancery and receive her money; she said she did not want it and would not go: he swore at her, held his clenched fist in her face; said he would do for her: she said she would not go without her trustee: he forced her to go with her maid, who was obliged to hold the smelling-bottle to her nose all the way."

It is said he had a right to insist on her going to receive the money; but this was not to be enforced by brutal violence; but in fact he [784] had no right, for it was her own separate property, and she was well justified in that moderate resistance she made. Again, it is said there was no actual violence, but that was unnecessary; because threats succeeded in compelling her.

The witness further says, "The baron's sister and nieces came on the 19th of August and observed her health and spirits were so bad that air would be of use to her: they asked her to go and visit them." Her conduct seems to have been dictated by a care not to offend him: she hesitates, but at last goes. "He was in a passion, swore he would play hell with her, would take care she should not go out again; he would do for her. The witness and other servants were alarmed for her, and her health was affected." Kahlen confirms this: "He insulted her by asking her to eat pork, &c.: deponent was so apprehensive of his doing mischief that she removed knives, &c. out of the way. He insulted her by talking of his amours before her; was in a passion if deponent spoke to her. Though her regular meals were served, he prevented her eating by terrifying her, so that she did not eat at all—she became ill: deponent was seriously afraid she would die." This witness is confirmed by Coto and Simmonds.

I think this lady was in that state of oppression which fully justified the step she took in withdrawing from her husband. That is the point which I have to determine: for, if she was not justified, I must pronounce her under the obligation to return. I think, in so doing, [785] I should place this woman at an advanced period of life, and who appears to have conducted herself well, in a situation which would expose her person to that bodily hazard and intolerable hardship from which the law of our country is bound to protect innocent subjects. I think that she has proved her case of cruelty.

Next, as to the adultery.

It has been suggested that the Jewish religious regulations allow concubines. By the Mosaic law, as at present received, is there any such privilege? If there be any such among the Jews themselves, it would be a great question how it could be attended to in a Christian Court to which they have resorted; and if it could be noticed, it ought to have been specially pleaded; but I think it could not.

A minute inquiry into the adultery is not necessary, as the Court is satisfied on the other branch, cruelty. Four witnesses—Elizabeth Smith, Mary Vincent, Catherine Fakes, and Harriett Smith, if believed—prove the adultery with Susannah Lewen, with whom the libel pleads he had lived and was living in a state of adultery. No objection is made to Mary Vincent, except from her conversation with Elizabeth Smith, which does not expose her to reproach: for she conducted herself very properly. She says, "His bedroom was on the same floor with Lewen's and communicated; went to separate rooms at night, but only one bed used; impression made of two persons: Lewen confessed it, and with sorrow; had told her that the child living in the house was her daughter by the Baron D'Aguilar." She is [786] confirmed by the evidence of the other three witnesses, and also by Coto, as to the acknowledgment of the child by the baron.

Fakes says, "When she knocked at the door of the room, sometimes one, sometimes the other, came in their shirt or shift: there were two impressions in the bed—witness heard them talk together. The other bed, in which the child slept, was the child's bed, and there was no other bed in the house."

The adultery is almost admitted in the interrogatories by insinuating the defence that the wife was cognizant and had forgiven. There is no evidence which satisfies the Court that she was apprized of it in any other manner than upon general or probable suspicion: it is not shewn she knew it so that she could legally prove it. If it was shewn that he had avowed it to her, it might be a condonation as to that particular fact; here, on the contrary, is evidence inducing a belief there had been no such avowal. His laughing in a sneering way when the child called him "Papa" in her presence proves that it was not openly known. Why should he have so done had he mentioned the subject to his wife?

But if she overlooked one act of human infirmity, it is not a legal consequence that she has pardoned all other acts; that she tolerates all other debauchery: her forgiveness is confined to that one act. Condonation, with respect to women, is not held to bear so strictly; a woman has not the same control over her husband, has not the same guard over his honor, has not the same means to enforce the observance of the matrimonial vow; his guilt is not of the same [787] consequence to her: therefore the rule of condonation is held more laxly against the wife. But it does not follow that, because she overlooked one offence, which she could not prevent, that is to be construed to give an universal licence to unlimited debauchery.

That the baron did indulge himself in other amours is demonstrably proved, partly by Vincent, to whom there is no just exception. She says, "She was with the baron when Fellows came and implored him to do something for her, for he knew he was the father of the child she was pregnant with; he said she was a bad woman when he was connected with her; the child might be another's." This is as near a direct confession of guilt as can be. "At last he ordered the deponent to take a lodging for her; she was supported by him. Fellows told deponent he had seduced her by intoxicating her." She speaks also to another fact, as to Lucy Dean. There are facts laid with others, but these are only proved from the probability as to the use he made of the houses, and therefore I do not lay much stress on them. I am satisfied that adultery with three different persons is proved; and the wife is no doubt entitled to the sentence of separation. It remains, therefore, to consider the question of costs.

In general, the husband is bound to defray the wife's costs; otherwise the wife would be disarmed and denied justice.(*a*) The husband has by the law of this country all the pro-[788]-perty; and therefore the wife must have the means of self-defence, and of subsistence from him; but when she has a separate fortune, the Court always considers whether such separate means are sufficient for self-defence and subsistence. If it deems them sufficient, she is not entitled to alimony and costs during suit. These considerations press here. The wife stands without that particular claim on the husband, but upon the common footing of a litigant party, who has, on proving his case, primâ facie, a right to the expences to which he has been put by the injustice of the other party. Costs, however, are a matter of discretion in which many things are to be taken into consideration; and the Court may, under circumstances, relax the rule. I have looked into this case for circumstances which would exonerate the husband, but without success. On the contrary, I find considerable aggravation. This lady of advanced age, of infirm health, void of reproach, who behaved apparently remarkably well to her husband, is, without provocation, treated with insult, with ill language, with menaces, and with violence occasioning fear for her life; the husband, at an advanced age, with passions under no degree of control or discipline, committing adultery and indulging himself in unlimited debauchery! There is no favourable ground, then, on which to release him from costs; and, on the whole, I consider I am bound to pronounce that the lady is not only entitled to a separation, but to her costs.

[789] BEEBY *v.* BEEBY. Consistory, Michaelmas Term, 17th Dec., 1799.—In a suit for separation à mensâ et thoro by reason of the wife's adultery, she, having in a plea of recrimination, or compensatio criminum, proved a long series of misconduct—(adultery, solicitation of the servants' chastity, and venereal disease communicated to her)—for which she separated from him long prior to the adultery committed by her, is intitled to her dismissal; nor will a return to live in the same house, after a former separation on account of the husband's adultery, operate as a condonation so as to extinguish her right to set up his guilt as a bar to his prayer.—Condonation is forgiveness legally releasing the injury and may be express or implied, as by the husband cohabiting with a delinquent wife; but the effect of cohabitation is less stringent on the wife, and condonation by implication is not held a strict bar against her, for it is not improper she should for a time shew a patient forbearance and entertain hopes of her husband's reform.—Unpleaded condonation can only avail as a bar so far as it is fully established by evidence.—The general presumption is that a husband and wife, living in the

(*a*) Vide *Bray* v. *Bray*, and the authorities referred to in the note supra, 168.

same house, live on terms of matrimonial cohabitation; but particular circumstances may repel that presumption.—It does not follow that because condonation will bar the remedy of a party agent, it will destroy the defence of a party recriminating.

The King's advocate (Sir John Nicholl) and Dr. Laurence for the husband.

Dr. Arnold contrà.

Judgment—Sir William Scott (*Lord Stowell*). This is a suit of adultery brought by the husband. The marriage took place in 1790, the woman being a minor; and the parties lived together for six years. It is pleaded that the wife quitted his society in or about June, 1796; but of that fact no proof is afforded on the part of the husband, except by one witness, who says "that they separated about June, 1796." The articles of separation, though called for by the Court, are not produced, but they were executed on the 27th of June, 1796. It seems probable that the separation took place some little time before; it is unlikely that parties in such a state of feeling towards each other should cohabit: on this general presumption then I should be disposed to antedate the fact of separation.

To the character of the lady there are strong testimonials, both as the best of mothers and of wives: her husband himself bears the strongest testimony by committing to her the charge of three female children. From this height of character she has fallen, for it cannot be denied that adultery is proved. The husband pleads that Mr. Rochfort, an acquaintance of his **[790]** abroad, formed a deep scheme for the ruin of his wife; but of this there is no proof, except that he visited her three times, on the last of which they mounted their horses together and went away. They were found cohabiting together as husband and wife, and identity is completely proved.

But a plea in bar has been given—a plea of recrimination or compensatio criminum —a set-off of equal guilt on the part of the husband. The doctrine, that this if proved is a valid plea in bar, has its foundation in reason and propriety: it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first violated his marriage vow, should be barred of his remedy: the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt. On these and similar grounds the doctrine of the civil law has been transplanted into the canon law, and with that received in the ecclesiastical courts of this kingdom, where it has taken deep root.(*a*) The husband's is no ordinary case of guilt; there are no circumstances of extenuation; it is not the case of a man led away by the sudden impulse of passion, seduced by an unlucky attachment, or driven by the ill **[791]** temper of his wife to seek the solace of softer society—not a case where the charms of the wife were decaying—not where the illicit pursuits were followed in secret and at a distance; but there is deliberate depravity from the time of his marriage, and habits of low debauchery from the first year of cohabitation to the last—among his own servants, in whose good conduct most persons seek a great part of their happiness—under the notice of his wife—a young wife exemplarily performing all the duties of a wife and a mother.

Many witnesses prove to my mind the husband's misconduct from the time of his marriage. Sarah Prickett lived three months in the family in 1791; she proves that by his attempts she was forced to quit the family, that she gave warning, but that Mrs. Beeby would hardly believe her story; and the nurse says that her mistress was so much affected by hearing of his infidelity that she would not allow her to suckle the infant for two days. The witnesses speak not only to their own adventures, but to the universal complaint of all the female servants—from fifteen years of age to upwards of thirty: he shewed no partiality. Jane Knapp, the cook, speaks to solicitation of herself and of Susan Chandler. As to Cherry Funnel, the cook, the transactions are spoken to by the footman. It is not necessary to go minutely into the matter, but it is impossible to contend, connecting it with the general habits of this man's life, that it does not afford satisfactory proof of actual adultery. Sarah Hildin speaks to attempts on herself and others, and particularly that a child of fourteen years **[792]**

(*a*) See *Forster* v. *Forster*, 1 Hagg. Con. 146 et seq.; *Proctor* v. *Proctor*, 2 Hagg. Con. 297-8.

of age was sent out of the house lest she should fall a victim to the persecutions of this husband.

In 1794 the husband communicated the venereal disease to his wife: there is no doubt upon the evidence that such was the case, and that the infection was recent. The husband would have made that excuse if it had been an old complaint breaking out anew. The surgeon gives his opinion that it was recent, but that Mrs. Beeby would incur no future danger by cohabiting as the husband expressed such deep contrition; he, however, is a bad reasoner, for her husband's contrition was short-lived. Sarah Clark speaks to subsequent solicitation, that he was continually taking liberties with her person; and Sandall gives an account of assignations at the same period with Shaw: and looking at other parts of the history, there can be no doubt for what purpose these were made. The declarations of the wife, spoken to by the surgeon, that the husband had again infected her, are no proof of the fact, but they shew her impression: her conduct all this time was perfectly correct—spotless on her own part—patient under all these provocations—endeavouring to remove the objects of his misconduct.

This is the substance of the evidence, and I forbear to make observations on it. What ideas this gentleman has of religion, of the laws, and of the decency of manners of the country which he inhabits I know not; but if such conduct were general, the kingdom would be one universal brothel, and those would introduce corruption who ought most to repress it. The **[793]** result of all this is, that if it had not been the misfortune of Mrs. Beeby to become the wife of such a husband, she would have filled her station most honorably. She is insulted for years; her health is at last affected; she retires indignant—she is deprived of the lawful pleasures of the marriage bed, to which she was entitled; and at last falls a prey to the schemes of a friend of her husband's worthy of his friendship by similarity of manners: he completes the ruin to which it can hardly be said the husband was not originally and mainly instrumental. These are circumstances of extenuation in the fall of the wife; and if the case rested here I should clearly dismiss her from this suit.

But condonation has been set up in order to take off the effect of the compensatio criminis. I will first consider the proof and then the effect of condonation. Now condonation is forgiveness legally releasing the injury: it may be express or implied, as by the husband cohabiting with a delinquent wife, for it is to be presumed he would not take her to his bed again unless he had forgiven her; but the effect of cohabitation is justly held less stringent on the wife; she is more sub potestate, more inops consilii; she may entertain more hopes of the recovery and reform of her husband; her honour is less injured and is more easily healed. It would be hard if condonation by implication was held a strict bar against the wife. It is not improper she should for a time shew a patient forbearance; she may find a difficulty either in quitting his house or withdrawing from his bed. The hus-**[794]**-band, on the other hand, cannot be compelled to the bed of his wife; a woman may submit to necessity. It is too hard to term submission mere hypocrisy. It may be a weakness pardonable in may circumstances.(*a*) Here no **[795]** condonation is pleaded: it is only taken up

(*a*) So, again, on the admission of the allegation; "Condonation is objected. But the Court is not to hold that strictly as to the wife; it is a merit in her to bear, to be patient, and to endeavour to reclaim; nor is it her duty, till compelled by the last necessity, to have recourse to legal remedy."

The same sort of language was again held by Sir William Scott (Lord Stowell) in *Dance* v. *Dance*, Consistory, 22nd April, 1799.

Per Curiam. "This is a suit brought by Catharine Dance against her husband, on account of adultery of an aggravated kind, incestuous with the wife's sister. The parties were married on the 1st July, 1791; they were fruiterers in Oxford Street, but it does not appear on what terms they lived together prior to 1796, when the history commences: the parties then had separate beds, which does not seem imputable to the wife, but to have been the determination of the husband: though on what ground there is no evidence. They never, as far as appears, bedded together afterwards, and, therefore, what has been said of condonation is quite out of the question: there must be something of a matrimonial intercourse presumed, in order to found it; it does not rest merely on the wife's not withdrawing herself. But the Court does not hold condonation so strictly against the wife, from whom it looks for a long

in argument from a passage in the evidence; if clearly proved, though not pleaded, I will not say it may not be sufficient, but the Court will never help it out, as it would operate as a surprize on the other party. If pleaded, equivocal facts might be explained: it therefore shall avail so far only as it is fully established by evidence. What are the facts here? The wife, when informed of her husband's misconduct at first, hardly believes it; then is surprised and concerned when satisfied of it by many unhappy proofs; and endeavours to reform him: when she is infected she declares she will quit him; she flies to her mother, is not received, and is obliged to return. The husband expresses contrition, but continues the same misconduct. She makes declarations of being again infected; the husband does not amend; he again solicits the chastity of his servants; he is proved to have done so as late as April, and she quits his house, certainly as early as June, but I think sooner.

I am told, "I must presume that she forgave **[796]** him; that she voluntarily returned; that she continued to admit him to her bed, as they were not in separate houses; that the separation took place on the ground of another misunderstanding—temper; that they separated in perfect friendship; that they mutually engaged when they parted to live chastely, and that she was bound to presume that the husband had never violated that engagement, and to act accordingly." If I am bound to act upon presumption, I should presume in almost every instance the reverse—that such conduct, especially the communication of disease, must have raised the anger of the wife; the communication of a painful and nauseous disease in the midst of conjugal endearment! Surely if there is an injury almost beyond forgiveness, it is what had taken place here, and this was treatment under which beyond all others the door of a parent ought to have been open to her child. Her mother however refused to receive her, and her return consequently was the result of necessity: but if it had been voluntary, still there may be circumstances in which, even under such injuries, it may be right for a wife to return; there may be hopes of the husband's reformation. How the husband was reformed is apparent from the evidence; some of the witnesses say that after her return they lived on good terms; others—not. The general presumption is, that a husband and wife living together in the same house do live on terms of matrimonial cohabitation, but particular circumstances may repel that presumption; and, taking together all the evidence before and after that **[797]** return, I lean the other way. I think that here it is more probable they did not; and the deed of separation recites that unhappy disputes had occurred. Again, the presumption is that the husband's conduct continued the same as before; for that this man should devote himself to chastity is as probable as that the Ethiopian should change his skin. These are the presumptions to which the evidence would draw my mind.

It is, however, sufficient that that evidence is only equivocal. Condonation, if set forward in this manner, must be fully proved; but here it is left equivocal. But what is the effect of condonation? In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released; but here the plea in bar is compensatio: and condonation is not in bar of the action, but a counter-plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the

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suffering and patience not expected nor tolerated in the husband: he is expected to complain to the Court immediately. The wife is more inops consilii; she may hope to reclaim her husband. Now, the sister of the wife lived in the house, and gross and odious familiarity is proved: she laced her stays before him without a handkerchief on: she undressed to her shift, when going to bed, in the presence of this man; his wife, his sister, and others were also present: and as it is not stated what was said by them, it has been argued that they were not offended. It however appears that the brother did remonstrate, and it is not to be presumed that this conduct was not disapproved of by the others, for there was nothing to lead the witnesses to mention their expostulations, if any such were made."

Note.—Three maid servants, examined about the same period, proved acts of indecent familiarity, of gross indelicacy; and that she was seen coming out of his bed-room on the morning of the 25th of May, 1797, in her shift, without shoes, and no clothes on, and desired the witness not to tell the wife, her sister: the witness however did inform her at or about that time, and in consequence she withdrew from his house on the 29th of December.

The Court pronounced for the separation.

same act which will bar the remedy will operate on the other side. And unless it is an universal rule that whatever is a plea in bar, and disables a party from bringing the suit, likewise destroys the defence, the present attempt cannot avail the husband. A man, it is true, who has forgiven adultery, cannot bring a suit; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court? Does her act bind the Court? If both are equally guilty, will her condonation make him rectus in curiâ and enable him to procure a sentence?

There may be cases where a wife may by **[798]** forgiveness, by cohabitation, by the reformation of the husband, be so barred that an obsolete fact shall not be a defence. This bar would not, however, be effected so much by condonation as by the general state between them, and the consequent impossibility of reviving former follies. It is impossible to assimilate this to the cases I have put, unless I can compel my mind to a belief that Mr. Beeby has complied with the vow of chastity supposed to exist in the articles of separation: that, however, I cannot do in the present instance.

It is said that condonation is favoured because it induces the parties to live together again; but here the effect would be to separate them, to shut the door more completely against a return: here, if the Court does not pronounce a sentence of separation, is no impossibility of a return. Both have much to be forgiven: the wife for the injury done to the children, whom she has deserted, to her husband whom she has dishonoured, to her own character, which she has disgraced, and to society, which she has outraged. The husband has still more to be forgiven, even as the means of his wife's misconduct. It has been much pressed that the children will be injured by a dismissal of the parties; but this is a bad plea for the father who has occasioned the mischief: and the answer is prompt and legal; he must not press on the Court considerations for those whom he has not himself considered. The consequences are to be warded off by other means. It frequently, however, happens that these consequences fall by law, as by Nature, on the **[799]** innocent connexions of guilty persons; but the effect is to bind duty more strongly on all. I think if a divorce is granted under these circumstances it will be granted in such as never before founded a sentence; and I shall be content to receive such a precedent from the superior tribunal: but my opinion is that Mr. Beeby is not entitled to the sentence he prays; and I therefore dismiss the wife.

N.B.—The preceding cases of *Popkin* v. *Popkin*, *D'Aguilar* v. *D'Aguilar*, *Beeby* v. *Beeby*, and *Dance* v. *Dance* have been printed from a collation of two cotemporary manuscript notes.

APPENDIX.

[1] APPENDIX A. (Vide p. 3.)

Rules to be observed by the Proctors of the Arches Court of Canterbury, and signed by the Judge, Advocates, and Proctors of the said Court. Ter. Mich. 1684.

CONCERNING CITATIONS.

Upon return of a citation, if the person cited being personally served, or by viis et modis duly executed, doth not appear either by himself, or proctor, the first day, then to be excommunicated without any reservation; that if a party be cited and appear (though the process be not returned), he shall be dismissed with costs—viz. six shillings and eight-pence, præter three shillings and four-pence, pro monitione, in case the party agent will not proceed.

CONCERNING LIBELS.

Every proctor shall be provided with his libel upon the day of the return of the process, and if he hath no libel ready, the party cited to be dismissed with six shillings and eight-pence charge, præter three shillings and four-pence pro monitione.

CONCERNING PROCTORS' ANSWERS.

That the proctor of the party cited shall be obliged to answer affirmative, or negative, the same time that the libel is admitted.

That when the proctor, to prevent the cause being assigned ad concludendum, shall say he gives in an allegation, he shall really give it in, and he shall swear that he believes he can prove it, if required by the adverse proctor, and that he gives it in non animo differendi litem.

[2] Appendix B. (Vide p. 47.)

O. J. Pullen *v.* Clewer.

[See *Combe* v. *De la Bere*, 1881, 6 P. D. 157.]

The following, extracted from the process deposited in the registry of the Court of Delegates, is a summary of the proceedings in a cause of office, instituted originally in the Court of Peculiars, by Pullen, a parishioner of Croydon, against Dr. Clewer, the vicar thereof; wherein the Judge pronounced a sentence of deprivation; and that sentence was affirmed in the High Court of Delegates.

1682. June 30. Before Sir Richard Lloyd, surrogate of Sir Robert Wyseman, Dean of the Arches—sitting at St. Vedast, Foster-Lane.

Clewer, D.D., in person, and Pullen, consented to day, place, and Judge.

Clewer alleged his suspension for not attending the visitation of the archbishop in Croydon church, and prayed it to be relaxed.

Pullen dissenting and alleging that Clewer had committed very many crimes, and had neglected his cure; and that he, Pullen, was ready to promote the office—upon which the Judge assigned him promoter; and the articles were immediately exhibited.

These articles were in the name of Sir Robert Wyseman, as Dean, or Commissary, of the Arches, against William Clewer, S. T. P., vicar of Croydon, county of Surrey, and deanery and jurisdiction of Croydon—"for his soul's health, and for the reformation of his manners and excesses, and especially for the neglect of his cure of souls, and of the execution of his clerical office in not preaching, nor reading the common prayers (as set forth in the book called the Common Prayer Book) on Sundays and holidays; in not baptizing infants; and not reading prayers for the burial of the dead; and for omitting the due celebration of the sacrament."

The presentments of the churchwardens of Croydon were annexed to the articles, which also objected that the vicar was of a quarrelsome temper; and, in the nineteenth article, "that, after the decree of suspension had been read in Wimbledon parish-church, and, on the same day (Sunday) had been, before the time of divine service in the afternoon, made known to Clewer, he did not desist from officiating."

[3] The twenty-sixth article prayed that Clewer might be punished for his excesses, and condemned in costs.

Upon these articles being exhibited, Clewer again prayed his suspension to be relaxed; and alleged that an attachment had issued against him from the Exchequer, on which account he had not dared to attend at the visitation; and he then produced a witness who swore to the attachment being out.

At petition of Pullen the articles were then admitted; and Clewer was assigned to answer "quatenus de Jure astringitur, et non aliter."

On 6th July Sir Richard Lloyd decreed the suspension to be relaxed, and letters testimonial to be made out, and admonished Clewer to be attentive to his cure in future.

Clewer then gave a negative issue to the articles, and witnesses were examined in support of them.

On the 12th of December (1682) an order—dated 4th December—was exhibited from the Barons of the Exchequer, empowering the Judge to proceed in the Peculiars, notwithstanding the order to stay the cause (dated 28th November, 34 Car. 2), obtained by surprise, on the part of Clewer: it was, however, a part of the order of the 4th of December that Pullen should shew cause on the first day of the following term why prohibition should not go to the Ecclesiastical Court—there being an information against Clewer, then pending in the Exchequer, for the said offence.

On the production of this order, Pullen alleged that Clewer was vicar of Croydon, &c.; and, after enumerating all his clerical defects "in grave scandalum Christianæ religionis, et periculum animarum parochianorum," prayed—and the Judge (having heard advocates) decreed—suspension pendente lite; and that a proper minister, to be approved by the ordinary, should be appointed, and the profits of the vicarage sequestered.

On the 20th of December the proctor of Clewer alleged an appeal from this order—as made during the term probatory. This appeal seems to have been abandoned, as, on the next Court-day, 20th of January, the cause proceeded, and the proctor for Pullen exhibited an order "pro exoneratione regulæ pro prohibitione."

An allegation had been admitted, on the part of Clewer, in the preceding Michaelmas Term: and he had been assigned to give in his further allegation, if any; when on the 15th of February he prayed further time.

[4] Pullen (in person) objected, and porrected a definitive sentence, which the Judge then signed.

The sentence was to this effect:—

"Pronunciamus Gulielmum Clewer à Vicariâ, et ecclesiâ parochiali de Croydon, cum suis Juribus membris et pertinentiis universis privandum penitus et amovendum fore ac privari et amoveri debere. Eandemque vicariam et Ecclesiam parochialem de Croydon, vacuam de personâ Gulielmi Clewer, esse et sic esse debere ad omnem Juris effectum pronunciamus, decernimus et declaramus, sicque privamus, amovemus et pronunciamus per præsentes"—and condemn him in costs.

Guil. Trumbull. RICH. LLOYD, Surr.

From this sentence Dr. Clewer appealed, and the following notice of the case in the High Court of Delegates is extracted, with the marginal observations, from a folio common-place book (in the library of the College of Advocates at Doctors' Commons), in the hand-writing of Sir Richard Raines,(*a*)[1] and Sir Charles Hedges,(*b*)[1] [p. 867].

Dr. Clewer, vicar of Croydon, in the year 1666 was presented for neglect of duty, and dismissed with a monition; and anno 1681 he was presented for not reading prayers, not burying, nor christening, and then again monished sub pœnâ suspensionis; he not appearing at the visitation next following, was suspended; after which he appeared and the suspension was taken off, and he was again monished: but he, taking no more care than formerly, was articled against in June, 1682, from whence he appealed to the Delegates, but the sentence was confirmed against him by the Judges at Serjeants' Inn.(*c*)[1]

The Bishop of London, the Bishop of Peterborough, Lord Chief Justice Jefferies, Mr. Justice Withens, Mr. Justice Holloway, Sir Thomas Exton,(*d*)[1] Dr. Falconbridge, Dr. Pinfold, Dr. Hedges—for deprivation.

The Bishop of Ely, Mr. Justice Charlton, Mr. Justice Windham—dissenting.

[5] The truth of the fact was, that several persons died unbaptized; several wanted Christian burial: non-residence, not reading prayers; and to these neglects were added obstinacy, and no amendment, notwithstanding the several monitions.

For the doctor it was urged that his absence was for the benefit of the church, that for omissions and negligences the punishment was but suspension. Canons 68, 69. Jacob (1603).

Against the doctor was urged Parson's Law, c. 17.(*a*)[2] Dr. Zouch, Descriptio Juris et Judicii Ecclesiast. part 4, § 9.(*b*)[2] Any common default after monition sufficient. Brownlow's Rep. part 1, p. 70. Magna negligentia to be removed: c. conquerente. Extra. de cler. non. resident: (*c*)[2] et ibi Ancharan,(*d*)[2] caus. 11, quest. 1, c. peti-

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(*a*)[1] Judge of the Admiralty, A.D. 1686.

(*b*)[1] Judge of the Admiralty, A.D. 1689. In 1702 Sir Charles Hedges was made Joint Secretary of State with the Earl of Nottingham.

(*c*)[1] Note.—It was objected that the Dean of the Arches could not deprive without a bishop; but it was overruled by the whole Court—that the canon did not affect the archbishop; besides, that it was the constant practice for the Dean of the Arches to deprive.

(*d*)[1] Dean of the Arches in 1686, and also Judge of the Admiralty, but the latter appointment he resigned in the course of the same year.

(*a*)[2] Vide Degge, c. 9, p. 146, 7th ed.

(*b*)[2] Zouch de politiâ Ecclesiæ Anglicanæ, Lond. 1705, 8vo.

(*c*)[2] Decret. Greg. lib. 3, tit. 4, c. 6.

(*d*)[2] "Non residens in Beneficio etiam modicæ æstimationis illo privari debet." Vide vol. 2, p. 13—Ancharani (Petr.) super Decretalibus Comment, 3 vol. Lugd. 1519, F.

mus.(*e*) Oldrad. Consil. 195.(*f*) Residere obligatus, et contumax privatur, 81 D (sed quære), c. 8, gl.(*g*) Barbosa de off. et potest. parochi. c. 18, n. 8, for not baptizing deprivable; (*h*) and c. quicunque de consecratione, Diaz, Practica Criminalis Canonica. Lindwood, c. quamvis de vitâ et honest. Cler.; et c. quoniam reus de pœnis; verbo "continuato diutius." (*i*) Otho. c. Ad. Vicariam. de offic. Vicarii. A vicar to swear residence, and to reside.(*k*) De officio Vicar. extr., Vicarius non dat. Vicarium; verbo "Vicarii teneantur," et verbo "in propriis personis."(*l*) Residentia quidem, c. Extirpand: extra. de præbend.(*m*) De Cler. non. resid. Lindwood, c. cum hostis; verbo "resideant."(*n*) Incorrigibilis quisque, Abbas c. cum ab hinc.(*o*) Maiolus de irregular. lib. 5, c. 26, n. 4, 5 Rep. *Speckard's* [6] *case*,(*a*) the same is cause for deprivation, which is for refusing a clerk. Doderidge, Treaty of Advowsons,(*b*) three causes of deprivation—want of capacity, crime, and contempt of ordinary; and ad Vicariam. de Institut. vicarii. Beneficium datur propter officium. caus. 1, q. 1,(*c*) et ibi gl. Parson's Law, 2 Jacob. All the Judges agreed that disobedience to the ordinary is just cause of deprivation. *Allen* v. *Nash*, 13 Car. 1, B. R. *Weedon's case*, anno 75 in the Arches.

At the common law an office of trust is void upon neglect of duty; 1 Inst. 233. Cure of souls is a public office, and neglect of duty a forfeiture; the concern is greater in the case of a cure of souls than in any temporal office. *Caudrey's case*, 5 Rep. He was deprived because he offended against the trust of his office, and that too for the first offence; though the stat. Hen. VIII. says for the second: for the statute is but affirmative of the ecclesiastical law—and he was deprivable by that law. The statute alters not the canon law; for the statute is in affirmative words which cannot repeal, so it doth but increase the penalty. Godbolt, 259, *Bishop of Salisbury's case*. Siderfin's Reports, *The Town Clerk of Guilford's case*.(*d*)

The Bishop of London was of opinion that the doctor's crime was against his oath, against his trust, and also that he was incorrigible in not amending upon monition, and therefore to be deprived.

The Bishop of Ely, that a man was deprivable for obstinacy; but he saw no obstinacy or disobedience to this Court, and all that appeared was but a non-feasance, and so not to be deprived.

The Bishop of Peterborough, that at ordination he had made a vow to observe the commands of his ordinary; that he had sworn canonical obedience, and to be resident at his institution, and he had broken both; that obstinacy and incorrigibility were added to these crimes, and, therefore, deprivable; and if not so, the Church might throw up all jurisdiction, and every little vicar might set up for himself in defiance of his ordinary; that the canon of King James, and Spelman's Council, 376, speaking only of suspension, means only for the first neglect.

Lord C. J. Jefferies, positively for deprivation.

[7] Mr. J. Windham, that non-feasance was no just cause for deprivation, and he was only for a sequestration, urging the ill consequence of deprivation for neglect only.

Mr. J. Charlton, the 88th canon of King James and Spelman's Council did but

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(*e*) Decreti, 2da. pars. causa xi. quæst. 1, c. 19.

(*f*) Vide p. 100. Ed. Venetiis, 1585, F.

(*g*) The editor has not been able to trace this reference.

(*h*) Lugd. 1634, 4to. Diaz uses the same words on this point as Barboza. "Si infirmus sibi (presbytero) commendatus, sine baptismo moritur, deponendus est," &c.

(*i*) Lindwood, lib. 3, tit. 1, and lib. 5, tit. 15, De Pœnis.

(*k*) Constit. Othon. tit. De Instit. Vicar: and John de Athon in Const.

(*l*) Decret. Greg. lib. 1, tit. 28.

(*m*) Decret. Greg. lib. 3, tit. 5, c. 30.

(*n*) Vide Lindwood, lib. 1, tit. 12. Lib. 3, tit. 4, et c. De Pœnis.

(*o*) Vide Panormitan. c. De Clericis Non Resident.

Note.—The doctor never was suspended ob crimina commissa for neglects, but only for non-appearance, yet deprived.

(*a*) *Specot's case*, 5 Rep. 57.

(*b*) Vide Doderidge's Compleat Parson, p. 72, Lond. 1641, 4to.

(*c*) Decreti, secunda pars. causa 1, quæst. 1.

(*d*) 1 Sid. 14. 2 Sid. 97.

suspend for refusing, which is more than a bare neglect, and no reason to outstrip the canon.

Mr. J. Withens, that the punishment was severe but not too much.

The rest agreed thereto.

11 June, 1684. At Serjeants' Inn.

RICH *v.* GERARD AND LODER. (Vide p. 47, supra.)

This was an appeal in a cause of office promoted by William Loder and Henry Gerard, churchwardens of the parish of Stalbridge, in the county of Dorset, against Samuel Rich, D.D., rector of Stalbridge aforesaid, "for neglect of his clerical duties, and for the crime of adultery, fornication, or incontinency with one Elizabeth Snook, wife of Thomas Snook, of the same place."

The suit was, originally, brought before the Reverend Richard Rodderick (sitting in the parish church of Blandford, loco Consistorii), surrogate to Henry Jones, LL.D., Official Principal and Vicar-General of the Episcopal Consistorial Court of Bristol.

The articles, eleven in number, pleaded the neglect of Dr. Rich to pray with the sick when sent for to visit the same; to read the Divine Service according to the rubric, and further objecting that he frequently read the same hastily and irreverently, and out of the canonical hours; and that he absented himself from his cure of souls—did not procure any person to reside or officiate for him; and that, particularly within the months of October, November, December, and January last (viz. 1688), he had neglected to repair the barn belonging to the rectory of Stalbridge, whereby the same had become dilapidated.

The sixth article objected that, contrary to the laws, canons, and constitutions of the realm, he was a sower or fomenter of discord and strife among the neighbours in the parish of Stalbridge and parishes adjacent, and promoted several vexatious suits against them, particularly for tithe before it was due.

[8] The seventh, that whoever commits adultery, fornication, or incontinency ought to be canonically punished.

The eighth, that notwithstanding the premises he did [in certain months specified] all, some or one of them frequent the company of Elizabeth Snook, wife of Thomas Snook, and particularly at his house, during his absence, use unchaste behaviour, dalliance, and embraces with the said Elizabeth Snook in very suspicious and indecent ways, and commit the crime of adultery: and more particularly in the month of November, 1688, in the chamber of the said Elizabeth Snook; and that so much hath been confessed by the said Samuel Rich and Elizabeth Snook.

The articles concluded with a prayer that Dr. Rich should be deprived, and be condemned in costs.

The cause having come up to the Court of Arches on an appeal from an interlocutory order of the Court below; the appeal was pronounced against, the cause retained, and a definitive sentence ultimately pronounced; it was to the following effect:—

"Tenor Sententiæ in principali ex parte Gerard lata:

"Idcirco nos Georgius Oxenden Legum Doctor, &c. pronunciavimus maturèque deliberavimus præfatum Samuelem Rich, annis et mensibus in hâc causâ articulatis fuisse virum conjugatum, viz. maritum cujusdam Annæ Wilks, alias Rich, et Clericum sacris ordinibus Diaconatus et presbyteratus insignitum et Rectorem de Stalbridge; et Elizabetham Snook, in processu hujus causæ nominatam, annis, &c. &c. fuisse fœminam conjugatam, viz. uxorem cujusdam Thomæ Snook, &c.; et quia etiam invenimus præfatum Samuelem Rich, annis, &c. carnalem copulationem cum dictâ Elizabethâ Snook, &c. &c., habuisse, et crimen adulterii cum dictâ, &c., commisisse et adulterum esse et de crimine adulterii reum fuissi et esse—'præfatum igitur Samuelem Rich, propter præmissa, à Rectoriâ Ecclesiæ parochialis de Stalbridge prædictæ, et ab omni beneficio ejusdem Rectoriæ de Jure amoveri et privari debere pronunciamus, &c. &c., sicque eundem Samuelem Rich à dictâ Rectoriâ et ecclesiâ parochiali de Stalbridge prædictæ et ab omni beneficio ejusdem rectoriæ amovemus et deprivamus per præsentes, dictumque Samuelem Rich etiam secundum canones puniendum et corrigendum esse decernimus et declaramus præfatum Samuelem Rich in expensis legitimis ex parte et per partem dictorum Gulielmi Loder et Henrici Gerard tam in primâ quam in hâc **[9]** instantiâ, hujus causæ factis et faciendis eisdemque seu parti suæ solvendis condemnandum de Jure debere pronunciamus, &c.'"

On an appeal to the High Court of Delegates this sentence was affirmed, with costs; and the cause was remitted to the Court of Arches.

The last notice of the case in the Delegates' Assignation Book is the attendance of Dr. Bramston, at Newgate, to absolve Rich from his contempt; but a formal definitive sentence, dated in June, 1690, was found in the Delegates' Registry, signed by—

WILLIAM, St. Asaph.
GILBERT, Sarum.
EDWARD, Winton.
SIR WILLIAM DOLBEN, C.B.
SIR THOMAS ROKEBY, K.B.
SIR RICHARD RAINES.
DR. GEO. BRAMSTON.

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOHN HAGGARD, LL.D., Vol. II. Containing Cases from Michaelmas Term, 1828, to Trinity Term, 1829, inclusive; and some Cases of an earlier Date in the Supplement and Appendix. London, 1830.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

COURTAIL *v.* HOMFRAY. Arches Court, Michaelmas Term, 2nd Session, 1828.—In a defamation suit, the defendant having been enjoined penance, and condemned in costs; and, to an appeal from his dismissal without such penance being duly performed, having given an affirmative issue, the Court directed the penance to be performed, as originally decreed, and condemned the defendant in the further costs.—Though an affirmative issue to a libel of appeal from a definitive sentence be given, the process must be transmitted, where the Court of Appeal has to take any step requiring a knowledge of the proceedings, or of the sentence of the Court below.

An appeal from Llandaff.

This was originally a cause of defamation brought by Harriett, wife of Charles Courtail of the parish of Llandaff, against Jeston Homfray of Cardiff.

An affirmative issue having been given to the libel, the Judge of the Consistory Court at Llandaff enjoined the defendant to perform the usual [2] penance; (*a*) and condemned him in costs; and further ordered that he should on Thursday, 6th of March, 1828, certify, under the hands of the minister and churchwardens, the due performance of the penance.

On the 6th of March Homfray presented the schedule of penance (but without the certificate) and alleged that he had duly performed the penance, and had given the necessary notices, but that no one of the parties attended.

The reception of this schedule was opposed on the ground that the penance had not been duly performed; and upon the affidavits of Mr. Courtail, and of several individuals, in support of this averment, a decree issued against the defendant for him to shew cause why the penance should not be performed conformably to the order of Court and to the tenor of the schedule. To this decree Homfray appeared, and

(*a*) The tenor of the schedule of penance was thus: "That Jeston Homfray shall, after giving twenty-four hours' notice at least hereof to Harriett, wife of Charles Courtail, repair in the day time to the vestry-room of the parish church of the united parishes of Saint John and Saint Mary, Cardiff, and there in the presence of the officiating minister and one of the churchwardens (and who are to have the like notice) and such other persons as the party complainant shall bring with her, audibly and distinctly make the following confession:" viz. to the effect "that he had defamed Mrs. Courtail; that he asked her forgiveness; and that he would not again offend in the like manner."

the Judge, having heard an affidavit verifying the schedule of the defendant, dismissed him upon his paying all the costs of suit. From this dismissal Mrs. Courtail appealed: an affirmative issue was given to the libel; the process from [3] the Court below was brought in, and the cause now stood for sentence.

Lushington for the appellant.

The King's advocate contrà.

Judgment—Sir John Nicholl. This case comes up by appeal from the Consistory Court of Llandaff, where it was originally a cause of defamation brought by Harriett Courtail against Jeston Homfray; and the præsertim of the appeal is "and more especially from the said Judge having, on the 27th of March, dismissed Jeston Homfray from all further judicial observance in the said cause." The alleged grievance then is that the party was improperly dismissed, and as an affirmative issue has been given to the libel of appeal, it is confessed and admitted that the party was improperly dismissed. On a former day it was objected that as the appeal was from a definitive sentence, and as Homfray had given an affirmative issue to the libel, there was no need of proof, and that the process therefore ought not to be transmitted, as such transmission would occasion the defendant unnecessary expence. The Court, however, thought it essential to justice that the process should be laid before it; for how could the Court know what to do unless the process informed it what was the nature of the proceedings, and what had been decreed in the first instance? I have looked through the process, and it is perfectly clear that the penance has [4] not been duly performed; and the party is now bound to do it, and to certify his obedience to the order of the Court within a reasonable time.

I pronounce therefore for the appeal, retain the cause, direct the penance to be performed in the manner decreed by the original sentence of the Court at Llandaff, and that the due performance thereof be certified by the fourth session of this term; and I also condemn the respondent in the further costs occasioned by this appeal. The decree as to costs must be taken down in that form, because in consequence of the affirmative issue, nothing remains for this Court but to affirm the sentence of the Court below in every thing but what respects the dismissal: and the respondent has been already condemned by that sentence in the costs of that Court.

The retractation of the defamatory words must be fairly made, and in the form directed; that is, in the vestry after twenty-four hours' notice to the party, to the minister, and to one of the churchwardens; and in the presence of the minister and one of the churchwardens. This cannot therefore be during divine service. I must here remark that the original notice given to the appellant of the time of performing penance is couched, and was served in rather a strange and insulting manner. It concludes, "Yours affectionately," and was delivered to the party in the public street of the county town by the town crier. If an injury to an individual has been done, or if the law has been violated, the most honourable and creditable mode is to [5] make the amends which the law requires. Such amends are due to society, whatever may be the private feelings and opinions of the party towards his adversary.

BROWN *v.* BROWN. Arches Court, Michaelmas Term, 3rd Session, 1828.—An assignment, apparently fraudulent and colorable, by the husband of all his property after the commencement of a suit by the wife for divorce, cannot affect her title to alimony pendente lite. The Court allotted alimony pendente lite at the rate of £50 per annum out of an income of £140, and refused to allow the monition not to issue till after fifteen days.

This was a cause of divorce brought by the wife against the husband; and the present application respected alimony pendente lite.(*a*)

The King's advocate and Lushington for Mrs. Brown.

Phillimore and Addams contrà.

Judgment—Sir John Nicholl. The affidavits upon which the husband's counsel have commented were made a year and a half ago, and for the purpose of allotting money on account of alimony: I infer that from the date of them, just prior to the long vacation in 1827, when a sum of 50l. was decreed to the wife. The Court cannot now advert to them. If, as it has been asserted, the wife is entitled to a separate

(*a*) The earlier stages of this cause are reported in vol. i. p. 523.

income of forty guineas, payable by a Mr. Rowlett, the husband should have stated that circumstance in his answers or put it into plea; but the assertion is directly in op-[6]-position to Rowlett's affidavit: "That he does not consider there is the slightest obligation upon him to continue the allowance." The question then must be decided on the answers.

The suit is brought by the wife against her husband for cruelty and adultery, and she was put to a considerable difficulty at the outset, for the husband having denied the validity of the marriage, she was compelled to prove it. This necessarily entailed on her much expence, and only 50l. has been allotted on account of alimony. The Court saw in the aspect of the suit sufficient to wish that it might terminate in some arrangement out of Court, but that recommendation failed, and the wife is now proceeding in her original suit. There being then a valid marriage and no proof of a separate income, the wife is entitled to a maintenance pending the cause, and that maintenance must be allotted according to the husband's faculties. He does not deny that at the commencement of the suit, and I should think up to a pretty late period, he was possessed of certain property and income now conveyed in trust for the children of a former marriage. Some of them are grown up; for the son has been examined as a witness, and a daughter is the wife of the trustee to whom the property is assigned. Brown has thought fit to abandon farming, and has conveyed away not only the land but his stock, crops, and even household furniture; and this too since the suit began; the intended effect of this assignment then is to deprive his wife of her maintenance. I do not mean to suggest that this assignment was made with the knowledge, much less by the advice, of the prac-[7]-titioners here; but I must consider it fraudulent and colourable. If such a contrivance could avail, no injured wife could ever hope for justice. I shall consider the case therefore as if no such circumstance had appeared.

What is his income? A person who would resort to such contrivances will not have the credit of over estimating his property; he would rather be suspected of undervaluing it. He admits that at the commencement of this suit he had a copyhold farm of eighty acres of the value of 420l.; but that it is incumbered with a mortgage of 120l.; he admits, however, that this property is tithe free; and that the husbandry implements, the stock and crops communibus annis were worth 500l., and that his furniture was worth 50l.; but he asserts that now there is nothing remaining to him except his mere wearing apparel. If the effect of the assignment has been to leave him so destitute, I am surprised that he has not applied to sue in forma pauperis. However, the income out of his farm was at least 200l., but it was reduced to 140l. by the payment of the interest of the mortgage. Mrs. Brown is entitled to be alimented as if living with him as his wife, and the wife of such a person could not maintain herself decently for less than 50l. per annum. I shall, on these grounds, and more especially seeing the means to which he has resorted for reducing his faculties, allow her that sum; and he must betake himself to some occupation in order to enable him to provide the necessary funds for this allowance. I must repeat strongly my earnest recommendation that this case should be settled out of Court.

I allot 50l. a year as alimony, pending suit, to [8] commence from the return of the citation, the money already paid on account being first deducted.

The proctor of the husband prayed that the monition should not go out till after fifteen days.

The Court said that the suit had already been depending two years; that the wife had had only 80l., and that consequently there was still a balance due to her. The delay in the issue of the monition was quite unusual, and it saw no reason for departing from the ordinary practice.

HAMERTON *v.* HAMERTON. Arches Court, Michaelmas Term, 3rd Session, 1828.—When no indecent familiarity, proximate act, or personal freedom (except two kisses) and no circumstances inferring adultery, are proved; letters from the alleged paramour found in the wife's possession, but not necessarily implying the commission of adultery, will not support a sentence of separation by reason of her adultery: but if the evidence raises a suspicion that an adulterous intercourse is carrying on between the parties accused, the Court may upon affidavits rescind the conclusion, and allow the husband to give in an allegation.—The

Court cannot separate on improper conduct short of actual adultery. The law does not require direct evidence of the very act committed at a specific time and place; but the Court must be satisfied that actual adultery has been committed.

[Affirmed, p. 618, post.]

This case, in some of its earlier stages, is reported in vol. i. p. 23. It was now, at the hearing, argued by Lushington and Dodson for Major Hamerton; and by the King's advocate and Addams contrà.

Judgment—Sir John Nicholl. This is a suit for separation à mensâ et thoro, by reason of adultery, brought by the husband against his wife. The parties, Major William Hamerton, an officer of artillery, and Miss Isabella Romer, were married at the British Ambassador's chapel at Paris in December, 1818, and of that marriage, which is confessed and sufficiently proved as the substratum of the [9] suit, there is issue one daughter now living and about nine years of age.

The parties cohabited together from their marriage and up to the 25th of March, 1827, at various places, principally abroad; but, for the last seventeen months of that period at Cheltenham: they then separated, he having dismissed her his house on finding certain letters; and no subsequent cohabitation is suggested; for she soon after went with her mother to Tours in France, and has ever since remained abroad.

During their residence at Cheltenham, which began in August, 1825, they lived, first, at a house in Montague Place till the spring of 1826, and then removed to Fancy Hall, where they continued the remainder of the time. At No. 1 Bellevue Place, near their former residence, there dwelt an elderly lady, the widow of an officer of rank, Mrs. Mathews, who had been the intimate friend of Mrs. Romer, the mother of Mrs. Hamerton, and of Mrs. Hamerton herself from her infancy.

The libel charges adultery with Mr. Bushe, a married man, who with his wife, Lady Louisa Bushe, lived at No. 2 Oxford Terrace. The acquaintance is alleged to have commenced at a fancy ball given by Mrs. Hamerton in January, 1826; though from some part of the evidence it appears that an acquaintance between Mr. Bushe and Major Hamerton subsisted previously.

The fifth article of the libel pleads that Mrs. Hamerton and Bushe first became acquainted at the fancy ball to which I have just referred, and then alleges, "That soon after the commence-[10]-ment of their acquaintance an improper intimacy, entirely unknown to the husband took place between them, and that at such time they have committed adultery." The sixth pleads "that in the spring of 1827 Bushe availed himself of every opportunity, unknown to Hamerton and during his absence out hunting or elsewhere, to keep up an improper intercourse with Mrs. Hamerton; that he very frequently met her by appointment (particularly at the house of Mrs. Mathews, No. 1 Bellevue Place, Cheltenham), and on many occasions gave her notes or letters, conversed with her for considerable periods of time, and occasionally in French." No adultery nor indecent familiarity is specifically alleged in either of these two articles; no impropriety but this correspondence by notes. Now, that subsequent to this acquaintance a great intimacy arose, and that frequent interviews in the streets and at other places by appointment, and that improper conduct took place, is pleaded in the eighth and ninth articles.(*a*) The eighth alleges, "That in March or April, 1826, Mrs. Hamerton, being out in the carriage with her little girl, met Bushe, who said to her in French, 'If you will go to No. 1 Bellevue Place, I will meet you there;' that she immediately returned home, left her daughter, and proceeded to No. 1 Bellevue Place, where, on her arrival, she was met by Bushe: that Mrs. Mathews went up stairs; and that Bushe and Mrs. Ha-[11]-merton remained alone together in the parlour (the blinds of which were drawn down) for upwards of twenty minutes, and during such time committed adultery." Here is an averment of adultery, but the witnesses examined do not prove in this parlour (for there it is laid) any indecent familiarity nor any thing beyond a mere visit. It is true that the blinds were down, but that was the habit of the house: it cannot be pretended that these averments of adultery are in any way proved, so that the Court can receive them as a fact established against the wife.

(*a*) The seventh article in substance pleaded, "That Mrs. Hamerton, after her intimacy with Bushe, entirely changed her usual habits, and became very inattentive to her child, of whom she had been previously exceedingly fond."

The ninth article pleads, "That a few days afterwards, being in or about March or April, 1826, Mrs. Hamerton being in her carriage in the High Street, Cheltenham, met Bushe, who, after conversing with her, ordered the carriage to go to Malcolm Ghur (a retired spot in the outskirts of the town), the residence of Major and Mrs. Croker; that the footman then told Mrs. Hamerton he had just seen them pass by, but she desired him to go to Malcolm Ghur: that on arriving there, the footman knocked at the house door, and returning to the carriage found Bushe with Mrs. Hamerton, and they remained together alone for above half an hour."

I do not understand that any impropriety or familiarity is alleged on that occasion.

The tenth article alleges, "That about a month after the meeting pleaded in the ninth article (being therefore in March or April), Major Hamerton, having reason to believe that Bushe was a person of loose morals, desired his wife to break off all acquaintance with, and to cease speaking to, him; that notwithstand-**[12]**-ing such direction, she continued clandestinely to meet Bushe, and keep up an adulterous intercourse with him."

Of this interdict at this time there is no proof. Two witnesses are examined on this article. Parsloe, who was in Captain Mathews' service while at his mother's at Cheltenham in the spring of 1826, knows of no interdict. Welch, Major Hamerton's footman, speaks to an interdict in January, 1827. Undoubtedly, if Major Hamerton was persuaded that Bushe, a man of dissolute habits, was in pursuit of his wife, though he cannot be suspected of criminal imprudence or connivance; yet it would have been an act of more caution if he had withdrawn from Cheltenham, a mere casual residence, where his frequent absences in hunting exposed his wife more unprotectedly to Bushe's approaches. Though this does not amount to connivance, one of the basest offences that can be imputed, yet it does amount to want of prudence, particularly considering the opportunities that the habits of such a town as Cheltenham furnish. The eleventh and twelfth articles plead facts which I will consider hereafter.

The thirteenth charges adultery in London and at a house near Fulham; but there is no proof that the parties ever met in London or at Fulham.

On the fourteenth article there is no evidence that any thing criminal occurred at Pittville in July, 1826.

The fifteenth alleges a meeting at the house of one Adamson; but there is no proof that they were ever in the house together. This is laid as happening the latter end of February, 1827, and it is proved that Mrs. Hamerton was seen com-**[13]**-ing out of that street and going to Colonel Ollney's, and that Bushe also came out of the street soon afterwards and went to his own house. This may be suspicious, but it is no proof that they had seen each other, much less that they had met at Adamson's, and there committed adultery. It is charged that she was much flushed, and that her dress was disordered when she arrived at Colonel Ollney's and on her return home. If it had been proved that she had been at Adamson's, these other circumstances might have aided, but no meeting is proved; and considering she was naturally of a florid complexion, and had walked through the air in the month of February, it is not surprizing that her colour should be heightened: at Colonel Ollney's she sat by the fire and had a hand-screen; she again walked through the air home, and appearing flushed when she arrived there, her husband asked, "what made her face look so red?" and said, "it looked very odd;" he was suspicious and shewed himself jealous; but there was no disorder of dress that the servant observed either at that time or when she dressed her hair before dinner; no agitation of manner that attracted attention; nothing to shew improper personal correspondence.

The next charge, on the sixteenth article, is at a house called the Pavilion. Bushe took this house on the 4th of March, 1827, and the separation took place on the 25th; and there is no proof that Mrs. Hamerton ever was in that house, nor is it even to be inferred from the letters of Bushe found in her possession.

As far then as the oral evidence goes there is no proof of actual adultery. If there is any **[14]** proof, it must be on the eleventh and twelfth articles, which plead the letters. These letters begin in January and end on the 15th of March; and Bushe, in the last of them, talks of returning to Cheltenham on the 25th, on which day the discovery was made.

What, then, are the proofs on the libel of actual adultery? for the Court cannot separate on improper conduct, short of actual adultery; such conduct may lead up to the proof of guilt; and it is true that the law does not require direct evidence of the

very fact committed at a specific time and place, but it does require the Court to be satisfied that actual adultery has been committed. That is the principle laid down and admitted by the counsel on both sides—"that there must be a surrender of her person to the embraces of the party with whom the offence is charged." Though the intercourse is alleged to have been kept up for above twelve months, and though thirty witnesses have been examined, yet no indecent familiarity is even laid; no proximate act is pleaded in the libel; and no personal freedoms are observed, except that two witnesses speak to a kiss; one, on a staircase at a ball; the other, while Bushe was handing her into the carriage, the witness standing at the door of the house. These kisses are not pleaded in the fifth article, on which the witnesses depose to them, and are not strictly evidence on that article, and should scarcely have been taken down. Herbert, a confectioner at Cheltenham, of the age of twenty only at the time of his examination, speaks to the first. It was at the fancy ball in January, 1826—the very commencement of their acquaintance; **[15]** though Welch says that Hamerton and Bushe were acquainted long before. Mrs. Hamerton undoubtedly ought to have resented this conduct; but it is a slight circumstance, except as shewing the assurance and libertinism of Bushe.

The other witness is Main: he says "that he was waiting at a party at Colonel Crowder's, about March, 1826, and that while at the hall-door he heard the sound of a kiss after Bushe had handed Mrs. Hamerton into the carriage; and that they afterwards shook hands." The kiss then might be on the hand; for it is not very credible that she should have ventured further in sight of this servant. The fact, I repeat, is not pleaded, and at the utmost it is slight. No other personal familiarity is then spoken to, except the shaking of hands, which is so almost universally practised in modern manners that it cannot lead to an inference of improper intimacy: whether the constant habit tends much to support the delicacy and propriety of females may admit of different opinions; it is to be considered as the common intercourse of society that may occur without guilt.

What, then, is the proof of guilt at Mrs. Mathews'? The charges are laid in the sixth, eighth, eleventh, and twelfth articles. The sixth is a mere general and introductory article; and I have sufficiently noticed it. The eighth also has been adverted to; and I may here again remark that in that room the blinds were usually down; there was no sofa in it; no familiarity was seen, and the door was not fastened. No witness, though three have been examined, ventures upon any sufficient ground to swear to **[16]** a belief that adultery was committed in that parlour. Welch rather negatives it.

The eleventh and twelfth articles are very loose: hardly time or place is so specifically fixed as to afford an opportunity to meet the charge. The eleventh pleads, "That notwithstanding the direction given by Major Hamerton to his wife (as set forth in the tenth article), and within a few days afterwards, she stopped and conversed with Bushe in Sherborne Walk; that they again shortly afterwards made an appointment to meet at Mrs. Mathews', at No. 1 Bellevue Place, at the door of whose house he met her, and they went in together, and remained in one of the rooms with the blinds drawn down for a considerable time; and on that occasion committed adultery." But the twelfth article is the most important. It pleads "that during the summer, autumn, and winter of 1826, and the beginning of 1827, Bushe and Mrs. Hamerton continued clandestinely to carry on their intimacy; that on several occasions, and particularly in July and December, 1826, and also in January and February, 1827, they met at No. 1 Bellevue Place, and remained for considerable spaces of time alone together in a room belonging to that house, and then and there on each of these occasions committed adultery."

This is laid in such a way that it is impossible for the party to defend herself. Nothing but very clear evidence that they did meet on some occasion would very consistently with justice warrant the Court in concluding that she was guilty of the crime imputed: it must be **[17]** such evidence as would allow the wife to counterplead even after publication.

Two maid-servants, Hargrave and Bright, depose to these articles. To what does their evidence amount? Mrs. Hamerton was almost an adopted child of Mrs. Mathews; she was very frequently at her house, at all times of the day. Mrs. Mathews had a son, Captain Mathews, who, according to the evidence of Parsloe and Bright, was staying at her house eight or nine months till June, 1826. Bushe was intimately

acquainted with Captain Mathews, and often called upon him; Bushe, too, probably might go still more frequently for the sake of seeing and of endeavouring to seduce Mrs. Hamerton; but after Captain Mathews left Cheltenham in June, 1826, Mrs. Romer, Mrs. Hamerton's mother, was at Mrs. Mathews' for three or four months in that year: and Hargrave says, "that during that time Bushe did not come at all to Mrs. Mathews';" and the libel leaves a chasm in the meetings from July till December, 1826. The same witness says, "that after Mrs. Romer was gone, Bushe and Mrs. Hamerton were never left alone together by Mrs. Mathews, except for a few minutes:" and Bright thus deposes: "She well remembers that for some time before the separation Mrs. Mathews did not ever leave Bushe and Mrs. Hamerton alone together."

Mrs. Hamerton had a husband who suspected and cautioned her, and she would have acted more properly and prudently if she had carefully avoided Mr. Bushe upon any occasion. Upon one occasion, however, Mr. Hamerton dined out, and she took an early dinner with **[18]** Mrs. Mathews; while they were at dinner Bushe called; he was shewn up into the drawing-room; there Mrs. Hamerton immediately went to receive and entertain him. There is nothing extraordinary or unusual in this interview disconnected from other circumstances—the kisses and meetings; it is only what might occur in any family: the hour of visiting was not passed; a visitor was announced; Mrs. Hamerton might have said, "I'll go up stairs and entertain him while you finish your dinner." The old lady staid and finished her dinner; afterwards, according to her custom, she went to her bed-room, attended by her maid, and then came down to Mrs. Hamerton and Mr. Bushe into the drawing-room. Here then they were alone together for some time, and there was a possibility of the act of adultery. But if any one else had called, the transaction would have taken the same course. Thus viewed, it is an ordinary occurrence, from which no inference of adultery can be drawn. One of the witnesses, the cook, thinks they must have committed adultery; but she is a very forward witness. The housemaid can say nothing as to the adultery; she can form no belief as to that; and there is nothing to warrant the Court in drawing that conclusion; no fastened doors; no forbidding of interruption; no marks on the sofa; no discomposure of dress; no familiarity seen. The husband has not ventured to cross-examine Mrs. Mathews. There is nothing, therefore, but what is consistent with the most perfect innocence. It may, connected with other circumstances, be suspicious: there might be familiarities, a pressing to the heart, as the letters would seem to indicate; but **[19]** there is nothing to justify the Court in concluding that which must consign Mrs. Hamerton to disgrace.

There is another circumstance not entirely to be laid out of the case. From the libel it is to be inferred that Mrs. Mathews was privy to, and conniving at, the adultery. The cook seems to suggest that. If so, Mrs. Mathews must be one of the most infamous, most abandoned, and most profligate of women. She would be a procuress, and be almost prostituting her own daughter. Up to this time Mrs. Mathews was considered as a most respectable person. Sir Alexander Bryce, and the Reverend Dr. Yates, two of her intimate acquaintance, give her the highest character. She was also the intimate and dear friend and benefactress of Mrs. Hamerton's mother; she had almost brought up Mrs. Hamerton as her own child; she has been examined as a witness, and consequently exposed to a cross-examination, but Major Hamerton has not addressed to her a single question. She states "that she would on no account have lent herself to any connection of a criminal nature between Isabella Frances Hamerton and John Bushe, or any other parties." And at the end of her evidence on the second article is this passage: "Deponent verily believes that on no occasion of the meeting of the said parties at her house did they commit adultery: the thing was morally impossible." So then Mrs. Mathews, as far as in her lies, negatives the commission of adultery at her house, and if the offence was not consummated there, there is no other place where there is any semblance of its having been effected; the hus-**[20]**-band then has failed in his charge, though he has examined thirty witnesses, and the wife is entitled to her dismissal upon the oral evidence.

But there are letters exhibited, addressed by Mr. Bushe to Mrs. Hamerton under the feigned name of Mrs. Godolphin; and it is proved that she fetched and received these letters from the post office. They are written, as I have before said, between the 10th of January and 15th of March, 1827. There is an allusion in several of them to Mrs. M., and in one of them, No. 8, to a note from Mrs. Hamerton inclosed by Mrs. M. If by Mrs. M. was meant Mrs. Mathews, it would give a very unfavourable

colour to her conduct and evidence—perhaps even a different aspect to the charge. But who Mrs. M. is, has not been explained in the evidence. It has not been pleaded that by Mrs. M. was meant Mrs. Mathews. There is, I observe, at the end of the letter No. 8, a reference to a Miss M. Now in the evidence there is no mention of Mrs. Mathews having any daughter, and therefore I see no reason to suppose that Mrs. M. meant Mrs. Mathews. No interrogatory has been put to Mrs. Mathews to know whether she had forwarded a note, and if she had, to explain how it happened.

The letters have been much examined and commented upon. I have read them over and over again; but I do not intend to follow the counsel in their comments. They are written in an ardent and romantic strain; Bushe soliciting interviews for criminal purposes, for it is impossible his object, in thus addressing a married woman, could have been other than crimi-[21]-nal, or that when a married woman receives such letters from a married man, but that she must know they were for licentious purposes. Still, however, some women will go a great way without proceeding to the last extremity of guilt; and the Court must be satisfied not only that there has been a surrender of the mind, but of the person. It has been argued that these letters shew that actual guilt had passed; but on reading them, and after the argument, I think they contain no unequivocal reference to, nor inference of, any act of adultery committed. The parts relied on are capable of explanation, though attended with much suspicion: and when the oral evidence has entirely failed in establishing the offence, and no occasion can be pointed out when adultery was actually committed; and when even these letters do not refer retrospectively to meetings at any particular time or place, it would be too much to say that such equivocal documents can be admitted as sufficient and conclusive proof.

The letters seem to shew that she had consented to an interview, and had promised that she at last would meet him at the Pavilion. They are, as already observed, strange extravagant stuff, breathing the most ardent affection, and soliciting interviews, written by a profligate libertine, professing something like an honourable attachment to a weak, vain, silly woman: he a married man and she a married woman. It was highly blameable on her part to allow this correspondence, but it is hardly possible, considering the profligate character of the writer, but that they would have contained some strong and unequivocal reference to an [22] adulterous connexion having previously taken place, some more direct and more gross allusions to past criminality if she had surrendered her person. I do not go so far as to say that they negative adultery, but, coupled with the want of oral evidence, they do not sustain the charge.

Thus then stands the evidence on the libel, and on it I do not feel myself warranted in pronouncing the adultery to be proved. There is, however, an additional article alleging a renewal of adultery at Paris, where it is pleaded Mrs. Hamerton took up her residence in the early part of February, after she had removed from her mother's house at Tours. Now the only witness to this part of the case is an attorney's clerk, a young man not more than twenty years' old, and he was sent over to Paris, in March or April, for the purpose of collecting evidence. Surely, if such was the object of his journey, it is a further reason why the Court must consider the only proof, now adduced on this article, insufficient and unsatisfactory. The whole of this witness' evidence is, "that on the 5th of April he saw Mrs. Hamerton get into a carriage at No. 51, in a street he describes, and that after driving about for nearly an hour, she returned to a street close adjoining, and there entered a house, No. 3; after which the carriage drove away with a lady in it. He says Mrs. Hamerton remained in that house for about four hours, and then walked home alone; and that shortly afterwards he saw Bushe come out of the same house, dressed as if he had not been out before on that day." How could that be known to the witness? Bushe might have [23] gone in dressed, while the witness was absent, and besides it is not proved that Mrs. Hamerton knew Bushe was in the house. "In less than a week afterwards he saw Bushe get into a coach at No. 3, and at No. 51 Mrs. Hamerton and another female, with bundles, get into it." This is a circumstance leading to a suspicion that Bushe and Mrs. Hamerton were renewing their intercourse. She happened casually to be at Paris; and there is nothing to shew that the meeting was other than accidental. If innocent, she might be ignorant that Bushe was at the house, No. 51; and the female accompanying her, when seen with the bundles, might be her mother; they might then have been going back together to Tours; and Bushe might have called to make contrite apologies for having, by his former attentions, brought upon her these

accusations. The circumstance however is certainly suspicious; but the wife is abroad, and this forms no part of the original charge. The Court, therefore, would not be warranted in drawing a conclusion of criminality, when the facts were capable of a construction of innocence. It must have proof of guilt, and it cannot listen to any excuse offered on the ground of the expence that would be necessarily incurred in examining witnesses by commission at Paris.

As was strongly urged by the counsel for the husband, it is a great hardship for him to remain liable to cohabitation with a wife so imprudent, and so culpable, as to allow of this correspondence: but still the presumption is in favour of innocence, and without proof of actual criminality—of real adultery—it would be an [24] injustice to cast her upon the world without a provision. No application is, as I understand, at present made to the Court, on the part of the husband, to rescind the conclusion, and permit him to go into further evidence, or to give in further articles. If he is desirous of doing so, the Court would be very unwilling to refuse an application of that kind, when there is proof of such culpability on the part of the wife.

Upon the application of the counsel for Major Hamerton, the cause was directed to stand over; and on the third session of Hilary Term, 1829, his affidavit was exhibited, which, after stating that his proctor, and William Gyde, had about the 25th of November, 1828, gone to Paris in order to make inquiries respecting Mrs. Hamerton; and after stating the result of those inquiries, thus proceeded: "That he has been informed and verily believes that, on or about the 20th of December, 1828, and not before, it was ascertained that evidence could be adduced in proof of the facts pleaded, and that the facts have come to his knowledge since the said 25th of November, and that he verily believes he shall be able to prove the contents of his allegation." This affidavit was corroborated by that of Mr. Gyde.

Upon these affidavits the Court rescinded the conclusion of the cause, and allowed an allegation to be brought in.(*a*) From this order an appeal was immediately entered.

[25] THE OFFICE OF THE JUDGE PROMOTED BY BENNETT *v.* BONAKER, Clerk. Arches Court, Michaelmas Term, 4th Session, 1828.—The Court is bound to admit articles by a churchwarden against an incumbent for frequent irregularities in the performance of divine service, and of parochial duties, and also for his violating the churchyard: nor (the suit being commenced in April, 1828, and the alleged offences being laid from September, 1824, till January, 1827) is the lapse of time any bar. By the general law the church service ought to be regularly performed every Sunday morning and evening. Any relaxation is to be supposed to have been permitted by the diocesan, owing to the circumstances of the parish; and the terms prescribed must be strictly observed.

[See further, 3 Hagg. Ecc. 17.]

On the admission of articles.

This suit was instituted by the churchwarden of the parish of Churchhoneybourne, Worcestershire, against the vicar and incumbent of that parish "for and concerning his soul's health; the reformation of his manners and excesses, and, more especially, for neglect of and irregularity in the performance of divine offices as vicar of the said parish, and for indecently and irreverently digging the ground or soil of the churchyard, and of the said parish, and thereby disturbing the bodies of the dead buried therein, and for other irregularities and excesses."

There were twenty-seven articles; they pleaded the institution of Mr. Bonaker in May, 1817; and charged specifically neglect of, and irregularity in, the performance of divine service, and the public offices of the church from the 19th of September,

(*a*) It is a known maxim in the civil law, "Causa nunquam concluditur contra judicem:" Oughton, tit. 117, s. 3, m. "Quoad judicem," says Gail, "nunquam in causâ concluditur, et ideo ex officio conclusionem rescindere, ulterioremque probationem partibus injungere potest." Pract. Obs. lib. 1, observ. 107, s. 5, et seq. This principle has frequently been adverted to and adopted in matrimonial causes. See *Elwes* v. *Elwes*, 1 Hagg. Con. 292. *Searle* v. *Price*, 2 Hagg. Con. 191. *Wyatt* v. *Henry*, ib. 219. And the editor has printed, in a Supplement, some notes of other cases where he same principle has been recognized and acted upon by Lord Stowell and the late Sir William Wynne. Vide "Supplement," p. 134, et seq.

1824, to the 11th [26] of January, 1827, inclusive: but they contained no charge of a later date.

Phillimore and Addams in objection to the articles. Considerable irregularities on the part of the vicar in the performance of his clerical duties are pleaded, but much time has been allowed to elapse before the suit was instituted; and it is not pleaded that the offences have been repeated since the early part of 1827; nor that they are likely to be renewed. The parish would seem to be small, and the vicar may have been prevented by illness, or by unavoidable accident. The Court will regard the offences as bygone, and presume them condoned; but if it admits the articles it will admit them with such observations as will put an end to the suit.

Per Curiam. Why was not the process taken out sooner?

The King's advocate and Lushington in support of the articles. Some time was necessarily consumed in communicating with the chancellor of the diocese, and in considering with him the propriety of instituting the present suit. The lapse of time is the only objection of importance; but it must be recollected that prosecutions of this nature, though conducted by individuals, are for no private interests; but ad publicam vindictam, and to assert the rights of all the parishioners. At present the Court cannot, upon bare suggestion, presume that the vicar was prevented by illness or by accident: nor is the smallness of the parish any excuse.

[27] *Judgment—Sir John Nicholl.* This is a suit brought by the churchwarden of Churchhoneybourne, Worcestershire, against the minister of the parish for neglect of duty, and for violating the churchyard. It is highly creditable to the clergy, considering the number of that body within the province, that suits of this nature are of such rare occurrence in these Courts.

By the general law the church service, according to the form prescribed in the Book of Common Prayer, is to be regularly performed every Sunday in the morning and evening. If less duty is required, it is to be supposed that the relaxation has been adopted with the approbation of the diocesan, and has been permitted owing to the circumstances of the parish; and as the service is to be performed for the use of the parishioners, such relaxation may properly be granted in certain cases: but, if it be so granted, the minister must strictly adhere to the terms prescribed, and must not vary them at his own pleasure, for his own convenience, and on his own authority. It is the diocesan who is to judge of the degree of relaxation to be allowed.

In this parish it is stated what was the usual service before the present minister's incumbency; and it was sufficiently indulgent, viz. during the winter months, from October to March, morning service at eleven every Sunday; and, during the rest of the year, service alternately in the morning at eleven, and in the afternoon at three.

[28] The articles charge various departures from the rule, and various omissions and neglects without any just cause. It neither is likely, nor would it be proper, that the parishioners should complain of occasional accidental omissions, but here the number of times shew that the vicar's neglect was habitual; and this conduct may possibly have arisen from a mistaken notion of his own rights, and from a belief that he might vary or altogether omit the duty at his own pleasure. These numerous irregularities however only prove the forbearance of the parish: but when the vicar is at length proceeded against, the accumulation of the facts constitutes the weight of the charge, and makes it more incumbent on the Court to receive the articles.

Primâ facie it cannot be denied that there have been a breach and neglect of duty of which the parish have a right to complain, and to such complaint the lapse of time offers no bar. In some instances no service was performed; in others, instead of morning there was evening service. Sometimes notice of the sacrament was given, particularly on Easter Sunday, and none was administered. All these are matters to be complained of, and for which the minister is to be admonished by the Court. If the charges are not true the minister must defend himself by denying them, or he may from circumstances be able to justify his conduct; but if they are true, and he has acted from a mistaken notion of his rights, he may admit them in acts of Court and thus avoid expence. There are however two or three very special charges. One that in February, 1826, he refused to [29] christen an infant brought to the vicarage house when very ill; and in his conduct there are circumstances of aggravation. It is not likely that the child would have been brought unless it was really ill: the very circumstance of its being brought by the nurse is primâ facie evidence that the family was apprehensive the child would die. The vicar, instead of consenting to do it, flies

into a passion and asks, "Whether she will swear that the child would not live twenty-four hours; and on her saying she could not do so, he declared, 'Then I'll not baptize it, you may bring it to the church, and I'll christen it.'"

Now if these circumstances are all true, they will render this an improper refusal; for if there was reasonable ground for fearing that the child's life was in danger the vicar was bound to do what he was then requested: though undoubtedly, if the child was not ill, the refusal was justifiable.

The twenty-second article imputes a still more extraordinary offence: he publishes the banns of marriage of two persons on two successive Sundays; but as there is no service on the third Sunday no publication then takes place, yet he gives a certificate of their publication as on that day. The parties are married, and he publishes the banns the third time on a subsequent Sunday. Here then, besides the neglect of having no service on that day, the vicar grants a false certificate, and then is guilty of a further irregularity by subsequently publishing the banns.

The last article of charge is one of a still more offensive nature; viz. removing the earth from [30] the churchyard, consecrated ground, together with the bones of the dead, into his garden. I cannot conceive any thing that would be more highly offensive to the feelings of the parishioners, nor indeed more grossly indecent. It is to be hoped and believed that irregularities of this kind are very rare.

On the whole, I think I am bound to admit these articles, and if the admission should have the effect of convincing the vicar of the impropriety of his conduct, and inducing him to refrain for the future, the churchwarden no doubt will not press these charges, nor proceed with any degree of vindictiveness, nor put this gentleman to further expence: but my duty is to admit the articles to proof; strongly, however, recommending the churchwarden to be satisfied, if an affirmative issue is given.

THE OFFICE OF THE JUDGE PROMOTED BY MOYSEY, D.D. *v.* HILLCOAT, D.D. Arches Court, Michaelmas Term, 4th Session, 1828.—A chapel being shortly before 1735 built by private subscription, and the subscribers agreeing, out of the pew rents, to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector and his successors, who, from time to time, performed therein parochial duties, but there was no proof of consecration, nor of any composition, between the patron, incumbent, and ordinary; such chapel is merely proprietary, and the minister, nominated by the rector of the parish and licensed by the bishop, cannot perform parochial duties therein, nor distribute the alms collected at the Lord's Supper.—The incumbent of the parish has a right without licence to perform divine service in any consecrated building within the parish. Semble, therefore, a licence to the rector from the ordinary, to perform divine service in a chapel, tends to shew that the chapel was not consecrated.—Proprietary chapels are anomalies unknown to the constitution, and to the ecclesiastical establishments of the Church of England, and can possess no parochial rights.—Primâ facie all parochial duties are committed to, and imposed upon, the parish incumbent, and all fees and emoluments arising therefrom belong to him; and such rights can only be granted to a chapel, or its officiating minister, by composition with the patron, incumbent and ordinary: quære, whether not also with a compensation to future incumbents.—The performance of baptisms, marriages, and burials, in a chapel existing from time immemorial, might possibly be presumptive evidence of consecration, and of a composition: aliter as to a chapel, the origin of which is ascertained.—Alms, collected in chapels as well as in parish churches during the reading of the offertory, are by the direction of the rubric at the disposal of the incumbent of the parish and the churchwardens thereof, and not of the minister or proprietors of the chapel.

[Referred to, *Liddell* v. *Rainsford*, 1869, 38 L. J. Ecc. 20; *Richards* v. *Fincher*, 1874, L. R. 4 Adm. & Ecc. 264.]

This cause came by letters of request from the Chancellor of Bath and Wells; and was promoted by Dr. Moysey, Archdeacon of Bath, and Rector of Walcot, against the Rev. Dr. Hillcoat, officiating minister of Queen Square Chapel or Oratory, in the parish of Walcot.

[31] The citation called upon Dr. Hillcoat to answer to certain articles, more especially "for publishing the banns of matrimony, solemnizing marriages, baptizing

children, churching women, and burying the dead in the said chapel or oratory without lawful authority, and contrary to, and in defiance of, the orders and injunctions of Dr. Moysey, and in breach of the ecclesiastical laws of this realm; and also for appropriating the alms received at the administration of the sacrament."

The articles, after setting forth the institution and induction of Dr. Moysey in June, 1817, to the rectory of Walcot, Bath, pleaded in the fourth and fifth "that in 1735 the Earl of Tilney and eleven other individuals caused Queen Square Chapel to be built for the celebration of divine service according to the rites of the Church of England, and agreed to allow a yearly salary of £40 to the rector of Walcot for officiating therein; and in consequence thereof, on or about the 20th of August, 1735, the Bishop of Bath and Wells granted his licence and authority 'to the Reverend James Sparrow, the rector of Walcot, and to his successors, to preach, administer the sacraments, and perform all other public offices of religion in the said oratory or chapel.'"

Sixth and seventh. "That on the 7th of April, 1821, Dr. Moysey nominated Dr. Hillcoat to perform the office of officiating minister in Queen Square Chapel within the parish of Walcot, and to receive all stipends, salaries, and emoluments of and belonging or theretofore usually paid and payable to the offici-**[32]**-ating minister in the said chapel by the proprietor or proprietors thereof." That on the 22nd of June, 1821, the Bishop of Bath and Wells granted his licence to Dr. Hillcoat "to perform the office of officiating minister in the oratory or chapel called Queen Square Chapel, in reading the common prayers and performing the ecclesiastical duties belonging to the said office."

Eighth and ninth. A notice in writing sent by Dr. Moysey to Dr. Hillcoat, which was as follows:—"I give you this formal notice to abstain from any encroachment on my rights as rector of Walcot, and to abstain from marrying, churching, burying, or performing any other such services within the parish of Walcot, as you will answer the same at your peril." And again, on the 8th of March: "I return the fee for churching which you have sent, and deny any right you may claim to interfere in my parish beyond reading prayers, preaching, and administering the Lord's Supper in Queen Square Chapel according to your licence." And again, a letter dated on the 2nd of April, as follows:—"I hereby withdraw my permission to appropriate to yourself for distribution by your hands any the smallest portion of the sacramental alms collected at Queen Square Chapel within my parish, and require you to pay those collected yesterday and all other such alms to me, as rector of the parish of Walcot, and, further, I repeat that you are forbidden henceforth to exercise any sort of ministry within my parish beyond reading prayers and preaching, and administering the Holy Communion within **[33]** that chapel or oratory according to your licence."

Tenth. "That in June, 1827, Dr. Hillcoat caused to be set up in Queen Square Chapel a notice 'that banns were published, and marriages, churchings, baptisms and burials solemnized in the chapel as aforetime:' and that the clerk publicly gave a similar notice from his desk."

The eleventh to the eighteenth inclusive pleaded (with a specification of dates and names) "that frequently and without any authority, and in defiance of the aforesaid notices, Dr. Hillcoat published in the chapel aforesaid, banns of marriage; solemnized marriages and made entries of the same in a book kept by himself for that purpose; and, further, that without any authority or urgent necessity he baptized several children, and made entries of the same in a book kept by himself, and described baptisms solemnized in the parish of Walcot in the year 1827." And, further, "that bodies were interred in the vaults under the chapel; that Dr. Hillcoat performed the burial service, and made entries of the burials in a book kept by him for that purpose." It was also set forth "that he performed the office of churching."

Nineteenth. After pleading "that by the general law, sacramental alms should be paid over to the incumbent and churchwardens of the mother-church, to be disposed of according to the rubric;" went on to object "that Dr. Hillcoat (notwithstanding the notice as pleaded in the eighth and ninth articles) had administered the Lord's Supper or Holy Communion at least once a month in Queen Square **[34]** Chapel, and particularly on the 3d of February, 1828; and that on every such occasion there were many communicants, and that the money given by them at the offertory was received by Dr. Hillcoat, who had refused, and still does refuse, to pay over the same to Dr. Moysey, in order that it might be disposed of to such pious and charitable uses as he

and the churchwardens should think fit, agreeably to the directions of the rubric and ordinances."

Upon these articles no witnesses were examined, as the proof by Dr. Hillcoat's admissions was considered sufficient.

In answer to the articles an allegation on the part of Dr. Hillcoat was given in and admitted without opposition. It consisted of six articles, and pleaded:—

1. "That Queen Square Chapel or Oratory was completed in or about August, 1735, at which time it was duly consecrated by the Bishop of Bath and Wells, and set apart for the performance of divine service, for preaching the word of God, administering the holy sacraments; for the solemnization of marriages, churching of women, and the burial of the dead, according to the rites and ceremonies of the Church of England: that a search had been duly made in the registry of the Consistory Court of Bath and Wells for the deed of consecration of the chapel; but that the same could not be found. That for several years after the consecration of the chapel, burials took place in the vaults, and the burial service was read by Mr. Sparrow and other ministers in holy orders officiating in the [35] chapel; and that from 1735 to 1819 divine service had been performed, the holy sacraments of baptism and the Lord's Supper administered, banns of marriage published, marriages solemnized, and women churched therein according to the rites and ceremonies of the Church of England, by Mr. Sparrow and his successors; that register books for the entry of the performance of such offices had been duly kept; and that the sacramental alms received in the chapel had been constantly, since the opening thereof, at the uncontrouled disposal of the minister therein officiating, and of the proprietors thereof." It further pleaded, "That the chapel had at all times been, and now was, accounted and reputed by the parishioners of Walcot to be duly consecrated."

2. Exhibited the ledger book kept by the proprietors of the chapel, in which were entered the receipts and disbursements in respect of the same; and pleaded "an entry of the payment of 10s. for a copy of the 'Act of Consecration,' and that the same referred to the consecration of the chapel." It further pleaded "Certain entries of fees paid and received on account of burials."

3. "Exhibited thirteen original licences granted for the solemnization of marriages in Queen Square Chapel; that the marriages were there celebrated by the minister thereof; and that the name 'C. A. Moysey,' written in the margin of the thirteenth exhibit, was of the handwriting of Dr. Moysey."

4. "That in 1817 Dr. Hillcoat became legally possessed of the freehold and inheritance of the [36] chapel; and that in respect of the same all the estate of the original proprietors vested in him."

5. "That the licence granted to Dr. Hillcoat had not been revoked, but was in full force; and that it was in the words and according to the usual form of licences granted to curates and ministers of the Church of England requiring licences to perform the regular duties of the church; and that such licences were deemed a sufficient authority for the performance of all such duties."

The sixth was the general article.

To this allegation Dr. Moysey gave in his answers; and also in support of the first article the Reverend Dr. Falconer of Bath and Robert Clarke, solicitor, were examined. Clarke, after speaking to the performance of divine service in Queen Square Chapel, and of the public offices of the church, deposed "That he had inspected the registers of marriages deposited in the rectory house, Walcot, and found No. 5, entitled 'The Register of Banns and Marriages published or solemnized in the chapel in Queen Square in the parish of Walcot,' wherein were entries of banns and marriages in the chapel from 1754 to 1778 inclusively. That No. 9 was endorsed 'The Register of Marriages belonging to Queen Square Chapel,' and began in 1779 and concluded in 1788. That Nos. 11 and 15 were respectively entitled 'The Registers of Marriages solemnized in the parochial chapel of St. Mary, in the parish of Walcot.' That No. 22 was entitled 'Register of Marriages in the chapel of St. Mary, Walcot,' which books severally con-[37]-tained entries of marriages solemnized in the chapel from the time at which No. 9 ended; such entries following in regular course; and that the last bore date on the 26th of July, 1819. That these books or registers were distinct from the register books kept for the parish of Walcot, although they were in the same chest. The deponent did not refer to the register of baptism; but from occasionally requiring

certificates of baptism, he knows that a register has been kept separately for Queen Square Chapel."

On the second interrogatory he answered, "That he knew not of any burial in the chapel vaults after 1738." And on the third, "That prior to 1813 he believed a separate register of baptisms was not kept for the chapel."

Dr. Falconer deposed, "That from 1798 to 1800 he was assistant minister to Mr. Sibley, the rector of Walcot, in his (Mr. Sibley's) separate office of minister of Queen Square Chapel; and that, as assistant minister, and not as parochial curate, he had in the said chapel administered the sacrament, baptized, published banns, solemnized marriages, and churched women, according to the rubric." This witness deposed, "That at the time he officiated in the chapel the entry of baptisms was made in the register of baptisms for the parish of Walcot." He further said "that he did not, of his own knowledge, know in what manner the sacramental alms were disposed of, save that the same were taken possession of by the clerk."

[38] The King's advocate and Lushington for Dr. Moysey. The question is, whether Dr. Hillcoat be entitled to perform all divine offices in Queen's Square Chapel, contrary to the prohibition of the rector of the parish? The right is not claimed for any particular district, but as co-extensive with the rector's. Now, whatever its character may be, we deny that any such right can be sustained. It is clear law that the incumbent has the cure of souls throughout the parish; he alone has authority to perform duties within the parish; no other can, unless by prescription, without his consent. There are chapels in many parishes, such as free chapels, chapels of ease, parochial chapels, proprietary chapels. What this particular chapel is does not appear. It would seem to be proprietary, with an agreement that the rector should perform the duty in it for a stipend of 40l. per annum. We admit that banns have been published in the chapel, marriages, baptisms, churchings, and burials performed. But if all this were irregular, the abuse is not sanctioned by the mere sufferance of former incumbents. No power of nominating the officiating minister of this chapel is reserved to the proprietors, nor is there an instance of any person performing in it the several services, but the rector of Walcot and his curates, before the appointment of Dr. Hillcoat. He was nominated by Dr. Moysey, and on his nomination obtained a licence, the same as a common licence to a stipendiary curate.

It is alleged that this chapel was consecrated in 1735; and it rests with the defendant to prove **[39]** it. It has no chapelry annexed; and we are not aware that there are any such consecrated, except noblemen's chapels. It is also assessed; it pays all taxes; and has contributed to the church rate. There is no precedent for a consecrated chapel paying taxes. No deed nor act of consecration has been found, nor any papers relating to it. There is no lapse of time to account for its non-production; no accident, as from fire, by which the registry might be destroyed and the muniments lost. There is, it is true, an entry in the book of receipts and disbursements for a charge of 10s. for "a copy of the act of consecration;" but there are no other charges for the expences incident to a consecration. This "copy of the act" might then be something preparatory to a consecration, but from which the proprietors evidently desisted. It will be contended that the acts done, and the services performed, would infer the consecration of the chapel. Now, in the account-books there are charges for preparing the instruments, but none for the actual consecration. The first charge is "three guineas for the rector's licence." A licence for the rector leads to this presumption, that it was for an unconsecrated place; he wants no licence for a consecrated place. Burials, it would seem, took place in this chapel till 1739. Three, however, are noticed to have occurred before March, 1735, the date of the alleged consecration. These, therefore, do not shew the place to have been consecrated. After 1739 no burials occur; and there is a charge, about 1740, in the ledger for the opinion of Dr. Strahan "as to the power of burial in the chapel:" the service was discontinued at that time; the inference then is, **[40]** that his opinion was against the existence of any right; and as the rector officiated at that time, the only question could be whether the place were proper for reading the funeral service; and it was considered as not proper. In 1743 there is a charge for depositing two bodies in the vault; and there are others of a similar nature; these strongly confirm the presumption that the chapel is unconsecrated. There appears also to have been a treaty in 1791 about letting the vaults to some brewers, and in 1798 to a wine merchant, which treaties certainly infer no consecration; and no repute of consecration.

In respect to marriages, there is no proof of a publication of banns before the marriage act of 1754. The two licences that have been discovered for marriages in this chapel previous to 1754 give no authority to Dr. Hillcoat for the exercise of such a privilege in it. The right is not claimed for any particular district. How could any parties be said to inhabit within the district of a chapelry where there is no district annexed? If a marriage be solemnized in a chapel it must be in a chapel with a chapelry annexed. *The King* v. *The Inhabitants of Northfield* (Douglas, 658).

This strengthens the presumption against consecration. Some irregularities, however, arose from the rector thus being the officiating minister in this chapel; and these seem to have led to the notion that he might perform all ecclesiastical duties in any place within his own parish, for which he was licensed; and this notion continued to prevail till 1819, when marriages in **[41]** this chapel were suspended. From these circumstances it appears there was no consecration.

But if the chapel had ever been consecrated, it must be presumed due care would have been taken of the rights of the rector. This was the duty of the bishop and the interest of the patron and of the incumbent. A consecration, however, would not oust the rector of his rights; the cure of souls would remain, and the right of officiating in the chapel. No office of the church could be performed there without his leave. His rights could only be infringed by an act of the legislature, in which case a compensation would be provided for the patron and incumbent of the mother-church. If it were otherwise, there would be great danger to the incumbents: all duties would be left on them, and the emoluments might be frequently diverted. The minister of this chapel is only the curate of the rector. The original licence here was to the rector; not separating the person of minister of the chapel from that of incumbent of the parish; but certain individuals agreed to give a stipend for the convenience of being able to attend divine service in this chapel. If the rector chooses to employ a curate for this chapel only, it does not convey any of his rights. The curate's licence gives him but a qualified authority: and Dr. Hillcoat's licence only enables him to perform the offices named in it. If the chapel is not consecrated, he is not authorized to exceed the terms of his licence: he could not be compelled to perform these duties, as there is no district annexed; there is no person who has a right to enter this chapel, or to have the offices of the church performed there. Mr. **[42]** Sparrow, the rector of Walcot, at the time this chapel was first opened, had a pew in the chapel, and paid for it. The chapel is not restrained to the use of the parishioners of Walcot; it has no rights of a parochial character, it is sui generis, and Dr. Hillcoat cannot legally do any acts in it, in prejudice of the rector. We therefore contend that, whether the chapel be consecrated or not, the rights of the rector remain, and exclusively entitle him to perform all offices of the church within his parish, and to forbid other persons.

Dodson and Haggard for Dr. Hillcoat. The performance in Queen Square Chapel of the different offices enumerated in the articles is, under the circumstances of this case, perfectly justifiable and legal—ratione loci, et ratione personæ. Their performance is in a place duly consecrated, and by a person duly qualified. It is admitted that marriages were solemnized in this chapel during a period of more than sixty years—from 1754 to 1819: and in this latter year we have a licence from Dr. Moysey himself, in his character of surrogate, for the performance of the marriage service in this very chapel. True, the consecration deed has not been found; but after such a lapse of time it may fairly and reasonably be presumed. *Read* v. *Brookman* (3 T. R. 151). Various matters may be presumed, even an act of parliament, and in *Smith* v. *Clay* (3 Bro. C. C. 639, n.) Lord Camden said, "That Courts of Equity had adopted principles analogous to those established by the statutes of limitation." We **[43]** admit there must be circumstances to found a presumption of consecration: in the present case, in the ledger book, there is a charge "for a copy of the act of consecration, and for the carriage of deeds to the bishop." If a consecration in this instance were not to be presumed, a charge of neglect on the part of the then bishop, archdeacon, and incumbent would necessarily ensue.

The licence is, to perform all the services of the church in this chapel—administer the sacraments—baptisms also; which it would not have been if the chapel had not been consecrated. The offices actually done in this chapel give ground for presumption: they amount to a reputation. Successive rectors and their curates would not have officiated, as they have done for a long series of years, if they had not been

satisfied of the consecration. The repute of consecration is more especially manifest from the long course of marriages that have taken place within this chapel. Dr. Moysey himself has performed the ceremony of marriage in the chapel; and his nomination of Dr. Hillcoat to the bishop contains no restriction.

Per Curiam. In 1819 the performance of marriages and other occasional duties in this chapel were restrained; then, when the bishop granted to Dr. Hillcoat his licence, it was subject to such restrictions. The licence was to enable him to perform the other duties of officiating minister.

Argument resumed.

It is said the burials were discontinued, and an opinion has been mentioned; but it does not appear when or by whom taken. The nomination of Dr. Hillcoat to be officiating minister is **[44]** to be interpreted "to act as others had done in that chapel before him," viz. to read, preach, and perform other duties. As officiating minister, the sacrament money is distributed by him.

Per Curiam. Where would he find the churchwardens to assist? What, too, is the nature of this chapel?

Argument resumed.

We apprehend it is of a mixed character—proprietary and parochial—proprietary, with the enjoyment of parochial rights. It has been objected that there is no chapelry annexed to this chapel; and, in support of this objection, the case of *The King* against *The Inhabitants of Northfield* has been cited from Douglas. But there the chapel was erected after the marriage act of 1754, which is an important distinction. Again, it is objected there is no charge, in the book of receipts and disbursements, for the expences of a consecration; but such expences may have been defrayed by the individuals who took an interest in building the chapel. Upon the whole, we submit that this is a consecrated chapel, and that the licence of Dr. Hillcoat authorizes him to perform all parochial services within it.

Judgment—Sir John Nicholl. This suit is brought in the form of criminal articles by Dr. Moysey, as rector of the parish of Walcot, Bath, against Dr. Hillcoat, the licensed minister of Queen's Square Chapel in that parish. The object is to try whether Dr. Hillcoat has the right to publish banns, so-**[45]**-lemnize marriages, administer baptisms, church women, bury the dead, and appropriate alms collected at the sacrament in that chapel.

The suit seems to have been conducted in a liberal and fair manner: for, in order to avoid the expence and delay of examining witnesses, most of the facts pleaded in the articles are admitted in "acts of Court"—a species of practice much to be commended. Indeed, nearly the only fact in controversy or doubt is whether the chapel was ever consecrated. It is not a chapel which has existed beyond memory, and of the origin of which no traces can be ascertained; for its building and history are fully shewn. The facts are these: Previous to 1735, several individuals, twelve in number, built this chapel in the parish of Walcot (which was becoming very populous), and agreed to allow the rector 40l. a year for officiating in it. They considered themselves as the proprietors; they let the pews, paid the rector's and clerk's salaries and other outgoings, and divided the surplus of the profits.

Whether this chapel was consecrated or not does not appear by any consecration act: there are some presumptions bearing both ways. The only evidence on this head is to be found in the tenth page of the ledger book; and in the accounts for the year 1734-5 there is this entry:—

For Mr. Sparrow's licence	£3 3 0
For a copy of act of consecration	0 10 0
For carriage of writings to the bishop	0 2 6

This is no proof of actual consecration; and there is no proof whatever besides this. The instrument sent might be the draft submitted to **[46]** the bishop for his approbation, and which he rejected, though still the carriage for sending it would be paid. He might prefer granting a licence to consecrating this chapel. Here is a licence to Mr. Sparrow, the rector, but that does not infer consecration: it is rather adverse to that notion. If the chapel had been consecrated, the rector of the parish would not require a licence specially to officiate therein, for he has a right, without licence, to perform divine service in any consecrated building within the parish. A licence may be necessary, and is often granted, to officiate in a place not consecrated, because there the party could not perform the church service without such authority.

No deed of consecration has been produced, nor can be found in the bishop's registry. The absence of it is a most material defect: since if it were forthcoming it would shew the endowment, if any, and the other terms upon which this new place of worship was set up in the parish of Walcot: it would shew what rights, if any, were granted to it—by what authority, and under what conditions and limitations, they were granted. If no such rights were granted, nor granted by competent authority, nor with all the necessary consents, the chapel became merely what is commonly known by the name of a proprietary chapel. A proprietary chapel is perfectly anomalous; it is a thing unknown to the constitution of our Church and in our ecclesiastical establishment. It can possess no parochial rights; and the exercise of any such rights would be a mere usurpation in the view of the law. The rector of the parish in this instance **[47]** was the licensed minister of the chapel. The original licence to Mr. Sparrow, the rector, was "to him and his successors," which perhaps is the least objectionable shape the matter could have assumed. And the very terms of this licence, describing it as "an oratory or chapel," and making no mention of its consecration, seem to confirm the idea already expressed that the licence was granted because the chapel was not consecrated.

The licence recites the erection of this chapel, "in order that the inhabitants of Walcot parish might more conveniently meet together for the celebration of divine service according to the rites of the Church of England; that the rector of Walcot was to have 40l. per annum for officiating therein; and that, to promote so good a work, the bishop of the diocese granted his full power, licence, and authority to the rector, Mr. Sparrow, and his successors in the rectory, to preach, administer the sacraments, and perform all other public offices of religion in the said oratory or chapel, according to the form prescribed in the Book of Common Prayer of the Church of England." This is a mere permission to the rector, and to his successors, to do the duty in the chapel, and puts the whole under his control. The rectors usually performed the offices in this chapel, though they sometimes employed their curates to do so; but the latter were mere assistants to the rector.

Up to 1821 the duties were thus discharged: but in the month of April of that year Dr. Hillcoat was nominated by Dr. Moysey, the rector, and was licensed by the bishop as the officiating minister. That nomination I shall pre-**[48]**-sently examine more accurately, to see whether it made any alteration in the general character of the chapel, and the rights of these parties.

As far then as appears, it was originally, and still continued till 1821, a mere ordinary proprietary chapel; whether consecrated or not may not very materially vary the question, unless it could be shewn that certain rights, otherwise belonging to the rector of the parish, were then granted to it with all the proper consents: for, primâ facie, all parochial duties are committed to and imposed upon the parish incumbent, and all fees and emoluments, arising from the performance of those duties, in like manner belong to him. How are such rights to be granted to a chapel or to its officiating minister? Only by composition with all the parties to whom they belong; namely, by the concurrent consent of patron, incumbent, and ordinary, and, possibly, with some compensation to future incumbents for any rights transferred. There are rights belonging to each of these parties which would, pro tanto, be taken away if a proprietary chapel should acquire them.

Of common right all parochial dues, whether from tithes or other sources, belong to the presentee of the patron; and the value of the patronage is diminished if the emoluments of the living are decreased. The incumbent alone cannot give a valid consent to any alienation; for he has at most a life interest, and he cannot injure his successor, and thereby deteriorate the rights of the patron; so, again, the incumbent must consent, for the whole cure of souls is committed to him; the whole emolument of the **[49]** living belongs to him during his incumbency. Without his consent neither his duties nor emoluments can be lessened by the joint act of the patron and ordinary. The ordinary, too, has rights; he has the general superintendence and guardianship of the Church establishment; he is to protect it against any improvident or corrupt bargain on the part of the patron and incumbent; he is to see that the general welfare of religion is duly consulted; that proper care is taken of the parishioners and their interests, as well as those of succeeding incumbents, and that such interests are not infringed by the other two parties. Nothing can be altered but by the joint act of all three. Hence chapels possess no parochial rights, unless acquired by a composi-

tion with the patron, incumbent, and ordinary. Nay, it is reported to have been held by Lord Chancellor Northington that all three uniting will not be sufficient without a compensation to future incumbents.(*a*)[1] Such composition and the endowment, if any, are usually recited in the consecration act, when the building is consecrated; but here is no trace of a deed of composition, nor of an endowment shewing the consent of the patron or ordinary: there is only an undertaking **[50]** by the proprietors to allow an additional stipend to the rector for performing duty in this chapel: it seems originally to have been a mere speculation of the proprietors, probably for a very good purpose and from very honourable motives, and not merely for the sake of the emolument arising from letting the pews. If they cannot from any cause let these pews, what is there to prevent them, even if the chapel be consecrated, from shutting it up; and if not consecrated, from converting it to any secular purpose?

It is contended that, the several offices of baptism, marriage, and burial having been performed in the chapel in question, amount to presumptive evidence that there was originally a composition and consecration; so they possibly might, if the chapel had existed from time immemorial; and the performance of these duties in it, if not otherwise to be accounted for, might by lapse of time be attributed to a lawful origin. But here is the origin of the chapel ascertained, and here is the bishop's licence to the minister of the parish to do duty in it, and no mention of consecration or composition. That licence is a material document, as it gives the history and character of the chapel. It is "to the rector and his successors:" the rector then, being the officiating minister, accounts for his occasionally performing these offices in the chapel; he might not be aware of the law: but such irregularities would not convey any privilege to the place when it went into other hands, nor would they affect the rights of future incumbents; and he might think it better to lay bodies in these vaults under the chapel **[51]** than that the proprietors should let them, if not consecrated, for other purposes.

The payment for the use of these vaults was received by the proprietors, and the fees for the funerals were accounted for to the rector (who was the officiating minister), as appears from the books. These funerals only continued for a period of three or four years, and from 1738-9 were discontinued for a great number of years. The exact reason why they were discontinued does not appear, but there was a contemporaneous opinion of Dr. Strahan, a learned civilian, "upon the power of burial in this chapel," which would tend to confirm the notion that the reason of discontinuance was the want of consecration; and the objection may have proceeded from the feelings of parties whose relations, connections, or friends had been buried there, rather than have been raised by the rector. The building is assessed to the parish rates: this, again, affords a further argument against consecration. However, to the dues arising from the different offices which have been performed in this chapel, the rector has a right, and a material injury might accrue to him from the transfer of those dues to other hands.

There is another point that is very important, though not much noticed in the argument. The entries of the funerals performed in this chapel used to be made by the parish minister in the parish register: (*a*)[2] but now Dr. Hillcoat sets up a right to keep separate registers of **[52]** baptisms, marriages, and funerals, quite independent of the parish minister and parish registers; and though there have been some separate registers, yet I see no authority for that course. Great public inconvenience might arise if chapels were allowed, without some authority lawfully given and publicly known, to set up separate registers: they could not be received in evidence; and the policy of the law and the convenience of the public require that parish registers shall

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(*a*)[1] *Dixon* v. *Kershaw*, Ambler, 532, S. C. 2 Eden, 360. In *Farnworth* v. *The Bishop of Chester*, 4 B. & C. 568, Lord Tenterden (then Chief Justice Abbott) observes: "In *Dixon* v. *Kershaw* Lord Northington says 'that a mere arbitrary agreement, made even with the consent of the parson, patron, and ordinary, without a compensation to the incumbent of the mother church, will not be sufficient.' Perhaps that expression requires some qualification: and where nothing is taken from the income of the incumbent, the consent of the parson, patron, and ordinary, without a compensation, may be sufficient."

(*a*)[2] The registers of the banns and of the marriages solemnized in Queen Square Chapel were, from 1754 to July, 1819, distinct from the parochial registers, though they were kept in the same chest.

be carefully kept and duly preserved, as authentic records, and that, except in the cases of chapels with chapelries annexed, "where the ceremonies of baptism, marriage, and burial have been usually and may according to law be performed," (*a*) there should be only one parish register, entitled to be considered as making faith, so that parties should know where to resort in order to make their search.

In my view then of the case up to 1819 this chapel, under the original licence of the bishop "to the rector and his successors," is a proprietary chapel, and nothing more, in which the rector and his curates performed the service: they did for some short time bury in the vaults, but that was discontinued after 1739 or 1740; they did frequently perform other offices—baptisms and marriages; and they administered the Lord's Supper; but this was **[53]** done wholly by the rector himself or his curate (which is the same thing), the rector receiving all the emoluments. These acts do not appear to alter the character and quality of this chapel; it was still a proprietary chapel, in which the rector was permitted by the bishop to perform divine service and religious offices, and the proprietors who received the pew rents paid him a salary for doing duty: but I am not aware of any chapel where the patrons or proprietors (forming themselves into a sort of joint-stock company) can appropriate a portion of the church dues.

The question then is, whether any thing has been subsequently done to vary the rights of the parties, or to alter the character of the chapel. It appears that in 1817 Dr. Hillcoat, by purchase, became the sole proprietor of this chapel, and in the same year Dr. Moysey became rector of Walcot: and as rector he had a right to do the duty of this chapel according to the original licence and the practice of his predecessors. In 1819 Dr. Moysey, on consultation with the bishop (and this is not unimportant), saw the irregularity of a part of that practice; he discontinued the occasional services of baptisms and marriages, and the use of separate registers at this chapel. No burials had for a long antecedent period been there performed. The chapel was then again put upon its legitimate footing, and matters were restored to a correct practice. The chapel was treated as a mere oratory in which divine service only could be performed; and payment was to be made to the officiating minister by a portion of **[54]** the pew rents; but there was nothing to break in upon the rector's rights.

In 1821 Dr. Moysey, as rector, nominated Dr. Hillcoat to be the officiating minister of this chapel; not to be the curate of the whole parish, but to officiate in this chapel in the manner the rector had determined it should be used. The nomination is exhibited and is material; for if any thing conveys a right it is this nomination, and no greater right can be supposed to have been conveyed to the officiating minister by the rector of the parish, even as against himself, than what the terms of this document specify. It appoints Dr. Hillcoat "to perform the office of officiating minister in Queen Square Chapel within the parish of Walcot, and to receive all stipends, salaries, and emoluments of and belonging, or heretofore usually paid and payable, to the officiating minister in the chapel aforesaid, by the proprietors of the said chapel."

Here is nothing that appoints Dr. Hillcoat to the exercise of all parochial rights, to the cure of souls, and to the occasional administration of offices to all the inhabitants, and in all parts of the parish. It is only to act "as officiating minister of that chapel;" and though it does not strictly prescribe his duties, it prescribes his fees. It only grants what was "paid by the proprietors." The words can only be so construed. It does not grant any thing which belonged to Dr. Moysey, as rector; neither the parochial duties, nor the surplice fees of this great and populous parish; nor the power of interfering and intromitting in all rights, **[55]** duties, and offices which had been committed to Dr. Moysey, as incumbent of the parish. Dr. Hillcoat was the curate of Dr. Moysey so far as respected the officiating in this chapel, but no further or otherwise. The character of a proprietary chapel and no other still remained to it; and in this chapel the rector might officiate under the original licence, or he might nominate an officiating minister to be licensed by the bishop.

(*a*) 52 Geo. 3, c. 46, s. 1. By s. 4 the certificates of baptisms or burials, performed in any other place than the parish church or church-yard, or chapel or chapel-yard of any chapelry providing its own registers, are directed to be transmitted to the minister of the parish or chapelry in order to be entered in the registry. And by 4 Geo. 4, c. 76, s. 5, the provisions relative to marriage registers are extended to certain chapels.

Dr. Hillcoat, on presenting his nomination, obtains the bishop's licence, which is one of the printed forms usually granted in that diocese to stipendiary curates; but the blank for the "stipend or salary" (those printed words being first struck through) is filled up with "all stipends, salaries and emoluments of and belonging, or heretofore usually paid and payable, to the officiating minister in the chapel aforesaid," omitting, which is rather extraordinary, the words in the nomination, "by the proprietor or proprietors of the said chapel." Whether this omission was accidental on the part of the officer who filled it up, or otherwise, does not appear; but to this instrument it must be remembered that the rector was no party; it was obtained by the nominee, and the rector is not bound by it: he had limited the emoluments to those "usually paid by the proprietors." Dr. Hillcoat had now united both characters; he would have the whole benefit of letting the pews, as well as of the stipend originally agreed upon. But even the licence itself, as it stands, will admit of the same construction: "All emoluments, usually [56] paid or payable to the officiating minister," could only be properly construed "paid to him in his character of officiating minister" (and as such he was entitled only to the 40l. per annum), and not those paid to him in his character of rector, the former officiating minister uniting both characters.

I am of opinion, therefore, that nothing was done by Dr. Moysey to give this proprietary chapel any new rights, nor the officiating minister any part of the incumbent's emoluments as rector, and that there is nothing to entitle Dr. Hillcoat, contrary to the rector's prohibition, either to restore or to continue those duties which belong exclusively to the rector, unless some composition can be shewn.

The alms, received during the reading of the offertory before the communion, are specially directed by the rubric to be collected "in a decent basin to be provided by the parish," which shews that the collection, wherever made, is a parochial matter, with which persons connected with a private chapel have no concern. Again, "After the divine service is ended, the money given at the offertory shall be disposed to such pious and charitable uses as the minister and churchwardens shall think fit: wherein, if they disagree, it shall be disposed of as the ordinary shall appoint." These directions, as to the "parish" and "the churchwardens," who are officers of the parish and not of the chapel, lead me also to construe the "minister" to mean the "minister of the parish;" and they shew that the rubric intended that all alms received at the commu-[57]-nion, as well at private chapels as in the parish church, should be at the disposal of the minister of the parish and of the churchwardens, and should not belong to the officiating minister nor to the proprietors of such chapel.

In any view that I am able to take of this case, I cannot consider that this chapel has acquired any legal rights at all encroaching upon the parochial rights which belong to the parochial incumbent, beyond those to which he has directly and specifically consented, viz. the performance of public service for the accommodation of those who take pews. To the emoluments arising from those pews Dr. Hillcoat, uniting both characters of officiating minister and sole proprietor, is entitled; but to them he is limited. Here is no district, no chapelry which connects any particular inhabitant with this chapel—here is nothing carved out of the parish nor out of the parochial rights of the rector. The general duties of the parish rest upon the rector; he is bound to perform them; and he is entitled to all the emoluments derived from them. It is the policy of the law to keep these duties entire and simple, unless they have been subdivided and parcelled out by competent authority. It is also the policy of the law that these public offices (the records of which are of considerable importance to the public in respect to the descent of property) should be performed in the parish church and be recorded in the parish or chapelry registers.

The suit has been amicably and liberally conducted; and though the articles, in the usual form, pray costs, and though in regularity [58] I am bound to allow them, yet I presume they will hardly be pressed.

The King's advocate stated that he could not consent to waive the costs, as Dr. Hillcoat might possibly appeal: if, however, the reverend gentleman would rest satisfied with the present decision, that part of the sentence decreeing costs would not be enforced.

[59] IN THE GOODS OF MARTHA STEADMAN. Prerogative Court, Michaelmas Term, 1st Session, 1828.—Administration de bonis non, limited to a certain legacy, granted to the representative of the substituted legatee, without citing the representative of the residuary legatee resident abroad, but by practice entitled

to the general de bonis grant; no claim to this legacy having, since the death (in 1797) of the residuary legatee (also the executor and legatee for life), been made by his representative.

On motion.

The deceased died a spinster; and by her will bequeathed a legacy as follows:—"I give to Frances Coventry £300 three per cents., and after her death to Thomas Coventry, and after his decease to Mrs. Margaret Coventry, his sister, for ever." In 1764 Thomas Coventry, sole executor and residuary legatee (Frances died in the testatrix's lifetime), took probate, and received the dividends upon the above stock till 1797, when he died. The chain of executorship being now broken, and there being no personal representative to Martha Steadman—

The King's advocate moved for an administration (with the will annexed, of the goods left unadministered by Mr. Coventry) "limited to the sum of £300 three per cents. and the dividends accruing thereon since the death of the executor in 1797," to be granted to Thomas Darby Coventry, the administrator of Margaret, the substituted legatee in the said sum.

[60] Per Curiam. In order to reduce this sum of stock into possession, it is necessary to have a personal representative to the original testatrix. The person, by practice entitled to the general de bonis grant, is the representative of the residuary legatee; but he is abroad in Italy and is not expected to return for some years. He has no beneficial interest in the £300. Since the death of Thomas Coventry (in 1797), the residuary legatee, the executor, and the legatee for life of this sum, no claim has been asserted on behalf of his representative to this £300, and this non-claim for so many years strongly confirms that he has no interest therein. The present claimant is the representative of the substituted legatee who, having survived Mrs. Steadman, took a vested interest. Under these circumstances, I think the Court may safely make the grant, without the formality of citing Thomas Coventry's representative.

Motion granted.

IN THE GOODS OF ANNE MIDDLETON. Prerogative Court, Michaelmas Term, 1st Session, 1828.—Administration de bonis non, with a will annexed, granted to a representative interest entitled to seven 12ths of the residuary estate, without citing those having a direct interest as entitled in distribution.

[Applied, *In the Goods of Kinchella*, [1894] P. 264.]

On motion.

The deceased died a widow. By her will she bequeathed the residue of her personal property to her two daughters. One died in the lifetime **[61]** of the testatrix, who, therefore, as to a moiety of the residue, was dead intestate. In November, 1823, Mrs. Herbert, the other residuary legatee, took administration with her mother's will annexed; and upon her death, also a widow, her executors, as her representatives in the character of residuary legatee, now applied for an administration de bonis non of Anne Middleton.

The property, about £2500, was in a course of administration under the directions of the Court of Chancery; and in addition to the moiety, as residuary legatee under her mother's will, Mrs. Herbert was entitled to one-sixth of the remainder, in distribution under the intestacy. Of the other persons in distribution there were only two (the rest being minors, or out of England) to whom administration could be granted, the one entitled to a twelfth; the other to a fourth of one-twelfth.

Lushington moved for the administration.

Per Curiam. According to the general practice a party having a direct interest is preferred in such a grant to those entitled in a representative character; but, considering that Mrs. Herbert, at the time of Mrs. Middleton's death, was a next of kin, while the others in distribution were not, and that Mrs. Herbert's representatives are entitled to seven-twelfths of the residuary estate, I think the form of citing those who have a direct interest may be waived, and that the administration de bonis non may be granted to Mrs. Herbert's executors.

Motion granted.

[62] HARRIS AND WIGGINS *v.* MILBURN. Prerogative Court, Michaelmas Term, 1st Session, 1828.—An administration (limited to substantiate proceedings in Chancery)—which was decreed, on the next of kin being cited and after due inquiries for a will, and was called in by the executors of a will, not produced

till long after—directed to be re-delivered out, and the executors, who might have taken a cæterorum probate, condemned in costs.

[Referred to, *Hewson* v. *Shelley*, [1914] 2 Ch. 25.]

On petition.

Addams prayed the Court to direct the limited administration to be re-delivered out, and to condemn the executors in costs.

Phillimore for the executors. We have a will. The decree taken out by the limited administration alleged an intestacy. It was not served upon those who have a right to the general grant, which is an invariable practice.

Per Curiam. In cases of limited administrations, parties entitled to the general grant may take out a cæterorum representation. As it was not known that a will was in existence, it was not possible, and therefore not necessary, to cite the executors. Why do they not now take out probate? How was the administrator to know there was a will, and that your parties were executors?

Phillimore. It appears in the solicitor's letter of September, 1827; at least I infer it from that letter.

Judgment—Sir John Nicholl. The circumstances of this petition are as follow:—William Joynson died in March, 1827, and left two daughters, both married; he made a will of which he appointed Harris and Wiggins two of the executors, and made his daughters residuary legatees. A suit in Chancery by a gentleman, named Barr, against the deceased **[63]** abated by the death of the testator. From time to time search was made, on the part of Barr, if any will had been proved, or administration taken; but without success; and in October, 1827, Milburn, the solicitor of Barr, wrote letters to the husbands of the deceased's daughters, inquiring whether there was any will, or whether they would take out administration, and apprizing them of the necessity of obtaining a personal representative to the deceased's estate. Seven months had then elapsed since the deceased's death: in September, also, Milburn had written to the nephew and to the solicitor of the deceased making similar inquiries, and informing them of Mr. Barr's intended application to the Court: but to these letters no answers were returned; all possible pains were taken, and in consequence of no answers being returned, and no intelligence of a will being received, a decree with intimation was then extracted, calling upon the daughters to shew cause why a limited administration should not be granted to Milburn, the nominee of Barr. Every exertion was made, every possible diligence was used, as appears from the certificate endorsed upon the decree, to serve the decree on the next of kin; but the husband of one would not permit access to his wife, and would give no information as to the other sister, whose residence could not be discovered. There was, then, a manifest intention to defeat justice. In December, 1827, the limited administration was decreed. The proceedings in Chancery were revived; a heavy expence has been incurred; and if the limited administration be now revoked, all those proceedings will be void, and must be commenced **[64]** de novo. In Easter Term, 1828, the executors, who at last prove the will, call in this administration. On what ground? Because the decree was not personally served. But they do not deny the receipt of the letters; they do not deny that the husband refused access; they do not deny that the inconveniences, to which I have adverted, will result, and that the proceedings in Chancery must be commenced de novo. It is a mere colourable pretext. They were fully aware that a representation was necessary. The death took place nine months before the limited administration was decreed. It was the duty of some of these parties to have taken out probate, or administration, long before that time. This hanging back has much the appearance of fraud, especially under the circumstances. The excuse offered is that the property is small; but it is not asserted that the executors and the next of kin were not aware of the proceedings in which the representation was necessary: nor do they state any inconvenience which will result from the continuance of the limited administration. The regular course would have been to take probate cæterorum, and if there was any fear of collusion, the executors might have intervened in the Chancery suit. However, the usual mode is to take a cæterorum grant; but that is not even yet taken out, which, at all events, is great neglect and delay.

The whole bears the appearance of contrivance, and as I am of opinion that the limited administration was properly granted, I am bound to direct it to be re-delivered out, and to condemn the executors in costs.

Petition sustained.

[65] RAVENSCROFT *v.* HUNTER AND OTHERS. Prerogative Court, Michaelmas Term, 2nd Session, 1828.—Ink alterations in a will being carefully made and not improbably final, the Court will not, on the non-appearance, after personal service, of executors appointed—and of minor legatees materially benefited—thereby grant probate, in common form, of the paper as originally executed.—Alterations in ink (in the margin and body of a duplicate will) carefully made and conformable to long entertained and lately expressed intentions, held to contain the testator's final intentions and entitled to probate.

[Referred to, *Francis* v. *Grover*, 1845, 5 Hare, 47.]

On motion.

Edward Ravenscroft, late of Portland Place, died on the 19th of August, 1828. On the 18th of April, 1825, he executed his will in duplicate, and thereof appointed his wife, Mr. Wilkinson, and Mr. Moore (his solicitor) executors. The two parts of the will were sealed up in separate envelopes; the deceased kept one part; Mr. Moore the other; and in the early part of February, 1828, shortly after the latter's death, his partner, Mr. Lake, sent such duplicate to the testator at his request. In June the testator observed to Mr. Lake (as he had before) "that he should soon trouble him to prepare a codicil to his will, or to make an alteration therein." On the 7th of August the testator was taken ill; on that and the following day he grew worse; a fever which then attacked him, and which was accompanied with frequent aberrations of mind, wholly incapacitated him for business, till he died. At his death was found, locked up in the drawer of his writing table, one part of his will loose and unfolded; and in it were several alterations and marginal notes written by himself.(*a*)[1] For instance, in the appointment of executors, the name "Daniel [66] Moore" was erased; the names of Henry Lanoy Hunter and James Rivett Carnac being substituted by an interlineation; so in other parts of the will: and opposite to a bequest in favour of his daughter, Elizabeth Head, "to her separate use, and free from the control of her husband," the deceased had written in the margin, "Mrs. Head is now a widow, therefore this clause must be modelled accordingly." And in the margin, opposite to the residuary clause,(*a*)[2] which was crossed out with a pen, were these words: "One of the sons is dead, and the remaining three sons being otherwise provided for, I intend to bequeath one thousand pounds to each of the three sons, and the residue of my fortune not before herein disposed of, to be equally divided between the two daughters of my said late son George Ravenscroft. My meaning is, which I do not think is clearly expressed in this will, that none of these bequests to the three sons and two daughters of my late son George Ravenscroft shall take effect until after the death of my wife Emma Ravenscroft."

Of these five children, the grandsons (one only being of age) were in the East Indies; the grand-daughters (both minors) were living with and wholly under the care of Mrs. Ravenscroft, the widow of the deceased in this cause. The property consisted entirely of personalty.

A decree had issued, at the instance of Emma [67] Ravenscroft, widow, citing Mr. Hunter, Mr. Carnac, and also the deceased's grand-daughters "to propound the said will with the alterations made and written in one part thereof, if they or either of them should think it for their, his, or her benefit so to do, otherwise to shew cause why probate of the said will as originally executed, and with the residuary clause reinstated, should not be granted to the surviving executors therein named, or one of them."

This decree was personally served, and no appearance being given; Lushington moved for a probate to be granted, in common form, agreeably to the tenor of the decree.

Per Curiam. I think the executors ought to propound the paper as altered; for

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(*a*)[1] The duplicate was also found in the same room; but locked up in a drawer under a book case, and with the seal of the original envelope unbroken.

(*a*)[2] "The residue upon trust to divide the same into sixteen shares and pay the same to the four sons and two daughters of my late son, George Ravenscroft; viz. to each of the two daughters, at twenty-one or day of marriage, four sixteenth parts; and to each of the four sons, who shall attain the age of twenty-one, two sixteenth parts, with benefit of survivorship."

the daughters, who are minors, are giving up a great advantage, and may be misled by the process served upon them, and still more by a decree, into a belief that the Court was of opinion the alterations were invalid. Observing then that the change of the intentions and wishes of the deceased are carefully expressed, and on very reasonable grounds, I cannot feel justified in granting this motion.

An allegation was accordingly given in and admitted, pleading the facts already detailed; and, further, in some additional articles, "that in the beginning of July, 1828, the deceased, alluding to the appointments he had obtained for his grandsons in India, declared to his sister, 'he had now only to provide for the girls,' thereby meaning his grand-daughters, and the **[68]** residuary legatees in the will as altered; that he at other times expressed to her an intention of altering his will for the purpose of so benefiting them; saying, 'Be easy, be easy, all shall be right.'"

Upon the evidence of these facts the cause was argued by the King's advocate and Dodson for the will in its altered form; and by Lushington and Addams contrà.

Hilary Term, 4th Session, 1829.—*Judgment—Sir John Nicholl.* This case lies within a narrow compass. The deceased died on the 19th of August, 1828, having made a will in duplicate on the 18th of April, 1825; of which he appointed several executors; among others, Mr. Moore, his solicitor. He left the residue to his wife for life, and after her death to his six grandchildren (the four sons and two daughters of a deceased son), but in different proportions; for to each of the daughters he gave four-sixteenths, and to each of the sons two-sixteenths. One grandson was dead, and the three others were sent out to India with appointments. Mr. Moore was dead. The deceased's daughter was become a widow. After these events, the deceased sent for the duplicate left at his solicitor's, and with his own hand in one duplicate erased the name of Mr. Moore, and in that respect corrected the paper in several places; he noticed in the margin his daughter's widowhood, and also in the margin wrote a different disposition which he wished to make of the residue.

From what appears on the face of the will at the time of the deceased's death, and from its being found in the drawer of his ordinary writing **[69]** table, in his study, and the other part in a drawer of his bookcase, there is reason to suppose that the duplicate altered was the one which he got from his solicitors. The question then is, whether the paper is to take effect with the alterations, or whether these are to be held as mere deliberative memoranda, on which he had not made up his mind, and which therefore are not to operate. From repeated declarations to his solicitor, Lake, it is clear he had long intended some alteration: from conversations with his sister, two or three months before his death, it is equally clear he intended to do something more for his grand-daughters: and in his last conversation with her, on the 29th of July, he talked of it prospectively as a thing to be done, not as then in progress. He was at that time in remarkably good health, though between seventy and eighty years of age, and was much engaged about the Devonport Dock Waterworks, of which company he was chairman. On the 7th of August he was to have gone to the play with his grand-daughters, but was prevented by illness; and on the 8th, though ill, he was in his usual sitting-room, where the will was found after his decease. On the next day he was so much worse, and so feverish, that he could hardly speak, and he grew worse till his death.

It is pleaded that these alterations were made before the 7th of August, but there is nothing in the evidence to fix the time. It is clear that on the 29th of July they were not made. Now, I do not think it at all improbable that the deceased wrote these marginal directions and the alterations in the body when ill on the 8th, or **[70]** on the evening before: if so, the completion was prevented by the act of God. Here, then, we have an alteration intended in favour of his grand-daughters: it was long decided on, and meant to be done with his solicitor's assistance; but the delay is pretty satisfactorily accounted for from his being in very good health, and occupied with collateral matters.

What, then, is the construction of the paper itself? The alterations might be in some degree deliberative—as to the form, for the testator might intend to effect his purpose more regularly by a codicil, and through an attorney—but not as to the disposition, since upon that he had made up his mind, and considered, meant, and thought the paper would operate as now altered: if he had not so thought, he would not have taken so much pains in altering, even to the end, the names of the executors for that would not have been necessary as mere directions or instructions. On the

variations in the benefits it may be inferred that he had definitively resolved; for the changes are written in ink carefully, and not as if on a casual reading over; and the former disposition of the residue is struck through as if meant to be finally altered. He always intended the grand-daughters to have double portions, and he now decided to give them a still larger share, apprehending that the grandsons were provided for, for so he has expressly written, though the extent of that provision does not appear. This departure from the original disposition being then no hasty, transient thought, but long intended, and now thus written, probably as late as the 8th, I **[71]** am satisfied was his fixed and final intention. Being written on the margin of a formal, executed will, with an alteration not merely directory in the body of it, it bears a very different character from alterations written on a separate loose piece of paper, or in pencil. It is rather to be considered as an act done and intended to take effect, in case from accident or otherwise the testator was prevented from having a formal codicil prepared. In this view, coupled also with the probability that it was written on the very day he was taken ill (the further progress and formal completion of the act being in that case prevented by his increasing illness and by the act of God), I am of opinion that by pronouncing for the will as altered, that is, that the grand-daughters should take the residue with the exception of 1000l. to each of the grandsons, the Court will be giving effect to the real intentions and last will of the deceased, without violating or breaking in upon any established principles that guide this Court.

The parties have altogether conducted the matter very honourably, and with proper delicacy towards the absent grandsons: they have brought the case fully and fairly before the Court, to whose judgment it was necessarily submitted, and therefore they are entitled to their costs out of the estate.

[72] TYRELL *v.* JENNER, AND *v.* T. J. AND MARY SPITTY, BY THEIR GUARDIAN. Prerogative Court, Michaelmas Term, 2nd Session, 1828.—The Court will not, when a competent party is opposing a will, stay the admission of the executors' allegation propounding such will, till the appointment of a committee of a lunatic next of kin be confirmed, more especially such committee being already a party to the suit as curator of other next of kin.

On motion.

This was a cause of proving, in solemn form of law, the last will and testament of the Rev. John Jenner, D.D., late of Billericay, Essex; promoted by Sir John Tyrell, Bart., the sole executor, against John Tyrell Jenner, the only child, and Thomas Jenner Spitty, and Mary Spitty, respectively minors, the grandchildren of the deceased.

An allegation, propounding the will, had been brought in; and on behalf of the next of kin Lushington now applied that its admission might stand over, under circumstances detailed by the Court.

Per Curiam. The will in this case is propounded by the executor against John Tyrell Jenner, the son of the deceased, and against two grandchildren, by a deceased daughter, who appear by Thomas Spitty, their father and guardian. The allegation is dated on the fourth session of last Trinity Term, and an affidavit was then exhibited to the effect that proceedings had been instituted in Chancery for the purpose of obtaining a commission of lunacy as to the son, and on that account it was prayed that the allegation might stand over. That application was granted, and now a further very long affidavit has been **[73]** brought in, detailing the proceedings in Chancery, and stating that Thomas Spitty, though appointed committee, has not yet given security, and that therefore the appointment has not been confirmed; but that is no reason to postpone the admission of this allegation, for there is a party competent to oppose the will—Thomas Spitty, the curator and guardian to the children of a deceased daughter; and it is not necessary to delay the cause till he can appear also in the character of committee of the lunatic. The solicitor supposes, because the Court of Chancery, in arranging trusts, may require all parties interested, and in all characters, to be before it, that the same rule must prevail here; but that is not so. The executor has a right to go on and propound the paper; otherwise his witnesses might die. If there is any risk from a want of appearance on behalf of the lunatic, it is the risk of the executor alone; but this want of appearance is a mere pretext:

there are parties competent to oppose, and it so happens that the very same person who is now before the Court, opposing the paper, is the person appointed to be the committee of the lunatic; so that on the ground of collusion there cannot by any possibility be an objection to the executors going on.

Experiments of this nature, made on a fancied analogy of the principles of proceedings in this Court with those of other Courts, must be watched narrowly, as they may lead to a very inconvenient practice. The present affidavit, instead of furnishing grounds for delay, furnishes a reason for allowing the executor to proceed; for in July it did not appear that Spitty was the committee; but this affidavit **[74]** proves that his appointment to that office only wants a formal confirmation, and that then he will unite in his own person the double character of committee of the lunatic and curator of the minors; and, in that latter character, as I have already said, he is a party to the cause.

The introduction of the affidavit of the solicitor is so improper that I shall reserve the question as to the costs of the application, and also as to the propriety of allowing an affidavit in reply, to be filed.

On the third session the allegation was admitted, unopposed.

MITCHELL *v.* MITCHELL. Prerogative Court, Michaelmas Term, 3rd Session, 1828.—The indorsement "Heads of Will" on a paper fairly written, signed, and dated, lets in parol evidence of intention; but the primâ facie inference rather is, that such paper was intended to operate, if no more formal instrument were drawn up. An allegation propounding such a paper, with alterations made from time to time, adapting it to the deceased's circumstances and pleading facts inferring adherence, admitted to proof: but, on the parol evidence, the paper pronounced against.

On admission of an allegation.

William Mitchell died on the 2nd of September, 1828. After his death was found locked up in a private drawer of his writing desk a testamentary paper, in his own hand-writing, dated the 29th of June, 1821, and near to it a statement of his property as it stood in 1827. On behalf of two of the executors this testamentary schedule was now propounded, in an allegation, as his last will and testament.

Lushington in support.

Phillimore contrà.

[75] *Judgment—Sir John Nicholl.* The real question is, whether the deceased did mean and intend that this paper should operate. It is all fairly written, though there are several alterations made at different times; it is signed and dated by him on the 29th of June, 1821, and contains a complete and very natural disposition: for it appears that he left a wife and six children—all minors; and that his wife had a separate property.(*a*) If the paper had remained in its original state and without endorsement, it would have been entitled to probate, in common form, on a mere affidavit of handwriting: and parol evidence would not have been admissible. Even though endorsed "Heads for the will of William Mitchell," yet being fairly written, signed, and dated, the primâ facie inference would rather have been, that he intended it to operate in case no more formal instrument were drawn up, the whole effect of the endorsement, under the authority of the case of *Mathews* v. *Warner* (4 Ves. jun. 186)—a most highly important and highly proper decision—being, that it leaves the case open to the admission of parol evidence. That decision was in conformity with the practice of these Courts in earlier cases, and with the judgments of Sir George Hay in the case of *Habberfield* v. *Browning* (4 Ves. jun. 200, n.); and of Dr. Calvert in *Cobbold* v. *Baas* (ibid.). The sentences however of the Prerogative Court in those **[76]** cases, admitting parol evidence, were, on appeal, both reversed, the Delegates holding that the papers, being wills both of real and personal estate, were, reddendo singula singulis, perfect dispositions of personalty, and therefore good wills; and that parol evidence was inadmissible. Though the latter case was determined by a commission consisting only of two common law Judges and one civilian, these Courts, in submission to two solemn decisions of the superior Court, felt themselves bound, contrary to their former invariable practice, to reject parol evidence in similar cases.

(*a*) The deceased directed the residue of his property to be equally divided among his children, except that he gave a double share to his eldest son.

But at length the law was correctly ascertained, and the original doctrine of these Courts was restored by the conclusion at which the Commission of Review in *Mathews* v. *Warner* arrived: and in that case it clearly resulted from the parol evidence that the deceased did not intend the paper to operate. The whole effect then of that case is, that the endorsement opens the paper to a question of intention; and lets in parol evidence.

If Mr. Mitchell had died the day after he wrote this paper, no doubt can be entertained but that it would operate. It appears however that, though originally written in 1821, he had from time to time made certain alterations in it, adapting it to the change of his circumstances, particularly on the death of his uncle in 1823: these alterations may possibly operate as so many recognitions, and shew that he still acknowledged it in its original character, namely, to operate if he made no more formal will.

In the latter end of March of the present year it is pleaded that one of the deceased's brothers **[77]** consulted with him on making his own will; and the deceased, in the course of a confidential communication with him, entered into the particulars of his will, particularly as to what he had left his wife and as to taking away from her the guardianship of his children. It has been argued that as the clause respecting the guardianship cannot take effect, because the paper is not attested according to the exigencies of the statute (12 Car. 2, c. 24, s. 8), it must therefore be presumed that the deceased did not consider it as operative: but I do not think that that is necessarily to be inferred; for the law requiring two witnesses to render such an appointment by will effectual is not by any means so generally known as that which renders essential the formal attestation to a will disposing of realty. On the contrary, this conversation with his brother may be a proof of adherence and of intention that this instrument should operate.

In July the deceased went to Worthing: he was not then in good health; he grew gradually worse, but still he shewed no anxiety about his affairs. An inference from this negative conduct might be drawn that he considered his affairs settled; for, by writing this paper and by the subsequent alterations, having shewn a fixed and decided intention to die testate, his silence might furnish an argument that he expected this document would carry his wishes into effect.

Under all these circumstances it is fit that this case should go to proof.

Another circumstance now mentioned is, that **[78]** the freehold estate devolved to the house of trade, and that the deceased took it as a tenant in common with the other partners: he possibly then never considered it otherwise than as part of his stock in trade: and though it is true that for a devise of land in Jamaica the same formalities are required as in the case of real property in England, yet the deceased may not have regarded this property as subject to such provisions.

The last article had better be reformed;(*a*) by the insertion of these facts respecting the freehold property; and, on that being done, I shall admit the allegation.

On the fourth session of Hilary Term the cause came on for hearing, when the Court was of opinion that, the evidence bearing rather against the intention that the paper should operate, the Court would not be justified in granting probate; and therefore pronounced that the deceased was dead intestate.

[79] IN THE GOODS OF THOMAS DAVIES. Prerogative Court, Michaelmas Term, 4th Session, 1828.—The 38 G. 3, c. 87, only authorizes the grant of a limited administration durante absentiâ of the executor when there are proceedings depending in Chancery.

On motion.

The deceased of his will appointed Joseph Nourse and John Charlton executors, who, on the 2d of July, 1795, took probate. Nourse survived his co-executor, and upon his death his sons Joseph and Henry proved their father's will in 1802, as

(*a*) The fifth article, as reformed, pleaded: "That the deceased, at his death, was possessed of a share of a real estate in Jamaica, which share was of the supposed value of £16,000, and came to the deceased in December, 1826, as a partner in a mercantile firm." It then pleaded the amount of his personal property, stating the share each child respectively would take under the paper propounded and under an intestacy, and that, in either case, the widow would be entitled to nearly the same benefit.

executors thereof. Joseph was since dead, and Henry was resident at the Cape of Good Hope, and had no agent in this country.

Mr. Davies died possessed of a leasehold house and premises in New Bond Street, held under the mayor, commonalty, and citizens of London for forty-one years, renewable every fourteen; this lease, the only part of his property that remained unadministered, was now renewable, but this renewal could not be effected without a personal representative to him.

Lushington moved for a grant of administration to Topham Davies (the son, surviving residuary legatee of Thomas, and tenant for life of the house and premises in Bond Street), limited to his being made a party to a renewal of the lease from the city of London. He submitted that the case was within the spirit of the 38 Geo. 3, c. 87, by which power was given to the Ecclesiastical Court (wherever an executor had left the kingdom after he had obtained probate) sufficient to authorize the grant of the present motion.

[80] Per Curiam. This case is under circumstances of hardship; but how can the Court grant this application? The executor of the executor is living at the Cape of Good Hope it is true; but still he is a full and complete representative. Mr. Simeon's act does not apply to the present case; it applies only when there are proceedings depending in Chancery: but it is to be lamented that this statute was not made more extensive; for at present there certainly is a defect in the law and in the power of these Courts. There is, however, another remedy, viz. a power of attorney from the executor at the Cape. Whenever this Court exercises its discretion in making a grant durante absentiâ, it is on the ground that there is no legal representative.

I must reject the present application.

Motion refused.

IN THE GOODS OF ELIZABETH CROSLEY. Prerogative Court, Michaelmas Term, 4th Session, 1828.—Of wills of the same date, that in the testatrix's possession and to which she last added codicils is entitled to probate, together with the codicils found therewith, and unrevoked codicils found with the other will.

On motion.

The deceased, a widow, died on the 31st of August, 1827. On the 25th of September probate of her will and eight codicils was taken by the executors. The will was dated in 1815, and the codicils at different times between January, 1820, and January, 1826. In April, 1826, a sealed packet, endorsed (but not in her hand-writing) "the will and two codicils of Mrs. E. Crosley," in the care of Messrs. Child and **[81]** Co., was discovered; it contained a will of the deceased, of the same date as the one proved, and also two codicils; one, dated July, 1816, was annexed to the will by a seal; the other, dated August, 1817, was separate, but enclosed and thus endorsed, "The last and only codicil to my last will." A legacy in this latter codicil was repeated in one dated 1820, and of which probate had been taken.

The residuary legatees in remainder were minors.

Lushington, upon affidavits, moved the Court for directions in respect to these papers.

Per Curiam. These two wills were executed on the same day, and attested by the same witnesses; they are both engrossed, and are duplicates with some slight variations: she keeps one by her, and from time to time adds codicils to it. She says that her will is in an iron casket; and there were found the will, which has been proved, and eight codicils. If any doubt is entertained which is her will, I think this which was in her own possession and to which she added several codicils, some in her own handwriting, must be so considered, but probate must also be taken of the other two codicils, as there is nothing to revoke them.

Probate of codicils decreed.

[82] IN THE GOODS OF GEORGE HULME. Prerogative Court, Michaelmas Term, 4th Session, 1828.—Original papers brought into the registry by A., in a suit between A. and B. as to the will of C., cannot be delivered out to D., on an affidavit of D.'s attorney that D., as heir at law of C., was in possession of certain premises, and that these papers were muniments of title thereto.

On motion.

George Hulme died in December, 1813. Upon his death two causes were carried on in the Prerogative Court as to the right of administration to his estate. The suits

had long been terminated; and this was an application for certain books and letters annexed to the pleadings and proceedings in the two causes, and now remaining in the registry, to be delivered out (upon their being first duly registered) to Elizabeth Duncalf, spinster, heir at law of the deceased.

Lushington moved on the affidavit of Miss Duncalf's solicitor, stating, "That in July, 1828, actions of ejectment were brought on her behalf to recover possession of two freehold houses of which the deceased died seized; that the verdicts established her claim to the premises as heir at law; and that she was now in quiet possession of them, and that the title deeds had been delivered up for her use; that the books and letters (now applied for) were important documents in aid of her title, and were produced in evidence on the ejectments: that they were muniments of title, and belonging to the title deeds of these houses."

Per Curiam. The same benefit will result to the party, if office copies of these papers are delivered to her and the originals remain in the registry; for [83] they may be of importance to some other person who may set up an adverse title; and there is no risk that they will be delivered out to any one else, so as to be lost to the heir at law.

Motion refused.

IN THE GOODS OF AGNES BLAGRAVE. Prerogative Court, Michaelmas Term, By-Day, 1828.—Administration to A. granted to the son of B., the brother and sole next of kin; those entitled in distribution to A., and the widow, sole executrix and residuary legatee of B., having renounced.

On motion.

The deceased died in June, 1824, a spinster and intestate leaving John Blagrave her brother and only next of kin who was also dead; and of his will, Frances Blagrave his widow, sole executrix and universal legatee, had taken probate.

A proxy was now exhibited from the widow, and also from the nephews and nieces (children of a deceased brother) of Agnes Blagrave, whereby they severally renounced the administration of her effects.

No administration had yet been taken out.

The King's advocate, referring to the case of *The Goods of Mary Keene* (vol. i. p. 692), moved for administration of the effects of Agnes Blagrave to be granted to the son of John and Frances Blagrave.

Per Curiam. Though the party has not a direct interest, he is acting under a person entitled to a moiety of the property.

Motion granted.

[84] MARSH *v.* TYRRELL AND HARDING.(*a*) Prerogative Court, Michaelmas Term, By-Day, 1828.—A feme covert having, under certain powers, made a will and codicil in February, 1818 (eight months after marriage), by which, after making provision for her husband and leaving sundry legacies, she bequeathed the bulk of her fortune to and appointed executors strangers in blood; such disposition (except the provision for the husband) being similar to a will in 1816; made a will on the 9th of March, 1827, and a codicil thereto on the 21st of April (she dying on the 8th of May), 1827, which papers, except legacies to three servants and rings to three friends, left all her property to her husband, and appointed executors, him and a total stranger: the Court holding that the latter papers were obtained by the husband's undue influence, when her faculties were much impaired, pronounced for the will and codicil of 1818, and condemned the husband (who though he denied the validity of the powers and nominally prayed an intestacy, was the real party setting up the latter papers) in the costs of the executors of the will of 1818.—Where there is a great change of disposition and a total departure from former testamentary intentions long adhered to, it is material to examine the probability of the change, especially if at the time of making the latter disposition the capacity is doubtful, still more if the person in whose favour the change is made, possessing great influence and authority, originates and conducts the whole transaction.—A person who can understand and answer rationally questions may still not be capable of making a will for all purposes. The rule of law is, that the competency of the mind must be judged

(*a*) Vide vol. i. 133.

of by the nature of the act to be done, and from a consideration of all the circumstances of the case.

[Reversed by consent, 3 Hagg. Ecc. 471.]

Lushington and Nicholl for Mr. Tyrrell.

Phillimore for Mr. Harding.

The King's advocate and Addams contrà.

Judgment—Sir John Nicholl. This cause was very ably and fully argued in the former part of this term, and the material parts of the evidence were then stated and discussed: it is not therefore necessary to recite in detail much of the depositions. The grounds of the decision must be looked for rather in the conduct of the parties and in the documents than in the oral evidence. The necessary inferences to be drawn from that conduct will afford a solid and safe basis for the judgment of the Court; where the oral evidence harmonizes with those inferences a moral conviction rightly follows, but the depositions, where they are at variance with the conduct of the parties and with the res gestæ, are less to be relied upon.

Some parts of this case afford a strong illus-[85]-tration of these remarks, and induce me to consider with more than usual attention the conduct of the several actors in the matters which are the subject of inquiry.

The question arises on the testamentary acts of a married woman; and for the purpose of deciding it the Court must assume that she had a right to make a will, since the consideration of the validity of the deed, under which the power is asserted, belongs to the jurisdiction of another Court.

The alleged testatrix, Mrs. Sophia Harding, wife of John Harding of York Place, Walworth, died on the 8th of May, 1827, and left property amounting to 20,000l. or 25,000l., exclusive of a sum of 10,000l. due to her from the estate of Marsh and Son. Two wills are propounded. The first, dated on the 28th February, 1818, with a codicil of the same date, by Mr. Arthur Cuthbert Marsh, one of the executors and a joint residuary legatee. The other, dated on the 9th of March, 1827, with a codicil of the 21st of April, 1827, by Mr. John Tyrrell, one of the executors. Of this latter will Mr. Harding, the husband, is also an executor, and is a party in the suit; appearing, however, separately, for the purpose of reserving to himself the right of questioning the deeds under which these wills were made: not opposing the factum of this latter will, for in truth he is substantially the party setting it up. The real question is, upon the factum of this latter will, for to the validity of the former will no serious objection has been, or can be, taken; though some insinuations have been thrown out against the conduct and [86] supposed influence of the parties benefited under it.

The general substance of the two wills is to the following effect:—By the former will the dividends on 5000l. navy five per cents. are given to the husband for life, and then the stock itself is bequeathed to his eldest son. Her leasehold house and furniture at Walworth are given to her husband absolutely, and several remembrances to friends, and legacies to servants are also bequeathed by it; but the bulk, the residue, is left to the children of Mr. William Marsh, "by Amelia Marsh his first wife, formerly Amelia Cuthbert, deceased." William Marsh, Arthur Cuthbert Marsh, and Richard Creed are appointed executors, and to each of them is given a legacy of 1000l., "as a compensation for their trouble." It is sufficient at present to state the substance thus generally, though it may be necessary hereafter to examine some of the contents more in detail. Here, then, is a provision for, and benefit to, the husband and to his eldest son, but the principal objects of her bounty are the children of Amelia Marsh, formerly Cuthbert. No other children of William Marsh are mentioned: and the two Messrs. Marsh, and Mr. Creed, are selected as her confidential exècutors and trustees.

The contents of the latter will, of the 9th of March, 1827, are more brief, for by it every thing is left to the husband, Mr. Harding, except legacies to three servants of 300l. each; and the codicil of the 21st of April bequeaths only rings to three ladies, sisters, two of whom were dead; but it contains a clause confirming the [87] will. Here then is a great change of disposition: the character and objects of the former will are totally abandoned.

In inquiring then into the factum of the latter will it becomes material to examine the probability of this great change of intention, and it becomes the more necessary to examine that probability, if at the time of making the disposition the capacity was in any degree weakened or doubtful; still more if the husband, in whose favour this

great change is made, and who, from the relation in which he stands to the deceased, must almost necessarily have great influence and authority, should be the person originating and conducting the whole business of the new will. To examine, then, the probability of this change, it may be proper to consider the grounds and circumstances of making the first will; if that were made upon hasty, capricious, temporary considerations, the departure from it becomes less improbable; but if made under motives long existing, and quite naturally inducing it, the adherence to it will be the more strongly presumed, and the circumstances to account for the complete revolution in her intentions will be required to be more forcible.

The deceased was, originally, Miss Sophia Smyth; and derived the principal part of her property from a brother, William Smyth, who about the year 1779 was in the East Indies, and succeeded Mr. Cuthbert as naval store-keeper and agent victualler of the fleet in India under Sir Edward Hughes. There is no proof that Smyth acquired that situation though the recommendation of Mr. Marsh, who was navy agent to Mr. Cuthbert; but it is admitted, in **[88]** Harding's answers to the second article, "that William Smyth may have professed and felt a great regard for Mr. Cuthbert," and he had also a great regard for and confidence in Mr. Marsh, for upon his death in 1784 he by will appointed Mr. Marsh his executor and trustee, and under that will the deceased and her sister, as joint residuary legatees, became entitled to a considerable part of William Smyth's fortune.

In 1785 Mr. Marsh married Miss Amelia Cuthbert, daughter of Mr. Cuthbert, and she died in 1793, leaving four children, two sons and two daughters. Mr. Marsh married again, and had a family by his second wife. After the death of the first wife, Mrs. Amelia Marsh, the friend of the deceased, it was not likely that any great intimacy would be maintained between the deceased and Mr. Marsh; but there is no appearance of her having at any time withdrawn her confidence in him, still less her regard for the children of his first wife. Messrs. Marsh and Creed continued her agents, and had the management of her property as her friends and the executors of her brother.

In 1813 the deceased's sister, Miss Elizabeth Smyth, died intestate, and her joint share of her brother's fortune devolved upon Miss Sophia Smyth, the testatrix. There is no proof that previous to the death of the sister the deceased had made any will, and probably she had not, as the sister died intestate; but she now was left alone; her father and mother were dead, her sister was dead, and she had no known relation. She was about fifty years of age, past the hopes of having a family of her own; she had a large fortune, and it was not unnatural that she should **[89]** wish to make a settlement of it. It was not unnatural, it was highly probable, that the children of Mrs. Amelia Marsh, formerly Miss Cuthbert, should be adopted as the principal objects of her bounty; there were no persons presenting themselves likely to stand in competition with them in the deceased's affection and regard. It was not improbable, nor unwise, that she should vest her property in trustees to her separate use, and at her own disposal in case of coverture. She might at her time of life, and with her large fortune, suspect herself, and wish to guard against her own imprudence, lest she should fall a sacrifice to the designs of some artful person, who, for the sake of her fortune, might inveigle her into marriage. She might do this without having any person specially in view, or without being even solicited by any individual: or she might do so because she was addressed by some particular person, and suspected his motives and designs. Accordingly, in 1816, there were several acts done for the arrangement of her property, vesting it in trustees for her separate use, and making a disposition of it by will, which, being revocable, she might at all times alter upon any change of circumstances.

By the deed of the 20th of February, 1816, recited in a subsequent deed, 10,000l. were left in Marsh's hands as executor of William Smyth, to answer all outstanding demands on Marsh in that character. The rest of the property was invested in the funds. This was no extraordinary security, considering that William Smyth was a public accountant, having been naval store-keeper and agent victualler to the fleet in the East Indies. In such transactions, **[90]** in a distant part of the globe, it is hardly possible to say when the representatives of public accountants are quite safe from demands; but, in the present arrangement, there was nothing particularly advantageous beyond mere indemnity, for the principal was to remain for ten years, and then it, or what then remained of it, was to be transferred to Miss Smyth or her

representatives, and in the mean time interest at four per cent. was to be paid to her: which, considering the war was over, and there was a prospect of a very permanent and firm peace, was a fair interest and not disadvantageous to Miss Smyth; for the credit of Mr. Marsh, at that time, stood quite unsuspected.

On the 8th of March, 1816, all the other property of the deceased, both as surviving residuary legatee of her brother and as administratrix and sole next of kin of her sister, having been invested in the public funds in the joint names of William Marsh, Arthur Cuthbert Marsh, and Richard Creed, a deed or declaration of trust was executed, by which this funded property was held in trust to the separate use of Miss Sophia Smyth, subject to her disposal by will at her death, notwithstanding any future coverture, and as if she continued a feme sole; "independently of any husband who is not to intermeddle therewith, nor is the property, or the dividends, to be liable to his control, debts or interference." The 10,000l. at the end of ten years were to be invested in the like trusts, with an additional power of disposal by deed in her lifetime. If Miss Sophia Smyth made no disposition of the property, either by deed or will, it was to go according to the statute of **[91]** distributions, as if she had died intestate and unmarried. This is the substance of the deed of the 8th of March, 1816.

On the 12th of March, 1816, she executed a further deed, irrevocably giving the 10,000l. at her death to Mr. Marsh; but there was perhaps nothing very extraordinary or improvident in this gift. He had had the whole trouble of winding up and managing the concerns of her brother, her sister, and herself; he was to have the additional trouble of this trust; he was married again, and had a second family: her fortune still remaining at her own disposal was ample. It was not astonishing that she should consider it but a reasonable remuneration to Mr. Marsh to secure to him this 10,000l. at her death, reserving the interest of it for her life.

Shortly after this she made her will, which probably was in preparation at the time the deed of gift was executed. This will was executed on the 23d March, 1816, and its contents are material. It directs that she shall be buried at Highgate, in the vault with her sister. It appoints as her three executors and trustees, William Marsh, Arthur Cuthbert Marsh, and Richard Creed, and leaves them as a compensation for their trouble 1000l. each. To Edward Rigden, if in her service at her death, it gives 500l.; if not, 200l.: to Mary Apostles, if in her service, the same; if not, 100l.; also her wearing apparel, and 2s. 6d. a week to take care of her dog: to Mary George, the cook, if in her service, 50l., and to the coachman, 20l., and her carriage, harness and horses. Rigden and Apostles are to live in her house for three months, and to be **[92]** paid a guinea a week as board wages; and her wines and liquors are to be divided equally between them. These are the provisions for the servants, and she then proceeds to give remembrances to her friends. To Charlotte Hillyer is left a diamond ring with her late sister's hair; to Sybilla and Sarah Hillyer, each diamond ear-rings: to the three Misses Binstead, an annuity of 100l. with benefit of survivorship: to Mrs. Isherwood, for a ring, 20l.: to Mrs. Rogers, for a ring, 21l.: to Mr. Creed, her house and furniture at Walworth, but with a stipulation that there shall be no auction on the premises. It is her "express wish" that the family paintings should be burnt, or otherwise destroyed. The miniatures of her brother and sister are to be put in her coffin and interred with her remains. The residue of her property is given to the children of William Marsh, by Amelia Marsh, his first wife, formerly Amelia Cuthbert, spinster, deceased, to be divided equally between them; and if only one of them be living at her death, then to that one.

This will has features strongly marking the mind, character, and testamentary intentions of the testatrix: here are friends recollected with tokens of remembrance, some with pecuniary benefits: here are old servants provided for according to their stations and length of service: here is her confidence continued to her brother's executors—Messrs. Marsh and Creed—one of the former, the husband of her late friend Mrs. Amelia Marsh: but the great objects of her bounty are the children of that friend, Mrs. Amelia Marsh; to these the bulk of her fortune is given in exclusion of Mr. Marsh's family by a second wife. **[93]** On the 26th of March, 1816, she made a codicil, merely giving an additional 50l. to her servant Rigden, and 100l. to her solicitor, Martelli. It is observable that in this will no notice whatever is taken of Mr. Harding; and although, in three months afterwards, he procured a marriage licence, yet there is no proof that she acknowledged him as a friend when this will

was made still less that he at that time, nor in the month of June, was received as an accepted lover, nor that the marriage was delayed by her ill health. If she was in ill health, it is more probable that she should make her will while she remained a spinster, than enter into a matrimonial engagement.

A twelvemonth afterwards, however, she did accept and marry Mr. Harding; but not with any peculiar marks of confidence or affection; for, a few days only before the marriage, she executed another deed of trust settling the house and furniture, and some other property at Walworth, to her own separate use; in the same manner as she had the year before settled the funded property. Whether this deed, executed just before marriage, is or is not valid, may depend upon circumstances: but the fact is, that the other deed of March, 1816, is furnished by Harding himself, as the foundation of the will made by his own solicitor in his favour; and is pleaded by Mr. John Tyrrell, Harding's co-executor, so nominated by Harding himself, and who, it is apparent, merely lends his name in this cause. Thus then Mr. Tyrrell, though he does not admit the validity of the deed of June, 1817, sets up the validity of the deed of 1816 as the very groundwork of the will [94] which he propounds; but Mr. Harding, though obtaining, and sworn executor to, that will, now denies the validity of both deeds and all wills made under them. That is the shape the case assumes.

In June, 1817, Harding became the husband of the deceased, he being about sixty-three years of age, with a family by a former wife; she a spinster about fifty-one. On the 28th of February, 1818, about eight months after the marriage, the deceased made a new will, the will propounded by Mr. Arthur Cuthbert Marsh. It was very natural and proper that she should now make a provision out of her ample fortune for the husband to whom she had united herself. It was not made in the first moon; eight months had elapsed since the marriage; she could therefore form a fair estimate of his qualities, his society, his real affection, and his just claims. She accordingly applied to Mr. Delmar, the successor of Mr. Martelli, who had prepared the former will of 1816, but who had since died; and there is not the least ground to suspect that this was not her own free, voluntary, uninfluenced act. Mr. Delmar's account of her first visit is as follows:—

"On the 21st of February, 1818 (deposing from his books), the deceased called upon him in Norfolk Street; she came in her carriage, and was introduced to deponent by a clerk who had been many years with Mr. Martelli: she told deponent 'she wished to make an alteration in her will:' deponent referred to her papers, and took out the draft of the former will: he went through it, item by item, with the deceased: she specified the alter-[95]-ations she wished, and deponent noted most of them in the margin. He afterwards directed a clerk to copy the draft embodying the pencil alterations; deponent revised the same, and after the draft had been settled by a conveyancer, deponent had two copies made ready for execution. On the 28th of February (again deposing from his books) deceased called again upon deponent, when he read over, or explained the contents of, one of the duplicate copies of the will, item by item, to the deceased, and she signified her approbation as he proceeded, but he does not remember in what terms."

The will being thus executed in duplicate, each part was sealed up and indorsed; one part was deposited at the office of her agents and trustees, Messrs. Marsh, in a box in which her other deeds and papers were deposited, and in which it was found at her death: and the indorsement on the envelope expressly states, "Duplicates in Mrs. Harding's possession." In conformity with this the other packet was delivered to herself, was retained by her for several years, was then delivered for safe custody to her confidential servant, Mary Apostles, since dead, who delivered it over, shortly before her death, to a friend of hers, Mr. Easton, in whose custody it remained unopened till after the commencement of the present suit.

Such being the history of the will propounded by Mr. Arthur Cuthbert Marsh, in the making of which there is not the slightest appearance of Mr. Marsh's interference, or even of his being privy to its contents, it becomes material to con-[96]-sider what alterations were by it made in the will of 1816. There is a provision made for the husband, £5000 navy five per cents., part of the trust stock, are bequeathed to him for life, and then to his eldest son. The house, furniture, plate, &c. at Walworth, before given to Mr. Creed, are now given to Mr. Harding; there is a trinket given to his eldest son's wife; the other trinkets are given as before, and the rest of her trinkets

to the eldest Miss Marsh: but all the peculiar features of the will remain; she is to be buried at Highgate with her sister; memorials are given to various friends, legacies to servants, an annuity of £100 to the three Misses Binstead, and to the survivor; the pictures are to be destroyed; the miniatures to be buried with her; all is nearly verbatim as in the former will; but, above all, the same confidence is given to her executors, with the same legacy for their trouble; her husband is not even one of her executors; and what is still more important, the bulk of her fortune is still given to the children of Mrs. Amelia Marsh. Looking then to the considerations on which this disposition was originally made; looking to the change which had taken place by the marriage, the estimate of and provision for it thus fixed; looking to the full confirmation thus given, after an interval of two years, and after the intervening marriage, even to the peculiarities of the will and to all the testamentary intentions of the deceased, it is difficult to suppose a case in which adherence to the disposition is more strongly to be inferred and presumed.

The next subject for consideration and examin-[97]-ation are the circumstances, subsequent to this will of 1818, either inferring the continued adherence to the will, or departure from it.

To shew adherence in the first place there is time. No testamentary act is suggested to have been done for nine years, till Harding's will of March, 1827, which was set about the latter end of February, 1827: but there are intermediate circumstances in aid of the proof of adherence. In 1823 the deceased had a severe paralytic attack, which caused a state of great bodily infirmity, whatever might be its effect on her mind. It was natural that such an event should have induced the deceased to have made an alteration in her will, if she were dissatisfied with the existing disposition. Six years of matrimonial cohabitation had taken place: if it had produced this "growing affection and confidence," so much relied on by Mr. Harding's counsel, she would not have remained in that deplorable state without expressing some wish, or taking some measures, to increase the benefit to the husband; but nothing was done in consequence of that attack.

In 1824 Mr. Marsh's misfortunes took place; in September of that year he became a bankrupt; from what circumstances does not appear in the evidence. His bankruptcy did not induce her to alter her will; not even to substitute a different executor. Some communication with Mr. Delmar took place as to whether it might not be necessary to make a slight alteration, not hostile to Mr. Marsh, but to secure the benefit to him in exclusion of his creditors: but that was not done, and on Marsh's obtaining his certificate in November, 1825, it became unnecessary. This [98] cannot infer departure from the disposition of 1818. There is no reproach expressed with regard to Mr. Marsh: the evidence is all the other way: it is pity and compassion for his misfortunes which she evinces. She does not take the management of her concerns out of his hands: the Messrs. Marsh are continued as her agents —that is a fact not disputed in the evidence—indeed the navy agency house was not bankrupt at that time, and did not become so till within a few days of her death. There is not only the simple fact that she did not take away her agency from them, but that fact has much increased force when it is admitted that the husband recommended and pressed her to take her concerns out of the hands of the Messrs. Marsh. This is admitted and justified: but it is proved that very urgent and harsh means were used to induce such a measure; and if the advice were justifiable, the urgency might not be so. Yet notwithstanding all the advice, whether properly or improperly administered, notwithstanding all the supposed increase of affection, and this marital influence and authority, the act is not done; the influence is resisted above two years till this new will is obtained; and yet, if it were her wish, what would have been more easy and practicable? Where were the risk and danger, she living at this time under the protection of her husband—he constantly with her? It is unnecessary to rely minutely upon the evidence of the servants who are releasing witnesses—the fact speaks for itself, and their evidence is in accordance with the fact, and it is confirmed by another witness (who is entitled to full credit), Mr. Delmar, and who speaks to [99] circumstances strongly corroborative, some of which will be presently stated. It is further confirmed by another part of the case. In answer to Marsh's allegation, which set forth matters inferring adherence to this will, a responsive allegation was given, which consisted of above twenty articles: to above half of those articles not a witness is examined. Most important would it have been to have produced something

demonstrating dissatisfaction at the former will—some intention of altering it, and making a new one; but there is not a circumstance of the sort: not a single declaration of that tendency.

Two servants and a woman who was principally employed in the garden are brought up all the way out of Devonshire to prove that in 1822 the deceased and her husband appeared to be living on kind and conjugal terms together. A few ladies, who made occasional calls at Walworth, are produced to prove that Harding was outwardly attentive to his wife, and never ill-used her in their presence; and some of these say that, "in their opinion, the deceased had a testamentary capacity." But in this mass of responsive evidence, which was to support the condidit and factum of the last will, there is not a single circumstance coming from the deceased herself shewing dissatisfaction at the former disposition, or the intention to make a new will. There is a total absence of any such supplementary evidence, important as it would have been to lead up to the factum of this new will.

The evidence as to adherence and departure, as well as the inferences and presumptions, are all on one side. Nay, the only circumstance relied upon, the bankruptcy of Marsh, instead **[100]** of affording a probable ground for this altered disposition, operates on my mind in the contrary direction. What could afford a stronger reason for her adhering to her former intentions of giving the bulk of her fortune to the children of Mrs. Amelia Marsh, two sons and two daughters, than the misfortunes of their father, now a bankrupt, with another family to provide for? But, further, why should Marsh's bankruptcy induce her to depart from all the characteristic peculiarities of this will? the place of her interment; the memorials to her friends; the burning of these pictures, and the placing of these miniatures in her coffin: for the change is total and complete. Looking then at the circumstances which preceded the first will, and those which intervened between February, 1818, and February, 1827, nothing can in my judgment be more improbable that the disposition contained in the will propounded by Mr. Tyrrell.

With this foundation of improbability the next inquiry is whether there are not circumstances leading to a strong suspicion that this will was obtained by the husband through undue influence, and circumvention exercised over a testatrix incapable of protecting herself, and of resisting his marital authority. Mr. Harding's object and motives in marrying this lady can only with certainty be known to himself; but circumstances may afford some inferences. He suggests that he was not aware how her property was settled till after Marsh's bankruptcy. Some facts, however, render it difficult to suppose that to be true, and that he was not apprized of it at the time of, and before, the marriage. Did he marry this lady sup-**[101]**-posing that her property was not vested in trustees to her separate use, and that by marriage he at once acquired the right to it? How came it then that no settlement was made on the marriage? Had she no sense? no friends? And had he no honesty, so as to make a settlement out of this large fortune, if he supposed that by marriage he became entitled to it? How came it that from the first moment after the marriage he never interfered, in the slightest degree, in the appropriation or management of the property? With every allowance for his disinterested liberality, it is hardly credible that in seven years he never should have interfered. He must therefore have been at all times fully aware, as his conduct proves, that her property was settled to her separate use. Here are also these facts leading to the same conclusion.

Harding produced a copy of the deed of trust of 1816, to enable Tyrrell to draw the will of 1827. Shortly after Marsh's bankruptcy he went to Delmar and told him "that he came from Mrs. Harding, who wished to have her settlements and will sent to her." Delmar went there shortly after, taking the drafts of these papers with him, not having the originals, for they were in the box at Marsh's office: but Harding then told him "that he had copies:" that is, copies of the settlements: for his own case is, that he did not know the contents of the will of 1818 to the last. How and when, then, came he by these copies? It is true indeed that Delmar says "he believes that, about that time, Harding received from the deceased a copy of the settlement of the 8th of March, 1816:" but that is contrary to the whole of **[102]** her conduct; for she was, at that time and at all times, most anxious to keep him ignorant of her concerns of every sort. But there is another circumstance that renders it not improbable, that he had these very copies communicated and delivered to him before the marriage, as in common fairness they ought to have been, and as

his conduct, in never attempting to interfere in the management of this property, strongly infers; that circumstance is, that the very copy of which Harding was in possession was a copy certified by two of Martelli's clerks in 1816. This copy was then in existence before the marriage, and the whole conduct of the parties renders it by no means improbable that he was in possession of it at that time.

It is true that, if he then knew of these instruments, he may appear the more disinterested in marrying the deceased without any settlement being made of some part of the property in his favour. It may be so: but an artful, cunning, experienced man might feel some confidence that, when married, he should have sufficient influence to persuade his wife to appoint and dispose of the property in his favour. If he had such a design and such a hope he would probably adopt two modes of effecting his purpose: first, by wheedling and coaxing to get her affairs and confidence into his power; and next, if those failed, by importunity and rigour to subdue her into acquiescence and submission. The two modes are by no means inconsistent with each other.

The letters of Mr. Harding to his wife have been exhibited by Mr. Tyrrell, and they are **[103]** rather of an extraordinary tone, considering the age of the parties: they display something of a character and plan not irreconcileable with the design just suggested. Mr. Harding had a cottage in Devonshire, and was engaged in manganese works, from which, as he represents, he was deriving considerable profit—about 1000l. a year: he goes down to this cottage soon after the marriage—the first month is scarcely over, and he is absent from his bride about two months. These are passages in his letters. The first is dated July, 1817, he having been married in the June preceding. After giving an account of his journey into Devonshire, he writes, "I have air and exercise in abundance, but I sigh that you do not partake of both with me; for happy should I have been to have had my dear, my beloved wife with me; but to this our separation I must be reconciled, knowing it to be necessary and not of long duration; but in my fond imagination you are and ever will be present, for while I live my bosom will ever glow with warm affection, and with the purest regard for you, and with these sentiments do I now subscribe myself, my dearest Sophia, most tenderly and most affectionately your's."

The next is from Ilfracombe, and is dated on the 25th of July. "Thus, my beloved Sophia, I am separated from you by necessity, or by a sort of destiny not to be commanded or controlled. My heart is yours, and in mind and thought you are ever present; for you my fond imagination is my present comfort, and my only bliss. Yes, my dearest Sophia, be assured I am with affectionate regard and **[104]** the most tender love truly and affectionately yours."

The third is on the 11th of August: that concludes: "I greatly regret that my absence from you is so long, but I shall not stay one hour more than is absolutely necessary. To me this separation is more than painful, for not a day or hour passes but I think of my much loved Sophia, my beloved wife: for be assured I am most faithfully and most affectionately yours."

The next is dated on the 3d of September, from Manchester: . . . "Do write to me, and let me hear from you; that will be the highest pleasure I can now receive. I trust in Heaven, that a few days more will dismiss me from this wretched place, and enable me soon to embrace my much loved wife, who has my warmest affection, my highest regard, and the tender love of him, who is, my beloved Sophia, your J. Harding."

The letter of the 15th of September thus concludes: "Oh! how I anticipate the joy I shall experience on seeing you. Yes, my Sophia, this thought throws a glow of happiness over my whole frame, and makes me feel that I am wholly and truly yours."

The next is much in the same tone. "I know not how to express to you the pleasure I felt on reading your last letter: it was the language of an affectionate wife; it was the harbinger of my future happiness, for nothing on earth can be more pleasant to me than your presence. Yes, my dearest Sophia, my greatest wish is, and always will be, to be inseparable and ever near you. My heart glows with **[105]** a warm affection for you, and I love you with tenderness and with truth."

These are passages from some of the letters written at this period of time. Why, the very heyday of life, the most ardent affections of youth, could not have dictated warmer effusions: they have more the appearance of being written with a view of wheedling her out of her large fortune, at her own disposal, than of being the expres-

sion of the real genuine feelings of a husband of sixty-four, to a second wife of fifty-one. This last letter is dated on the 12th of April, 1818, shortly after she had been making the will now propounded by Mr. Marsh. Her answers are not produced, and if they contained expressions of equal warmth they might have shewn something of this "growing affection:" they may have been rather cold replies; she may have seen through, or thought she saw through, these high-flown effusions, and suspected that they had her property rather than her person in view. None of her letters are exhibited till after her paralytic attack: the first is dated in May, 1835, when she was no longer able to write herself: they are in the handwriting of her servant, Mary Apostles: they are dry and formal, possibly on that account: but it is not wholly unworthy of remark that, though written after Marsh's bankruptcy, they contain no expression of dissatisfaction towards the Messrs. Marsh nor the least allusion to her accounts with them; still less a wish or suggestion of any new testamentary act.

That Harding advised her to take her concerns out of Marsh's hands is admitted: that **[106]** she refused to do so is demonstrated by the fact; but it is important to inquire whether he did not then resort to rough means. That he did so is proved by the servants, who, though releasing, are not discredited witnesses. It is not necessary to advert to the particulars of their depositions; they were fully pointed out in the argument: nor even if their evidence is biassed and high coloured would it be material, for it is not necessary to rely on them alone, nor on the exact details of their testimony: for sufficient is stated by Mr. Delmar in confirmation of them; and I see nothing to impeach his credit.

That Harding endeavoured to get at the original deeds and will is proved by Delmar. Delmar carried copies, but Harding then said, "he had copies, he did not want copies." But there is this strong mark of falsehood; he pretended that he had applied to Delmar by the deceased's desire, but when the three parties are together he does not venture to appeal to her in the presence of Delmar to confirm the truth of his mission; he does not venture to say—"Now, madam, here is Mr. Delmar, deliver your message to him yourself; I will leave the room; he is your confidential solicitor, he prepared your will in my absence, tell him what your real wishes are; he may suspect that I have some selfish object in view." It is quite incredible that she had any wish of the kind. The res gestæ and the evidence of the witnesses concur to prove that she was most anxious no paper of hers should be given up to Harding, and that no account of hers should be rendered to him.

What is the substance of Mr. Delmar's ac-**[107]**-count? "Mostly, when he called, Harding seemed to make a point of being present and was painfully intrusive; he constantly kept speaking of Mr. Marsh and his son, in a way tending to excite an unfavourable impression of them; the conversation always took that turn; he uniformly manifested a wish to pry into her pecuniary affairs, even at times when she was evidently very ill; his object seemed to be to ween the deceased's regard from Marsh and his family. The deceased for the most part sat silent, but at times, when he urged the subject more closely, she used to manifest impatience, saying 'No, no,' to avoid the subject: the very mention of such matters seemed to give the deceased pain, but Harding's conversation was nevertheless always about them. Deponent's visits were continued principally because they seemed to soothe her, and operated as a check on the irritation Harding's conduct excited. . . . Harding was constantly alluding to the subject, and there was an unhappy state of discord on that account. He used great harshness of expression towards the deceased on that subject, and at a time when from ill health she required every tenderness. On several of his visits deponent found her in tears; he sometimes observed to Harding that the deceased was in that delicate state it was very necessary to treat her with kindness. She appeared to grow gradually weaker."

This is the general substance of Delmar's evidence, and it is in perfect accordance with, though not quite so strong as, the evidence of some of the servants. It needs no comment.

[108] There is another fact not only inferring, but nearly conclusive upon, the absence of all previous intention of the deceased to make a new will. She had a duplicate of the will of 1818, as I have said, in her possession; but fearful of its falling into the hands of her husband, she delivered it to her confidential servant, Mary Apostles, in the presence of Rigden; and Apostles, when in a dangerous state, delivered it to her friend Easton; and in his hands it remained till some time after

her death. Now Harding had been applying to Delmar, as from the deceased, for her will: supposing that to be true, and that Delmar had declined to deliver it, yet she had the duplicate within her power. If she had wished to revoke that will, would she not have communicated the fact of her possession of this duplicate to her husband, unless indeed her capacity was so gone that she had no recollection of its existence? But if she wished the will to be revoked, and recollected the existence of that duplicate, it is quite incredible that she would not have apprized her husband of it, and would not have required Rigden and Apostles to deliver it up; and yet it is Harding's own case that he did not know the contents of the will, nor the existence of this duplicate till after her death. How fully, then, do the facts and the conduct confirm the parol evidence that Harding was anxious to possess himself of the will, and the property of the deceased, and that she was no less anxious to keep both her property and her will out of his hands.

Such being the circumstances of the case, up to the very commencement of the transaction of **[109]** Harding's getting this will made, it becomes essential to inquire what was the state of the deceased's capacity at this period. This part of the case, again, lies within a narrow compass, and is established by the conduct of Harding and his own witnesses: it does not require to be closely examined upon the opinions of witnesses, which are generally conflicting upon the subject of capacity.

The deceased had a paralytic attack in 1823, which reduced her to great bodily infirmity; but whether she had another in 1825, or whether she was in a state of despondency and made an attempt upon her own life is not material; she certainly had a good deal to prey on her mind and spirits: the misfortunes of Mr. Marsh, the "worritting" of her husband, and subsequently the illness of her confidential old servant, Apostles, were not likely to be without their effect upon a nervous patient. It is admitted that Mr. Delmar had intimated an opinion that she was incapable of managing her own concerns: it is admitted that an operation on her maid, Apostles, was wished to be postponed lest it should agitate her too much and render her unfit for making this will: it is admitted that, before the drawer of this will would undertake to attend for the purpose of receiving her instructions, he wished her to be visited and examined by medical gentlemen to ascertain the state of her capacity; it is admitted that the opinion of a surgeon, the drawer's brother, was not alone deemed sufficient; was not alone deemed satisfactory: it is admitted that Dr. Burrows, a medical person, supposed to be particularly conversant with defects of the mind—at least in cases of derange-**[110]**-ment—after sitting with her for three quarters of an hour, would only give a limited opinion as to her capacity, and wished for a second interview before he gave a decided opinion. In such a case, to resort to the judgment of persons who occasionally, or of others who frequently, saw her, whether she was quite capable or quite imbecile, would be utterly useless: she was, at all events, in a state of very weakened and doubtful capacity.

If, then, in addition to these circumstances; first, that the disposition in the new will is highly improbable; next, that the husband had been endeavouring to get at her deeds and testamentary instruments; and, further, that she was in this state of doubtful capacity; if, in addition to all this, we yet find that the husband, as far as the evidence goes, originates and conducts the whole business, representing or rather misrepresenting the previous facts, and being present at all the material parts of the transaction, the case proceeds to the evidence of the factum under presumptions of fraud and imposition, which hardly any evidence would be sufficient to repel. It would at least be extremely difficult to shew that she was a free as well as a capable testatrix; to shew that she had a real disposing testamentary mind, and an intention to abandon all the dispositions of her former will made so carefully and adhered to so firmly. The strong presumption would be that, in whatever she said and did, however it might impose upon the witnesses, she was a mere instrument and puppet in the hands of her husband.

We come then now to the evidence on the condidit.

The witnesses to the factum are three. Mr. **[111]** Edward Tyrrell, a solicitor, and deputy-remembrancer of the city of London; Mr. Frederick Tyrrell, a surgeon, his brother; and Dr. Burrows, a physician. Certainly three persons, respectable in situation, of unimpeached general character, and competent to arrive at a fair opinion, as far as their opportunities and the means they used of judging enabled them to form an estimate of her mental capacity. There is no reason whatever to suppose

that they would either enter into a fraudulent conspiracy with the husband to obtain this will, or that they would have come forward to support it by wilful perjury; nothing of the sort can possibly be imputed to them: but it is necessary to see under what prepossessions they engaged in the matter, in order to form a correct judgment of the inquiries which they made and of the conclusions at which they arrive. They may have been imposed upon and duped by the artful misrepresentations of Mr. Harding: they may have suffered their vigilance to be lulled and their penetration to have slept, and, after having embarked in the transaction and after their characters were in some measure implicated, they may be under a strong bias to support and give effect to the act. Under that bias very honest persons (such is the infirmity of our nature) often deceive themselves without being aware of it: they fancy impressions to have existed, nay, they sometimes even suppose facts to have taken place, because those impressions now exist, or because those facts might or ought to have passed in order to support their impressions. Hence this strong bias will often give a false colour to a transaction, without the witness intending to speak falsely **[112]** or to suppress the truth. Without, therefore, in the slightest degree suspecting any thing of conspiracy or wilful misrepresentation on the part of these gentlemen, it may be necessary to examine their evidence upon those other principles which have been just stated; for it was correctly said by the leading counsel for Mr. Tyrrell, and it cannot be expressed in better words (if I have taken them accurately), "Even persons of high character may fail to do their duty when nearly connected." This he applied to the evidence of Mr. Delmar.

The principal witness, and he who begins the history, is Mr. Edward Tyrrell, the solicitor who prepared the will: he states, "He and his family for two generations have been intimately acquainted with Mr. Harding; he had a slight knowledge of the deceased." He then was the intimate friend, but he was also the solicitor of Harding, but not the solicitor of the deceased. He goes on: "On or about the 19th or 20th of February, 1827, Mr. Harding called on deponent at his office, and informed him that Mrs. Harding wished to see him for the purpose of making her will, and for him to act as her solicitor. Mr. Harding said that his wife had since her marriage made a will without his knowledge, and that it was either in the hands of Mr. Delmar or Mr. Marsh, the navy agent; that his wife, and he at her request, had applied to them both for the will, and also to Mr. Marsh for her, the deceased's, account as her agent: he further stated that Mr. Delmar had called upon the deceased a few weeks back, and that on his, Delmar's, leaving the room, Mrs. Harding became agitated, and **[113]** burst into tears, upon which Mr. Delmar turned round and asked whether he thought the deceased in a fit state to manage her affairs, to which he, Harding, replied, 'that he certainly did think her quite capable.' After this statement Mr. Harding handed to deponent an attested copy of a deed of gift, dated antecedent to deceased's marriage, whereby she had assigned £10,000 to the elder Mr. Marsh: also a like copy of the deed of settlement which she made of the greater part of her property shortly before her marriage; which settlement reserved to the deceased the right of disposal by will of the property therein mentioned. Deponent, referring himself to what Mr. Harding had let drop as to Mr. Delmar's doubts about Mrs. Harding's capacity for the management of her affairs, told Mr. Harding 'that he, deponent, should not feel himself justified in taking instructions for a will from Mrs. Harding, until some medical person of respectability had seen her and given an opinion as to her state of mind.' Mr. Harding having concurred with deponent in respect of such a caution, deponent, with the like concurrence, applied to his brother, Mr. Frederick Tyrrell, requesting him to call upon the deceased for the purpose of ascertaining her state of mind, which he promised to do."

Upon this account of the commencement of the business, several observations occur. First, the matter, as far as here appears, originates entirely with Mr. Harding: there is no note from the deceased, no servant nor disinterested messenger sent by her: Harding goes himself **[114]** to his own friend and solicitor; and it is Harding's own story "that Mrs. Harding wished to see Tyrrell;" but of the reality of that wish there is not a tittle of evidence, and from the circumstances already adverted to, there is every reason to suspect that it was misrepresentation. "He told him the will was in the hands of Delmar or Marsh, that his wife, and he at her request, had applied to Delmar and to Marsh for the will." This, again, is false; the deceased never did apply to Marsh or to Delmar for her will; but Harding applied to Delmar

as from the deceased, when Delmar told him "that the will was at Marsh's office:" and though Delmar afterwards attended the deceased in Harding's presence, yet the will was never mentioned by, nor even in the presence of, the deceased to Delmar. It is clear, also, that Harding was not aware the deceased either then had, or ever had, a duplicate in her own possession, of which she must have apprized him had she wished to revoke it. By this misrepresentation, then, "That the deceased wished to revoke her will, that it was in the hands of Delmar or Marsh, that the deceased herself, and he at her request, had applied to each of them for the will without success;" is Mr. Edward Tyrrell imposed upon, and induced to engage in making this new will? This is the very origin and foundation of the whole sequel. Upon this false basis, originating entirely with Harding, the subsequent transactions are all built. There is no reason to suppose that Tyrrell did not fairly embark in the business under the impression that he was going to carry into effect the real wishes of a free and capable testatrix. Upon the former point her free agency, **[115]** with a little more penetration, Mr. Tyrrell ought perhaps to have taken some alarm when he saw by this settlement that the wife had in her own power the disposal of a very large property, and that the channel of communication was her husband. Upon the latter point, the capacity, when told that Delmar had insinuated her incompetency, he did take the precaution of desiring that medical persons should first see the deceased; but all his precautions were directed to ascertain whether she was fit to make a will which she really desired and wished to make. Upon the other point, by far the most important, whether in this questionable state as to capacity she was or was not under the influence and dominion of her interested husband, no precautionary inquiry whatever took place; and this course was pursued throughout the whole business and by all the witnesses.

Edward Tyrrell applied to his brother Frederick, one of the surgeons of St. Thomas' Hospital, and (upon the authority of the husband) he conveyed to him the same impression, "that the deceased was desirous of making a will in favour of her husband, but that some doubts had been raised by Marsh, or by some one on his behalf, respecting the deceased's fitness for the performance of such an act." This is stated by Mr. Frederick Tyrrell in answer to the 6th interrogatory. So that Edward Tyrrell not only received himself, but conveyed the same false impression, from the misrepresentations of Harding, that the deceased really wished to make a will in favour of her husband, but that Marsh or some one was raising doubts in order to obstruct it. He also mentions "that he has **[116]** a notion that before his first visit to the deceased he saw Mr. Harding."

Frederick Tyrrell saw the deceased four times, but Harding was always present, except that on one occasion he went out of the room for a few minutes to call the maid servant, Apostles, and was also absent at a part of the execution; so that the examination of the deceased's capacity was always in the presence of the husband. He says, "that he was with her the first time about half an hour, and was satisfied of her capacity:" but the fact is that he and his brother did not act on that opinion. They, upon conference, thought it best also to call in Dr. Burrows. It is not necessary to examine minute discrepancies between the witnesses, nor to inquire whether a medical person, whose particular line of practice is attending lunatic persons, is more fit than other medical practitioners to form a judgment on the capacity of a mind weakened by paralysis, where there has been no delusion nor derangement. Be that as it may, Dr. Burrows' opinion is entitled to attention; but he again visited the deceased under the same prepossessions and prejudices. He states, "Two or three days previous to the 27th of February, 1827 (referring to a note witness made at the time), the deponent was called upon by Mr. F. Tyrrell who informed him, that he wished deponent to see a lady he, Tyrrell, was attending at Walworth, who was desirous of making her will; but that she was very much debilitated by paralysis, and that her husband wished to have her state of mind, relative to its fitness for a testamentary act, properly ascertained; that disease of the mind not be-**[117]**-ing within his particular practice, as it is that of the deponent, he, Tyrrell, had on that account applied to deponent, who on the 27th of February met Mr. F. Tyrrell at the deceased's house, being then introduced to her as having called to see one of the deceased's servants; on that occasion he sat and conversed with the deceased nearly three quarters of an hour, after which deponent informed Mr. F. Tyrrell that as far as he had seen of the deceased on that day she appeared capable of disposing of her property,

but that he could not come to a decided opinion on the subject until he had seen her a second time. Deponent was desirous of seeing the deceased a second time, because, although she was perfectly rational while he so saw and conversed with her, yet she was under very considerable agitation in contemplation of an operation which her maid-servant, of whom she spoke with great kindness, was to undergo; and deponent, not willing to increase such agitation, did not touch upon the subject of her will." Thus, then, the impression travelled: Dr. Burrows received it from Frederick Tyrrell; Frederick Tyrrell from Edward Tyrrell; Edward Tyrrell from Harding, the most suspicious and interested source from which the impression could possibly originate; and the deceased's wishes in that respect are highly improbable; are unsupported by any proof; and are contradicted by all the facts and evidence in the cause.

Dr. Burrows never saw the deceased but twice; on the 27th of February, when he and Frederick Tyrrell were there together; and on the 9th of March, when the instrument was ex-[118]-ecuted. On the third interrogatory he says: "He never was alone with the deceased. Mr. Harding was in the room on both occasions for great part of the time." On the seventh interrogatory: "The deceased was alone when Mr. Harding introduced him and Mr. Frederick Tyrrell: he introduced respondent as a medical friend of Mr. Frederick Tyrrell, who had come to see the maid-servant. Mr. Harding went out of the room to call the maid-servant alluded to, but he returned saying she had gone out."

This is the sort of contrivance by which the medical gentlemen were brought into the society of the deceased in order to judge of her capacity. Contrivances are always suspicious. If the deceased really wished to make this entirely new disposition, had a capacity for the purpose, and was a free agent, why not frankly and fairly explain to her the object and reasons of the visit? Why did not Harding say to her, "Mr. Marsh and Mr. Delmar refuse to deliver up your will, and they suggest that you are not in a fit state to make a new one: under such base conduct and unfounded insinuations, it is prudent, in order to insure the execution of your wishes and kind intentions, that respectable persons—persons of medical experience, of skill and judgment—should visit you, and converse with you, and learn your real wishes from yourself: I will bring respectable medical men for the purpose; you can have no objection to see and converse with, and satisfy, them of your intentions, and that what I represent are your own real wishes." This would have been proper and natural conduct, and having thus intro-[119]-duced these gentlemen, and thus prepared the deceased, the husband should have withdrawn from the room, if not from the house. Far more was necessary than the ability to answer a few questions on common topics: here was not only capacity to be proved, but here were volition and free agency to be ascertained, and to that point he should have desired the two medical gentlemen to address their inquiries. But here are these two medical men introduced by this contrivance on the 27th of February; a few questions are asked on common topics in the presence of the husband, on whose sole authority it is assumed that the questions are answered correctly: but still the visit ends by Dr. Burrows deposing "that he could not come to a decided opinion on the subject until he had seen her a second time." After an interview of three quarters of an hour this is the result, even as to capacity. As to the power of making any will, he goes a little further on interrogatory than on his examination in chief in one respect. In his answer to the eighth he says, "at his first visit he had no doubt whatever of the deceased possessing her mental faculties and power of reflection sufficiently to enable her to make a general disposition of her property in one bequest, and to bequeath legacies to her servants; he cannot swear the deceased was able to recollect, know, and understand the purport of any former will which she had made. He has no doubt whatever that she was able, at such time, to comprehend the effect and purport of such a will as that she subsequently executed in his presence." This is the utmost length that Dr. [120] Burrows can go, prepared as he was by the partial view which Harding exhibited to him of the deceased and of her wishes. If this will were in conformity to her previous intentions, and declared or ascertained wishes, Dr. Burrows thinks she had sufficient capacity to give effect to the act: but if, when he gave his evidence, he had been in possession of the earlier history of this transaction, and of all the circumstances which preceded this will, then from his testimony it is clear he must have arrived at a different conclusion and have given a different opinion. His answers to other interrogatories

infer as much; for instance, on the eleventh, he thus answers: "That when he visited the deceased on the 27th of February, he was informed by Mr. F. Tyrrell, as he best recollects and believes, that the deceased had, previous to her marriage, made a will in favour of some individual other than her husband, upon which respondent inquired, 'whether such individual was her next relation.' Tyrrell replied it was not, but that she now wished to revoke that will and to make a new one in favour of her husband, and that it was to satisfy all parties of the deceased's competency to make that new will that respondent was applied to." Now, though the person principally benefited under the will referred to was not a next of kin, yet it is to be remembered the deceased had no known relation. And how was this application to Dr. Burrows "to satisfy all parties?" What! the parties in whose favour the former will was made: they knew nothing of what was going on. "Respondent knew not, and did not hear, **[121]** that such former will had been made in favour of Mr. William Marsh or his family, or that such individual was one of the deceased's oldest friends, and a friend of her late brother, through whom he heard the deceased's property was derived; he never heard that the deceased, subsequent to her marriage, executed a will, by which she gave her house and furniture at Walworth to her husband absolutely, and 5000l. navy five per cents. to him for life, with reversion to his son by a former marriage, or that by such will she bequeathed the residue to Mr. William Marsh and his family." If then Dr. Burrows had known all the previous history, it is to be inferred that he would not have sanctioned this instrument without some better proof that she was acting of her own free, uninfluenced will and wishes.

To revoke this former will so made and so adhered to, it was necessary that the deceased should be proved to have recollected at least its general contents; to have recollected that she had distributed memorials among her friends; that she had provided for her servants; that she had given her husband a certain portion; that she had bequeathed the bulk of her fortune to those whom she had long adopted for that purpose, the children of Mrs. Amelia Marsh: it was necessary that she should be proved, upon some rational grounds negativing the importunity of her husband, to have become desirous of abandoning all her former intentions; but to no part of her former will is there the least reference. That this new will was without the importunate influence of the husband there is not the slightest appearance in any part of the evidence of Frederick **[122]** Tyrrell or Dr. Burrows. Harding is always present, he scarcely goes out of the room for an instant, and no question upon the point of free agency is put to the deceased.

Without then stating this preliminary evidence more minutely, there is nothing to convince me that the mind of the deceased was sufficiently probed to ascertain whether she was or was not either a free or, as applied to such a will, a capable testatrix; nothing satisfactorily to discover what her real wishes were, without the restraint and influence of her husband.

It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. In *Combe's case* the rule is laid down in these words: (*a*) "It was agreed by the judges that sane memory for the making of a will is not at all times when the party can answer to any thing with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the will is void." It is not answering that "she had been round Clapham Common," or "that her house was leasehold," or the like, even if the questions were answered correctly and the husband had not been present, **[123]** that would be sufficient in the present case. So again, in the *Marquess of Winchester's case* (6 Rep. 23): "By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason." To support then such a complete revolution in the testamentary dispositions of the deceased, it was necessary to shew that she had recollection of what the former disposition was, even supposing there were no grounds to suspect a mere tutored acqui-

(*a*) Moore's Rep. 759. S. C. 8 Vin. Ab. 43, No. 22.

escence under the influence of the husband. The influence of the husband, however, is much more readily inferred to have its effect than the importunity of the wife, and yet it is laid down, "If a man makes a will in his sickness by the over importuning of his wife, to the end he may be quiet, this shall be said to be a will made by restraint, and shall not be good" (8 Vin. Ab. 166, No. 3). And Swinburne says in respect to restraint, "whereof no certain rule can be delivered, but it is left to the discretion of the Judge, who is to consider all the circumstances" (part vii. s. 2). In my judgment in the present case the circumstances are quite sufficient, prior to the application of the husband to Mr. Edward Tyrrell, and quite sufficient, from his presence upon all subsequent occasions, to require that he should afford the most satisfactory proof that the deceased was not a mere unresisting instrument in his hands, **[124]** so taught, tutored, and impressed, as to say and do all that Mr. Edward Tyrrell states to have taken place.

With this view of the case it may hardly be necessary to go, with any minuteness, through the account given of the instructions and execution. Mr. Edward Tyrrell, having given entire credence to the representations of Harding, and to the report on the capacity made by the medical gentlemen, proceeded, on the fifth of March, to take the instructions; and his account of what then passed is stated at considerable length: and had it not been already so repeatedly cited in the argument, it might have been important here to have read it at length: but it will be sufficient to refer to parts of it.(*a*) His **[125]** narrative, supposing it to be quite correctly given, appears at first

(*a*) "Within a day or two after deponent (Edward Tyrrell) had learnt from his brother that Dr. Burrows and he were both of opinion that the deceased was in a fit state to manage her own affairs, he, deponent, informed Mr. Harding, who called on him, 'that he was now quite satisfied, and had no objection to attend to take Mrs. Harding's instructions whenever she should make an appointment.' An appointment was then made by Mr. Harding for deponent's attendance: in consequence whereof deponent, on the 5th of March, 1827 (having referred to his book), attended at the deceased's house in York Place, Walworth: on his arrival there about noon, Mr. Harding said, 'I am sorry our appointment was made for to-day, as Mrs. Harding has had a bad night, and is not very well to-day.' Deponent said, 'he was sorry to hear it, but he supposed she was well enough to see him:' Mr. Harding said, 'that she was;' and the deponent was shewn up stairs into a small sitting-room on the first floor in the front of the house; Mr. Harding accompanying him: they found Mrs. Harding alone, evidently expecting deponent, sitting by the fire, and writing materials were on a table at hand. On deponent entering the room the deceased with some difficulty rose to receive him; on which Mr. Harding said to her, 'Don't trouble yourself, Mr. Tyrrell will excuse your rising.' After deponent had taken a seat, as Mr. Harding did also, and after the deceased had made some inquiries after deponent's mother, and other branches of his family, who were known to her in consequence of her marriage with Mr. Harding, she proceeded to give deponent a statement of her affairs. The deceased of her own accord entered upon such statement saying, 'I suppose Mr. Harding has told you what it is I want you to do, and how ill the Marshes have behaved to me.' Deponent told her 'that Mr. Harding had so informed him;' and deponent then said 'that he was come according to her desire, as he had been informed, to take instructions for her will.' The deceased said, 'she was much obliged to him, but she wanted to know what she should do to get her former will and papers out of the hand of Mr. Marsh' (meaning Mr. Marsh the elder). Deponent asked the deceased 'in whose hands she considered her will to be, whether in the hands of Mr. Delmar, or of Mr. Marsh.' She replied, 'that she supposed in the hands of Mr. Delmar, as she had executed it at his office, and left it there:' she said 'that she had several times called on Mr. Delmar for the purpose of getting her said will out of his hands, but could not get it, and that she wished to have it that it might be destroyed.' The deceased gave deponent to understand that the will she so wished to destroy was made in favour of Mr. Marsh, but she did not otherwise specify its tenor: she, in continuation, said 'that she was very uneasy at not being able to get any account from Mr. Marsh, and that she should be very thankful if deponent would exert himself to get both the will and the account from Mr. Delmar as soon as possible.' Mr. Harding then left the room: he had not joined in the conversation before deposed of in any manner, except to correct a date, and to correct the deceased, when in the course of such conversation

sight strong and favor-**[126]**-able ; but the Court must consider whether the bias and prepossession of the witness have not **[127]** led him to colour his deposition in chief rather too highly. It must be recollected that the **[128]** husband was present nearly the whole time. How far he may not have impressed, and by influence compelled, her to say all this (if she did say it exactly as it stands upon the deposition in chief) may be suspected. There is sufficient to raise a presumption against the husband that she was a mere instrument in his hands, and it was incumbent upon him to repel the presumption so raised. But it would be extraordinary if all did take place exactly in the manner the deposition is calculated to represent. Here is a long, smooth, fluent account of all the circumstances, which Harding had before represented to Mr. Edward Tyrrell; almost totidem verbis, all told without interruption: of her own accord; Harding not **[129]** interfering, not dictating, merely supplying a date and the name of his co-executor. If this were so, it is extraordinary that Frederick Tyrrell after his first interview should have required the attendance of Dr. Burrows: if there was all this ready and active capacity, this clear expression of her wishes, it is extraordinary that Dr. Burrows should have desired a second interview before he gave a decisive opinion of her being capable of making the sort of will he was induced to suppose she wished to make: particularly when, at this interview with Edward Tyrrell,

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she named Mr. Arthur Marsh instead of his father. What the deceased so addressed to deponent was spontaneous on her part, and was not, in deponent's presence, dictated to her, nor was she, save as aforesaid, prompted in what she said. When Mr. Harding had so left the room (deponent and deceased being then alone together) the deceased said, 'I wish to leave my property to Mr. Harding after my death, and to leave a legacy to each of my three servants, at the same time naming the three servants: to the man-servant, whose name he does not without reference recollect, and to Mary Apostles, £300 each ; and to her other maid servant, whose name he does not recollect, £150. Such instructions as the deceased dictated the same were by the deponent committed to writing, and he had written thus far when Mr. Harding returned into the room. Deponent then asked the deceased 'whom she appointed to be her executors?' She answered, 'Mr. Harding;' and turning to Mr. Harding and addressing him, she added, 'and the gentleman you mentioned to me.' Mr. Harding replied, 'You mean Mr. Tyrrell of Lincoln's Inn.' The deceased answered, 'Yes.' Deponent then wrote down the names of Mr. Harding and of Mr. John Tyrrell as of the deceased's executors. This done, the deponent, in the presence of Mr. Harding, read over to the deceased, in an audible and distinct manner, the instructions which he had, in manner aforesaid, committed to writing; and having done so the deceased signified her approbation by saying, 'Very well,' or something to that effect. The deponent then made an appointment with the deceased for the execution of a will to be drawn pursuant to the said instructions; the 9th of March was named, after which he took his leave. Between the 5th and 9th of March deponent suggested to his brother Frederick that, to remove all doubts as to the capacity of the deceased, and all responsibility from him, the deponent, as a professional man, it would be proper for Dr. Burrows and himself to attend with the deponent to be present at the execution of the will then in preparation, which was agreed to; and accordingly, the will having been engrossed from a draft will, which in the interim deponent had prepared from the aforesaid instructions, deponent attended at the deceased's residence at about 2 o'clock on the 9th of March, meeting his brother and Dr. Burrows there, so nearly at the same time that they were all shewn into the deceased's sitting room at once; finding there the deceased and her husband. A few complimentary words had passed chiefly between Dr. Burrows and the deceased, when deponent produced the will he had prepared for execution, telling the deceased 'that it was the will which he had drawn according to her instructions,' or to that effect; and 'that he would read it to her.' The deponent then audibly and distinctly, and in a deliberate manner, read over the will. When he had read the legacy to the deceased's second maid servant, namely, as a legacy of £150, the deceased stopped him, saying, 'I wish so and so (naming the servant) to have the same legacy as the other two servants.' Upon which deponent made an alteration in the said will, by striking the sum of £150 through with a pen, and by inserting in lieu thereof, and over the same, the words 'three hundred' or 'three' instead of the words 'one' and 'fifty.' Dr. Burrows then in an under tone to respondent observed 'that Mr. Harding had better leave the room while his wife

Harding represented that "the deceased had had a bad night and was not so well that morning."

But it is extremely difficult to reconcile this deposition in chief, so far as respects the spontaneity of the deceased, and the active part she takes in the communication to Mr. Edward Tyrrell, with what he himself states when pressed upon interrogatory. The Court cannot suppose that he has intended to give an unfair representation; but his bias may have caused him unawares, in his deposition, to convey a very incorrect impression of the real character of what took place. For example, he states this: "After deponent had taken a seat, as Mr. Harding did also, and after the deceased had made some inquiries after deponent's mother and other branches of his family, who were known to her, she proceeded to give a statement of her affairs." Now, on reading this account I was led to suppose that the deceased, recognizing Edward Tyrrell, began the conversation of her own accord, and therefore that her behaviour shewed memory, intelligence, and alertness of mind, and all that might lead **[130]** to the inference of spontaneity and capacity; and that this evidence was on that account important. Yet, on the eighteenth interrogatory, he says, "On entering the room, and being introduced by name, the deceased said to respondent, 'I hope you are very

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executed the will,' and deponent suggesting it to Mr. Harding, he did so. When Mr. Harding had left the room the deponent read over a second time that part of the will which he had so altered, and the remainder thereof, and having finished, the deceased signified her approval of it by bowing her head: deponent then handed her a pen, requesting her to sign her name opposite the seal (already affixed); the deceased made an attempt to sign her name, first, with her right hand, and then with her left; but she was unable to do it; her fingers appeared to be contracted and her hand unsteady, which previous thereto was unknown to the deponent. Deponent perceiving the deceased's inability to sign her name, took the pen out of her hand, saying, 'We must get you to sign with your mark, Mrs. Harding;' to which she replied, 'Yes,' and the deponent, preparatory to such mode of execution, and to make the latter clause of her will and clause of attestation conformable, altered the same severally, and, having done so, handed her the pen a second time, pointing with his finger to the seal, or place whereon her mark was to be made. The deceased accordingly made a cross: deponent then placed his seal on the wax impression, desiring her to lift it off, which she did: she next, at his desire, laid her hand on the will, and after his dictation, being so directed to do by him, she repeated the words, 'I declare and publish this to be my last will and testament, and request you, gentlemen, present, to affix your name as witnesses thereto.' Dr. Burrows, Mr. Frederick Tyrrell, and deponent then subscribed their names at the foot of the clause of attestation. While the witnesses still remained, deponent asked the deceased 'what he should do with the will?' to which she answered, 'I think you had better keep it for me:' upon which deponent folded up the said will and put it in his pocket. After the usual parting compliments deponent withdrew in company with his brother and Dr. Burrows, leaving the deceased and her husband together. Sophia Harding was, as well on the day she gave instructions for her said will as on the day and time of the execution thereof, as deponent verily believes, of perfect sound mind, memory, and understanding, and well knew and understood what she at such times said and did, and what was said and done in her presence, and was fully capable, as the deponent verily believes, of giving instructions for and of executing her last will, or of doing any other serious or rational act requiring thought, judgment, and reflection. Deponent has no doubt whatever of her capacity, having in the first instance his attention drawn in a particular manner to the enquiry of that fact, as aforesaid: she, at the times deposed, was evidently very debilitated in bodily strength, and had almost lost the use of her limbs; her speech also was affected; and at times, particularly on the day of his taking the instructions, she was for a moment flurried and shed tears; but the impression was very transitory; she soon recovered herself; on the day of the execution of the will she was only once excited to tears or apparently flurried; that happened when deponent dictated to her the words of publication: she, for an instant, was then excited, but readily recovered herself, and repeated the words in a very firm and deliberate manner, shewing that she knew and fully understood the import thereof."

well,' and shortly after, 'I hope your mother is well;' she made the latter inquiry on respondent saying 'that he had that morning seen his mother, who desired her compliments.'" This gives quite a different character to the inquiry: the one account inducing a belief that the inquiry originated with the deceased; the other shewing that it grew out of a previous observation, and was such a remark as a person in a state of great imbecility might well make.

In respect to this "statement of her affairs," it is difficult to reconcile it with his own answer on the third interrogatory: "At the interviews which the respondent had with the deceased, and at which he was present with others, she did not speak until she was spoken to; when so addressed she confined her answers, as much as she could, to monosyllables, but not always so; it appeared she did so on account of the difficulty of utterance under which she laboured; she never, in his presence, attempted spontaneously to join in general conversation; she only in general gave answers to the questions put to her, but she did, of her own accord, and not in answer to any question, make a statement to respondent on the day of his taking instructions for her will, viz. 'that she had been ill-used by the Marshes (her own words) and that she could not get an account from them, nor her will out of their hands.'" Here, again, is difficulty **[131]** of speech; she seldom spoke but in answer to questions, generally only in monosyllables, yet she entered on a "statement of her affairs:" but what does the witness specify?—that she had been ill-used by the Marshes, and could not "get her will." These are the very circumstances about which Harding had been "worritting her," and might now either have impressed on her weakened mind or compelled her to hold out; or they are the mere repetition of what Harding had previously told Edward Tyrrell. It was the tale that was to be told and that might easily be learnt. As to "not getting the will," either she was capable or incapable; if capable, she must, I repeat, have been aware of the duplicate delivered to Apostles, and have purposely concealed it: if incapable, then she might have forgotten the existence of that duplicate, but then she would not have had mind and memory sufficient to remember the contents, nor consequently to revoke her will. But what is the ostensible reason? "The Marshes had used her ill." Is that true? or, if true, does it account for cutting off all Mrs. Amelia Marsh's children, and passing over all her other friends, and abandoning all the other peculiarities of the wills of 1816 and 1818.

Again, how does Mr. Tyrrell state in chief the actual instructions? "After Mr. Harding had so left the room, deponent and the deceased being left together, the deceased said, 'I wish to leave my property to Mr. Harding after my death, and a legacy to each of my old servants.'" Now, on reading this, it would be supposed the deceased, the moment she was left alone with Mr. Tyrrell, began the conversation, **[132]** and of her own accord commenced giving the instructions, perfectly understanding, and spontaneously proceeding with, the transaction intended to take place; and in that view, as far as capacity was concerned, it would be a favourable fact: it would not indeed go far as to the control, marital authority, and undue influence of the husband (the more important branch of the case); for it was a short lesson easily imprinted and remembered, which was to be submitted to and repeated. But when the witness is pressed upon interrogatories, it has not even this circumstance (favourable at least to the capacity) of the deceased proceeding of her own accord to give the instructions; for, on the twentieth interrogatory, Mr. Tyrrell answers, "The instructions given by the deceased for her will were given freely by her, but not until respondent put questions to her on the subject; no third person was present. After two preliminary questions (viz. whether she wished the will made by Delmar to be revoked, and to make a new will; to both of which the deceased answered 'Yes'). Respondent asked her, 'To whom she wished to leave her property?' she answered, 'To Mr. Harding after my death.' 'What! the whole of your property?' 'Yes, the whole, except legacies to my servants.' Respondent then requested her to give him the names of the servants, and amount of their legacies, which she did with some difficulty, that is, she was not able to articulate their names readily; and she did not appear to have made up her mind till then as to the amount of such legacies. Mr. Harding at this period returned **[133]** into the room; respondent inquired who she would have as executors? she said, 'Mr. Harding,' and, turning to him, added, 'and the gentleman you named.' Mr. Harding said, 'You mean Mr. Tyrrell of Lincoln's Inn,' she answered, 'Yes.'" This gives a very different colour to the business: even

these short instructions, instead of originating with the deceased or being delivered of her own accord, are extracted from her by interrogatories.

The Court has no reason to impute to the witness any intention to misrepresent; but he was duped, he was prepossessed, he had had repeated conversations with Harding: he had got thoroughly impressed that the deceased thought herself ill-used by Marsh; that she could not get her will; that she wished to make a new will and to give her property to Harding: he was not aware of the disposition in the former wills—the considerations on which they had been made—the manner in which they had been adhered to—the fruitless attempts Harding had made to get the deceased to take her concerns out of Marsh's hands and to transfer them to himself; not knowing these circumstances, perhaps it may be too much to impute to Mr. Edward Tyrrell even a want of vigilance in allowing himself to be so imposed upon by Mr. Harding, or a want of penetration and sagacity in not suspecting his objects. But, hearing that there had been a former will and that the state of her mind was doubted it is to be regretted that he did not inquire a little more into the contents of that former will, and probe the mind and memory of the deceased as to the disposition she had before made and was now about **[134]** to revoke. Seeing also the large property she had at her disposal under these deeds of settlement made in the year 1816, how weakened she was in capacity, and how entirely the origin and conduct of this new will was managed by the husband himself—everything passing in his presence except mere formalities—it is to be regretted that Mr. Edward Tyrrell's penetration did not point out to him the propriety and importance of satisfying himself that there were no marital authority and undue influence interposed; and yet all he hunts after is a little testable capacity to give effect to a testamentary disposition which, upon the previous representations of Harding, he allowed himself to believe she really wished to make.

If the instructions, with the previous visits of the two medical men, do not satisfy the mind of the Court as to the testamentary intentions of the deceased, the execution, on the ninth of March, carries the case no further. Here are the same sort of inquiries made: the husband is present, except being sent out of the room for a minute, just while the formality of the execution by the attempt to sign takes place. There is, however, the single circumstance of her desiring George's legacy to be increased and made the same as the other two servants. Whether even that circumstance is not more like a cunning artifice, devised by Harding, in order to give the deceased the appearance of capacity, than the spontaneous desire of her own mind, may admit of some doubt; for neither George's station, nor the length of her service, nor the deceased's former estimate of it, lead to her being placed on the same level with Rigden **[135]** and Apostles.(*a*) It may have been, and it looks, like a contrived suggestion of Harding; for his conduct has exposed him to every suspicion.

On the 11th of April the deceased has a fresh paralytic attack, and yet on the 21st here is a codicil obtained from her, which, Mr. Edward Tyrrell being out of town, Mr. Timothy Tyrrell is employed to prepare. He comes with the same prepossessions and impressions derived from Mr. Harding, and he ventures upon no better ground to communicate the same prepossessions and aspersions to Dixon, the medical attendant; for on the fourth article he says, "Deponent briefly stated to Mr. Dixon that Mr. Marsh had prevailed on the deceased to make a gift to him of 10,000l. and had procured from her a will in his favour, and also, unknown to Mr. Harding, a settlement of her property." There is no proof of one nor of the other; the will is not in his favour, though it is in favour of part of his family. "That she had since made a will revoking that in favour of Mr. Marsh, and that the last will was in favour of Mr. Harding." All this he states as fact upon mere hearsay, proceeding from no better source than the imputations of a most interested party—the husband—who was getting a new will, almost exclusively in his own favour. Here the husband is still more directly an agent; he is the medium of communication between the deceased and the witnesses, the deceased being by the last paralytic attack rendered so weak as **[136]** to be unable to express herself intelligibly to Mr. Tyrrell.

What, then, is the Court to consider this codicil? the wish of a capable testatrix,

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(*a*) It appeared from Rigden's evidence on the eleventh article and thirteenth interrogatory "that he went into the deceased's service, as footman, in 1795; Mary Apostles, as housemaid and lady's maid, in 1799; and Mary George, as cook, in 1804."

or the fraudulent contrivance of the husband to give a semblance of confirmation to the will? The witnesses were off their guard, for since it was to the prejudice of the husband, they might easily have pinned their faith upon him as to the volition of the deceased, not discovering that he might have quite a different object in view. The codicil confirms the will, but what is its disposing object? to give rings to three near and dear friends of the deceased—the three Misses Binstead. The deceased by her will had given them an annuity of 100l. with benefit of survivorship: a ring is now substituted! that change is not very probable: but the fatal fact is, that two of the Misses Binstead were dead! the death of one, if not of both of them, must have been known to the deceased. Harding might not have known either event, for the deceased does not seem to have been in much confidential communication with him: but what must have been the state of her capacity when this codicil was obtained? The transaction lies under a strong suspicion of being a contrivance to give the appearance of confirmation to the will: and it is the only confirmation; for as to any recognition of the act, through any disinterested parties, there is none.

The case in my judgment might rest here: but there are detached circumstances which throw some light upon the character and conduct of the transaction.

Repeated applications were made to Marsh **[137]** for money, but all access to the deceased was prohibited him: drafts were drawn and presented, one for 400l., a second for 100l., and a third for 100l. When the drafts were presented the signatures were suggested not to be the hand-writing of the deceased; Mr. Edward Tyrrell presented the last himself and said he saw it signed. An offer was made to carry the money to the deceased, but access was refused. This seems extraordinary. What reasonable grounds could there be for refusal, if the deceased were a free and capable agent, dissatisfied with the Messrs. Marsh, and having with sufficient capacity transferred her entire confidence to her husband and freely made a will in his favour? She was under the protection of her husband, assisted by his attornies, and residing in her own house: where could be the fear or the objection to the money being carried and delivered to her? She would merely have had to recognize the draft, and declare her wishes to have the money. When the signatures had been doubted, it is extraordinary that the parties, for their own credit, did not insist that some person—if not one of the Messrs. Marsh, that some clerk belonging to their house—should accompany them to the deceased to verify the signature: but, even now, the drafts themselves are not forthcoming.

Here is, however, a letter produced on the other side, dated the 31st of March, addressed to "Messrs. Marsh," demanding the delivery of the deeds, wills, and papers; and signed "Sophia Harding." Here are also a great number of drafts signed by the deceased from 1817 to 1820. The signatures to the earlier drafts are a neat formal hand; to the latter **[138]** drafts, from the autumn of 1824, the signature becomes very slovenly, bearing very little similitude to the earlier ones; and the suggestion is, that the signature to the latter is a forged imitation of the early signature of the deceased. The explanation offered is, not that the deceased really signed the letter of herself, but that her hand was guided by Harding. When she executed the will on the 9th of March she could not make any signature; she attempted but failed, and was obliged to make her mark—a mere cross. Whether a person with her hand in this paralysed condition could so far assist in the signature, or her hand could be so used as to make a signature nearly approaching the original character of her hand-writing, is more than the Court will venture to give an opinion upon: but here is her hand entirely in the control and use of her husband, and there is no proof that her mind was not equally under his influence and authority; he uses both to endeavour to get at her property and her papers, excluding from all access to her those persons to whom her property, and her papers had been intrusted by herself. The inferences against the husband are obvious.

It should have been noticed that earlier in March, about a week after the execution of the will, Mr. Edward Tyrrell, in the character of the deceased's solicitor, wrote to Mr. Marsh requiring her account. Mr. Marsh, in his answer, says "that he has directed his son to make out Mrs. Harding's account immediately, but before he puts it into other hands than her own he deems it necessary to see the deceased in person; and he proposes, accompanied by **[139]** Mr. Delmar, to meet Mr. Tyrrell at the deceased's house:" to this Mr. Tyrrell answers "that the deceased refuses to see him, and has given orders that he shall not be admitted." Mr. Marsh replies, "He cannot

consider such a message as emanating from her own free will, and must persevere in his determination, more especially as it is in compliance with her repeated injunctions, both to him and to his son, not to give any papers or information respecting her concerns but to herself personally." The truth of this is confirmed by the history and by the res gestæ. Here then is a careful exclusion of Marsh, of his son, and of Delmar; here is an attempt to get the original papers and to get money; first by the solicitor, Tyrrell, then by drafts with the deceased's asserted signature, then by this letter, with a signature at best made by Harding guiding and using the deceased's hand: but though Marsh offers to attend with papers and to meet Mr. Tyrrell; though Arthur Cuthbert Marsh offers to carry the money and to deliver it into the deceased's own hand; though she is living in her own house with her husband, and Marsh only proposes to see her at a time to be fixed by Tyrrell, yet non-access is enforced under a pretended order from the deceased herself to exclude these, her longest and dearest friends. Certainly these circumstances do pretty strongly increase the suspicion that Harding was at this time making use of the deceased as a mere instrument in his own hands, and for his own purposes.

There is one further circumstance to be noticed. The deceased died in the middle of **[140]** the night, between the 7th and 8th of March. Harding alone was with her; no other person was present; no other person was sitting up; so that she must have died rather unexpectedly, though he admits her incapacity for a few days before her death. He states "that she died about four o'clock in the morning; that he went out about six, leaving the bedroom locked up and no key in the door, and without apprizing the servants of her death; that he returned about half-past eleven, unlocked the door, and then told the servants of the deceased's death;" but he even then desired them not to communicate it to any one, particularly not to the Messrs. Marsh or Mr. Delmar. The next morning being the 9th, he and Mr. John Tyrrell are sworn executors, as appears by the jurat on the will. I cannot understand, if the making of this will was a fair and honest transaction, why, this poor woman dying in the night, her body was to be locked up and the matter kept secret from the servants for seven or eight hours, or why the death was afterwards to be kept secret, especially from the Messrs. Marsh and Delmar, or why there was this great haste in getting sworn to the will. Where was the necessity for this clandestinity and contrivance? Here was non-access to the deceased, and exclusion of the Messrs. Marsh, not only when the deceased was alive, but even after her death. What could induce an honest man, having acted honestly and fairly, to have pursued this conduct? It serves to confirm the suspicion that Mr. Harding has throughout been a man of contrivance; that he has by misrepresentation induced the witnesses to embark in his object, and that these **[141]** persons have in a great degree been the dupes of his imposition.

Upon the whole, having in various parts of the case explained the feeling that has been impressed on my mind in respect to the transaction, and the grounds and principles upon which that impression has been formed, it is superfluous to recapitulate the several points. Considering the extreme improbability of this entire change of disposition—the means used by the husband to urge her to place her concerns in his hands—her long resistance till reduced to a weakened state of capacity—the presence of the husband conducting all these transactions, it is not proved to my conviction that this latter will was the real mind and wish of a capable and free testatrix.

On the contrary, I am of opinion that it was the will of Mr. Harding—obtained by him by undue influence and marital authority—contrary to the real wishes and intentions of the deceased, as far as she was capable at that time of forming any testamentary intention.

In my judgment she never did depart with a willing and disposing mind from that disposition of her fortune which she made in 1818. That will therefore remains her true will: and as the whole transaction of this latter will originated with Mr. Harding, and the whole expense of this suit was occasioned by him (for Mr. John Tyrrell is merely the nominal party), I feel bound in justice to condemn Mr. Harding in the costs of Mr. Marsh.

[142] BIRD *v.* BIRD. Prerogative Court, 17th Dec., 1828.—Where the drawer and attesting witnesses of a will (executed ten days before death by a person of eighty-five, in weak bodily health) are confirmed as to capacity, volition, and free agency by adverse witnesses, and by the deceased's affections, declarations, and recogni-

tions; the general character of the drawer (an attorney employed by the deceased for many years), and slight discrepancies in the evidence of the factum are not material. A will, in such a case, pronounced for, and the opposer, who had pleaded incapacity, conspiracy, fraud and circumvention, condemned in the costs incurred since the giving in of his allegation.

[See as to costs, p. 553, post.]

The King's advocate and Lushington in support of the will.

Burnaby and Addams contrà.

Judgment—Sir John Nicholl. The parties in this cause are the following:—The deceased is John Bicknell: the person propounding the will is William Bird, a nephew and the sole executor: and the person opposing it is John Bird, another nephew and one of those entitled in distribution. The personal property is of the value of 10,000l. or 12,000l., and the realty is about 200l. a year, in addition to an estate of about 300l. a year, entailed upon the heir at law. The deceased at the time of his death was a bachelor, and his family consisted of one sister, Sarah Bicknell; one niece, the daughter of a brother, Mary Waldron; and four children of a deceased sister, named Bird, William Bird and John Bird the parties, Mary Webber and Joan Bond respectively married. The personalty therefore was distributable—one-third to the sister, one-third to the niece, Mary Waldron, and the remaining third among the four Birds, that is one-twelfth to each: so that supposing 12,000l. was to be distributed, the sister would take 4000l., Mrs. Waldron 4000l., and William Bird, John Bird, Mary Webber and Joan Bond each 1000l.

[143] The deceased's heir at law was a great nephew, John Bicknell, descended from an elder brother, Peter: to him the real estate would descend, but he is not entitled in distribution; a real estate, however, as I have already said, of 300l. a year, which was entailed, devolved to him on the deceased's death.

Two wills are produced: one dated on the 21st of September, 1787, forty years before the testator's death: but all the parties benefited under it are dead, except his sister Sarah, who was a legatee under it for 300l.; so that that will would leave the deceased nearly in a state of intestacy.

The other will, the one propounded, is dated on the 13th of September, 1827, ten days before the death; and it gives his estate at Stapley to his niece, Mary Waldron, for life, then to her son and his heirs: his estate, called Lippencotts, to his great nephew John Bird, son of William: an annuity of 100l. to his sister Sarah Bicknell; 200l. to his niece Mary Webber, and 200l. to each of her daughters; 200l. to his niece Joan Bond; 50l. to his nephew John Bird, and 50l. to each of his children; 50l. to John Sharland, a great nephew; and 50l. to Lucy Hardwidge, a great niece, neither of whom is entitled in distribution. The house, garden, and orchard at Bradford, where he resided, to his sister for life, and then to Mrs. Webber. The residue of his real and personal estate to William Bird, who is appointed the sole executor. Here then all parts of his family who are, and some who are not, in distribution, are noticed: but the bulk is given to William Bird; and he is placed in the confidential situation of executor.

[144] Who then is the party opposing the will? Not the sister, who in case of an intestacy would be entitled to one-third; on the contrary she is a witness against her own interest, in support of the will; not Mrs. Waldron, the niece, who also would be entitled to one-third; not Mrs. Bond, nor Mrs. Webber, conjointly with John Bird; but John Bird alone, who would only be entitled to one-twelfth under an intestacy: yet it is not even John Bird, for his son, an attorney, who has been examined, proves on interrogatory that the real opponent is John Bicknell, the great nephew, who is the heir at law and not entitled in distribution. Instead of trying the validity of the paper at common law, where his real interest could alone be ascertained, where there would be a vivâ voce examination before a jury, supposed to be the best mode of detecting fraud and perjury, John Bicknell has set up John Bird as the opponent here, and has agitated the question in a jurisdiction which extends only over personalty in which he has no interest. Certainly, this is an extraordinary mode of proceeding, not calculated at the outset to create favourable inferences respecting the opposition; for contrivances always suggest a suspicion that there is something wrong and rotten at the bottom.

The will upon the face of it is regularly executed, and is attested by three witnesses —the attorney who received the instructions and drew the will, and two respectable

neighbours who were called in to see the fact of execution. They have been examined in support of the factum: and if they are credited, if the circumstances they state are believed, the case is **[145]** proved. The drawer of the will details what passed at the instructions and preparation; which, if true, sufficiently shews the mind and intention of the deceased: that account is confirmed by the act of execution and by all the witnesses speaking to their belief, supported by the facts which then occurred, of the deceased's being of sound mind and capable of giving effect to the will.

Before examining the evidence of the factum more closely, it may be proper to refer to the grounds of opposition. These are—

1st. The state of the deceased's affections towards the different branches of his family, rendering this disposition improbable.

2d. The state of his capacity; which, if not amounting to absolute and total incapacity, yet rendered him liable to fraud and imposition.

3d. A conspiracy between Mrs. Webber and William Bird to assume the custody of the deceased, and to exclude other parts of the family; and the consequent obtaining of this will by fraud and circumvention.

4. The association in this conspiracy of Symes, the drawer, a person of bad character, of low practice, and the particular friend of William Bird.

In support of these grounds of opposition a great mass of evidence has been gone into, and great expence has been incurred. Each party contends for costs, and I concur in thinking it must be a case for costs: for if this fraudulent conspiracy is established, the party who has framed and engaged in it must pay all the costs incurred in detecting it: while, on the other hand, if the grounds of opposition fail; if the imputation **[146]** of fraud is not sustained, the party who has been setting up an unfounded charge, a charge which he is unable to prove, must pay the costs which he has occasioned.

The mass of evidence, though great, does not require to be minutely detailed: but it will be sufficient to state the result of it upon the different points; and for that purpose the case (in comparison with the length of the depositions) lies within a very narrow compass.

The deceased was of a very advanced age, from 84 to 86, living at Bradford in Somersetshire, and his sister, Sarah Bicknell, who was four years older, resided with him. He had been engaged all his life in farming; part of the land which he occupied was his own property; and he being, as described, a penurious, reserved man, his property seems to have increased; for looking to the will of 1787, it is not probable that the property was nearly so considerable at that time. I have already stated what it was at the time of his death.

Upon the first head of opposition—the state of his affections—it is pleaded that "he had a great affection for his sister;" but this will is not inconsistent with that affection: for she was very old, she had a property of her own; he leaves her in addition to that property an annuity of 100l. and the house, garden, and orchard for life. This, under the circumstances, is more probable than by an intestacy to leave 4000l. at her own absolute disposal; but the more important part of the plea is the particular regard for John Bird, and the disaffection for William Bird. If that were proved, the principles laid down in the case referred to in the **[147]** argument, and decided last term, would apply.(*a*) The disposition would be against probability, and the case would set out with strong presumptions against the evidence of the factum: but if the fact be the very reverse; if William Bird was the favoured relation, then a strong foundation is laid, by the probability of the disposition, in order to support and corroborate the account of the instructions and execution.

To resort to particular circumstances in the depositions upon this head is quite unnecessary: whether the deceased was angry with William upon one subject, or with John upon another, need not be sifted; for the conduct of the deceased, in the different degree of intercourse he kept up with the two brothers, quite satisfies me. John Bird never came to the family parties at the Bradford revels, did not attend the funerals of the family, had very little communication with the deceased: it matters not in what this originated, whether in dissatisfaction at the conduct of John Bird respecting his father's will or his behaviour to his sisters; or whether it was of long date: the non-intercourse continued to the testator's death. John Bird had a large share of his father's property: on the other hand, William Bird, whether right or wrong in his differences with his wife, is constantly in the most friendly intercourse

(*a*) *Marsh* v. *Tyrrell and Harding*, supra, p. 84.

with the deceased, is consulted by him, assists in the management of his farm, and in buying and selling his stock and crops. There are various circumstances shewing that he was the favourite nephew; most of John Bird's witnesses admit those [148] circumstances; and the deceased's partiality continued and was shewn during his last illness and down to his death.

The effect produced was not extraordinary, viz. that several persons were impressed with the expectation that William Bird would have the bulk of the deceased's property. With respect to the affection pleaded for the heir at law, the evidence by no means establishes that the deceased had any intention that more of the landed property should go to him than the entailed estates, of which the deceased could not deprive him.

Here, then, the main ground of opposition, the point of affection, wholly fails: there is no improbability in the disposition; none in selecting William Bird to be his principal heir and executor, and in giving small legacies only to John Bird and his children, in order to shew no resentment in this last act.

The next ground is the state of capacity. The attempt to set up a case of total absence of testamentary capacity has been disavowed: but it is asserted that the deceased's mind was so weakened as to be incapable of protecting him against fraud, undue influence, or importunity. If so, if testamentary capacity existed, it is at least necessary that the practice of fraud and circumvention should be clearly proved. The fourth article takes a wide scope: prior to entering upon the account of the last three weeks of his life, it goes into the history of his former illnesses, one five years before; another six months before. Where parties resort to such long ranges, bearing so remotely and slightly on the real point in issue, so far from serving their own cause, they [149] only afford marks of its weakness. The substance of this long article, which occupies three pages, is as above stated. It thus concludes: "That from the commencement of his last illness, but more especially during the last three weeks of his life, the deceased was of unsound or greatly weakened and impaired mind and memory, and was in a state and condition both mental and bodily which peculiarly exposed him to, and rendered him absolutely incapable of protecting himself from, either actual fraud practised upon him, or undue influence and importunity; and that at no time within that period was the deceased competent to the making and executing of the pretended will propounded in the cause, or to the disposition of his real and personal estate therein contained, or to the doing of any other complicated act of that or the like nature requiring thought, judgment and reflection." This is a little deviating from the usual form in pleading capacity, but the Court will take the article, as it presumes it was intended.

Now it is unnecessary to go further back than the deceased's last illness. Up to that time he was quite an extraordinary old man of his age, in full possession of his faculties, mental and bodily. John Bird's own witness, Bridge, a medical man, who, however, never attended the deceased, who was but slightly acquainted with him, who never saw him during his illness, who is brought to give a speculative opinion upon a supposed case, says on the ninth interrogatory: "He last saw the deceased about six weeks before his death, he was riding on horseback alone about a mile from his own house. His conver-[150]-sation was upon common topics, and lasted a minute or two." This was the state of the deceased up to his last illness.

The principal witnesses to support the description given in the fourth article wholly disprove it; Bennett, a labourer, who sat up with him at nights; and the medical attendant, Mr. Liddon. The deceased's illness was a violent inflammation of the lungs, which affected his breathing, and required the application of a blister on his chest: after a time he had the thrush, which affected his speech till his mouth was cleansed. Bennett did not attend in the day time, only by night, till the last week or ten days, and even then in the day time only occasionally. It is true that this witness states "the deceased used sometimes to say things deponent could not make out: this was not constantly, only now and then: at times he was quite sensible." But what might be the wanderings in the night, "now and then," of a person labouring under an acute inflammatory disorder, or during the last few days of his life, is not very material. This account goes but a little way to prove general incapacity, or even what is called "fluctuating capacity." It is not necessary further to consider his evidence, as the Court has before it the much more satisfactory testimony of the medical attendant, produced by John Bird in support of his plea, Mr. John Liddon,

who deposes "he knew Mr. Bicknell for a period of twenty-seven years; and from 1816 to the deceased's death was his constant medical man: the last illness which the said deceased had was about a month previous to his death; by reference to his book he is **[151]** able to depose that he first went to attend the deceased, in consequence of it, on the 29th of August, 1827, and he died on the 23d of September following; deponent was sent for to attend him as he had been taken ill; the message, which was brought by the boy Burford, did not describe it as urgent; and on going to Bradford he found the deceased had been ill some few days; he was in bed breathing with great difficulty, and, with what deponent never observed in him before, an intermitting pulse: the inflammation on the lungs had come on as usual, and from the first moment he saw him deponent considered the case to be a lost one; the deceased was worse than he ever had seen him: he had not at this time a complaint which came on in an after state of his illness, viz. the thrush, or, as it is called by the common people, the white mouth; it always indicates a breaking up; it is an alarming symptom, but this did not appear for a fortnight after. Deponent, from the time of his so going to see the deceased, attended him regularly twice a day till his death; he never missed a day without seeing him once, but on two days the first or second visit was paid by his brother and present partner Henry Liddon; one of these was the day before his death, the other was about a week after deponent's first visit as near as he can recollect. Deponent's times of attendance were eight in the morning and six in the evening: he believes the deceased wished him to come oftener, for he understood from Mrs. Webber that he complained of his neglecting him; but deponent could not go oftener, **[152]** as Taunton is five miles from Bradford." He then describes the remedies he applied, which "for a few days occasioned a slight improvement, and deponent began to think the deceased might again rally, but he soon relapsed, and after a fortnight the white mouth came on; deponent checked it for at least two days, but it again got a head, because the deceased refused to take the medicines ordered; he would not take any medicines for the last fortnight." Then, after detailing the means used for clearing the phlegm from the deceased's throat, Mr. Liddon continues; "The deceased, from the first of his attending him, was confined to his bed; he never saw him attempt to get out of bed or to return into it, and from the decay of his bodily powers, which was extremely rapid, and such as to force itself on the deceased's attention, and produce depression of spirits, he thinks he could not do this without assistance; for in raising the deceased for the purpose of gargling his throat they were obliged to prop him up; nor could he feed himself, except occasionally he would put a cup to his mouth;" deponent further saith "that the visits he paid the deceased were generally of a quarter of an hour's length, sometimes longer, or just as he was able to extricate the phlegm, but never shorter; he cannot depose to having on any occasion heard the deceased utter an irrational or incoherent expression." From what I have already quoted it is manifest that this witness had the best opportunity of judging of the condition and capacity of the deceased: and he does not remember an "incoherent expression." He cannot **[153]** say that on any occasion, when he saw the deceased in his last illness, he considered him to be in an unsound state of mind, or in a state unfit to make his will, or do any serious or rational act, or even an act that might require some little exercise of thought; he never saw him but he appeared quite capable to dispose of his property, or to make any testamentary arrangements to which he might feel inclined: their interviews were pretty much alike, and their conversation respected chiefly, almost exclusively, his state of health; deponent on entering the room generally said, 'Well, sir, what is the report of the day?' and he recollects his invariable answer was, 'I do not feel very well, sir;' it was always that, for deponent recollects his rejoinder was 'Very well, sir, why no, sir, I suppose not, or there would be no need to see me:' and the deceased, in reply to deponent's hoping he was better, would often say, 'I don't think I shall ever be better in this world,' or to that effect: deponent recollects being struck with this as shewing the belief he had that he was sinking, which he had never done in any former illness." Therefore, prior to this, the deceased might not be impressed with a sense of his dangerous state. "Deponent never recollects to have seen him in any particular state of exhaustion, or weakness, more at one time than another, but every day he was getting weaker; he was never in deponent's presence in such a state as not to be excited to attend to what was passing around him; he always attended to deponent, except the last day or two, when a degree of stupor came on." **[154]** This, it is to be recollected, was several days after the will had been

executed. "Deponent has no idea that the deceased was unable to protect himself from fraud, undue influence, or control: to deponent he always appeared quite his own master, and was able to resist any improper interference with his concerns."

Here, then, is a complete disprover of the case set up by the opposer's own witness, a medical person, attending twice a day, at eight in the morning and six in the evening, competent, and having full opportunity of forming a judgment, and shewing that the deceased was fully capable of making a disposition of his fortune; negativing that he was peculiarly liable to be circumvented, or imposed upon, as alleged in the plea: at all events rendering it necessary to shew by decisive evidence that fraud and circumvention were practised upon him.

The next ground is a conspiracy formed by Mrs. Webber and William Bird, they obtaining the custody of the deceased, and excluding the relatives, and taking Symes for their associate. Of any custody, of any exclusion of his relations, there is no proof; but the reverse is proved: for John Bird, the son of the nephew, not a youth, but a young man of the age of thirty-one, an attorney at Taunton, was admitted, and was alone with the deceased after he knew that the will was made. He states, "That on the average during the last eight years he may have visited his uncle about once in two or three months, and on such occasions has dined with him." "About a week or ten days before his death (on the Monday or **[155]** Tuesday after the making of the will), having heard of the deceased's illness, he went to his house, and saw him in bed, for about fifteen minutes: the deceased knew him, shook hands with him, said, 'How is your health now?'" This person had been in ill health, a circumstance with which the deceased was acquainted. On the Monday or Tuesday then, after the witness understood the will was made, there was no custody—no difficulty of access—no incapacity. This charge, therefore, is quite unfounded and disproved. Next, where is the proof of fraudulent conspiracy? Mrs. Webber was the person who sent for Mr. Symes, but the will is against her interest; and proof of preconcert, between her and William Bird, there is none.

The case now arrives at the factum, not with any ground of improbability against the disposition, nor semblance of adherence to the old will (though no disaffection existed towards the party principally benefited thereby)—not with a testator deprived of testamentary capacity, but proved, by his own medical attendant, to possess faculties equal to the act, and to be not liable to imposition: the case itself too stripped of any evidence of fraud and contrivance; nor was there any concealment; for Mrs. Webber had previously mentioned the subject to Mr. Liddon, who was of opinion that the deceased was not incapable.

On the afternoon of the 12th of September Mrs. Webber sent a note by the boy Burford, desiring the attendance of Mr. Symes; but here again was no concealment, for Burford told Bennett where he was going. Bennett said, "He dare say it was to make master's will." Bur-**[156]**-ford went to Symes' house; he was not at home, but Burford found him at Mr. Were's, and delivered the note. William Bird happened to be there at the time, and was not at Bradford concerting the plan with Mrs. Webber, nor was he expecting that Symes would be sent for, otherwise he would have kept him at home or had him near Bradford. Symes had been employed by the deceased for several years; he had seen the deceased before during this very illness, but was not so forward as to hint, or suggest, a will to him. The deceased, as I have observed under this old will made forty years before, was in effect in a state of intestacy. Persons, however, who are saving money, and altering and adding to their property almost continually, are very apt to postpone making a disposition of it by will: if penurious, they do not like the expense—they fear they may have to do it twice over; and even the extreme of old age does not extinguish this spirit of postponement and procrastination.

Symes arrived, and had an interview with the deceased on the evening of the 12th. I see no improbability in his relation of what passed, as applying to the deceased, still less any improper conduct in Symes; on the contrary, with propriety and forbearance, he waited till the deceased should commence the business. He says, "He found the deceased alone, and very ill in bed: deponent was very much struck by the great alteration in his appearance, and from his look deponent believed he would not recover. The deceased said 'he had got a blister on his stomach:' he shook hands with deponent, and requested him to sit down by the bed-**[157]**-side, which he did; the deceased then said 'he had sent for and wished to speak to deponent about some

property of his (which deponent knew well) at Wellington, that he wished to sell it; and thought he could obtain a good price for it:' he went on talking about his houses and estate there, but deponent thought it was no time for the deceased then to be thinking of selling his estates." They conversed upon this and other business for about half an hour, when the witness, "finding it late, rose to go: the deceased seemed as if he had not done what he wished, and said with an anxious manner, 'When will you come again, Mr. Symes?' Deponent replied, 'Whenever you please, sir;' he answered, 'Can you come to-morrow?' deponent said, 'Certainly, if he wished it;' the deceased added, 'At what hour?'—'at any hour it might suit him.' 'Would ten o'clock suit deponent?' 'It would;' and deceased then requested him to be there at that hour, which deponent promised. He then went away; the deceased shook hands at parting, and said 'he should expect deponent at ten o'clock.'" It appears, however, that Symes afterwards resolved to be at the house earlier, in order to meet the medical man. There was nothing unnatural in this conduct in the deceased: he could not prevail upon himself to begin the subject, and Symes very properly forbore to introduce it, but the deceased himself appointed him to come the next morning. This, as really passing, is not improbable, but as a fabrication is highly so. The deceased had a very bad night. Bennett states, "he thought **[158]** the deceased could not have got over it, but he certainly did revive wonderfully, and he believes the deceased was as sound in mind during that morning after, as during all his illness; may be more so." This again is not adverse to the transaction: if he were thinking about the will he was going to make it might render him more than usually restless; if his disorder was really more violent that night—if he had spasms and paroxysms of pain, as Bennett describes him to have had—it would be the more likely to decide him to proceed with the making of his will the next morning. There is, therefore, no improbability in the course of the transaction. Liddon saw him in the morning, conversed with him, was of opinion he was capable, and mentioned to the deceased that Symes was below stairs.

There is some confusion in Symes' account, as given upon his first and second examination, as to the time when he was at the deceased's house on the morning of the 13th; but it does not appear to be any thing more than lapse of memory; not wilful misrepresentation. Symes proceeds to give an account of the preparation of the will, and of receiving the instructions from the deceased, which he immediately committed to writing. It is said that it was "a will by interrogation:" but it was not what is generally understood by the expression; it was not, will you give such a person such a sum? and then a mere affirmative acquiescence; but in this case some of the persons were named, and the deceased freely and voluntarily declared what he would give. He himself began the instructions: Symes thus deposes: "He found **[159]** the deceased in bed, but evidently much better:" agreeing with Bennett in that respect. "Deceased bid him sit down, and at once entered on the subject of this will: 'Mr. Symes, I wish to speak with you about making an alteration in my will.'" Great stress has been laid on the term "alteration in my will:" but I do not see the force of the observations, nor that any advantage can be derived from them; for if the deceased were capable of making an alteration in his will, he was equally capable of making a new will. Symes proceeds: "That never having made a will for the deceased, although he had been his solicitor for many years, he asked him 'if he had a will:' deceased replied, 'he had; but wished it to be altered, or an addition made to it.' Deponent wished to see the will: to this deceased objected, and said 'he could not.'" Much discussion ensued about the production of this old will: the deceased persisted in saying "it could not be seen," and Symes, after repeating in reply, "Then really, sir, I cannot make the codicil," quitted the room, informed William Bird (whom he met in the passage or on the stairs) of what had passed, and the witness was, in a few minutes, called up again into the bed-room: "He found the deceased sitting up in bed, apparently he had been out of bed, and W. Bird said he had helped his uncle out, to get the will himself from the bottom of an old coffer at the foot of the bed: . . . the deceased had evidently read the will, or Bird had read it to him, for he said to deponent, 'I must make a new will altogether.' . . . Pen and ink being brought, deponent took the de-**[160]**-ceased's instructions from his own mouth to prepare the new will; he made no draft of it, he wrote it off fair at once, in the deceased's presence: he commenced writing the deceased's name, residence, and date, and then looked for directions to the deceased, who said, 'I shall give Molly

Waldron, my niece, my estate at Stapley for her life, and after her death to her son, Peter.'" So it was the deceased who commenced the instructions: "Deponent did not know the estate, but he considered it freehold, and wrote down a devise thereof accordingly: he then looked to the deceased for further directions: the deceased was silent, as if considering what should come next, when Mr. Bird said (they three being alone in the room), 'Do you mean, Uncle, to give my son, John, any thing?' to which deceased replied, 'I'll give him my place at West Buckland.' Deponent inquired the name of it: deceased said 'it was called Lippencotts;' that name deponent wrote down, and asked, 'In whose occupation?' the deceased replied, 'My own:' deponent concluded it was a freehold, and, as deceased did not say it was for life only (as with the devise to Mrs. Waldron) he gave it in fee." This clause did spring from a question put by William Bird; but it was the deceased who settled what the devise should be. Symes proceeds with a circumstantial detail of the instructions; (*a*) **[161]** and if all his statement be true, there is no doubt of the deceased's volition, nor was there **[162]** any thing of dictation: the deceased decided for himself, and his family were all brought fairly to his recollection. But the main point for my consideration is the disposition of the residue; and, in respect to that, William Bird had actually quitted

(*a*) "As deponent was looking to the deceased for something more, Mrs. Bicknell, deceased's sister, who deponent knew well, came into the room and exclaimed, 'Brother, what will you leave me?' he answered, '£100 a year:' deponent enquired 'if he should charge his remaining real estate with this annuity,' and deceased replied, 'Yes,' and deponent made it so. Mrs. Bicknell then left the room, but afterwards came in again: Bird then said, 'What do you mean to give Mrs. Webber' (the deceased's niece, then in the house, who came into the room for a short time, but not, as he thinks, till after this part of the will was settled); the deceased said, '£200.' The deceased was still sitting up in bed; he addressed his answers to deponent, who wrote that legacy down; Bird then added, 'What do you mean to give her children?' the deceased said, 'The same to each.' Deponent knew Mrs. Webber had four daughters and no sons, and he wrote that legacy also. Bird, as before, then asked, 'What do you mean to give Joan Bond?' (William Bird's sister, whom deponent knew well, as indeed almost all the deceased's relations); the deceased, in reply, said, '£200;' he wrote that also: Bird then said, 'What will you give brother John?' he replied, '£50:' he did not assign any reason for giving John Bird less than the rest: but William Bird asked, 'And what will you give his children?' he replied, 'The same:' deponent asked 'if he knew their names?' he said, 'No;' deponent understood there were eight, and said, 'Shall I write, to all the children that shall be living at your death?' and the deceased replied, 'Yes.' William Bird then enquired 'what the deceased would give John Sharland?' married to a great niece of the deceased, and he said, '£50.' Before, however, deponent could write this legacy, Bird left the room: and deponent then asked the deceased himself about Sharland's legacy: the deceased gave him the same answer, and he wrote it down. 'I mean,' the deceased added, 'to give the Bicknells £50 a-piece.' (John Sharland's wife was a Miss Bicknell.) There was another daughter, Mrs. Hardwidge, and deponent asked 'if he was to put her name down for £50,' and the deceased said, 'Yes.' At this time Mrs. Bicknell had come into the room again, and said, 'Brother, do you mean to give me any thing more? where am I to live—am I to be turned out of this house' (or to that effect)? to which the deceased replied, 'No, you shall have the house as long as you live.' Deponent then enquired of the deceased what it consisted of, and he replied, 'There was a house, orchard, and garden; I shall give them to her for life, and, after her death, to Mrs. Webber.' Deponent wrote all this down, and the deceased then asked him (they were now alone, for Mrs. Bicknell had left the room) 'to add up the legacies, and tell him their amount.' Upon deponent informing deceased they came to £1750 (so he thinks), the deceased, who said, 'I did not think it was so much,' or to that effect, seemed a little hurt at not having left more for the residue: deponent then said, 'Who is to have the rest?' the deceased replied, 'I shall give the rest to William (meaning William Bird), and make him my executor,' or to that effect. Deponent accordingly wrote this also, and having read it over several times to himself to see that there was no mistake in it which required correction, he added the concluding period, 'In witness whereof I have hereunto set my hand and seal the day and year first above written.'"

the room before it was bequeathed. He was not named to the deceased: so this part of the transaction proceeded from the testator himself. If, then, this evidence can be believed, and if the witness be not wholly discredited, can I possibly doubt of capacity, intention, and volition? Here were free agency and the absence of fraud and circumvention.

It is unnecessary to proceed with this account of the preparation of the instrument. Two respectable neighbours, apparently quite disinterested, were called in to see and attest the execution. It is true much did not pass in their presence: but it was not natural that the deceased—with an inflamed chest, with a blister on, with a white mouth beginning, and being in some degree exhausted by the preparation of the will—would be disposed to say much: but he recognized them, he asked for his spectacles, **[163]** he signed, he published the instrument, he shook hands with one or both of them; and he thanked them. The witnesses at the time were satisfied of, and they now believe in, his testamentary capacity. There is some little variation between these witnesses and Symes as to the publication: but little variations will not affect the truth of the transaction. Symes says the deceased himself, of his own accord, used the words of publication. Rendell, the second witness, that the deceased was beginning to publish, but that Symes took this part of the matter up, and then the deceased repeated the words after him; and Carpenter, among other grounds, judges that the deceased was, on this occasion, capable, from the way in which he repeated the words of publication after Symes. There is nothing of material contradiction in these accounts: the proof then of instructions, execution, and capacity is sufficient on the condidit, unless there be some other circumstance to overturn it.

The remaining ground of impeaching the factum is the character of Symes: it is alleged that he is "a person of bad character, of low practice, a friend of William Bird, and that he made certain drunken declarations subsequently." Supposing all this to be true and proved, though it must shake his credit, so that the Court cannot give full faith to his single testimony, yet if he is supported by probability, and corroborated by other circumstances, the act itself and the instructions of the testator would not be defeated. If this were a will against all probability—the deceased nearly in a state of fatuity, or in the custody and under **[164]** the control of the person benefited—the general character of the attorney might indeed be important: but the disposition and the whole course of the transaction are probable, and the evidence of the witness is confirmed.

To go then into the general character and line of practice of Symes—to hunt up witnesses to prove that, thirty years ago, he was extremely ill-used under the popular outcry set up of his being a common informer, or the clerk of a common informer; to produce witnesses in order to attempt the introduction of a great deal of extraneous and irrelevant matter into the suit, such proceedings only shew the sort of spirit in which the cause has been conducted; and the same observation applies to the evidence respecting the disputes between William Bird and his wife. Symes may be more concerned in recovering debts than in drawing conveyances, but he does both; and, what is to his credit, he pays over the money when he has received it: he has long resided and practised at Wellington—from twenty to thirty years—his character must be well known—yet several of John Bird's own witnesses have employed him. The very professional duties of a country attorney, however respectable he may be, necessarily produce some enemies; and the unsuccessful suitor, whether client or adversary, is, not unfrequently, ready to censure, and be angry with, the attorney.

There is one other circumstance to which I think it is necessary to advert. Symes was the friend of William Bird, and both seem much too fond of drinking—a vice which, according to the evidence, is rather prevalent in that part **[165]** of the country; and on the day and after the execution of the will, elated for the sake of his friend and excited by liquor, Symes did, very imprudently and very improperly, go into a large company and express himself about this business in a very unbecoming manner. Such a communication was a great breach of his professional duty; but in these declarations, loosely made and loosely recollected, there is nothing satisfactorily proved to have been said that imports fraud or conspiracy in the making of the will. It was elated joy at a valid instrument having been executed, it was vain boasting and disclosure.

If, however, the witness be in some degree shaken in credit, or confused in his recollection, still, if the general substance of his evidence be corroborated by circum-

stances, the case is proved. There are circumstances of that description—testamentary declarations previously made by the deceased, and subsequent recognitions that the act had taken place.

The declarations, detailed by Shattock, appear quite natural and probable, and I see nothing to affect the credit of that witness in the particulars which he relates.(*a*) Though **[166]** the deceased generally was a reserved man, not addicted to speak of his concerns, yet the circumstances deposed to were such as to call forth the declarations, and they nearly concerned the witness; so that he is not likely to have misapprehended them: and the sincerity of the deceased is confirmed by his general conduct and confidence towards William Bird. So long ago, then, as 1817, he intended to appoint William Bird his executor, and to make a will in his favour; it was therefore no transient intention—it was long decided, and is consistent with his conduct and intercourse, though he procrastinated, and postponed the execution of his purpose.

The other declaration came from the deceased the last time he was at Buckland, shortly before his death, just when his illness was commencing, and tends more directly to shew that the instructions for this will originated with himself. Shattock says, "In the wheat harvest preceding the deceased's death the deceased rode up to him and began a conversation, by **[167]** asking deponent 'whether he had made up his mind about the fields?' deponent said 'he had not exactly done so;' upon which the deceased observed 'that he should very much wish to know,' and added, 'I'll tell you my reason, for I feel this illness and pain in my stomach, and I don't think I shall be here many years: I have made my will, but it is many years ago; it is an old will of a great many years' standing, and I mean to make another, and William Bird will have the management of it:' these were his exact words as near as deponent can recollect them, but deponent is quite sure they were to that precise effect: he says the last observation about William Bird was made in answer to the deponent, who, inquiring as to the rent, said, 'I can't tell, sir, into whose hands it will fall after your death:' to which he said, 'As to that, I can make your mind easy, for William Bird will have it all, and I mean to give him the greatest part of my property.' Before parting, the deceased said, 'Now do let me know in a day or two, because I want to make my new will.' After this the deponent did not see the deceased." This latter part of the conversation connects itself with, and in some degree accounts for, his conversation with Symes on the evening of the 12th: but finding himself worse on the night of the 12th, he, on the morning of the 13th, went at once to the making of the will. On that morning, immediately before the testamentary business, was his conversation with Liddon, his medical attendant. The evidence is by no means immaterial, and is to the following effect:—"On the morning of the **[168]** day on which the will in question was made he was at the deceased's, and was then introduced to Mr. Symes: Mrs. Webber asked deponent 'whether he still thought her uncle in a fit state to alter his will?' deponent replied 'he would go up and see:' he accordingly went up; asked the deceased the necessary questions connected with

(*a*) John Shattock, a yeoman, after stating that he was intimate with the deceased; that they conversed together about their families and property; and that he had borrowed money of the deceased, went on: "In 1817, deponent called upon the deceased to repay him: William Bird happened to be at the house that day, but deponent and deceased went into a private parlour together, and deponent told the deceased what he had come for: the deceased did not like to have the loan back because he could not get so good interest for it elsewhere, and he tried to make deponent keep it, and said 'he should have it at four and half per cent. interest:' deponent well recollects, on that occasion, the deceased remarking, in order to induce him to keep it, 'Why, Mr. Shattock, you know the money you have of me is not like what you might have of any body else, for you know I shall never trouble you for it; and even when I do miss (meaning when he died) I can tell you whose it will be; it will be William Bird's:' he at first said 'a person in the next room,' and afterwards Mr. Bird; 'and I will, if you like, go in and speak to him, and I am sure he will always let it be in your hands in the same manner, and you shall not be troubled about it:' he also said, 'You know there will be no expence to you of bond or mortgage, or any thing of that sort:' he very much wanted deponent to keep the money and to go and speak to William Bird, but deponent was determined that the deceased should take it back."

his disease; found him pretty much the same as usual; believes the thrush had not come on: in the course of conversation he said to the deceased, 'I understand you are about to alter your will; Mr. Symes is below—do you feel equal to it?' And the deceased replied, 'I think I do.' Deponent added, 'I hope you will go through it well.' Upon returning to the room where William Bird and Symes were, deponent said, 'Mr. Bicknell is in a state to attend to you, Mr. Symes.'" And, on the 26th interrogatory, the same witness—after he has stated what he communicated to Mrs. Webber about the deceased's blister; and that he had perused the will of the 13th of September—answers, "He verily believes the deceased was of sufficiently sound mind, memory, and understanding on that day to have given directions for it, and to have comprehended every clause therein, and to have executed the said will, more especially because, in the evening of the same day, on his second visit, respondent inquired of him, 'If he had gone through what he wished, and how he bore it?' and the deceased said, 'He had done it, and bore it very well.'" This evidence—coming from such a witness—to capacity, to testamentary intentions immediately before the act, and to a recognition **[169]** of the act so soon after it had taken place, coupled with other circumstances, is so confirmatory of Symes as to leave no doubt, in my mind, in respect to the proof of the factum of this will; and I therefore pronounce for it.

And as the charges of fraudulent conspiracy, set up and founded on misrepresentation of the state of the deceased's affections and of his incapacity, and those of control and custody, have each of them so failed in proof, and as the whole cause has been conducted with so much litigious acrimony, and with attempts to introduce much irrelevant matter, justice requires the sentence, pronouncing for the will, should be accompanied by a condemnation of the opposer, John Bird, in all the costs occasioned by his giving in his allegation.

MYNN *v.* ROBINSON AND OTHERS, BY THEIR GUARDIAN. Prerogative Court, Trinity Term, By-Day, 1828.—After publication, the evidence of an attesting witness may be excepted to by the party who produces him.—The admission of an allegation responsive to an exceptive allegation reserved to the final hearing, the Court being of opinion that part, if otherwise admissible, was not material, and that the remainder probably would not in the event be of sufficient importance to delay the cause.—When the will of a married woman—obtained, while she was in an extremely weak state nine days before death, by the active agency of the husband, the sole executor and universal legatee—wholly departed from a former will deliberately made a few months before, the presumption is strong against the act; and the evidence not being satisfactory, the will pronounced against, and the husband condemned in the costs.—Declarations of testamentary intentions, if unaccompanied by any immediate acts, are always looked upon with great caution, and their weight depends upon all circumstances accompanying and connected with them.—The proctor being the "dominus litis" is responsible to the Court for the purity of the proceedings.

This was a cause arising upon the will of a married woman, made under a power, shortly before her death, and exclusively in favour of her husband: some circumstances respecting the non-production of Robert Hone, an attesting witness to such will, are noticed in vol. i. p. 68. Since those proceedings, allegations had been given in on both sides; publication of the evidence had passed; and on the by-day after Trinity Term, 1828, an allegation, exceptive to the testimony of Robert Hone (examined upon **[170]** the condidit), and given in on behalf of the husband, whose witness he was, was debated. The allegation set forth that Robert Hone had sworn "that he verily and in his conscience believes the attestation clause, now appearing at the foot of the paper (bearing date the 2d of June, 1827), was not written when he signed the same: he has no recollection whatever thereof, and that he never could have signed it had the clause been written; that it contains a direct and palpable falsehood, and has been interpolated and introduced subsequent to his signature." And on the 31st interrogatory—"To the best of respondent's recollection, there was a blank in the place where the attestation clause is now written in the said will, when he first saw and signed the same." The allegation then pleaded that Hone had therein knowingly and wilfully deposed falsely; that the attestation clause was not introduced since his subscription: "For that the will was written by William Whitehead from the dictation of his brother George, a witness in the cause, to whom instructions for the same had been

conveyed through the party proponent (viz. John Mynn, the deceased's husband) about a week before the execution; that W. Whitehead also at such time, from the dictation or by the direction of his said brother, wrote at the foot of the will the attestation clause preparatory to the execution of the will; that such clause is of the handwriting of W. Whitehead, who never had possession of or saw the will from the time when he wrote the same and the attestation clause thereof, until the 2d of July, 1828." The third article—after reciting Hone's answer on interrogatory, viz. **[171]** "That the will was attested in a room on the ground-floor of the deceased's house, but not in the presence of the deceased; that after such attestation was concluded they, the witnesses, had some refreshment, when the producent took them all up stairs, to the leads or roof of the house, for the purpose of seeing the prospect; and they remained there about ten minutes"—pleaded, "That Hone neither did nor could, on that or any other occasion, go up to the leads or roof of the said house, either alone or accompanied by any person, for the purpose of viewing the prospect or for any other purpose; for that there were no leads, nor was there any flat surface whatever (save as hereinafter excepted) on the roof of the house." (*a*)[1]

The King's advocate and Lushington in objection. This is quite a novel experiment to except to an attesting witness, produced by the party who now attempts to discredit him.

Burnaby, Dodson, and Addams contrà. An attesting witness is rather the witness of the Court than of the party, and the circumstances under which this person was produced **[172]** are peculiar, and render his evidence suspicious: though our witness nominally, he comes forward to depose against us, and against his own act. The true rule at common law is, that where a person produces a witness, he cannot except to his general character, but may produce other witnesses to contradict his testimony, if he deposes unexpectedly contrary to the case of the party on whose behalf he is examined. *Alexander* v. *Gibson*, 2 Campbell, 555. This allegation is not to attack his general character but rebut his evidence, and is therefore within the common law principle. The matter is stringent; if Hone's evidence be true, our case is utterly false. In order to uphold his own credit it was necessary for him to get rid of the attestation clause; and the second contradiction is hardly less material: the assertion was clearly introduced in order to account for his being up stairs, if any of the witnesses should depose to that fact.

Per Curiam. I think this allegation is admissible. In the case of *Goodridge and Hunter* v. *Slack* the party was allowed to except to a witness originally produced by himself, but who had afterwards been produced on the other side, and deposed, on the second examination, in direct contradiction to his own act and to his former deposition.(*a*)[2] But it is for the party, under **[173]** the advice of his counsel, to consider

(*a*)[1] The article went on to describe the only access to the roof; and set forth very minutely the dimensions of the door in order to shew that a person of Hone's stature could with difficulty, if at all, have got through it; and that it opened into a gutter so narrow as only to admit of a person standing on the roof by placing one foot therein and the other on the sloping tiled roof; and that no prospect whatever was visible from the gutter on the roof beyond the tiles and bricks with which they were surrounded. A plan and measurement were annexed.

(*a*)[2] *Goodridge and Hunter* v. *Slack*. Prerogative, Trinity Term, 1786.

John Underwood, an attorney, was originally produced on the part of Goodridge and Hunter in support of a will, alleged to be dated on the 14th of December, 1782, of which Goodridge was an executor and residuary legatee. Of this will Underwood was asserted to be the drawer, and in his examination on the condidit had deposed, positively and minutely, to instructions on the 6th of November, 1782, to approbation, capacity, and execution on the day of the date. It was suggested that this will was an absolute forgery; that the deceased never gave any instructions, and had executed a will on the 4th of November, 1782, of which Slack was executor; that the last-mentioned will was deposited in an iron chest, and was taken out by means of a false key; that Underwood took a copy and made a will in Goodridge's shop; that the witnesses were let into the deceased's house on the 29th of January, 1783; that the deceased was then in a state of insensibility; that the pen was put into his hand, and guided by Goodridge; that the witnesses then went down stairs and signed; that afterwards, the date being thought to be too late on account of the deceased's

whether it is worth while to attack the credit of Hone, his own witness; it is hardly probable that, in such a mass of depositions, the sufficiency of the evidence on the condidit and to the factum would **[174]** depend on the degree of credit to which this man is entitled.

Allegation admitted.

[175] On the second session of Michaelmas Term an allegation responsive to the above exceptive allegation was debated, and was, in substance, as follows:—

The first article pleaded generally "that full credit was due to Hone; that he had not deposed falsely, as set forth in the exceptive allegation."

The second, after reciting the third article of the exceptive allegation, pleaded "that Hone did **[176]** not answer untruly, for that the will was attested below stairs and that he did go up stairs to the roof: and that he on the same day mentioned the mode in which the will was attested to Mr. Laurence; and shortly afterwards to Eaton, Norcutt, and Thorpe, witnesses examined in this cause; that he also had mentioned to them that he had been carried up to the roof of the house for the purpose of seeing the prospect."

The third pleaded "the arrangement of the rooms in the attic of the deceased's house; and that in the gable end of one there was a window, from which was a prospect."

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incapacity, another will was made dated on the 14th of December, 1782, subscribed by the witnesses before execution, and that Goodridge undertook to procure the execution of it.

To establish this fraudulent transaction Underwood was examined on the part of Slack, and deposed to the above effect in direct contradiction to his own act and to his former deposition. After publication, an allegation, exceptive to several witnesses, and consisting of twenty-two articles, was offered on behalf of Goodridge and Hunter.

The opposition was confined to the eleventh and thirteenth articles in contradiction to the depositions of Underwood and his wife: but no difficulty seems to have been raised on the ground that the witness had been before produced by the party now excepting to him. The following is a note of what passed:—

Dr. Harris and Dr. Scott. A party is not at liberty to plead to a witness what he had the opportunity to plead against an allegation.

Dr. Wynne and Dr. Bever contrà. The general rule is liable to exception. Our parties, when the allegation was given, were in custody, charged with having forged the will; they have been acquitted since publication in this cause. The matter now offered formed a part of their defence; and it would have been injudicious to have revealed it antecedently.

Per Curiam (Dr. Calvert). The objections to the two articles are of the same kind, namely, that you are now contradicting to a deposition what you might have done before to an allegation. It is a rule that after publication you cannot plead as to facts; so far the cause is considered as shut: but it is also a rule that you may to witnesses, provided any thing shall have arisen from their depositions which you could not have contradicted from the plea. I think the circumstances of this case are particular: the danger of a trial for life, the caution necessary for the exposition of the defence. When the proofs on this allegation shall come before the Court, the time of contradiction will be considered. No evidence on this exceptive allegation will be received as to facts in the cause: what may be said can only go to the credit of the witnesses; for the cause is closed as to the facts.

Allegation admitted.

*** The Court finally pronounced against Goodridge's will, and in favour of the draft of the will propounded by Slack.

Peculiars, Hilary Term, 2nd Session, 1786.—In *Inglefield* v. *Inglefield*, originally a suit brought by the wife for restitution of conjugal rights, and in which the husband had, in a cross suit, pleaded and examined witnesses to his wife's adultery, a further allegation was offered on the part of the husband, and the Court (Dr. Calvert), in remarking upon it, said: "It is strange that the husband, in the eighth article, should charge Webb, his principal witness, with perjury;* but as this allegation is given in

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* It appeared that Webb, the alleged particeps criminis, had been examined on both sides.

[177] Against this allegation it was argued that the declarations of Hone could not be received in corroboration of his own evidence; and that the rule was so laid down by Lord Redesdale in the case of *The Berkeley Peerage.*(*a*)

On the other side—that Chief Baron Gilbert considered such declarations as admissible; that Mr. Justice Buller originally was of the same opinion, though in the later editions of his work he seemed in some degree to have departed from his former doctrine: (*b*) and that in *The Berkeley Peerage case* the declarations of Lady Berkeley, recenti facto, were received in corroboration of her evidence at the bar of the House of Lords, though subject to future revision.

Per Curiam. Looking to the former proceedings in this cause, it is full time that the evidence and pleas should be closed, unless this allegation contains something very material. It is stated to be responsive to the exceptive allegation. The first article is to be considered as merely introductory: the second pleads facts which have already been deposed to, and which can only be repeated by Hone; and it also pleads certain declarations made by him recenti facto. The present shape of this cause is extraordinary: the persons who support the will have attacked the credit of the subscribed

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on the part of the husband, upon whom the expenses will fall, I shall admit this article."

Note.—In the two preceding cases the witnesses objected to were examined on both sides, and the exceptions were taken to that part of their evidence which was given by them when produced on behalf of the adverse party. So, in *Mackenzie* v. *Handasyde* (Prerogative, 1828, June 30; and S. C. infra, p. 209), an exceptive allegation was admitted to John Williams, who attested both the will and the codicil, and who was produced by one party in support of the will, and by the other party in support of the codicil; and the exception was to that part of his evidence which was given upon his production by the adverse party. But in the case in the text, *Mynn* v. *Robinson*, the exceptive allegation was given to a witness produced and examined only by the party excepting to him.

Now it is a well known rule at common law that "a party cannot be permitted to produce general evidence to discredit his own witness; that is, a party cannot prove his own witness to be of such a general bad character as would render him unworthy of credit; but if a witness unexpectedly state facts against the interest of the party that called him, another witness may be called by the same party to disprove those facts." 1 Phillipps on Evidence, 294; and the authorities there cited.

But in the Ecclesiastical Courts, where the depositions are never seen till all the witnesses have been examined, it is necessary that parties, though they may not before publication attack the general character of their own witness, should be permitted, after publication, directly to except to his credit; because as no plea unless exceptive, and no evidence unless on such a plea, can be given at this stage of the cause, parties would otherwise be precluded from contradicting their own witness falsely deposing to the occurrence of matters which might go to the foundation of the whole case, and yet to which it could not have been foreseen that he would speak. The variation, however, between the practice of the Common Law Courts and of the Ecclesiastical Courts arises only from the different manner in which the evidence is taken, and the different opportunities thereby afforded to a party of obviating the effect of his own witness unexpectedly deposing against him; and is a variation in form rather than in substance. At common law the primary purpose of the examination of other witnesses is to support the party's original case; the accidental consequence, to discredit the first witness; or, as Mr. Justice Buller expresses it, "The other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only." (Buller's N. P. p. 297, 5th edit.) On the other hand, in the Spiritual Courts, the primary purpose of an exceptive allegation is to destroy the credit of the witness; the accidental consequence to support the original case. The practice in both Courts, however different at first sight, produces the same result, and originates in the same good reason and sound principle; viz. "That there is no rule of law by which the truth is on such an occasion to be shut out and justice perverted." Per Lord Ellenborough, C. J., in *Alexander* v. *Gibson*, 2 Campb. 556.

(*a*) See Phillipps on Evidence, vol. i. 307, 5th edit.

(*b*) Buller's N. P. 294, and note the difference between the early and 5th, 6th, and 7th editions.

witness; those who oppose the will are now sustaining his credit. **[178]** As I suppose it is not intended to re-examine Hone in respect to the attestation taking place down stairs, the principal part of the article must relate to the declarations. Now, if this case had assumed a different shape; if the opposers of the will had pleaded in exception to the credit of the subscribed witness, these declarations might have been material and admissible, but they are now brought forward for the purpose of supporting his credit. Without entering into the law whether such evidence can be received, I am satisfied that this part of the plea is not material, even if otherwise admissible; because Hone has already deposed to it. At the end of his deposition he says, "That on the very same day the attestation of the will took place he mentioned all the circumstances to Mr. Laurence, a student of Lincoln's Inn, also to Mr. Norcutt, a solicitor, and to others of his friends, from doubts that he had." Now, in the exceptive allegation, it is not attempted to deny that he ever made such a declaration: Laurence and Norcutt might have been produced to disprove that circumstance; such a contradiction would have been much more important than the contradictions as to the leads of the house, and the prospect therefrom. The fact, then, that he did make these declarations, having been sworn to by Hone, and being uncontradicted, it is very immaterial to produce witnesses in support of it: the Court will assume that the declarations were made, as no attempt has been made to disprove them.

As to the third article, the only fact capable of further proof is, that the prospect may be seen; for Hone alone can swear to the fact that **[179]** he was taken up stairs for the purpose of seeing the prospect, and that he has already done. It cannot surely be of sufficient importance, at this stage of the cause, again to open these proceedings in order to receive such evidence as could be given on this article. If, at the hearing, the question whether it was possible Hone could be taken up stairs under the pretence of seeing the prospect should appear of sufficient weight as touching the credit of the witness, the Court may either direct some of its own officers to inspect the house, or may even allow witnesses to be examined on this article; but considering all the circumstances of this case, I cannot think it necessary for the opposers of this will, in order to sustain the credit of Hone, to press that this article should be admitted to proof at present: and I therefore suspend the admission of this allegation till the hearing of the cause.

This cause came on for informations and sentence on an extra day after Michaelmas Term, when the Court, having only heard the counsel on behalf of the husband, proceeded to give judgment.

18th Dec.—*Judgment—Sir John Nicholl.* Although the present question arises on the will of a married woman, yet, since there is no doubt of her power to make a will, as if sole, the **[180]** case is to be decided upon the ordinary principles of testamentary law.

There are two wills before the Court; the factum of the earlier will is not controverted: the case principally depends upon the proof of the factum of the latter will—mainly, indeed, upon the evidence taken on the first plea, or condidit; yet there are some other collateral circumstances to which it is important to advert.

The first will was executed on the 23d of November, 1826.(*a*) The latter will is dated on the 2d of June, 1827; and its tenor is altogether to sweep away the first

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(*a*) Its general substance was as follows:—After some directions for her funeral, a bequest of the furniture, plate (except a tea-chest with silver canisters to her nephew, William R. Robinson), linen, &c. in and about her house at Westbourn Green, to her husband, absolutely; and also of the use and occupation of such house and premises, free from rent and taxes, for six months next after her death; it directed that her brothers, Charles and John Peter Robinson, and her said nephew, their executors and administrators, should stand possessed of all her real and personal estate, upon trust to pay an annuity of £700 to her husband; and upon his death, to assign over her freeholds in Bishopsgate Street to her nephew, John Travers Robinson, and the sum of £12,000 three per cents., with the unapplied interest thereof, unto and among the children of her nephew, William R. Robinson, who should be living at the death of her husband. The will then gave various legacies—some of £300—to her relations: it named her trustees to be executors, with £100 each for their trouble over and above the several legacies before bequeathed to them, and appointed her brother, John Peter Robinson, residuary legatee.

will, and to give exclusively to the husband—who is named sole executor—the whole benefit in the deceased's real and personal estate. The deceased died on the 11th of June, nine days after the date of this paper. Looking then **[181]** no further than to the dates and contents of the two documents, and to the death, there is a demand for clear and full proof. Here is a full and formal will made only eight months before, disposing of her property among various objects, and here is another will, dated only nine days before her death, wholly departing from that disposition, and giving every thing to the husband. On the very surface there is a strong suspicion of the exercise of undue influence and of marital authority: the evidence, it is true, may clear away that suspicion, and it therefore becomes proper to examine the history of the parties.

The deceased, Mrs. Catherine Mynn, was a lady of considerable fortune and of a very respectable family. Soon after the death of her mother she took a house at Westbourn Green, where she had an establishment suited to her station in society—she kept her carriage and had servants in proportion: she was at this time above forty. The deceased had several brothers—they resided at some distance—had their different avocations; and though, certainly, there does not appear to have been any quarrel, yet there was no very great frequency of intercourse, nor particular warmth of affection subsisting; she had even complained, in some measure, of their neglect and coldness. A spinster of this age, living alone, with an independent fortune, and with her own establishment, was not an unlikely person to be sought by, and to fall a prey to, some needy adventurer, who would form a matrimonial connexion for the sake of her property.

Mr. John Mynn, who afterwards became her **[182]** husband, and is the present party, does not stand quite clear of the imputation of having acted with such views. He was the younger son of a gentleman farmer in Kent who had a large family; and being intended for the medical profession, served some short time with two different apothecaries; but he disliked and gave up that line of life, and we find him for about three years lodging at the house of Whitney Milborne West, at that time an apothecary at Hammersmith, but who afterwards got a diploma from Scotland, and is now a doctor of medicine, and a subscribed witness to this will. With a son of this Dr. West, Mynn formed a partnership as a coal-merchant, but they carried on business in a very inferior mode. They seem to have had no wharfs nor waggons, nor even a regular office with clerks; but they received little orders at a house in the borough, where an elder brother of Mynn was established as a hop and seed merchant.

In 1823 Mynn and his partner, West, took a house at Westbourn Green, next door to the deceased; whether with a view to this lady and her fortune, or whether accidentally, is not ascertained by the evidence: but at this place Mynn had an establishment, a horse and two-wheeled carriage, a man-servant and two maids; and visitors occasionally staying with him. Here he became acquainted with the deceased, by meeting her at an evening party, and at the very first meeting he paid her particular attention: their acquaintance was improved upon, and in July, 1823, it ended in marriage. What was the relative situation of these parties? He was sixteen years younger than she—he was **[183]** without a farthing—deeply in debt—at least 1500l., and probably much more. That he practised a gross deception on the deceased, as to his situation and property, cannot be doubted: he pretended to be in partnership with his brother as a hop and seed factor; no articles of partnership were ever entered into, and no real partnership is shewn ever to have existed: he asserted that he was not in debt; the fact was clearly otherwise; for he was in a very short time harassed by his creditors, notwithstanding the assistance of his friend and connexion, Martin, who, within two or three months after his marriage, advanced him 1500l.; executions were taken out and sent into his house, much to the distress and annoyance of the deceased, till at length, in November, 1825, he rendered himself (as the phrase is) into the rules of the King's Bench: attempts were made to obtain a composition with his creditors, but that negociation failing, he became in November, 1826, a bankrupt, and his debts amounted to about 7000l. How debts to that amount were incurred does not appear, for since the period of his marriage he had been partaking of his wife's establishment at Westbourn Green. He obtained his certificate, but no dividend whatever has been paid; and finally, on the 27th of April, 1827, after living within "the rules" for sixteen months, he obtained his release, and returned to Westbourn Lodge; there his wife was dying of a cancer, her recovery was quite hopeless, and her death took place in six weeks afterwards.

A character more exposed to suspicion in every circumstance relating to the will he has produced cannot well be described or conceived. **[184]** That Miss Robinson's family should be averse to the marriage was very natural. One of her brothers was referred to the house in the borough, respecting the partnership in the hop business, but William Mynn was not at home, and Mr. Robinson was taken up into the drawing room: no books were produced, and no partnership, I repeat, up to this time has been shewn to have existed. Miss Robinson's brothers, finding her nevertheless determined to marry John Mynn, did not interfere in the settlement: that was undertaken by a very respectable and friendly individual, Mr. Peter Free, her cousin, but who had no interest in her property. Attempts were made by Mynn at the time to procure more favourable terms, but his propositions were resolutely rejected by the deceased herself, and he at length agreed to the terms of the settlement required; and various efforts were subsequently made to get at her property, in order to relieve his distresses; but the settlement was strict, and the trustees were firm. It is asserted that the deceased gave verbal promises to some of the creditors; but, except such promises and any assistance which she may have given out of her income, she did not involve herself and her property for the payment of his debts.

It has been relied upon in argument that she was strongly attached to her husband, shewed him great affection, constantly visited him, even during his residence within the rules of the King's Bench, and that he at all times and after his release treated her with great kindness and attention. This is proved by the evidence on both sides, and is almost the only circumstance of recommendation to his case: but it **[185]** was naturally to be expected: she had married him from affection and fondness; it was his interest to be kind to her; he was dependent on her, and was endeavouring to obtain present assistance as well as looking to receive her fortune for his future provision. But what was the effect of all this attention on the one side, and of all this affection on the other, on her testamentary intentions? for that is the object of the Court's inquiry: nor is the Court left to inferences from their mutual kindness to each other; because it has before it a will solemnly made by the deceased two or three years after the marriage, and eight months before her death. In November, 1826, after his deceitful and imprudent conduct had been fully developed to her, after he had been in confinement for twelve months—after his bankruptcy she made her will—made it in the most careful and deliberate manner: she went herself to her confidential solicitors, Dunn and Wordsworth, who had prepared her settlement: her brother Charles accompanied her, but he left her alone with Mr. Wordsworth; and she having delivered her instructions in writing, they together canvassed every item, particularly the annuity to her husband, whether it should not be void if he attempted to sell it, but she at length determined not to fetter it with any conditions; "expressing a hope that the lesson he had received would produce an amendment in his habits;" the draft was sent to her, some trifling alterations, principally in the wording of it, were suggested; the will was then engrossed, and on the 23d of November the deceased again went to the office; the will was all read to her; **[186]** "she expressed her entire satisfaction and approval thereof:" and it was then executed and attested by the two Dunns and Wordsworth.

After this deliberate testamentary act it is useless to be drawing inferences from affectionate conduct or from declarations that it was a mere temporary disposition: and what removes all suspicion that this will was made under the influence of the brother is, that on going to Dunn and Wordsworth, either for the instructions or the execution, she was actually accompanied by her husband in the carriage, who lifted her out of and into the carriage, but did not go into the office. Indeed, the provision made for the husband is a liberal one, and, being by annuity, was in some degree guarded against his future imprudence. Why should he not have been satisfied? On his marriage he was without a farthing in the world: since, he had been much embarrassed: in short, he ought to have been very thankful for such a bountiful bequest. A suggestion that this act was not the deliberate wish and permanent intention of the testatrix was founded upon the declarations of the deceased, which, if really made, were probably uttered in order to get rid of importunity, or to impose.

On the 27th of April Mynn quitted the rules of the King's Bench. The deceased was at that time in a very precarious state; her cancerous disorder was advancing; she was confined to her house, and was only carried down stairs to a sofa in the drawing room. An attempt was made to induce her to advance 2000l., in order to set

Mynn up in business; but it was found that the trustees had not even the power to make such an advance. Whether the deceased [187] really wished for this measure and was disappointed and angry, is not very material, for she does no act in consequence of it till the testamentary act—the subject of the present suit.

Whatever declarations were made at this time under the feelings of irritation were accompanied by no immediate act, and therefore amounted to nothing. The Court always looks to declarations of this kind with great caution, and more especially so under the circumstances of this case. Their weight in all cases depends much upon the whole of the circumstances that accompany, and are connected with, such declarations. They are liable to be insincere on the part of the deceased, or if sincere, the effect of a mere transient feeling; they are liable to be misapprehended and their extent exaggerated; they are liable to be misrepresented by others, or they may even be an after-thought invented to prop up a weak and defective case; and in the present instance many of the declarations are considerably exposed to this latter suspicion, namely, that they were either invented by the witnesses, or by those who have imposed them on the witnesses and made them fancy that such declarations were made. In short, the Court can venture to place little reliance on them when connected with the account given of the factum; which in all cases is the main consideration, but which in this, in a more especial manner, demands the attention of the Court: and to the account of it I now proceed.

In the latter end of May, the particular day is not fixed, Mynn, the husband, went to one Whitehead in Boyle-street, and desired him to [188] draw a will for the deceased immediately, giving every thing to him, the husband; Whitehead, with the assistance of his brother, drew up the instrument, leaving a blank for the date; and in three or four hours afterwards Mynn returned, and the instrument was delivered to him to get it executed. With this sudden haste was the instrument prepared! Mynn himself, if Whitehead speaks truly, was surprised that such should be the intention of the deceased: or he might say so in order to diminish Whitehead's surprize: a priori, therefore, the thing was improbable which renders some of the declarations now brought forward not very credible, and throws an increased doubt over them. This is the account of the drawing up of the will: the instructions given, not by the deceased but by the husband, the executor and universal legatee. The execution was on the second of June: the three attesting witnesses, Dr. West, Thain Wright, and Mr. Robert Hone, were on that morning fetched by the husband from Hammersmith, about three miles distant.

West states he took the will up stairs to the deceased and said to her: "As she was better she could sign her will. She replied, 'Yes, I will:' he then said, 'Now, ma'am, you know the contents of this will, as it is a gift of all your property to your husband.' The deceased replied, 'Yes, I do:' she then signed it." This is the whole account in substance of what passes at the subscription. "He brought it down again with her signature to it. The three attesting witnesses then went up stairs: the deceased, repeating after West, acknowledged the signature and published it as her [189] will, but said nothing else; and the witnesses attested it."

Now, this is the summary and substance of the act of execution, even giving credit to West's, the most favourable, account of it. The husband procured a merely formal execution, not indeed a formal one, for the will was not read over nor signed in the presence of the witnesses: the husband himself was present: the deceased was confined to her bed within nine days of her death; her approaching dissolution fully known to the husband: and by this will, so drawn up and so executed through the agency of the husband, the former will—so deliberately made only seven months before—is to be swept away, and every thing given to this husband!

The act itself and the mode of effecting it are each so indicative of fraud and undue influence on the part of the husband that it could hardly be sustained by the testimony of the most respectable witnesses: the facts would be insufficient.

The deceased's capacity was not gone—her mind was not affected by delirium, but she was extremely weak, labouring under a painful disorder, taking laudanum to lull her sufferings—and in the hands of this husband—the active agent in the whole business; so that it could hardly fail to be considered as an act done under undue influence and undue marital authority. If the deceased's mind and wish had really gone with this new disposition, it is hardly credible but that either her own solicitors, Dunn and Wordsworth, or at least some respectable solicitor, would have been called

in to receive the instructions from herself: and that he, her medical [190] attendant, Mr. White, and some of her own acquaintance in the neighbourhood, would have been summoned to attest the regular execution. The mode adopted could hardly have been resorted to in a fair case.

But who are the witnesses that the Court is to rely upon, even for this account of the factum? and how has the cause been conducted? Of John Mynn himself the history has been already given. The drawer, Whitehead, describes himself to be "a certified conveyancer and in the habit of transacting annuities:" he has been frequently concerned in negotiating loans of money for various persons, and in April, 1825, procured 840l. by way of annuity for John Mynn: he has also lent money to him "to the amount of upwards of 3000l." Such is Mr. Whitehead's line in the profession, and such his connexion with Mynn: he supplied him with money on annuity, and became his creditor for upwards of 3000l.: he continued his confidential adviser during his imprisonment; and attempted to prove under the bankruptcy; but Springett, the assignee (Mynn's own witness), states that "Whitehead appeared in person, produced an account; all the creditors exclaimed against it; the commissioners rejected it; he did not prove any debt; he was not allowed to prove; he was proposed as assignee, but the commissioners said, 'That could not be, as he was not allowed to prove.'" (*a*) Such was Mynn's selected drawer and associate. In all Mynn's transactions before, at, and after [191] the death of the deceased, Whitehead has been his agent and adviser, and has been twice examined in this cause: he admits that "he cannot swear he is wholly disinterested in the event of this suit, as the producent is indebted to him in a sum of money, which he expects in any case to recover, but he should get immediate payment if the producent should succeed." This witness entertains some distinctions about propriety, which are rather difficult to be understood. On the 22d interrogatory he says, "It was in consequence of the producent being then indebted to him in a large sum that he did not attend the execution of the will, and he did not for the same reason send one of his clerks: he was of opinion it would not be either decent or prudent for him, being a creditor of the producent, to do so:" and yet "being a creditor of the producent," and "not wholly disinterested in the event of the suit," he thinks it not indecorous to be the agent and adviser in the conduct of the suit; to consult repeatedly with Mynn and his proctor, though he must have been informed that, as the drawer of the will, it was necessary he should be examined: and he has been twice examined on very material points. The evidence of a person so mixed up with the transaction is entitled to no great credit; nor does the conduct of the business exonerate it from the suspicions which otherwise attach.

The first subscribed witness is Whitney Milborne West: he was, as I have said, an apothecary practising at Hammersmith for many years, but has recently obtained a Scotch diploma, and practises as a physician; still, however, he carries [192] on the business of an apothecary, which is conducted for a salary by an assistant, Thain Wright, another subscribed witness. Dr. West, on the interrogatories, makes an apology for his deposition in chief, in respect to the presence of the husband at publication, and attributes the error to the defect of his memory, occasioned by an accident; and Mynn's counsel also make that the ground of apology for the inconsistencies of his evidence; and it would be advantageous and fortunate for this witness if all the contradictions in, and to, his evidence could be attributed to the same cause: he has long been intimately acquainted with Mynn and in some degree connected with him—his son was Mynn's partner, and married Mynn's sister a few days after Mynn married the deceased: that son also became a bankrupt: indeed Dr. West himself was likewise a bankrupt—twelve or fourteen years ago: bankruptcy seems almost infectious among these parties: he was not only specially fetched to attest this will, and took with him his assistant Wright and his friend Hone; but the will was placed in his custody; he attended on the death; he sealed up the effects; he has been throughout the suit an active agent: it is true that on both his examinations he says "he had no meetings with any person on the subject of this cause save to be produced as a witness—simply that:" and yet he has been constantly at the

(*a*) On interrogatory, Mr. Whitehead answered, "that under the commission of bankruptcy issued against Mynn he took no part whatever: he did not prove, nor offer to prove, a debt."

proctor's office; he has been down to Oxford in search of Hone, and went with William Mynn to Winchester for the same purpose; nay, the proctor in the cause, who has been himself examined, says on an interrogatory: "Respondent was in frequent communication with **[193]** George Whitehead, Whitney Milborne West, and William Mynn, who called almost daily at his office in respect to this cause;" and yet Dr. West says, "He has had no meetings with any person respecting it." To point out all the circumstances that induce me not to place entire reliance on Dr. West is unnecessary: but I shall advert to one or two presently.

The other two attesting witnesses are Thain Wright and Robert Hone: and they are in direct contradiction to each other on several points; to which the Court is to give most credit, or whether much to either, may be a matter not essential to be decided. Mynn himself has attempted to discredit Hone; but he is his own witness, and before he was produced, and when it was held out that he could not be produced, he was described as a highly respectable person; and anxiety was shewn to plead his good character and handwriting. Whitehead, on the sixth interrogatory, says, "West acquainted him that Hone was a very respectable gentleman living upon his fortune." West deposes that "he carried Hone with him on account of his respectability to witness the will." Yet he was not produced, and affidavits were exhibited to account for his non-production. And, on the 14th of November, 1827, Dr. West and Thain Wright made oath "that in consequence of certain pecuniary transactions, Robert Hone left this country on or about the 22d of June last, and, as they verily believe, has never since returned, nor do they know where or in what country he is at present residing." Stating, therefore, without reserve, that he had left the kingdom.

[194] Considerable evidence has been gone into in order to shew that Mynn could not have produced Hone; and it is clear that he was embarrassed and in concealment: he had engaged in a joint stock company, and was liable to be made in some manner responsible for the engagements of that company; and he certainly wished to keep out of the way. Dr. West's expression is "that he had absconded:" but that term is not very applicable, when it appears that Hone regularly gave up his house (at lease his aunt's house), had his goods packed up by an upholsterer, Eaton, and laden in open day on a van; and that the same person, Eaton, was left as his agent to let the house. Hone himself was several times in town in July and August, he and his friend and solicitor, Norcutt, dined at West's on the 3d of August. Without entering into a detail of the circumstances (for after all it is but a subordinate matter), the result on my mind is, that not only was there a want of due diligence used to find him, or to convey to him a letter, but that contrivances were used by Mynn's agents to induce him to keep out of the way, by holding out the terror of injunctions and legal proceedings against him.

The proctor, it seems, trusting entirely to Whitehead, West, and Mynn, took no steps to find this attesting witness; he did not go to Hammersmith, nor send a clerk; nor cause advertisements to be inserted. It does not appear that he even gave any directions as to the best mode of inquiry and the means to be used: he merely advised, and the advice was proper enough, "that every exertion should be made **[195]** to find the attesting witness, as it would certainly be expected by the Court."

If this be the general mode of practice, I strongly recommend the introduction of a different system, and for these reasons. The proctor is the dominus litis; he is responsible to the Court for the purity of the proceedings; the interests of the suitor are intrusted to him; statutes have been passed to protect him in the exclusive practice of his profession; no person can use his name nor participate in his profits. If the scene lies in the country at a distance, it may be necessary to employ other agents—a country solicitor or some other substitute; but here in London, or at a short distance, the necessary inquiries should not be devolved or intrusted to a Mr. Whitehead, or to a Dr. West, or a Mr. Mynn, who are to come daily to the proctor's office in order to consult on the conduct of the cause; and who are afterwards to be material witnesses in the cause. If inquiries had been made of these persons, particularly of Hone's friend, Dr. West, when he last saw Hone? Who was his agent and packed up his goods? Who was his solicitor? Dr. West must have answered, "I saw my neighbour Mr. Eaton packing up Hone's goods in July; he himself was present; he and Mr. Norcutt, his solicitor, were at my house and dined there on the 3d of August." Would it not have been nearly evident that if a confidential letter had been sent either to Eaton or to Norcutt to be conveyed to Hone, stating the importance of his being

examined, and that every precaution should be taken that his place of residence should [196] not be disclosed that a communication might have been had with Hone.

I do not blame a young practitioner for not taking these steps; but if proper means had been resorted to they could not have failed to trace Hone; Eaton and Thorpe both saw him several times between July and the beginning of August; they spent the evening with him at Mrs. Jefferson's on the 8th of August: Norcutt went with him to Winchester on the 9th of August: Hone was then uneasy about this will, and desired Eaton to call upon Mynn's proctor; and the fact is now admitted that Eaton did call and left his card of address on the 24th of that month. It is said that it is not every card that would cause inquiry, but Whitehead had been there that very day; and this, when coupled with the entry in the office diary, "Mr. Eaton—*Mynn v. Robinson*," would almost necessarily lead to some investigation whether Hone could not be found. From that entry it is clear Eaton did call, and about this very cause; though both the proctor and his clerks depose that they have no recollection of any communication about Hone.

The accuracy of this evidence, "that they do not recollect it," cannot be doubted; but this only confirms the Court in the expediency of the improved practice just recommended: viz. that the proctors should themselves inquire about the witnesses; for if the proctor and his clerks had felt the duty cast upon them of finding out Hone, they would upon Eaton's coming from Hammersmith, where they must have learnt that Hone lately resided, and on finding that Eaton came about this cause and had left his card of ad-[197]-dress, have made inquiries at that time; indeed they would have made inquiries long before whether he, Eaton, had seen Hone, and could give them any information about or convey any letter to him.

The expression of Hone's uneasiness to Eaton on the 8th of August is in some measure confirmed by one of Mynn's own witnesses, Matanle, a solicitor, who in October mentions that Hone had declared "he did not see the deceased sign the will, and that he and Wright signed below stairs." It is pretty clear then that these parties had fears about Hone's evidence, and had reasons for wishing to keep him out of the way: they considered him so far a person of respectability, that he would disclose the truth however he might have been induced to set his name as a witness to this will.

There is another circumstance respecting the mode of conducting the cause to which I reluctantly advert; but it is impossible, consistently with my duty, to pass it over without observation. I mean the delay in the examination of the witnesses on the condidit: that plea is dated the 11th of July, and was admitted on the caveat-day in August, yet the first witness was not examined till the 5th of November. The inability to find the third witness was no reason for postponing the examination of the other two; for Hone might possibly have appeared at any time, and the previous examination of two would at least have expedited the matter if attended with no other advantage: but the loss of time is in this case the least important part [198] of the consideration. Here was a case, from the very import of the papers, of suspicious character; here were the party's brother and the two principal witnesses—the drawer, Whitehead, and the attesting witness, West—almost daily at the proctor's office. What could be more dangerous to the truth of the case and the purity of the evidence than that these persons should be in this constant communication without being first examined, should be endeavouring to see Hone, either to concert with him or to send him out of the way, should be the agents, advisers, and conductors of the cause before their examination? No satisfactory reason has been, nor I think can be, assigned why these witnesses were not examined as soon as the condidit was admitted: their testimony would then have been much less suspicious; this delay throws a cloud over it.

Here are, for example, declarations not passing either at the instructions, or execution, introduced into the evidence of both these witnesses; and it may be much doubted whether they would have found their way into their depositions if none of these previous meetings had taken place. Whitehead introduces not only a declaration asserted to have been made in May, 1827, but also one in November, 1825, that the deceased "had made a will previous thereto and had left her husband every thing, but had burnt the same in order that her property should not go to those wretches, meaning some bill creditors."

Now is this declaration true, or is it not true? Did the deceased ever make such a will? If she did, why is it not pleaded and proved? It [199] was a will under a

power; who made, who attested, it? If she did make such a will, surely the husband must have known, and if he had known it, it would have been pleaded and proved, because it would have laid a strong foundation for the present will, as reverting back to that disposition: if no such will was made, either the declaration is the invention of the witness, or it shews the insincerity of the deceased in her declarations, and that she made them merely to please the friends and creditors of Mynn. There is no trace of any such former will, and this declaration must have been thrown in from considerations of what would be useful to the cause; and its introduction reflects great suspicion on the management of the business by the husband and his associates.

The same sort of circumstance occurs in West's deposition, which is to this effect: he sets out with stating "that he became acquainted with the deceased about a twelve-month prior to her death," though he afterwards says "that he was acquainted with her four or five years." This shews that he deposes at random, and if his head and memory are so bad, how can the Court rely upon him for a single fact? He says "he was consulted by the deceased, and prescribed for her during the illness whereof she died, and until a short time immediately before her death." Again, this is not true; he had ceased to attend her for many months, and Mr. White was her sole medical attendant. West says "he had seen and prescribed for her on the first of June; that she then related to him her anxiety and wish to make her will, and was determined to leave her [200] husband all her property, as her brothers had refused her money of her own to give him; that a will had been prepared by her directions through her husband, which she was anxious immediately to execute, and that deponent should witness; but as she was then ill and much agitated, the deponent said, 'Do not agitate yourself, leave that to a future day:' upon which she said nothing further on the subject."

Now I should have doubted this evidence much, even if the witness had been examined immediately, and had not been employed as an active agent in the manner he has been; but I suspect it much more when I look to this delay and to the other circumstances of the case, to some of which I must presently advert; nor indeed am I convinced that if he had been examined soon after the admission of the condidit, this would have formed part of his evidence.

For the sake, then, of general practice, and to protect the purity of proceedings—which is of importance more extensive than this individual case—I recommend that attesting witnesses should be forthwith examined while the facts are fresh in their minds, and before false impressions can be made upon them: and, further, that persons who are necessary witnesses, as attesting witnesses are, or any others who are intended to be examined, should not be employed as the advisers, agents, and conductors of the cause.

I come then to the account of the execution, and it is to be observed that, on the responsive allegation, Mynn has introduced fresh witnesses [201] to the execution; to previous declarations and to subsequent recognitions; particularly three servants—a footman and coachman who are still in his service, and a house-maid who lived with him some time after the deceased's death. It sometimes happens that fresh evidence introduced to prop up a failing cause only the more completely overturns it.

The coachman says: "The footman brought a message at six in the morning to get ready one of the carriage horses as soon as possible: Mynn came soon afterwards; he had never rode a carriage horse before: he said he was going to Hammersmith; he should not hurt it; deponent let him out of the gates; it might be near seven o'clock." Here, then, was a sudden and hasty plan—nothing was arranged the day before with Dr. West; if he was there at all on the first of June.

Elizabeth Price, the housemaid, gives a very different account: "There was no haste, nor was it at that early hour—the deceased herself gave the directions;" she deposes to various previous declarations—that the deceased was quite alert, and that the matter was previously arranged: "Two or three days before the deceased told her that West and two gentlemen were coming, and she was to shew them into the parlour." Here is not one word of West being there the day before: "Deceased told her this as she was in the bedroom dressing her." Not speaking of her as excessively weak and confined to her bed; indeed, on the following article, she speaks to a recognition two days afterwards. "She was happy she had done what she said she would do . . . deponent was dressing her, was [202] lacing her stays; the deceased did not, however, go down stairs for some time afterwards on that day." So that here

is this poor woman, within a week of her death, dying of a cancer in the breast, up dressing, having her stays laced, going down stairs, though she had taken to her bed some days before, and was in her bed when the will is alleged to have been executed.

This is the sort of adminicular evidence produced. I cannot give much credit to this recognition; and I may as well now notice another, to which the footman is brought to depose on the day after the alleged execution; this witness says "he met Mynn on the top of the stairs, who asked him to go into the deceased's room; deponent asked her how she was; she answered, better; and added, 'I have made a fresh will and left every thing to your master for his kindness to me.'" Now this story is not very probable, and I must consider it, in conjunction with other circumstances, before I can give it much credence.

To return, then, to the evidence of the execution: West, Wright, and Hone had arrived; Price told the deceased that West and another gentleman were come; she seemed quite pleased; asked "What sort of a gentleman?" It was a short, stout gentleman: the deceased said "she dared say it was Mr. Hone." This was a lucky guess; for it does not appear that she had ever seen Hone, and his being brought is (according to West) West's own act; and he admits "that Hone had never seen the deceased before the 2nd of June," and so says Wright. Price states, "She was then sent down to call up **[203]** West: she went, delivered the message, and West went up alone, with papers in his hand. The deceased desired her to fetch a candle; she fetched it, placed it on the table; West was standing by the bed reading some writings out loud to the deceased, which he continued during all the time she was in the room; she seemed very attentive, laughed, talked to him, and seemed quite pleased while West read to her." Now West says he did not read the paper to her; but how incautious it was, on the part of Mynn and of his advisers, not to have had the other witnesses up to hear this reading and laughing and talking, and to observe these pleasant feelings.

This witness, Price, states further: "West continued with the deceased no great while; he soon went down stairs; in not quite an hour afterwards West, Wright, and Hone returned into the bedroom; deponent came out of the dressing-room and opened the door for them—they remained therein about half an hour—deponent went down stairs and saw them very soon after all come down stairs." She adds, "When West was reading the will to the deceased, Mynn was down stairs with Wright and Hone, she heard him talking to them."

It is difficult not to suspect that the whole of this is after-thought, fabrication, and falsehood; it is difficult to make a fabricated after-thought fit well in with a former fabrication; truth alone is consistent. Price's account is materially different from West's, and tends to throw an additional suspicion on the case. According to his story there is not one word of Price's coming down with a message from the deceased; Mynn **[204]** is not left talking to Wright and Hone, but is up stairs in the adjoining room; West states that twice; there is no reading over. West not only does not mention it in his deposition, but on the thirty-first interrogatory he admits the negative. At first, on interrogatory, he had answered, "he had never seen the will before;" but afterwards he appears to have recollected what he had deposed as to his interview on the 1st of June, and corrects it by erasure and interlineation.

Now as to the date and sealing. West says, "He inserted the date;" Whitehead says, "It is in the handwriting of Mynn." West says, "The seal was affixed in the adjoining room before the execution:" though he had said before in chief "that he had no recollection of the matter."

Price says, "She carried the candle into the deceased's bedroom." Wright says, "He did not take notice of any seal when he attested;" Hone, that "the seal was affixed below stairs."

All these contradictions and variations raise a suspicion that truth is not at the bottom of this account; and though I do not place any sort of reliance on any thing that Hone says as forming the ground of my judgment, it is some confirmation of his testimony that West himself admits there was some sealing in the dining parlour, namely, the sealing up of the will in an envelope.

There is a still more striking contradiction to West, and in a circumstance that involves the whole transaction in still further suspicion. West states, both in chief and upon interroga-**[205]**-tories, "that the deceased having signed the will, he carried it, so signed, down stairs, and that he and the other two witnesses returned immedi-

ately up stairs (not 'in somewhat less than an hour,' as Price says, but immediately): that the deceased then, repeating after him, acknowledged the signature and published it as her will, and that he and the other two witnesses attested it in her presence and in the presence of each other:" he expressly says, "he attested it in the presence of the other two witnesses;" but Wright and Hone contradict this and assert that, when West brought down the instrument, both the deceased's name and West's were subscribed and the ink was wet.

West then—the principal witness—the sole witness to the deceased's subscription—is directly falsified on a fact which could scarcely have escaped his attention, and respecting which he could hardly be mistaken through lapse of memory: he surely must be laid out of the case; not from this alone, but, from this and a variety of other circumstances, he cannot be relied upon as to any one fact. Whether he did really go up stairs, and the deceased, in the dying state in which she then was, did repeat these words of acknowledgment, or whether the witnesses signed below stairs, makes no great alteration, in my judgment, as to the insufficiency of the evidence. If Hone also is falsified, the case would rest upon Wright alone, and it would be impossible, under all the suspicions of this case, to hold his evidence sufficient. If the case was fair, why adopt this extraordinary mode of execution? It is not diffi-[206]-cult to conjecture why West should write his name fresh before producing the will: it might induce the other witnesses the more readily to add their names to the attestation: but if they were really intended to be carried up to the deceased, why should either she or West subscribe the will in their absence? why should not they have heard the will read to her, when there could be no evidence of instructions proceeding from her? I cannot help thinking that the very proctor in the cause falsifies, in some degree, the story of West and Wright, or at least proves that they have given different accounts. They assert that the deceased put her forefinger, or her hand, on the signature and acknowledged it to be her handwriting: that is the whole ceremony according to both their depositions; but the story which had been told to the proctor was much more formal, stating, among other particulars, that the deceased went over the signature with a dry pen. The two witnesses, however, mention nothing of the ceremony of a dry pen; they merely say she touched it with her hand or finger; and yet pretending that a dry pen had been used might be material, and be a wilful though a false suggestion; for it would have shewn greater alertness and activity on the part of the deceased, both in mind and intention, and would also have shewn her ability to write, and be a corroboration of West—the only witness to the signing. On the other hand, if she was not able to write, it accounts for Mynn and West going up stairs together, and then bringing down the paper, as if just signed by the deceased and West. The case is not wholly without evidence creat-[207]-ing a suspicion of that kind; and some doubts may be entertained whether Mynn and West went into the deceased's room at this time; whether they did not merely go into the adjoining room and then bring the will down, with the two signatures with the ink wet, in order to induce Wright and Hone to add their signatures.

Mr. White, who attended the deceased at this time, and who appears to have given a very fair evidence, describes her state, and is entitled to much more credit than Dr. West, and the associates and servants of Mynn. He thus relates the condition of the deceased, and I see nothing to impeach his credit.

"From October, 1826, till her death, he was the constant medical attendant of the deceased: he frequently observed her very unhappy; and with spirits depressed; they influenced her general health:" he then speaks to her lamenting her husband's debts, and the harassing applications to her to liquidate them, and on the fifth article says: "She informed him she had, by will, secured to her husband an income which would render him independent; and that it was a very hard thing she should be so teazed, considering the liberal provision she had so made for him." Here, then, is a complete recognition, in her last illness, of the will of 1826, and it corresponds with Lady Hunter's evidence "that on the 4th of May, 1827, the deceased told her she had settled all her affairs."

The state, however, of the deceased's health is more completely spoken to by Mr. White, in his evidence on the thirteenth article. "During the last ten days of her life, in conse-[208]-quence of her bodily powers having become very much worn down and enfeebled, she continued in bed." Yet, two days after, Price says the deceased was up and being dressed. "Her right arm was almost completely paralysed; and

her hand and fingers so swollen that for several weeks before, and to her death, she carried the same in a sling: deponent saw her write a cheque with the greatest difficulty: after that the powers of her arm became much more diminished; but her mental powers continued unimpaired to the last day he saw her, and this was the day before her death. When Mynn returned home from the King's Bench prison her recovery was hopeless: her death might have happened at any time."

This state then of her mental powers renders it not impossible that Mynn and his agents, in respect to this paper, did not venture to have any communication with the deceased, lest she should refuse, if not overcome with pain, and laudanum, and extreme weakness, to express an acquiescence and repeat the words dictated: but, considering her extreme debility—the pain she was enduring, that she was taking laudanum to lull it; in the hands of this husband if she did acquiesce so far as to repeat, after West, the acknowledgment of the signature and the words of publication, it would not prove satisfactorily that she had even subscribed the paper—much less approved it: and looking to her bodily infirmities, that for the last ten days she had been confined to her bed; that her right arm was almost in a state of complete **[209]** paralysis; that the hand and fingers were swollen, so that, several weeks before, she had great difficulty in signing a cheque, and that afterwards the powers of the arm became much diminished; yet seeing with what alertness West describes that she took the pen and made the signature; seeing how well the signature is written (for the names, particularly Mynn, are written freely and well), and, finally, that the attesting witnesses—two of them at least—do not see her sign, there is but too much reason to doubt whether this is a case of a mere failure of proof.

At all events the evidence is not sufficient, in my judgment, to enable the Court to pronounce for the validity of this will; and, as the husband was the conductor of the transaction, and has resorted to such a mode of getting this paper drawn and executed, it is my duty to accompany the sentence, pronouncing against the will, with a decree condemning Mr. John Mynn in the costs.

MILLER AND ROSS *v.* BROWN. Prerogative Court, 20th Dec., 1828.—A widow having, after the death of her husband, delivered a will made during coverture to her executor for safe custody, such delivery, coupled with other recognitions, amounts, in a Court of Probate, to a republication, rendering it a new will of which the executors are entitled to a general probate.

This was a business of granting probate of the will of Harriett Miller, widow, and was promoted by two of the executors against a brother **[210]** of the deceased (also an executor) and a party entitled in distribution in case of an intestacy. The will purported to dispose of real and personal property; it was made during coverture, but by permission of the husband, who was acquainted with, and approved of, its contents: he died on the 16th of December, 1825, and his widow on the 11th of September, 1827. The evidence fully established that, after the death of her husband, the testatrix frequently recognized this instrument as her will; expressed her satisfaction that it was made; and that, in June, 1827, she delivered to one of the executors a tin box, which she informed him contained her will (and in which it was found after her death), and on the evening of the day on which she so left the tin box she declared to Dr. Chichester, a physician, whose daughter was married to the executor referred to, "that she had that day deposited her will with him."

The King's advocate and Haggard in support of the will.

Lushington and Pickard contrà.

Judgment—Sir John Nicholl. The deceased was a widow at the time of her death: and whether this will refers principally to real property is not for me to inquire. It has been said that it is necessary to shew a republication after the husband's death, animo republicandi: it would be a strange doctrine for this Court to hold that a formal republication is necessary for a will of personalty where no **[211]** publication is necessary: custody is a sufficient publication of personalty. What has been done here is quite sufficient. Dr. Chichester speaks to a very strong act of recognition, which, as far as concerns this Court and a disposition of personal property, is a sufficient publication. The deceased (within three months of her death) brought the will sealed up and deposited in a tin box, which she delivered to one of her executors for safe custody, and so it remained till her death, and was then found. The answers, too, admit the depositing and finding.

This is a republication to all intents and purposes, and the instrument so delivered becomes a new will: there cannot be the slightest doubt as to what her mind and intention were; she did not consider a formal republication necessary, but she adhered to the disposition.

What effect this paper may have upon the real estate it is not for this Court to determine, but it is clear that the executors are entitled to a general probate.

The costs may be paid out of the estate.

MACKENZIE *v.* HANDASYDE. Prerogative Court, 12th Jan., 1829.—Where the execution of a codicil was clandestinely, and without previous instructions, obtained—from a testator of eighty—only one month before death, by the son—the person solely benefited—and his associates, the disposition being contrary to the repeated former acts of the deceased, the clearest proof of capacity and free agency is necessary. Codicil pronounced against, and the son condemned in costs.—A testamentary instrument may be established against the evidence of all the subscribed witnesses, but such a case would require to be supported by the whole res gestæ, by strong probability arising from the conduct of all parties, and by the improbability of the practice of fraud, circumvention, or undue influence.

Peter Handasyde died on the 20th of November, 1824. In the following month Thomas Handasyde, the son and sole executor of his **[212]** will, took probate thereof and of a codicil. In Easter Term, 1827, a decree "to bring in the probate" was served upon the executor at the instance of Allan Mackenzie, whose legacy, under the will, was revoked by the instrument proved as a codicil. The will was dated on the 7th of September, the codicil on the 21st of October, 1824. The codicil alone was opposed.

The King's advocate and Addams for the codicil.

Lushington and Dodson contrà.

Judgment—Sir John Nicholl. The deceased was originally a common soldier, but by merit raised himself in life, and became sergeant of the 45th Regiment. In 1795 he was appointed barrack-sergeant at Porchester, at which time Mr. Mackenzie, the party in the suit, was barrack-master. In 1810, on a memorial of his services being presented to the commander-in-chief, he was rewarded by an ensign's commission in the Veteran Battalion, went on service to Gibraltar, and returned in 1814. He was then appointed to the First Royal Veteran Battalion, which he joined at Plymouth, and there he remained till the regiment was disbanded in 1816. In that year he married Miss Murray, his second wife, who died in May, 1823. In August the deceased removed to Hilsea, where he resided for some time with Mackenzie; and he afterwards removed to a small house next door, in which he died on the 20th of November, 1824.

[213] While the deceased was barrack-sergeant at Porchester a great friendship was formed between him and the barrack-master, Mackenzie, notwithstanding their disparity in rank; and this mutual attachment continued till the death of the deceased. How far Mackenzie was instrumental in procuring his commission does not appear, but it is pretty evident that he assisted the deceased with money to fit him out for Gibraltar in 1810, and, on the death of his second wife, it was to Mackenzie's house that he retired; he was an inmate there for some time, then took a house next door, and, in two wills now exhibited, his friendship and obligations to Mackenzie are expressly recognized; and there is no suggestion that any quarrel or misunderstanding had arisen between them.

The deceased by his first wife had an only child—a son—but for many years was alienated from, and kept up no intercourse with, him; but the grounds of that alienation need not be inquired into: on the death of his second wife, in 1823, the deceased did not even know where to find his son; he did, however, at length discover him, and a reconciliation took place: whether this was chiefly brought about through the intervention of Mackenzie is not very important; but it is certain that Mackenzie went to London with the deceased, and that the son and his wife came down to reside with the deceased at Hilsea. On one side it is alleged that there were subsequent disagreements; on the other, that the son and his wife were most attentive, and that the deceased was very fond of them. It comes out, however, from the son's own witness, Mary Thompson, "that the **[214]** son and his wife had frequent quarrels, which often proceeded to high words, and once even to blows. On one occasion the deceased took part with the wife, and his son left the house, but a

reconciliation was brought about and in a few days he returned." Here then, on one side, are long and uninterrupted friendship and gratitude to Mackenzie, down to the very time of the deceased's death: on the other side, towards the son, long alienation of affection, reconciliation in 1823, and a residence together—but not quite in unbroken and increasing amity and regard.

I shall next look to his testamentary acts. In February, 1824, after the son and his wife had resided with the deceased for some months, when the reconciliation and attention had had time to operate, still he made a disposition, in substance, as follows:—He gave Mackenzie 1000l. sterling—his own son, the dividends of the residue for the use of himself and of his wife, with an absolute power of disposal to the survivor: he also gave his son the household goods, and appointed him and Mackenzie joint executors. The son, then, had only the interest for life in about 3000l., the amount of the residue, unless he survived his wife, who was placed on an equal footing. The bequest to Mackenzie commences in these terms: "To my benefactor and highly esteemed friend." It is useless to inquire the extent of Mackenzie's assistance in obtaining the commission and fitting him out for Gibraltar in 1810: here was a solemn recognition by the deceased of the obligation in this very instrument, fourteen years afterwards: and, what renders it more strong, this will was **[215]** made not only several months after the son and his wife had resided with the deceased, but they knew of the instructions; were actually privy to, and present at, the execution of the instrument; and were acquainted with its contents. This will also marked the continuance of his want of confidence in his son, and a wish to protect his wife; for Mr. Mackenzie was joined in the executorship, and she was nearly as much benefited as this son, and had the absolute disposal of the residue, if she survived her husband.

The son was dissatisfied with this will, and used his best endeavours to get it altered (and this may account for his apparent attention to the deceased at the time): he did at last succeed to a certain extent, and a new will was made, but in a very suspicious manner. The deceased, now in his 80th year, was rapidly declining of mere old age; and about seven months after the former will, and two months before his death, this new will was obtained: not by employing the same solicitor, not with the privity of Mackenzie; but the son, Thomas Handasyde, provided an attorney from Portsmouth, and a friend from Portsmouth, to manage this second will. It is not, however, necessary to enter into a detail of the circumstances attending the factum of this will, as its validity is not in question. But to what extent does it vary from the former will? Its substance is shortly this: it bequeaths 1000l. 3 per cent. stock, instead of sterling money, to Mackenzie; but there is still the expression, "in testimony of my gratitude for past services and benefits he has done and bestowed to and upon me:" here therefore is still the strongest recognition **[216]** of his obligations to Mackenzie. This will, however, has other alterations. The son's wife is excluded from any interest in the residue; the son takes it absolutely, and is appointed sole executor. Yet his own evidence shews that the daughter-in-law was the deceased's favorite; he took her part in the conjugal quarrels; but now she is wholly passed over. This will, as I have said, is not opposed: but it has much the appearance of being the act of the son, and not of the father. Yet this was the highest point to which Thomas Handasyde could carry the alteration of the disposition by this instrument of September, after seven months' dissatisfaction at the former will: and so long as the deceased had strength and firmness to resist, the total exclusion of Mackenzie could not be effected. Still, in six weeks after this second will so strongly acknowledging his gratitude to Mackenzie, without the least appearance of quarrel or dissatisfaction, was the codicil in question in this cause made, revoking the bequests to Mackenzie altogether. It is in these terms:

"This is a codicil to the last will and testament of me, Peter Handasyde, which will bears date the seventh day of September last past, and in and by which I bequeathed to my friend, Allan Mackenzie, the sum of 1000l. stock, part of 2350l. stock which I now have and then had in the three per cent. Bank annuities. Now, upon consideration of the affluence of my said friend, and that I ought in justice to consider the interests of my son rather than a stranger in blood, I do hereby **[217]** absolutely revoke and make void the said bequest, and do declare that my said only son, Thomas Handasyde, shall have and receive in the nature of a bequest or legacy the said sum of 1000l. stock, and also all and every part of my estate and effects whatsoever,

which I am now or may be possessed of or entitled unto at the time of my decease; and I hereby declare this to be a codicil to my said will, and recognize and again appoint my said son Thomas Handasyde as the only sole executor as well of the said will, as of this codicil thereto. In witness whereof I have hereunto set my hand, this twenty-first day of October, 1824. "The mark ⋈ of

"PETER HANDASYDE.

"Signed by the said Peter Handasyde affixing his mark hereto, after the same being fully read over and explained to him (he then being in sound mind and perfectly aware of the nature of the codicil, but by old age and affliction unable to write distinctly), in the presence of—

"S. Blyth, Geo. Vicat, John Williams."

This codicil is executed by the mark of the deceased, though he had signed his name to the will, and the attestation clause is totally different from the usual one. This, so far from assisting the paper as evidence of the fairness of the transaction, shews to my mind some doubt as to the deceased's capacity: and what are the alleged grounds of revocation? Mackenzie is still recognized as his friend, and the reasons assigned respecting his "affluence" and his be-[218]-ing "a stranger in blood" existed in February and September, when the testator was much more competent to decide on the weight of those considerations. The deceased had now taken to his bed, was within a month of his death by decay of nature, and was so weak in body as only to be able to make a scrawling mark; he was scarcely able to resist importunity, or to form any sound judgment for himself.

On the face then—on the very surface of the transaction—the affair is suspicious, and with the admitted dissatisfaction of the son at both the wills—the last only executed six weeks before, by which the change in Mackenzie's legacy from sterling to stock was made, the Court would require the clearest possible evidence of the factum of this codicil. It is attested by three witnesses, Blyth, Williams, and Vicat. Blyth, the attorney and drawer, is since dead, and his death, character, and handwriting have been pleaded. The evidence to his character is somewhat conflicting: there are several witnesses who give him a very good character; but the fact is clear that he was rather in low practice, was chiefly concerned for prisoners and smugglers, kept no office, nor clerk, became an habitual drunkard, and died in consequence of his intemperance, having first become insane: he was not of that high character in his profession as to give a strong assurance that he had not lent himself to, or at least been surprized into, the making of this codicil under the directions of Thomas Handasyde, without sufficiently ascertaining that it was the free and voluntary act of a capable testator.

[219] The other two witnesses have been examined, and if they are credited, it was merely the act of the son; they entertain at least strong doubts of the capacity of the deceased. These witnesses are deposing against their own act, and are to be heard with considerable caution; if fully believed, there would at once be an end to the case; it would be a great and manifest fraud. It is possible that a testamentary instrument may be established against the evidence of all the subscribed witnesses; but such a case would require strong supplementary circumstances, would require to be supported by the whole res gestæ, by strong probability arising from the conduct of all parties, and by the improbability of the practice of any fraud or circumvention, or the exercise of undue influence.

Both these witnesses have been making applications to Thomas Handasyde, as they suggest, for promised rewards. From that circumstance two inferences may be drawn: they probably have not disclosed a fraudulent transaction from honest compunction of conscience; but, on the other hand, if the transaction had been fair, would they have made these applications? At all events, if they are discredited they make no proof of the factum; that must be established by other evidence: but the res gestæ, always a strong species of evidence, are all against the probability of the act.

These witnesses are the friends of Thomas Handasyde, brought by him from Portsmouth wholly without the knowledge of Mackenzie: in the next place, it is a night transaction: Blyth had gone to the Winchester sessions; he [220] was way-laid, waited for on the road at his return, and carried to the deceased's house, where the codicil was prepared and executed between 8 and 11 o'clock at night. Blyth had dined with a friend on the road; he might have been rather elevated, for he had no objection to indulge a little freely in liquor; but it does not appear that he was

intoxicated: and there were refreshments at the deceased's after the business was over. If the deceased was so willing and so capable, where was the necessity for such haste? It is not stated that he had any sudden attack. Why not wait till the next day, and let this codicil be made in broad day-light? Abundance of persons, competent to attest, were close at hand. Why not call in the medical attendant or respectable neighbours? Why has it been necessary to resort to declarations either before or after, and to opinions upon capacity? Witnesses so easily mistake times and dates that some of the declarations may possibly apply to the will of September. The transaction being so manifestly conducted by Thomas Handasyde and his associates, the disposition so contrary to the former wills, and to the very recent will of September, it requires the clearest proof both of capacity and free agency.

There is a piece of evidence, introduced on the part of the son, to which it is necessary to advert, though I notice it with extreme reluctance. The curate of the parish attended as a clergyman on the deceased, who was a devout, conscientious man, and was desirous of receiving the sacrament; but he being in this weak state, the curate thought it proper, before ad-**[221]**-ministering the sacrament, to undertake, upon the representation of Mr. Handasyde, to interfere about this will in the following manner:—"The deponent was informed by Mrs. Handasyde that the deceased was distressed in his mind on account of his will made, in some measure, in favour of Mr. Mackenzie." He does not, however, on this ask the deceased whether he had any distress of mind on such point: but "he told the deceased it was essential his mind should be quite free before he could receive the sacrament; and asked him what had occurred on his son's part to prevent his leaving his property to him? The deceased spoke of his son having been somewhat wild formerly. But on deponent's talking further with him, and pointing out to him that it was his duty to take care of his only child, the deceased made up his mind to do so: at least the deponent, after having administered the sacrament to the deceased, which he did when he had ascertained his mind was in a fit state to receive it, and free from distress, left him with a firm impression that he intended to leave the property which he had given to Mackenzie to his son; and that his mind was relieved by that resolution: this must have been before the 25th of October." Here, then, was this pious man, so ill that the sacrament was about to be administered to him; but, under a supposition that he had left his property from his only son to a stranger, the witness undertook to determine that his mind was not in a fit state to receive the sacrament till he acquiesced in the propriety of altering his will. It also appears from the an-**[222]**-swer of this witness, upon interrogatory, that "in the summer of 1824 Thomas Handasyde and his wife called upon and asked him to interfere with the deceased on account of the will in favour of Mackenzie: they complained of the deceased's partiality for him: the respondent declined interfering." Here, then, both the son and his wife apply. "Respondent did express his surprize, as interrogate, that Mackenzie should want any money from the deceased's estate, when there was barely enough for him to leave his son." But how did he know all this; and why did he afterwards interfere on grounds of this kind? I am of opinion that this was a degree of influence and importunity that the deceased was not, at that time, capable of resisting. He might have a testable capacity, but that will not meet all the demands of the law, and supply the want of evidence of instructions, and overcome all the difficulties and suspicions under which this codicil labours. As to the refusal of the sacrament, what importunity, what influence, could be more undue? even assuming that all which occurred is correctly related, and with the true colour, though that may be doubted; for the fact is not expressly pleaded so as to cross-examine to it. Suppose this gentleman had been told, as the real fact was, that this bequest to Mackenzie was a mere debt of gratitude—that he had so recorded it in both his wills (the deceased might perhaps think that had he not experienced the kindness of Mackenzie, he might have had nothing to have given this son), could his interference have been justified? Or if this fact was concealed from the **[223]** curate, such concealment was an imposition practised upon him. But, on the other hand, suppose the deceased had left every thing to the son, and Mackenzie had induced this clergyman to interfere and get him 1000l. legacy by a codicil, telling him that till he had discharged the debt of gratitude he owed Mackenzie "his mind was not free"—"was not in a fit state for the holy sacrament;" what would have been said of a codicil so obtained by Mackenzie?

The state of firmness of the deceased's mind at this period could not have been

great; for the curate states that, after the conversation to which he has deposed, he never went to the deceased again. His evidence, then, does not give a more favourable impression of the case: at all events it will not supply the proof of the factum, the continuance of intention, and capacity: it goes no further than to shew that at one time (whenever it was) the deceased, under the pressure of this improper interference, seemed to acquiesce.

There is a recognition relied upon, and spoken to by Mrs. Robertson, an old markswoman of seventy-five; and there is also something of a recognition deposed to by Mary Thompson, the nurse: but the Court cannot rely much on their recollection of declarations made three or four years before, nor of the time at which they were made, nor of the transaction or instrument to which they might apply. They are not sufficient to counterbalance the other defects.

A codicil, then, obtained under circumstances already adverted to, and so completely opposed **[224]** to the repeated acts of the deceased, when of sound and perfect mind, requires evidence going much more directly to instructions, to volition, and to capacity. The son, after seven months' dissatisfaction at the will of February, though he was privy to its factum, could only, in September, get the deceased to reduce the mark of gratitude to his friend from sterling money to stock; and that will has every appearance of being the deceased's ultimatum.

When, however, the Court sees, after this old man, in his 80th year, had taken to his bed, the son, by himself and his friends, by a minister of the church, holding out, in effect, excommunication to this pious old man, if he left this token of gratitude to his benefactor, instead of leaving everything to his son; when it sees also the son getting these associates of his own from Portsmouth in the night, in such haste as to watch Blyth's return; and procuring the execution of this codicil by a mere mark without any respectable and disinterested person being present; it cannot but hold that this conduct and the whole transaction bear such strong marks of unfairness, and are exposed to such suspicions of fraud, that it must pronounce against the codicil: and I hardly think the Court would be doing justice, and using sufficient endeavour to prevent similar applications when parties are in this condition, if it did not accompany that sentence with a condemnation of the son in costs.

[225] BARWICK *v.* MULLINGS AND OTHERS. Prerogative Court, 14th Jan., 1829. —1st. A paper, commencing "Memorandum of my intended will," but dispositive in terms, signed, and intended to operate if no more formal will was made, is, unless revoked, entitled to probate. 2d. Neither instructions nor a will drawn up therefrom (which, though in the deceased's possession for several months, was not executed nor shewn to be finally determined on) will, either as entitled to probate or as letting in an intestacy, revoke such a paper.

[Applied, *Whyte* v. *Pollok*, 1882, 7 A. C. 412.]

Lushington and Pickard for paper No. 1.

Dodson and Nicholl in support of paper A.

The King's advocate and Phillimore on behalf of the widow, and for an intestacy.

Judgment—Sir John Nicholl. In this case there are three parties before the Court: first, William Barwick, a nephew and one of the residuary legatees in the paper which he propounds, marked No. 1; secondly, Phœbe Barwick, a niece and executrix in a paper of a former date, marked A, which she propounds; and, thirdly, Hannah Mullings, the widow, who opposes both, and contends for an intestacy.

The deceased, Joseph Mullings, died on the 16th of November, 1827, and left a widow, a sister, and four nephews and nieces entitled in distribution. His property, which is all personal, was nearly of the value of 11,000l.

Of the papers propounded, paper A, the earliest, begins: "This is a memorandum of my intended will;" but it goes on throughout in dispositive terms; it appoints executors, is dated and signed by the deceased himself, and the character of the signature is different from that of the body of the instrument.

[226] In legal consideration, this paper, upon the face of it, being subscribed by the testator, would be a finished and perfect paper. The subscribing it would be primâ facie evidence that the deceased intended by that act to give it effect; and that, though he began it as a memorandum, yet as he went on to use dispositive terms and finally signed it, he altered his mind and converted it into an operative instrument; more especially as the body of it is not in the handwriting of the deceased; so that

the signature could not have been carelessly and thoughtlessly added, but intentionally and upon consideration; nor is there any thing to shew that he intended to do any further act to this particular instrument. Still, the term "memorandum of my intended will" would raise a sufficient doubt to let in evidence of circumstances whether it was finished in order to have effect, or only as a deliberative memorandum.(*a*) Parol evidence then being let in, the history of the deceased and of this paper may give to his intentions a more decided character.

The deceased had been a butcher, but was retired from business: he was married to his second wife, and had been in that state for about sixteen years; but it is impossible to describe his life as the happiest state of connubial bliss, for he and his wife did not live on the most harmonious or comfortable terms together. It is clear that he had no thought of dying intestate; the instruments propounded as well as the parol evidence establish that fact beyond all doubt: he was aware that under an intestacy the law would **[227]** give his widow half his property absolutely, and he was determined to guard against that course of distribution: he had a sister living who had children; he had also other nephews and nieces; and he meant therefore to provide for his wife by what he considered a handsome income for her life, but on her death to divide the bulk of his fortune among his own relations: he seems also to have been aware that his wife had the same knowledge of the distribution which the law would make, viz. that she, as widow, would take half absolutely; while she appears to have differed entirely from her husband in opinion that a mere life interest in the produce of that moiety would be a handsome provision for her: she preferred the moiety absolutely, and entertained no great hopes that a testamentary distribution by the husband would be more favourable, or even as favourable, to her as that disposition which the law would make.

In this state of opinions the deceased apparently thought that it would tend much to domestic peace if, in whatever testamentary arrangement he might wish to make, the act were done without the privity of his wife. Mr. Richard Barwick, who had married the deceased's sister, was much in his confidence, was consulted by him frequently upon the subject, but always when Mrs. Mullings was not present, and if she approached the conversation was dropped. The deceased and Barwick used often to go out together in the deceased's gig on a Sunday—the only day when Barwick was not engaged—and it appears that, according to an arrangement between them, on on the first Sunday in April, 1820, they met at the house of Barwick, **[228]** where, by the deceased's instructions, and in his presence, he wrote paper A: and the deceased read it over, approved of it, and signed it; it was then sealed up in the deceased's presence, who desired Barwick to keep and take care of it.

Now if the parol evidence stopped here, and if the deceased had died the next hour or the next day, there can be no doubt that this instrument would have been valid: but further, a presumption of abandonment would not attach to it; the instrument was not unfinished, the deceased intended to do no more in order to give it effect: it was signed, sealed up, and deposited for safe custody in the hands of one of the executors. Even if the deceased had at this time expressly declared that he intended to have a will formally prepared, still this paper would be deemed his will till he had executed a more formal instrument, however long delayed; in addition, however, to the evidence that he did not like the trouble or expense of making a formal will, the deceased, shortly after its execution, strongly recognized this instrument as his will. Unless therefore there be some act of revocation, paper A will have operation.

Thus matters remained till 1826: when Barwick, by the deceased's desire, brought A in his pocket, and in the course of one of their drives the deceased said he wished to read it and make some alterations therein: the seal was broken and the will read both to, and by, the deceased. He said, "It was not to his mind, and that he thought of making an alteration;" but he did not say what alteration, nor can Barwick recollect whether this was before or after some offence which Joseph Fanthorn, his **[229]** nephew, had given the deceased while living in his service; he rather thinks before; nor did the deceased appear to have made up his mind respecting the alteration, nor specify whether it was trifling or considerable, only that it was some alteration. The will was returned to Barwick, and they agreed to confer again upon a

(*a*) See *Mitchell* v. *Mitchell*, supra, p. 75.

future Sunday. They did accordingly consult, and after that second conference the deceased took the will with him, kept it two or three days, then left it with Mrs. Barwick, and subsequently told Barwick "he was afraid Mrs. Mullings should get hold of it:" and it remained in Barwick's hands till after the deceased's death.

Here, then, after six years, was not only adherence to, but a complete demonstration of, confidence in Barwick and confirmation of this instrument: he treated it in every respect as his will; he talked indeed of making some alteration—what he did not state; but after repeated perusals and considerations he again deposited it with one of the executors. In point of legal validity this instrument, though described at the outset as a "memorandum," but being testamentary in terms, then signed, thus deposited originally, thus revised and reconsidered after six years, thus again deposited, is as much to be considered the will of the deceased as to his personal property (and he had no other) as if it had been executed and attested in the most formal manner: it was his will till he had altered or revoked it by some other valid instrument.

The question then comes to the validity of the **[230]** other papers propounded: for intestacy seems quite out of the consideration; it would be as much against the manifest wishes and intentions of the deceased as against legal construction.

The matter rested till the spring of 1827, when the deceased and Barwick had further conferences, and Barwick sketched him out a sort of skeleton will, leaving blanks to be filled up with the description of persons and premises. This paper he left with the deceased; at the same time advising him to apply to a professional person and recommending Mr. Collingwood. From this paper, or in some way or other the deceased himself wrote No. 1, the paper propounded by William Barwick, but the skeleton will drawn up by Richard Barwick has not been produced, and was probably destroyed by the deceased when he had written No. 1.

This paper is hardly intelligible; it has no date; it has executors, and the disposition made by it varies a good deal from the former, and is more favourable to the Barwicks, more unfavourable to the Fanthorns, Joseph Fanthorn having only a legacy of 50l. instead of 50l. a year: but still it adheres to the intention of providing for the widow by an annuity of 250l., though a house and a legacy of 100l. are given her in addition. This paper, thus drawn out in a most insufficient way, the deceased in May, 1827, carried to Mr. Collingwood as instructions. Like A, it contained no disposition of the residue—that was only added by Collingwood after conversation with the deceased; and no executors were named—at least none are written down. Collingwood details what passed upon the occasion of the deceased's **[231]** coming to him, "That the deceased came alone, in the morning; professed to be in a hurry; delivered to him No. 1, as instructions for his will; they were read over to him, the necessary alterations and additions made, and the interview lasted about half an hour, but there was no lengthened conversation, the deceased being impatient to go."

It was in this hurry that he gave these imperfect instructions; and this was the only communication that he had with Collingwood as to the contents of No. 1, and it is from this interview that the Court is to decide that No. 1 is the last will. What might be the effect of Collingwood's evidence if no former will existed and the deceased had died immediately, with strong circumstances to support the intention of the disposition thus made, is not the question for my decision, for there is a former will long adhered to and confirmed. He had some misunderstandings with parts of his family—with his nephews William Barwick and Joseph Fanthorn—before these instructions were given: that with William Barwick, the father admits to have been temporary; and between these instructions and his death he may have thought less unfavourably of Joseph Fanthorn.

Mr. Collingwood, as I have said, had no second interview with the deceased respecting these instructions, but from them, given in a hurry (and it might be under a temporary impression), the draft of a will was prepared, and an engrossed copy sent to the deceased ready for execution. The fair copy varies in several respects from the instructions, and is of considerable length, being no less than thirteen sheets of paper. It was given to the deceased on **[232]** the 29th of May, and remained in his possession till the time of his death, on the 16th of November; but no execution took place, nor anything tantamount to it. Collingwood frequently saw the deceased—asked him when it should be finished—pressed him to bring it to a close—but he could not prevail; he never obtained even a declaration that he had read and approved it: all he got were complaints of its length, or, as the deceased expressed it, in language not very inappropriate to his condition of life, it was "gallows long."

To his friend Barwick he disliked the phraseology "there were so many 'aforesaids:' he could not understand it, it puzzled him." Barwick offered his assistance to explain it; he read part, but there was no direct approval: the fact is, there are marks, some of which shew that he thought it incorrect in parts, and wished it altered in other parts—and he declined to execute, for so the non-execution must be considered; since if it was only reluctance arising from a difficulty of understanding it, he would have gone (for he was well enough) to Collingwood and obtained an explanation: the expense had been now incurred, that could not be the objection.

Against this conduct it would not be possible for me to decide that he quite approved of the disposition: might he not begin to doubt and hesitate as to the propriety of executing it? He was taken ill—the instrument was in the room—he saw Barwick—he frequently was alone with his apothecary—still he took no steps to execute. The evidence is pretty strong to shew that the wife gave no great facilities for making or completing any testamentary disposition; **[233]** but there is no evidence, on the other hand, in any degree satisfying me that the deceased now wished to execute this will making the exact disposition of property it contained: he desired to see Barwick—he wished to see Collingwood—he was in possession of his understanding, but non constat that he did not intend to make alterations in this instrument, which for six months he had declined to execute, though reminded and requested by Collingwood and urged by the approach and continuance of illness. It is true that Mr. Collingwood says "he has no doubt that No. 1, as altered by the deceased on his interview with him on the 21st of May, contained the testamentary intentions of, and was fully approved by, the deceased:" but this conversation six months before his death was hurried; he might have changed his mind: and this does not quite rest on inference and conjecture, for there is direct evidence that he did wish alterations in that paper, in order to assimilate it in some degree to the disposition under A, particularly in favour of Fanthorn, towards whom—after time, the great softener of resentments, had elapsed, and when from the reflections of a sick bed and the approach of death his heart would naturally relent—he might feel forgiveness, and wish to bestow upon him a larger share of his property than he proposed in No. 1. That within three days of his death he contemplated some alteration favorable to Joseph Fanthorn, and that he wished to see Barwick about settling his affairs, is deposed to by Parrett, who was attendant on the deceased as his nurse; and her evidence is confirmed by a note she wrote, upon the occa-**[234]**-sion of his conversation with her; which note she delivered to Barwick on the evening of the same day: so that her account is no afterthought; she acted upon it at the time; and there is no reason to doubt its truth, for it accords with probability, with the evidence of the boy M'Duff, and with the conduct of the deceased in not executing this will.

Under these circumstances it would be contrary to all the principles of this Court to pronounce for No. 1, there being no reason to suppose that imperfect paper contained his final intentions. The case therefore reverts back to paper A. That instrument, having been signed, approved, revised, confirmed, restored to its former custody, and adhered to for so many years, and containing a disposition conformable at the last to the deceased's intentions—he being determined to die testate; to provide for his wife by this annuity of 250l.; to leave the bulk of his fortune among his own relations; and reverting to his purpose of including Fanthorn in his bounty (whether or not with any slight alterations cannot be ascertained)—I am of opinion that, till any meditated alterations had been legally and effectually made, paper A was to be esteemed the will of the deceased, and must be pronounced for.

Lushington moved the Court to decree William Barwick's costs to be paid out of the estate.

Per Curiam. Though there was a "justa causa litigandi" in William Barwick, it does not follow that he **[235]** is entitled to his costs out of the estate: however, upon the whole, thinking that it was necessary for him to bring the matter before the Court, I will allow his costs out of the estate: but the widow certainly is not entitled to any indulgence. The party, who has established paper A, will of course take her expences out of the estate.

MASTERMAN *v.* MABERLY. Prerogative Court, 13th Jan., 1829.—Where a testator executed a will and two codicils, and afterwards had a new will and certain bonds prepared, which were, in conjunction, to dispose of his property, on the

same principle as his former will, and died when preparing to sign the new will; first, the execution being thus finally determined on and prevented, the new will is entitled to probate; and, secondly, the new will never being intended to operate independent of the bonds, the Court is bound, in order to carry his intentions most nearly into effect, to grant probate of the new will and of the unexecuted bonds, as together containing his will; and to revoke a probate of the former papers.—Where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate an instrument disposing of personalty. The disposition has the same legal effect as if the instrument had been actually signed and attested.—When a paper is not intended as a will, but as an instrument of a different nature, if it cannot operate in the latter it may in the former character, for the form does not affect its title to probate, provided it is to carry into effect the intention of the deceased after death.

[Referred to, *King's Proctor* v. *Daines*, 1830, 3 Hagg. Ecc. 221; *Henfrey* v. *Henfrey*, 1842, 4 Moore, P. C. 35. Applied, *In the Goods of Morgan*, 1866, L. R. 1 P. & D. 214. Referred to, *O'Leary* v. *Douglass*, 1878, 3 L. R. Ir. 329.]

The deceased, William Leader, died on the 13th of January, 1828. Of his will and two codicils, respectively bearing date the 2nd of August, 1826, probate had been taken by the four executors therein named: this probate was called in for the purpose of trying the validity (as testamentary instruments and, as such, whether entitled to probate in conjunction with the will and codicils already in operation) of a will, regularly and formally prepared, and of three draft bonds. These four instruments were severally engrossed in 1828; but were all unexecuted. In the unexecuted will William Leader Maberly was substituted in the place of his father, John Maberly, an executor and trustee under the testamentary papers of 1826: the other three executors were retained.

Lushington and Pickard in support of the unexecuted will and bonds.

[236] Testamentary papers, of which the execution is only prevented by death, are as much entitled to probate as instruments duly executed. Here final intention is proved, and the deceased died in the very act of execution. An union of executed and unexecuted papers is not unusual.

Per Curiam. Is there any instance where two papers—both complete as to the disposition of personalty, and where the only defect of the second paper is a want of due execution—have been admitted to probate as together containing the last will? Such a case is not within my recollection, and seems contrary to the principle upon which two papers are incorporated for the purpose of probate. The practice of taking two papers as together containing the will is, in strict principle, for the purpose of supplying imperfections in the disposition of personalty by the later paper: though, perhaps, for the convenience of parties it may be extended to cases where a latter paper, the execution thereof being prevented by the arrest of death, operates as to all the personalty; but not as to the realty, which would pass under the former executed paper. Where a subsequent paper is merely codicillary then no difficulty arises.

Argument resumed.

The object of this Court is to effectuate intentions. In the present case probate of the unexecuted instruments would certainly most fully attain that object; but the question is, whether the Court can grant probate of instru-**[237]**-ments—such as the three bonds now propounded—clearly intended not to operate till after death?

The cases upon this point establish that an instrument, whatever be its form—whether deed-poll, indenture, deed of gift, or even an indorsement upon a banker's note—may be testamentary: the form of the bonds, therefore, is no objection to their being admitted to probate. *Corp* v. *Corp*, and the other cases quoted in *Thorold* v. *Thorold* (1 Phill. 1). *Ousley* v. *Carroll* (in the Prerogative Court), cited by Lord Hardwicke in *Ward* v. *Turner* (2 Ves. 440), *Habergham* v. *Vincent* (2 Ves. jun. 205, S. C. 4 Brown, C. C. 377), *Peacock* v. *Monk* (1 Ves. 127), *Tomkyns* v. *Ladbroke* (2 Ves. 591), *Smith* v. *Ashton* (Vin. Ab. tit. Devise (A. 2), 4).

The King's advocate and Phillimore contrà. The execution of these papers was not prevented by the "act of God:" it was postponed till the deceased's property was in a fit state for the complete arrangement which he contemplated. The only son is, in this case, a minor; and his interests are peculiarly under the protection of the

Court. No decision has been, nor, we apprehend, can be, adduced where probate of two papers, each containing a final and complete disposition of personal property, was pronounced for and decreed.

If probate were to be granted of the papers propounded, the intention of the deceased would **[238]** not be carried into effect: he contemplated the operation of all the unexecuted instruments together—the deed of settlement as well as the unexecuted will and bonds: (*a*) they, when executed, were to be substituted for his existing testamentary papers, viz. the will and codicils of 1826: these have already been acted upon; and we submit that the probate, originally granted, should be again delivered out. The executors have no interest in the suit, but thought it their duty to apply to the Court for directions.

Lushington in reply. Suppose the draft settlement deed were admitted to probate, there would be great doubt whether a Court of Equity could act upon it. If, however, it be desirable to propound this deed, it may be done apud acta.

Judgment—Sir John Nicholl. Upon the facts of this case there is no controversy, nor does there arise any considerable question upon the law applying to these facts. The case derives its importance only from the magnitude of the property, and from the minority of the residuary legatee: but, be its amount great or small, the testamentary disposition must be governed by the same principles. The only question is on the validity of the unexecuted will and the unexecuted bonds.

[239] The deceased, William Leader, described as of Putney Hill, and of Queen's Square, Westminster, died on the 13th of January, 1828, leaving a widow, a son who is still a minor, and four daughters: he executed a will and two codicils in August, 1826: these papers were of considerable length, distributing his large property among his family; and appointing four executors who took probate of them soon after his death. The personalty, affected by the probate, is stated to be nearly 300,000l.

It appears that in the autumn of 1827 the deceased wished to make some alteration in this will. Instructions for a new will were given: certain drafts and instruments were prepared, but the actual execution had not taken place when he died; and, as I have already said, the present question arises upon the validity of those unexecuted papers.

In order to bring that question before the Court the former probate has been called in, and these unexecuted papers have been propounded by one of the executors named in each set of instruments, and opposed by the other three executors. The suit seems to have been quite amicably conducted. The plea propounding the unexecuted papers details all the circumstances, and in proof, the answers of Mr. Langford, one of the executors, have been given, he being the confidential solicitor of the deceased employed in preparing the several instruments; and five witnesses have been examined; two of these are Mr. Langford's clerks, who supply some material facts not within Mr. Langford's own knowledge: the other three witnesses are, the medical person **[240]** who attended the deceased, and two tradesmen who were called in to attest the execution, but which execution was prevented by the death of the deceased, when he was just about to execute the principal instrument—the new will.

The facts thus laid before the Court, it may be proper to state. The deceased, besides his personalty, had a valuable real estate; he was engaged in a distillery, and also in a glass manufactory. On the marriage of three of his daughters, Mrs. Crofton, Mrs. Luttrell, and Mrs. Dashwood, the deceased advanced 10,000l., and on the marriage of the other daughter, Mrs. Acland, he settled on her 20,000l.; 10,000l. in money and 10,000l. by bond.

On the 2d of August, 1826, as I have already stated, he executed a will and two codicils; by that will, as far as it is necessary to state it, he gave to each of his married daughters, with the exception of Mrs. Acland, 10,000l. in addition to their settlement; and to his unmarried daughter, Ann, 20,000l., who was at that time about to be married to Mr. Dashwood; so that he then clearly intended that each of his daughters should receive from him in the whole 20,000l. His daughter Mary (Mrs. Crofton) having been left a widow with two children, had afterwards married Captain Losack, and her additional 10,000l. were secured to her children by Mr. Crofton, but

(*a*) The deed of settlement was before the Court, but it was not propounded: its contents and the reasons of its non-execution are noticed in the judgment. See infra, pp. 242, 3, 5.

the deceased also gave to his grand-daughter, Miss Losack, 2000l. The residue, real and personal, he bequeathed to his son, who then was, and still is, a minor: he appointed as executors Mr. John Maberly, with a legacy of 1000l.; **[241]** Mr. Edward Temple Booth, Mr. John Masterman, and Mr. Robert Langford, each with a legacy of 500l.: these were the contents of the will of August, 1826, so far as it is necessary to recite them.

The first codicil directed that the legacy duty should be paid out of the estate: the second, that if the son died a minor (for it was only on that contingency), the residue, real and personal, should be divided among the daughters.

About September, 1827, the deceased became unwell, and grew gradually worse till his death. Mr. Langford, his solicitor and one of his executors, was at the commencement of this illness absent from London, but returned in November. The deceased shortly afterwards expressed to him his wish to make some alterations in his will, and in the beginning of December they read over the will together, when he gave instructions for the alterations he wished to have made, which Mr. Langford took down in writing. Those alterations were, an annuity of 100l. to Miss Sandford; the omission of the conditional provision to his daughter Ann, as the marriage between her and Mr. Dashwood had taken place; the substitution of William Leader Maberly as a trustee and executor, in the place of John Maberly, his father; the omission of the legacy to the latter; the introduction of a legacy of 100l. to his coachman, and of one year's wages to other deserving servants; blanks were to be left for the legacies to his daughters; and the legacy to his grand-daughter, Augusta Losack, was to be 5000l.

Such was the substance of the instructions **[242]** given, as I understand, at the first interview; and from them, which made no very important alteration in the former will (that is, supposing the legacies to the daughters were filled up), the draft of a new will was prepared. On the 12th of December Mr. Langford attended the deceased and read or explained the draft to him, and was then informed by him that Mr. Atlee, his partner in the distillery, had proposed paying him 30,000l. for his share of the business, and that he, the deceased, had determined to invest that sum in the funds, in the names of trustees, for the benefit of three of his daughters, Mrs. Losack, Mrs. Dashwood, and Mrs. Luttrell, and their children: Mrs. Acland, as has been before remarked, had had the whole 20,000l. secured to her at her marriage. At this interview the deceased also told Mr. Langford that he had it in contemplation to give bonds to the trustees of the marriage settlements of these three daughters, in order thus to secure to each of them 10,000l. instead of doing it by will.

At the latter end of December the deceased had a further interview with Mr. Langford, and then gave instructions for some additional small legacies; and 500l. a year to his wife in case she did not wish to inhabit the house at Putney; for the omission of the legacies to the three daughters, as he intended to secure them the 10,000l. by bond instead of by will; and for the insertion of a legacy of 5000l. to his daughter Mrs. Acland, and of 5000l. to Mr. Acland—and who were to have no share in the 30,000l. from Atlee; of an additional 500l. a year for the maintenance of his son till he came of age; and if the son died before the age of twenty-**[243]**-one, then, instead of the residue going equally between the four daughters, he directed only 20,000l. to be given to Mrs. Losack and the rest among the other three. He also gave instructions for a deed of settlement of the 30,000l. expected to be received from Mr. Atlee; one-sixth thereof was to go to his grandchildren the Croftons, one-sixth to his grandchildren the Losacks, one-third to Mrs. Dashwood and her children, one-third to Mrs. Luttrell and her children; and, in consequence of this arrangement, the legacy of 5000l. to Miss Losack was omitted. In pursuance of these further instructions drafts were prepared—of the new will without legacies to the three daughters—of the bonds securing 10,000l. to the trustees of each marriage settlement—and of the deed of trust for Atlee's 30,000l., which latter deed was to be executed as soon as that sum should be invested in the funds. These draft bonds, and the draft of the new will, are the papers propounded. On the 4th of January the drafts of these several instruments were carried by Langford to the deceased, were read or fully explained to him, and he approved of, or expressed his satisfaction at, them.

Here, then, were the instructions carefully decided on, after much consideration and repeated interviews, and the drafts finally approved. The only further direction given on that day had no reference to the former part of the disposition; it was

merely an authority to his executors to allow his partners, both in the distillery and in the glass manufactory, a certain time to pay in their share of the capital in these concerns.

[244] Mr. Langford was under an engagement to go out of town on the following day, the 5th of January, and it was settled that the matters should be completed as soon as he came back, which was expected to be in a few days: but he informed the deceased that the instruments should be prepared, so that if he wished to execute them he might send for them to his (Langford's) office. Mr. Langford, therefore, must have considered the mind of the deceased to have been finally made up. On the 5th of January the additions, respecting the time to be allowed the partners for paying off the deceased's share of the capital, were directed by Simmonds, Mr. Langford's clerk, to be inserted in the draft; and he waited on the deceased with the draft, so altered, on the 7th. He found the deceased very ill, but sitting on a sofa; he informed the deceased, "That he had brought the several drafts, but would only trouble him with the alterations:" he replied, "That every thing had been arranged respecting the said will with Mr. Langford, and that he only required to have the additional clauses read to him." This was accordingly done; those clauses were finally settled; some other unimportant explanations were given, and the deceased expressed himself quite satisfied; so that here, again, was a final approbation. Simmonds then asked, "If he should get this instrument engrossed for execution?" The deceased replied, "No, nothing can be done till I see Mr. Atlee, who is to pay the 30,000l.; it must wait till Mr. Langford comes to town." This does not appear to have arisen in the slightest degree from any wavering of intention, but merely from **[245]** a wish that the whole might be completed at once; for the deed of settlement could not be executed till the 30,000l. was actually invested.

It was argued that this declaration shewed that the disposition was wholly to depend on Mr. Atlee's paying this 30,000l. I cannot view it in that light; every thing was settled; and suppose that Atlee had changed his intention and declined to pay, it would not have affected the whole; it would be no abandonment. I cannot think that the whole matter was at all dependent upon the completion of the act by Mr. Atlee. So satisfied, however, was Simmonds of the deceased's final approbation, that, perceiving the deceased was very ill, he caused all the instruments to be actually engrossed.

On the 11th of January the deceased was alarmingly ill, but was better the next day: on Sunday the 13th, however, he was again worse, and asked his medical attendant, Fisher, "If it was the 17th?" who replied by asking, "If he had any thing to do on the 17th?" He said, "He had some papers to sign." Fisher said, "He had better not defer it:" the deceased replied, "I know what you mean:" understanding, therefore, that he was in that degree of danger that, if it was necessary to do any act, he had better not delay it: he then immediately informed Mr. Acland that there were some papers at Langford's house which he wanted to execute; and desired they might be directly fetched. Langford had, as already pointed out, said that the papers should be ready if wanted; and though the deceased had told Simmonds that the whole business should stand over till Langford's return to town, yet, immediately on **[246]** being apprized of his danger, he sent for the papers, though he was clearly aware that the deed of settlement could not take effect. These circumstances again shew final intention, and that at this time the deceased was in a perfect state of capacity. One of Mr. Langford's clerks, Stent, immediately delivered the engrossed copy of the will—but what other papers does not appear: it was carried to the deceased's house; he was informed of its arrival by Fisher; he wished to sign it; witnesses were procured; he was lifted up in bed; but at the very moment that a pen was handed to him he expired.

Now these circumstances, happening on the 13th, are sufficient to shew adherence of intention, generally, to the arrangement he had decided upon making; but it cannot be understood that he meant to give effect to the engrossed will in exclusion of the bonds; it is quite clear that the bonds constituted a part of the arrangement which he intended should take place after his death. Fisher describes him as being in a dying state on that morning; he speaks of papers (in the plural) which he wanted to execute, not as if he wanted the will in exclusion of the bonds; no allusion was made to the omission in the will of the legacies of the 10,000l., which legacies were merely omitted because he was to carry his intentions into effect in a different mode: it was

as much his determination to execute the bonds as the will; the bonds were meant as a substitute for the legacies in the will.

These being the facts of the case, and the intentions of the deceased quite manifest, there seems to be no difficulty thus far as to the law.

[247] In respect to personal property, where there is final intention proved and execution prevented by the act of God, the mere want of execution does not invalidate the instrument. The disposition intended to be made has the same legal effect, in regard to personal property, as if the instruments had been actually signed and attested. This non-execution does not in law affect the validity of these instruments as testamentary instruments applying to personal property. It is also settled law, and several cases have been decided, that if the paper contains the disposition of the property to be made after death, though it were meant to operate as a settlement, or a deed of gift, or a bond; though such paper were not intended to be a will nor other testamentary instrument, but an instrument of a different shape; yet if it cannot operate in the latter, it may nevertheless operate in the former, character.

Cases of Scotch conveyances, of deeds of gift, and others of a similar nature were cited in argument; and I will only mention a few in addition to them. In *Musgrave* v. *Down*, T. T. 1784, the assignment of a bond by endorsement—in *Sabine* v. *Goate and Church*, 1782, receipts for stock and bills endorsed "for Mrs. Sabine"—in *Drybutter* v. *Hodges*, E. T. 1793, a letter—in *Marnell* v. *Walton*, T. T. 1796, marriage articles—in *Maxee* v. *Shute*, H. T. 1799, promissory notes, and notes payable by executors to evade legacy duty, were held to be testamentary.

These are a few out of many cases that have occurred in the Prerogative Court; and, from the reports both at common law and in **[248]** equity, a variety of instances have been, and others might be, cited.(*a*)[1] So that it is a settled point that the form of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death. Here the intention of the deceased in respect to the disposition is beyond doubt; it is clear that he meant these daughters to have the additional 10,000l. each; he had proposed at first to effect this in the form of legacies in his will; but afterwards thought it would answer his purpose better to give those legacies in the form of bonds, and to omit them in the will; and these bonds therefore are to be considered as testamentary instruments, and the mere want of execution does not invalidate them; as that execution is shewn to have been prevented alone by death.

The fair copy of the will and the bonds therefore taken together, though none of them are executed, contain, on the ordinary principles of the Court, the will of the deceased as to his personalty. For it is clear that the execution was intended till the latest moment of his life, and that he would have executed the bonds as well as the will had he not been suddenly struck by death: nor is there any reason to suppose that he would have postponed that act till Atlee's 30,000l. were paid and invested in the funds.

The effect of pronouncing for probate of the unexecuted paper and the bonds may be to give a larger relative benefit to the Aclands; for the other three daughters will, under those papers as well as under the original will, each take **[249]** 10,000l. less than the deceased finally intended: Miss Losack's legacy also may be defeated from the circuitous mode in which the deceased proposed to give effect to his intentions: the Court much regrets that circumstance, and would fain trust that, when the minor comes of age, effect may be given to the deceased's wishes in that respect.(*a*)[2] But on all the consideration that a judicial view of the subject requires, and acting on legal principles, without regarding what may be the result upon the construction of these papers, I decree probate of the fair copy of the will (for in that way the instrument was laid before the deceased for execution), and of the bonds.

The probate which has been granted must be revoked, but the will may remain in the registry of this Court for safe custody.

(*a*)[1] See *Molineux* v. *Molineux*, Cro. Jac. 144.

(*a*)[2] In the course of the argument the Court said: It was the clear intention of the deceased that his grand-daughter, Miss Losack, should have a legacy of £5000: it was taken down in writing, in the instructions given to Mr. Langford at his first interview, in December, 1827, with the deceased, on the subject of his will; and it was inserted in the first draft. The revocation of the legacy was only conditional upon the execution of the deed of settlement, which was not effected.

REAY *v.* COWCHER. Prerogative Court, 15th Jan., 1829.—The presumption is that a codicil disposing of realty as well as personalty, unattested, only signed by initials and with many interlineations is unfinished and preparatory; and then it must be shewn the deceased thought it would operate in its actual form or was prevented by a sufficient cause from finishing it.—When a paper is unfinished the presumption of law is strong against it; especially when it is to alter an executed instrument; still more when to revoke a disposition of the bulk of the property to the deceased's own family, and transfer it to a stranger.

The King's advocate and Dodson for the will and codicils. [See vol. i. p. 75.]

Lushington and Haggard contrà.

[250] *Judgment—Sir John Nicholl.* This cause has been already under the consideration of the Court at a former hearing, so far as respected the validity of the will, which was opposed by the widow. A multitude of witnesses were examined; but, though much contradictory and inconsistent evidence was produced, the grounds of opposition manifestly and completely failed her; and there being no doubt of the deceased's capacity in 1824, the will was clearly established. The wife being thereby excluded, and her interest not being affected by the codicil, the case stood over; and the Court reserved the question arising upon the codicil till the party interested under and excluded by it intervened.

The codicil rests upon totally distinct grounds from the will. The question is, 1st, whether the instrument is finished or unfinished; and, 2dly, whether, if unfinished, it is supported by circumstances sufficient to shew that it contains the fixed and final intentions of the deceased, and that the finishing was prevented.

The will marks a considerable degree of resentment and want of confidence towards the son and daughter, or rather towards the daughter's husband; but still the bulk of the deceased's property (after providing for his housekeeper, and reposing trust in her, and in her sister) is to centre in his own family—in his grandchildren. Now the codicil makes a great alteration: instead of the annuities to the son and daughter, it gives the daughter and her children a house in Davies-street, and to the son and his children another house in the same **[251]** street: whether these are of equal value with the legacy does not appear; but the paper bequeaths the residue to Mrs. Reay, and authorises his executrices (viz. herself and her sister), if his wife, daughter, or son should institute legal proceedings, "To cut them off with a shilling." This codicil is dated on the 21st of October, 1826.

Here, then, between March, 1824, the date of the will, and October, 1826, is a complete departure from, and alteration of, the intention of the will. The son and the daughter are differently provided for, and the bulk of his property is given away from his own family—from his grandchildren—and is transferred to a stranger in blood who lived with him in the capacity of housekeeper. To account for this great change no circumstances are adduced which rationally and naturally lead to it.

The deceased was a strange, eccentric, violent man in temper; his quarrels with, and separation from, his wife; his alienation from his son and daughter, prove that to have been his character: but these things had occurred long before the will was made; so that these resentments account in no way for the change in the disposition of his property; and the daughter had a child, which would be an additional reason for the continuance of the bequest in their favour. So also as to his confidence in Elizabeth Reay; she had resided with him under the name of Mrs. Smith ever since 1820; and there is no evidence that her residence was otherwise than perfectly innocent, and in the character of companion and housekeeper: but there had been no change in her relation to him; **[252]** no fresh quarrel with his son and daughter; they occasionally called and were kindly received; and on the last occasion of his seeing his daughter "he kissed and blessed her." This is proved by two of Mrs. Reay's own witnesses.

Much evidence was offered to shew that the deceased was not only eccentric and, in the opinion of several, insane, but that he was also much addicted to intoxication; and Mr. Crowdy, the medical man, deposes, "That the disorder of which he died was brought on by intemperance:" and though that was not sufficient to affect the validity of a will formally drawn up, and regularly executed and attested in March, 1824, yet it may be material, coupled with the change of disposition, to bear upon the inference whether, in October, 1826, within six weeks of his death, this codicil was a finished and final paper, or whether it was produced by a hasty and transient feeling not afterwards adhered to, but abandoned.

The question then comes to this consideration, whether from the form and appearance of the paper itself, or rather of the two papers, they are to be esteemed final. There is a third paper which is not propounded; but on which an observation arises, and not an unimportant one; for though it is a mere directory memorandum, yet the deceased's name is subscribed formally and fully: this shews his practice and habit, and affords something of an inference against the mere subscription of A, by his initials.

However, paper A, the dispositive paper, is the important instrument: it is half a sheet of gilt post letter paper: and apparently it was only **[253]** half a sheet when the deceased took it up, for the writing which covers both sides of it begins at the gilt, and not at the torn, edge. It is not a paper therefore on which it is likely that a methodical formal man (for so the deceased was) would begin writing an important codicil, to which he had previously made up his mind: it looks more like a hasty memorandum for further deliberation; and upon the face of it cannot be deemed a final instrument. There are various erasures and interlineations; and most important alterations, particularly in the disposition of the residue; for though, as first written, it was revocatory of the residuary clause in the will, yet this paper originally bequeathed it quite to a different person from the actual legatee, viz. to "Mr. Charles Douglas of Cambridge College:" but who he was, or why he was introduced, or why he was superseded, no account is given: and afterwards the name of Mrs. Elizabeth Reay was interlined. The paper is only subscribed with initials: is unattested: seems to have been written and subscribed uno contextu; and the alteration appears to have taken place subsequently; but when is not ascertained.

The first impression therefore was not to give the residue to Mrs. Reay: so that the origin of this codicil is not to be sought in the increase of his affection for her: and when I consider that the deceased was a man of great regularity, form, and precision; and that all the papers found in the drawer with the paper in question were in order, it is hardly possible to suppose that he could have intended it as final and finished, or have proposed it to be any thing more than a mere preparatory sketch for future deliberation.

[254] But further; his will, all written with his own hand, is signed and sealed, and was executed in the presence of three witnesses: he was aware, therefore, of the necessity of having three witnesses to a devise of real property; and part of the residue is real: if, then, he had intended this paper to operate, it is to be inferred he would have had witnesses: and it is proved by Mr. Crowdy, the surgeon, Mrs. Reay's own witness, that the deceased did intend to have the paper attested, and to do a further act in order to give it effect. The paper under these circumstances must be regarded as unfinished.

A declaration, however, is relied on: but it is quite impossible to depend on a loose declaration, deposed to at a considerable distance of time. From the experience we have in this place, we know declarations are for ever made and for ever misunderstood, and never can operate against the conduct of the party deceased. The paper itself shews that he had a floating intention when he wrote it to do something, and that he also had the same sort of intention when he altered it: but I have already said it can only be considered as unfinished and preparatory; and then the question is, whether there is sufficient to establish it in that character.

When a paper is unfinished the presumption of law is strong against it; more especially when it is to alter an executed instrument, and, à multo fortiori, when it is to revoke a disposition of the bulk of the property to the deceased's own family, and to transfer it to a stranger; and such would be the effect of this codicil. There is a total absence of all circumstances tending to shew either that the **[255]** deceased considered this paper would operate in its present form, or that he wished to finish it, but was by some sufficient cause prevented. The paper is dated on the 21st of October, and the deceased died on the 1st of December, so that he lived for six weeks after he wrote it, and had abundant opportunity of completing it. True, he was confined to his bed for the last three weeks of his life, but there is no reference to this paper within the last month of his life, except a single declaration, and that, I repeat, is of no weight under the circumstances of this case.

The question then comes to the finding. The will itself was found sealed up in an envelope endorsed as the will, and placed in a tin box with other papers relating to his property. Had the codicil been also so found it might have been a very

material fact, but it was found in an open drawer of a table in the room where the deceased sat, in which drawer was the memorandum to which I have adverted, and which could have been of no effect for the last three or four years of his life: this is just the situation in which the deceased might leave an unfinished, deliberative paper, to be taken out and copied whenever he should make up his mind finally to give it effect: but if he had already decided, if he meant to do nothing more, if he intended the paper to operate in this form, he would have put it away in a place of safety with his will. But, then, it is said, that paper B, a fairly written paper, was found in the same place; B, however, carries the matter no further: it is true that it is fairly written; but it ends without any stop, not even a comma, and has no date; nor does it **[256]** appear when it was written, nor is there any certain constat to what paper it applies; there is no positive reference to A, and the direction contained in it as to the sale of the house would be unnecessary, if Mrs. Reay was already residuary legatee. The inference then is that it is quite independent of, and has no connexion with, A, except that it was found in conjunction with it. There is, then, nothing to shew that A was a finished paper; or, if unfinished, that the deceased was prevented from completing it; nor is there any circumstance to prove adherence to it, nor an intention that it should operate at the time of his death.

I therefore pronounce against the validity of the codicil, and direct the costs on all sides to be paid out of the estate.

[257] BEARE AND BILES *v.* JACOB. Arches Court, Hilary Term, 1st Session, 1829. —Though the regular appeal from a jurisdiction not peculiar but subordinate is to the diocesan, yet, if the Judge of the subordinate and diocesan courts be the same person, the appeal may be per saltum to the metropolitan: but the reason must appear by the formal instruments in the cause.

[See further, p. 522, post.]

On protest.

This was an appeal from the Court of the Sub-dean of Sarum, described as "an exempt and peculiar jurisdiction." (*a*)

It was a suit originally instituted in that Court, before the Reverend Matthew Marsh, B.D., sub-dean of the said sub-deanery, by Peter Jacob, who, as surviving residuary legatee in the will of James Jacob, had called upon Messrs. Beare and Biles, the executors, for an inventory and account.

The præsertim of the appeal was: "That the Judge had confirmed a report of the registrar, thereby pronouncing that 57l. were due to Peter Jacob."

After the inhibition and citation were returned, an appearance, under protest, was given for the respondent; and, on his behalf, it was alleged **[258]** in act on petition, "that the right of appeal in all cases, depending in the Court of the Sub-dean of Sarum, by law notoriously belonged to the lord bishop of the diocese of Sarum, or his chancellor for the time being, and did not lie directly and immediately to the Court of Arches: that the Court of the Sub-dean was not an exempt and peculiar jurisdiction, but archidiaconal merely, and that the sub-dean, in the exercise of his jurisdiction, was subordinate to, and controuled by, the bishop."

For the appellants it was alleged "that the Judge of the Court of the Sub-dean was also Judge of the Consistory Court of the bishop of the diocese, and that the appeal would, under the circumstances, lie to the Arches."

In reply it was averred "that the circumstance of the two offices being held together by the same person was no ground for altering the established course of appeals; and that if it were, such ground ought to have been alleged previous to the issuing of the inhibition and citation, and inserted therein, as founding the metropolitan jurisdiction; but that those instruments had issued on a false suggestion, viz. that the Court of the Sub-dean of Sarum was an exempt and peculiar jurisdiction."

Dodson in support of the protest. The sub-dean of Sarum has no peculiar nor exempt jurisdiction: the dignity and office are conferred by the bishop of the diocese

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(*a*) The inhibition and citation did not originally state that the Court of the Sub-dean was an "exempt jurisdiction;" but on the registrar of the Arches Court refusing to sign them, because it did not appear, on the face of the instruments, that the appeal lay to the Arches, the proctor alleged the jurisdiction to be exempt, and the words "exempt and peculiar" were interlined.

who collates to them, who visits and inhibits the sub-dean. Mr. Davies, twenty-two years deputy-registrar of both Courts, states in his affidavit **[259]** "that the jurisdiction of the Court of the Sub-dean is not exempt and peculiar, nor co-ordinate with the jurisdiction exercised by the bishop of his diocese, his chancellor, or official:" and, further, "that the sub-deanery is visited by the bishop in every respect as the archdeaconries within the diocese." The appellants allege that the chancellor of the diocese and the sub-dean are the same person, and that it is nugatory to appeal to the same Judge: but this objection, if good, should have been originally set forth and legally asserted. Oughton, "De recusatione judicis suspecti," tit. 272. This objection, however, being to the person of the Judge, and not to the Court, the Court should not on that account be passed over, particularly as the Judges of the two Courts are not necessarily the same. On the course of appeals he cited *Parham* v. *Templar*, 3 Phill. 241, *Tull* v. *Osberson*, 1 Sid. 90.

Lushington and Addams contrà. Objections of form will not be favoured: and much difficulty exists in ascertaining the different jurisdictions in each particular diocese. If the sub-dean of Sarum has not a peculiar and exempt jurisdiction; still, should this protest be sustained, the appeal will be to the same Judge, who must, at least, be considered as disqualified; since, having once decided this very cause, his mind cannot be free from bias. The case comes precisely within the general principles laid down upon this subject by Gail.(*a*) An appeal does not lie from the com-**[260]**missary to the bishop, "lest," says Burn (referring to Gibson), "the appeal should seem to be made from the same person to the same person" (1 Burn's Eccl. Law, 8th ed. p. 60). Though by the civil law appeals were strictly gradatim, non omisso medio (Dig. 49, 1, 21, and Theod. Cod. 1 vol. p. 82), by the canon law and by custom they were allowed per saltum. X. 2, 28, 66. Sexti Decret. 1, 4, 2, and 2, 15, 3, et Gloss. Also *Gastrell* v. *Jones*, 2 Roll. 448. But a passage from Peckham's Register, fol. 149, will decide the question.(*b*) Nor was the law altered at the Reformation; for by the statute of appeals the jurisdiction of the archbishop is preserved as before (24 Hen. 8, c. 12, s. 8). *Cart* v. *Marsh*, Stra. 1080. The absurdity of an appeal ab eodem ad eundem has been so strongly felt that, in *Lee's case* (Carthew, 169), it was made to overrule the statute of appeals, which, by the 7th section, expressly gives an appeal from the Dean of the Arches to the Archbishop of Canterbury. This decision strongly shews the doctrine of the Courts of Common Law: and, in this case, there are special circumstances why the appeal should not be gradatim: viz. the same Judge; the same **[261]** registrar; and, still more, the appeal is from the registrar's report. Strictly, we admit, the objection, to the regular course of appeals being pursued in this instance, ought to have been set forth in the inhibition and citation; but to obviate any inconvenience from this defect the Court may direct a special entry of the fact to be made in the muniment books.

In reply. The ground, that the sub-dean in his Court exercises a "peculiar and exempt jurisdiction," is abandoned as untenable. The cases of bishops, officials and commissaries, as referred to by Gibson, are easily distinguished. The bishop would there have already acted by his sufficient officer; and both the commissary and bishop have the same Court. So in *Cart* v. *Marsh*. And in *Lee's case* it was in substance an appeal to the same person. But here the sub-dean is not an officer of, nor has the same auditory as, the bishop, but is the judge of a different court. It is admitted that appeals regularly are gradatim: and to that course, I apprehend, the court is bound to adhere.

Judgment—Sir John Nicholl. This is an appeal from the sub-dean of Sarum,

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(*a*) Gail, Pract. Obs. lib. i. obs. 119, s. 2.

(*b*) Viz. "Processus contra Subdecanum Hereford qui in causâ matrimoniali sententiam tulit definitivam, à qua R. ad sedem Cantuariensem legitimè appellavit, omisso medio, juxta consuetudinem Curiæ Cantuar. observatam; et non obstante rescripto ad appellationem et inhibitionem, Subdecanus dictum R. denuntiavit excommunicatum. Officialis Cantuar. vocavit judicem prædictum dicto querelanti responsurum, et prædicto contemptui Curiæ Cantuar. responsurum et satisfacturum." Concil. Mag. Brit. (Wilkins), vol. ii. p. 84.

And Archbishop Parker says: "Ab inferioribus judicibus ad hunc metropolitanum omissis mediis appellatur, et non gradatim ut jura præscribunt." De Antiquit. Brit. Ecc. p. 42, ed. 1729.

in whose Court it was originally a suit for an inventory and account instituted by Peter Jacob—surviving residuary legatee—against the appellants as executors. A decree was there given against the executors, and upon an appeal to this Court an inhibition issued to the Court of the Sub-dean described therein as "a peculiar and **[262]** exempt jurisdiction." An appearance was here given for Jacob under protest, alleging "that the jurisdiction was not 'peculiar and exempt,' but subordinate to the bishop, and that the appeal lay to his Consistorial Court." The appellants denied this statement, and further alleged that the same person was chancellor and sub-dean, and therefore that there was no appeal, pro hac vice, to the Consistory. The respondent answered that the inhibition and citation did not suggest that ground, but alleged only the jurisdiction to be "peculiar and exempt," and consequently that these proceedings were not valid.

Hence, it seems that three questions present themselves:

First: of fact: whether the sub-dean's Court exercises a peculiar and exempt jurisdiction; for if it does, the appeal lies to the Arches; if however not peculiar but subordinate, then the appeal is to the bishop in his Consistory Court.

Second: whether the circumstance of the chancellor being also the sub-dean alters the course of appeal.

Third: whether it is competent to the parties to raise that question on the present process.

The first point, which hardly admits of any question either on the fact or law, has been but little pressed in argument. The instrument of appointment of the sub-dean has been exhibited, and is merely subordinate and archidiaconal: the bishop visits and inhibits: during his visitation the sub-dean's jurisdiction is wholly suspended, and is merged in, and exercised by, the bishop as in ordinary archdeaconries. This jurisdiction of the sub-dean of Sarum **[263]** is well ascertained, and has been made more public by the return to Parliament, in the last session, of Courts exercising ecclesiastical jurisdiction. In the diocese of Sarum it is stated, "The Bishop of Sarum, by his chancellor, exercises the authority of granting probates and administrations, in the sub-deanery of Sarum, during the bishop's triennial visitation for six months, only containing five parishes." "The sub-dean of Sarum exercises the (above) authority, except for six months in every third year (as aforesaid)." This return confirms what appears from the instruments of appeal, and from the appointment of the sub-dean, that he is appointed by the diocesan, and has a mere subordinate jurisdiction; and his jurisdiction being subordinate, and not peculiar and exempt, no doubt, in common cases, the appeal lies to the diocesan, and not, per saltum, to the metropolitan. I will not now go into that question, for it was fully discussed, and the cases and authorities examined, in *Parham* v. *Templar* (3 Phill. 223); and I see no reason to alter the opinion then expressed.

The next point is, whether the intermediate appeal is lost by the same person holding both offices. It appears that not only the Judge—but that the registrar—of the two courts is the same person (and this, it must be remembered, is an appeal from the registrar's report); there is, however, nothing to shew whether the Courts are held in the same place. If it is meant to keep the jurisdictions separate, the offices are incompatible: the Dean of the Arches cannot **[264]** hold the chancellorship of a diocese; the Judge of the Consistory of London is never at the same time official of the Archdeaconry of London or Middlesex. But if the bishop thinks fit to appoint the same individual to both offices, they must be considered as consolidated and merged, otherwise the absurdity and extreme inconvenience of appealing from the same person to the same person would be introduced. I cannot suppose the Judge of the Courts now in question is of a different condition from other persons, and I must, therefore, consider the sentence of the sub-dean to be the sentence of the chancellor, or, in other words, that this cause has in effect been decided by the chancellor.

It is said "that the two offices being held by the same person ought not to deprive the Consistorial Court of its jurisdiction:" jurisdictions, however, are not set up for the sake of Courts and their officers, but of the suitors who live within the jurisdiction. It is the act of the diocesan in appointing to, and of the chancellor in accepting, the two offices, that deprives the suitor of the benefit of an appeal. What would be the effect of compelling the suitors to travel through both Courts? It would only be an intolerable hardship without any probable advantage, or the fair benefit of an appellate jurisdiction; for an alteration of the sentence would, under such circumstances, be

perfectly hopeless. In truth it would be no appeal. I should therefore be disposed to hold that the two offices must, pro hac vice, be regarded as consolidated, and that the decision of the Chancellor of Sarum has been already given in his character of sub-dean.

[265] The remaining question is, whether this consolidation of the two offices ought not to have been stated in the inhibition and citation, and alleged in the nature of a recusatio judicis, as the reason for coming to this Court "per saltum." This omission seems a stronger ground of protest. The citation and inhibition are defective: they have made a misnomer, which is not merely formal but may be substantially injurious to the Consistorial Court: they call the sub-dean's jurisdiction "peculiar and exempt," and may tend, at a future time, to deprive the diocesan jurisdiction of its due authority, for they will remain as part of the records of this Court and of the Sub-dean's Court, and therefore would be instruments describing the latter as exempt and not subordinate.

This Court cannot, then, proceed on these instruments; but it would be very unwilling, when the property is so small, and when under the circumstances of this case the intermediate Court is taken away, as a real and substantial appeal, to send the parties back and deprive them of the remedy intended by the law. I shall therefore let the matter stand over for consideration, whether the real ground of appealing to this Court omisso medio, and the principle upon which this Court might properly have issued its inhibition, can be made to appear in such a manner as shall hereafter prevent any proceedings, taken in this cause, from being drawn into a precedent to the injury of the diocesan Court.(*a*)

[266] COLVIN *v.* FRASER AND OTHERS. Prerogative Court, Hilary Term, By-Day, 1829.—A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession and was not found at his death, the primâ facie presumptions are: first, that the testator destroyed the part in his own possession; and, second (if the first be not repelled), that he intended thereby to revoke the duplicate not in his possession. The deceased pronounced dead intestate.—The primâ facie presumption that the deceased revoked a will, which was in his own possession, but is either not found at all at his death, or is found cancelled; and the primâ facie legal consequence that a duplicate, not in his possession, is revoked thereby, may be rebutted by a strong combination of circumstances leading to a moral conviction, or by direct positive evidence.—In order to rebut a presumption of law (e.g. as to the destruction of a will by a testator), declarations unsupported by circumstances strongly marking their sincerity, and confirming their probability (especially where their stringency depends on the exact words of a casual expression), cannot safely be relied on.—Declarations, coupled and consistent with conduct and acts are of weight in proof of intention, so are those not depending on the precise words of a particular expression, but on the tenor of an extended conversation, especially if not liable to the suspicion of insincerity; still more if repeatedly made in confidential communications.

[See further, nomine *Schoolmasters of Scotland* v. *Fraser*, p. 613, post.]

John Farquhar, formerly of Calcutta, but late of London, the deceased in this cause, was found dead in his bed at his house in the New Road, on the morning of the 6th of July, 1826, being then seventy-six years of age; he left behind him Elizabeth Willoughby (wife of Peter Trezevant) the daughter of a deceased brother; John Farquhar Fraser, and Dame Charlotte (wife of Sir William Templar De La Pole), children of a deceased sister; and James and George Mortimer, Charlotte (wife of William Aitken), and Mary (wife of James Lumsden), children of another deceased sister; the only persons in distribution in case he had died intestate.

On the 15th of September, 1826, administration of the goods of the deceased, as dying intestate, was granted to John Farquhar Fraser. A copy of a will and codicil (executed, in duplicate or triplicate, by the deceased in India) having been received by David Colvin, the party in this cause, authenticated under seal of the Supreme Court of Judicature at Fort William, in Bengal, a decree issued at his instance,

(*a*) On the 8th of June a decree had not been made; the case being under agreement.

calling upon Mr. Fraser to bring in the administration, and shew cause why the same should not be re-[267]-voked, and probate of the will and codicil be granted to Mr. Colvin.(*a*)

(*a*) A comparative statement of the will and codicil of the 7th of March, 1814; of paper A; and script No. 1:

Will and Codicil—
Dated 7th March 1814:

"I, John Farquhar, agent for the manufacture of gunpowder at Ishapore in Bengal, being about to embark for Europe, and being in sound and disposing mind, do hereby bequeath my real and personal property as follows. To my nephew John Fraser, and niece Lady Pole, each 500l. sterling money of Great Britain: to my friend George Wilson, at present one of my agents, 1000l. of the same denomination: to Sir John Royds, one of the puisne Judges in the Supreme Court of Judicature in Bengal 500l. of the same denomination: to George Davidson, Esq. Mint Master of Bengal, 1000l. of the same denomination: to Alexander, David, and James Colvin (brothers), and Alexander Colvin, their nephew, 300l. each, to commence from the time of the respective arrival of the parties in any part of Great Britain: to my old friend Dr. George French, professor, or some time since professor of chemistry in the Marischal College of Aberdeen, 300l. of the above denomination: to Colonel or Lieut. Colonel Calcraft 300l.: all the above sums to be paid to the respective persons named during the natural term of their lives annually. I likewise bequeath for the purpose of promoting learning,

Paper A and Script
No. 1—
as far as they differ from the will and codicil of the 7th of March, 1814. The passages in Italics are the clauses which are not contained in script, No. 1: in other respects, except as is hereafter noticed, and with some slight verbal variations, the three instruments coincide.

For an account of paper A, and script No. 1, see the 14th article of Mr. Colvin's allegation, infra, p. 273:—the 9th, 10th 11th, and 12th articles of Mr. Fraser's allegation, p. 280;—and the 6th and 9th articles of Mr. Colvin's second allegation, pp. 287, 8.

Paper A is also noticed in the judgment. See infra, p. 315, et seq.

"This is the last will and testament of me John Farquhar of Gloucester Place, Portman Square, in the county of Middlesex, Esquire.

"I give devise and bequeath all my estate of what nature or kind soever not herein otherwise disposed of unto my executors hereinafter named their heirs executors and administrators for the purpose of promoting learning in manner following: viz. To apply

"such sum as may be sufficient for salaries of the following professors who are to teach during the whole of the summer, as I know from my own experience that nothing is so contrary to the acquisition of knowledge as the long vacations in the Scottish universities: viz. I bequeath for the salary of the professor of Greek 200l. sterling; for the salary of the professor of the second class, called the semi-class, the same sum; for that of the professors of the third and fourth classes the same sum to each: the above sums to be paid annually in lawful money of Great Britain to the new professors of all the universities or colleges of Scotland beginning with Aberdeen, next St. Andrews, next Glasgow, and lastly Edinburgh: likewise 200l. sterling for the salary of a professor of Mathematics, payable in the same manner, at each of the above seminaries: and my will is, that if the present professors will agree to teach during the whole year without any other vacations than those established by law, and fourteen days about Midsummer, in that case that they shall in the first instance be offered the option and receive annually the above sums during their professorships: I likewise bequeath 300l. annually of sterling money of Great Britain for the purpose of erecting a professorship of mathematics in the College of Old Aberdeen, unless that may have been already done: likewise 300l. annually for one professor of astronomy in the Marischal College of Aberdeen, and 100l. annually for each of two assistants: likewise the same sums for a Professor and two Assistants in the King's College, Old Aberdeen: likewise such sum as may be sufficient for the erection of two observatories of celestial bodies, and furnishing them with the necessary instruments, admitting nothing that

[268] The administration was accordingly brought in; and, after some preliminary steps for the **[269]** purpose of citing all persons interested, and getting all testamentary papers before the **[270]** Court (see *Colvin* v. *Fraser*, vol. i. 107), on the by-day after Hilary Term, 1828, an allegation, propounding the copy of the will and codicil, was admitted. It, in substance, pleaded:

1. The death of, and the persons entitled in distribution to, the deceased.

[271] 2. A detailed history of the deceased from his birth in the county of Aberdeen, to his death; his education at a parochial school, and afterwards at the Marischal College at Aberdeen; and that early in life he went to India, where "by close application to business and parsimonious habits, he rapidly accumulated considerable property, and at a very early period conceived an intention of leaving his property for the improvement of the system of education in Scotland, and frequently, whilst in India, expressed such intention to his friends."

3. A statement respecting the deceased's relations at the time of his quitting Scotland and subsequently; and that during his residence in India he kept up no communication with them, except by directions to his agents to allow a sufficient sum annually for the maintenance and education of his nephew, Mr. Fraser, and of his

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is not absolutely necessary for the above purpose for the use of the two above mentioned professorships. Lastly I desire that [on the natural decease of the above persons, to whom annuities have been bequeathed, that the annual sums, respectively appropriated to them, shall be added to](a) the annual surplus of my receipts, and, after providing for the other purposes [herein-before] expressed, shall be divided amongst the parochial schoolmasters [over all](b) Scotland in sums of not less than 10l. of sterling money of Great Britain annually to each [beginning with the Schoolmasters of Aberdeenshire;] and as, in my opinion, the study of the Greek language ought to precede that of the Latin, I leave 100l. sterling annually to each of four teachers of Greek, provided that such a change of system be approved of by a majority of the Professors of the Universities of Scotland, and in that case, that is to be effected in preference to the provisions for parochial schoolmasters.

"Declaring this to be my last will and testament I appoint the following gentlemen to be my executors, John Bebb, George Wilson, and Dr. John Fleming in Europe, and the above-named Alexander, David, and James Colvin and Alexander Colvin the younger and John Corsar of Calcutta, Agents; and George Davidson, Esq. Mint-master of the same place. Dated in Calcutta this 7th of March 1814."

*** It was signed, sealed and executed in the presence of four witnesses; and at the foot of the paper was added a codicil as follows:

"I hereby further bequeath by this codicil of the same date 1000l. sterling money of Great Britain to Mrs. M'Kenzie, wife of John M'Kenzie, Esq. Military Paymaster General of Bengal for the purchase of a ring." J. FARQUHAR.

"I give and devise all my East Mark estate in the county of Somerset unto my nephews James and George Mortimer (c) *for their lives, and at their death to the eldest male heir, or in default of male issue to the eldest female heir of my said nephew George Mortimer, on condition that whoever succeeds to the possession of my said East Mark estate shall take and use the name of Farquhar. I give and bequeath to my niece Lady Pole, wife of Sir William Pole of Shute in Devonshire, the sum of l. and to each of her children the sum l. to accumulate for their benefit till they arrive at the age of* 21 *years respectively, and I give to my niece Mrs. in America the sum of l.* and I give and devise unto my most particular friend David Colvin of Gloucester Place aforesaid all my freehold and copyhold estates in the parish of Hanwell, Middlesex. And whereas I have lately agreed to sell unto David Colvin all my leasehold house in Gloucester-place, now in his occupation, for 3400l. but the same has not yet been conveyed to

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(a) The clause within brackets was not in paper A; nor in No. 1.

(b) In paper A the words "herein-before" were "herein-after;" the words "over all" were transposed; and the words, "the shires or counties of Aberdeen and Mearns in," were interlined before "Scotland;" and the words "beginning with the schoolmasters of Aberdeenshire," were struck through.

(c) In script No. 1 here followed, "and their heirs on condition that they shall take and use the name of Farquhar."

sister, then orphans; and specially directed that the former should pay particular attention to the study of Greek and mathematics.

4 and 5. The execution in duplicate of the will and codicil in India, when the deceased was about to return to Great Britain.(*a*)

6, 7, and 8. Formal articles.

9. That both copies of the will and codicil, sealed up in separate envelopes, were left in the custody of Messrs. Colvin—the deceased's agents in Calcutta; that he arrived in England at the end of 1814; in 1816 became partner of a house of agency in Broad Street, under the **[272]** firm of Bazett, Farquhar, Crawford and Co.; that his property at the time of his death was nearly of the same value as at the date of his will; that he desired one part of the will to be transmitted from India; and that in 1816 a sealed packet endorsed "the will of John Farquhar, Esq." arrived in England, and was delivered by David Colvin into the deceased's possession: that he frequently conversed upon the system of education in Scotland, and the improvement thereof; and, whilst in Scotland, in 1816, made various inquiries at Aberdeen and elsewhere upon the subject.

10. That on his arrival from India he was disappointed at Mr. Fraser's progress in mathematics: in 1817 wholly discontinued the allowance to him, frequently expressed dissatisfaction at his conduct, and declared he should inherit no part of his property.

11. Great intimacy with David Colvin; declarations to him and to others of his friends, that he, the deceased, had left his property for the improvement of education in Scotland, and that Colvin was one of his executors.

12. That the deceased, being about to proceed to Paris in October, 1821, brought with him to Mr. Colvin's house (the carriage which was to convey him to Dover being at the door) the packet (pleaded in the ninth article) which was now open; that he took from it a paper which he described as his will; and on a separate sheet of small foolscap paper hastily wrote and executed a codicil, thereby devising the East Mark estate (which he had lately purchased) to his nephews, James and George Mortimer, on condition of their taking the name of Farquhar; **[273]** a leasehold house and small estate to David Colvin; and appointing, with 100*l.* legacy, his partners in the house of agency executors: that the will and said codicil with the original envelope were left in the hands of David Colvin, who deposited them in the deceased's iron chest in Broad Street.

13. The purchase in 1822 of the Fonthill estate; inquiries respecting the effect of the statutes of mortmain, and declarations of his want of affection for his heir at law, saying, "his heir at law was a vagabond in the back settlements of America."

14. That Mr. Colvin, apprehensive that the said codicil might be invalid, on consultation with his partners and with the deceased's solicitor, sent to the deceased at Paris a sketch will, No. 1, and also a draft will, paper A, that the deceased, on reading it, declared "it would be of no use to make such a will, as he had two already to the same effect, and that one was in his own possession—the other in India."

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him; now I do hereby bequeath the said house unto David Colvin his executors and administrators discharged of and from the said sum of 3400*l.* *And I further give and bequeath to my friend David Colvin, should he survive me, all my leasehold house in Gloucester-place, Portman-square at present in my own occupation to his executors and administrators together with all the furniture, &c. which may be contained in it at my death:* and I give to each of my partners in Broad-street, London, viz. R. C. Bazett, David Colvin, W. Crawford, and J. G. Remington, the sum of l. in token of my regard: And my will is that in case all or any of the devises or bequests heretofore contained or any part thereof shall be void under the statutes of mortmain or otherwise howsoever, then I give and devise all my said estate unto

"And I hereby appoint my (aforesaid) partners to be executors of this my last will, and hereby revoking all former wills by me at any time made I publish and declare this as and for my last will and testament: in witness whereof I have hereunto set my hand and seal this day of November 1821."

*** The usual clause of attestation was added.

(*a*) The due execution of this will and codicil, but in triplicate, was admitted by the next of kin.

15. That in 1822, on his return from France, the deceased took his will and codicils to his own residence; that in the spring of 1822 or 1823 he destroyed the codicil in Broad Street, in a fit of anger with Mr. Colvin, but afterwards expressed his regret and was reconciled.

16. Pleaded the execution of a codicil on the 17th of July, 1823, and that it was deposited with a solicitor: (*a*) it also pleaded declarations to Harry Phillips and others, "that in conse-**[274]**-quence of the statutes of mortmain, he (the deceased) intended to sell the Fonthill estate, of which no conveyance had been made to him, alleging as a reason that conveyances might at once be made to the next purchaser, and that he should thereby save the stamp duty;" and that he had, previously to his death, sold or agreed for the sale of the greater part of the said estate.

17. That in the early part of 1822 the before mentioned iron chest, and also a certain cabinet, were sent to the deceased's residence in the New Road: it further pleaded declarations, from the beginning of 1822 to his death, "that he had a will or two wills which he had made in India, that one remained in India and the other in his own possession, that he kept the latter in the cabinet, and that David Colvin and Dr. Fleming were two of the executors."

18. A declaration in February, 1823, to his solicitor, Mr. Drake, on his suggesting that he should make a new will, "I have a will by me; it is in that cabinet, and David Colvin and Dr. Fleming are two of the executors."

19. Declarations to Mr. Hume in January, 1825, "that he (the deceased) had a will in the said cabinet;" and also declarations of the contents of such will; which were to the same effect as the bequests in the will propounded.

20. A further declaration to Mr. Hume "that he could not take more than four shares in the London University, because it might interfere with his intentions in respect to the college at Aberdeen, and to education in Scotland in general."

21 and 22. Further declarations on the 29th **[275]** of June, 1826, to George Harry Phillips, "that he [the deceased] had two wills (which he had made in India) one part thereof in his own possession, and one in India:" and on the 4th of July, 1826, to Harry Phillips, "that he had already two wills;" that on Harry Phillips stating "unless he, the deceased, made a codicil to such will in the presence of three witnesses it would only convey personal property; the deceased replied, 'he would sell all that remained of the Fonthill property:' and that, on leaving Phillips, he appointed to return the following day, but did not keep such appointment."

23. Frequent declarations during the latter part of his life that Mr. Fraser should never have sixpence from him; that the Mortimers had received too much from him already, and should have no more (this more especially to Harry Phillips on the 4th of July, 1826), and that none of his relations should be benefited by his property at his death: that on Mr. and Mrs. Lumsden going to Fonthill in 1822 he expressed displeasure at their coming, and said "she was no relation of his;" and would not permit them to dine at his table.

24. That for several years before his death the deceased was in an enfeebled state of health, and that during the last few years of his life, and particularly the last twelvemonth, he was in the habit of leaving his papers lying about his room, and on going out he usually left his cabinet and other places unlocked, or locked, leaving the keys about; that he occasionally locked his room door, but frequently left in the key, and that after his death several of his pa-**[276]**-pers of importance and an envelope endorsed "Will of John Farquhar, Esq.," or to that effect, were found in the said cabinet, and that such envelope was taken possession of by Mr. Fraser.

25. That Mr. and Mrs. George Mortimer, about two years before the deceased's death, prevailed on him by false pretences to allow them to reside in his house in the New Road, during his absence, and were from such time to the deceased's death in the habit of residing in it for a considerable time together; and that the deceased expressed great dislike of Mrs. Mortimer: that while there they were frequently, and for a considerable time together, in his room, where the said cabinet and iron chest were; and had free access to his papers.

26. That it being understood Mr. Colvin was one of the deceased's executors, he attended with Mr. Drake and Mr. Fraser, at his house in the New Road, for the

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(*a*) This codicil was brought into the registry by the solicitor, and was propounded on behalf of Mr. Colvin; it is noticed in the judgment.

purpose of searching for his will; that they searched for the same with two of the deceased's servants; Mr. and Mrs. Mortimer having refused or declined to attend: that one part of the will and codicil, received by the deceased from India, was not cancelled or destroyed by him, nor by his directions, but was destroyed without his knowledge, privity, or consent.

27. That soon after his death disputes arose between Mr. Fraser and Mr. George Mortimer as to the grant of administration: that Fraser having obtained the same to be granted to him alone, George Mortimer and his wife expressed great dissatisfaction thereat; and a few days afterwards Sarah Hurst, widow, being at his **[277]** house in Gloucester Place, Mrs. Mortimer, his wife, expressed herself to Sarah Hurst (with whom she was intimately acquainted) in terms of anger and resentment at Mr. Fraser's conduct, and said, "John Fraser is under great obligations to me; for if it had not been for me he would have had nothing; for I destroyed the will;" or to that effect; and repeated the same expression, thereby meaning that she had destroyed the duplicate of the will of the deceased, which he had in his own possession.(*a*)

[278] On the first session of Trinity Term an allegation, with forty-five exhibits, was admitted on the part of the next of kin: it pleaded—

1 and 2. The deceased's real estate as worth 60,000l.; other freehold estates, for the sale of which he had contracted, 170,000l.: other personal property, 310,000l.: and certain slight inaccuracies in the history of the deceased, and of his family as pleaded by the executor.

3. That the instruments propounded were duplicates of a will and codicil brought by the deceased to this country, or shortly afterwards transmitted to him from Calcutta, and subsequently cancelled and destroyed by him. That the said duplicates remained in India, in the custody of Colvin and Co. of Calcutta, till after the deceased's death. That the deceased, when he left Calcutta, never intended to, and never did, return to India.

4. That in September, 1816, shortly before his visit to Scotland, the deceased deposited in **[279]** the hands of Messrs. Whitbread of London, brewers (in which firm the deceased was a partner), certain papers, among others, a paper sealed up in an envelope, which he declared to Mr. Bland, one of the partners, was his will; that the said paper was a will of the deceased, and remained there three months, and till after his return from Scotland, when it was returned to, and subsequently cancelled and destroyed by, him.

(*a*) In the course of reading the evidence the counsel for the next of kin took an objection to the deposition on this article, on the ground that the declaration of the wife could not be evidence against the husband. 1 Phillipps, p. 76, 7th edition. 2 Starkie on Evidence, pp. 45, 707; nor against the other parties, on the ordinary principle that nothing except what was given under the sanction of an oath was evidence against third persons.

On the other side, it was argued that, on the principle of the case of *Carey* v. *Adkins*, 4 Campb. 92, the evidence was admissible against the husband; and being evidence against him, it was evidence against all the parties in the same interest, as the answers of one executor may be read against the other;* and, further, that the parties, having neglected to object to the admissibility of the allegation, pleading the declaration, were now barred from objecting to the depositions taken on that plea.

In reply. That if these declarations were not legal evidence, it was never too late to object; as, in Chancery, the evidence of an interested witness is struck out when ever such interest is discovered; and, further, that even if the objection were not raised by the party, the Court was bound to see that the cause was decided upon legal evidence: so, at Nisi Prius, the Judge, as soon as he discovers that the evidence is not strictly legal, always stops it and tells the jury not to give it any consideration. In *Carey* v. *Adkins* the wife was acting as the agent of the husband, and then her declaration stood upon the same ground as that of any other agent. 1 Phillipps on Evidence, p. 85; 2 Starkie on Evidence, 46, 707. It seemed to be admitted that these declarations were not per se evidence against third persons; but it was contended that, if evidence against one party, it was evidence against all. But it is unnecessary now to argue this last point, which involved a question in these Courts

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* See *Maclae and Ewing* v. *Ewing and Others*, vol. i. 317.

5. That Mr. Colvin, by the deceased's desire, about the latter end of 1821, wrote to Mr. Drake, solicitor to the deceased, and to the house of agency, for instructions for making his will; that Mr. Drake wrote a full letter of instructions, which was delivered to the deceased, and found among his papers at his death; and that, from and after the receipt of such letter, the deceased well knew the effect of the statutes of mortmain.

6. Exhibited Mr. Drake's letter.

7. That about the latter end of 1821 the deceased sent to George Mortimer to meet him at the house of David Colvin in Gloucester Place, "and that the deceased then and there in the presence of George Mortimer and David Colvin produced a will or testamentary paper, and proceeded to cancel and erase by striking out with a pen many material parts thereof, and to make many material alterations in the disposition and bequests contained in the said will or testamentary paper, and did then and there also erase or strike out with a pen the attestation clause and the names of the subscribed witnesses, and did afterwards restore **[280]** some of the bequests and dispositions so altered."

8. That the codicil (pleaded in the twelfth article of Mr. Colvin's allegation) was on the same occasion written on the back of the will; that it revoked all former wills, and declared the will, as altered, together with this codicil, to be his last will and testament; and that the codicil was attested by two servants, and deposited in Mr. Colvin's hands.

9. That paper No. 1, in Mr. Colvin's handwriting, then in the registry, was an exact transcript of the altered will and codicil, save a certain clause as to the statutes of mortmain.

10. That from No. 1 Mr. Colvin drew up paper A with certain (specified) alterations (see ante, p. 267, note (*a*)).

11. The handwriting of No. 1 and A.

12. That Mr. Colvin, intending that the deceased should supply the blanks and execute paper A, transmitted the same to the deceased at Paris, in an envelope, consisting of half a sheet of foolscap paper of English manufacture, endorsed in the handwriting of Mr. Colvin, "Copy of the will of John Farquhar, Esq. and codicil thereto:" that on the receipt of such paper the deceased expressed himself angry at the conduct of Mr. Colvin in sending it to him; and that he never executed the same, nor any copy thereof: that, on the return of the deceased to England, he cancelled and destroyed the will and codicil, so executed before he went to Paris, by tearing it in the presence of Mr. Colvin; but kept paper A and its envelope in his possession; and afterwards placed them in **[281]** a cabinet which stood opposite to the fire-place in his sitting room in his house in the New Road, "where the same remained until the said paper writing was without the knowledge of the deceased abstracted from the said envelope by some person and at some time unknown to Mr. Fraser, but that the envelope was left in the cabinet folded up."

13 and 14. That the deceased purchased Fonthill Abbey on speculation, and not as a permanent investment; and that his resolution of selling the same was not formed in consequence of the operation of the statutes of mortmain; and that, subsequent to Mr. Drake's letter, he purchased other landed property, and advanced money on mortgages, and was, at his death, in possession of landed property, worth 60,000l., and of leasehold estates; that he had not foreclosed any of the mortgages; but in September, 1824, voluntarily offered to permit 100,000l. to remain on mortgage; and in October, 1824, lent a sum of 20,000l. upon mortgage.

15. Exhibited, in supply of proof, two letters to his banker.

16. That after his return from India he conceived a great affection for several of his nephews and nieces, particularly for George and James Mortimer, and Lady De La Pole; that in 1814 he resided for a year with Sir William De La Pole, and, to the time of his death, was on the most friendly terms, and corresponded with them;

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deserving the nicest consideration; they would, however, merely say that, in *Lord Trimlestown's case*, Lords Eldon and Redesdale held the contrary doctrine.*

Per Curiam. Without expressing any opinion as to the ultimate admissibility of this part of the deposition, it may be argued upon de bene esse.

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* 1 Bligh, 452 (New Series).

and that from 1822 to his death, Mr. and Mrs. George Mortimer almost constantly resided with him in the greatest harmony.

[282] 17. Exhibited a letter from the deceased to Sir William De La Pole.

18. That after 1820 the deceased frequently advanced to George Mortimer sums of money; and, previous to his going to Paris in 1821, gave an order upon his bankers "to advance him such sums of money as they might think prudent, subject to the opinion of Mr. Colvin."

19. Exhibited the order.

20. That in 1824 the deceased executed a memorandum of agreement to convey to George Mortimer certain lands, not to exceed fifty acres—part of the estate of Fonthill—for the erection and convenient enjoyment of a woollen manufactory.

21. Exhibited the memorandum.

22 and 23. Pleaded and exhibited an order in writing on his bankers to honour George Mortimer's checks, which order was in force at the deceased's death.

24. That the deceased gave his bankers directions to honour George Mortimer's checks to the amount of 20,000l., who, at sundry times, drew to the amount of 10,000l. That the deceased declared that such was the case, and expressed his approbation of George Mortimer's behaviour in these matters, and of his assiduity in business.

25 and 26. That, from 1818 to his death, the deceased treated George Mortimer with great affection, kindness and confidence, and also had a great esteem and regard for Mrs. George Mortimer; and exhibited, as proof thereof, twelve letters from the deceased.

27 and 28. Pleaded, that David Colvin well knew of the deceased's regard and confidence [283] in George Mortimer; and exhibited, in proof, two letters from David Colvin to George Mortimer, dated in November, 1821, and November, 1824.

29. That the deceased's permission to Mr. and Mrs. George Mortimer to reside in his house in the New Road was applied for under the advice of Mr. Colvin, and readily granted by the deceased.

30. Exhibited the letter of permission from the deceased.

31. That in 1825 the deceased also authorized James Mortimer to draw upon his bankers for money; and advanced to him from time to time 1300l.

32. Exhibited the letter to, and order on, the bankers.

33. That though for a considerable period he was greatly offended at Mr. Fraser, on a groundless report, he was afterwards reconciled to him, and from and after the summer of 1822 was on friendly terms, and received him at his house with hospitality; and on the day before his death Mr. Fraser passed upwards of two hours with the deceased at his house in the New Road.

34, 35, 36, 37. Pleaded written and verbal declarations, from 1821 to 1825, to shew that the deceased had destroyed the will, and intended to die intestate; others, that he had executed a will of a different tenor from that propounded; and exhibited a letter from the deceased to Mr. Alderman Wood in 1825.

38 and 39. Declarations of David Colvin (before and since the deceased's death) to his be-[284]-lief "that the deceased had no will; and that it was impossible to get him to make one."

40. That the deceased was not careless about his papers of importance, or his depositories, and that he always carried about his person two keys which opened boxes, one containing articles of value, the other the keys of all his depositories, and that on his death the said two keys were found by Mr. Colvin under his pillow, tied up in his handkerchief, as was his constant custom.

41. That Mr. and Mrs. George Mortimer did not refuse to attend the search; but, being at Fonthill at the time of the deceased's death, they were unable, though they proceeded with all dispatch, to reach London before the search on the morning of the 7th of July.

42, 43, and 44. That the search was principally conducted by Mr. Colvin, and no papers of moment found in the cabinet, except two bonds of Mr. Colvin to the deceased, and an envelope (as described in the twelfth article) with this endorsement "Copy of the will of John Farquhar, Esq. and codicil thereto:" and not "Will of John Farquhar, Esq." and that, after administration had passed, this envelope was destroyed by Mr. Fraser in the presence of a witness who had particularly noticed and could describe the same; and that Mr. Colvin admitted at the search that it was

the envelope of paper A, and that the endorsement was in his handwriting: and, further, that the deceased himself, after his return from Paris, had destroyed the altered will and codicil.

45 and 46. Denied that there had been any **[285]** dispute about the administration between Mr. Fraser and George Mortimer; explained the circumstances under which it had been taken out, and exhibited in supply of proof four original affidavits of Mr. Fraser and Messrs. Mortimer.

47, 48, and 49. That since the death of Mr. Farquhar the firm in Broad Street, of which David Colvin was a partner, had paid over to Mr. Fraser, as administrator, 15,000l. in part payment of a sum due to the deceased as his share of the partnership; and then entered into a further statement of account and a communication relative thereto, and exhibited, in supply of proof, certain accounts, vouchers and bonds.

50. That (in contradiction to the 15th, 17th, and 18th articles of Mr. Colvin's plea) the deceased did not reside in the New Road till the summer or autumn of 1823.

51. That for many years previous to his death he had no property in India or elsewhere out of Great Britain, and that four persons—respectively executors or legatees in the will propounded—were dead.

52 and 53. That for some time previous to his death he had lost all confidence in the Messrs. Phillips: and exhibited a deed executed by the deceased, revoking all revokable instruments made by him in their favor.

On the by-day after Trinity Term an allegation, with eighty-two exhibits annexed, was admitted on behalf of Mr. Colvin.

1. Pleaded that the deceased, while in India, corresponded with George Wilson (an executor in the will propounded), and therein set forth **[286]** "the manner in which he intended to dispose of his property at his death, and that he was willing to assist his relations during his life, but that they should not inherit his property." That after his return to this country he continued to correspond with Mr. Wilson till the death of the latter in 1816; and in one of those letters, referring to the statutes of mortmain, he inquired, "Whether he could leave to a permanent body a specific sum to be realized by the sale of land; and that, if he could not, he must give up a purchase which he then contemplated;" and he also inquired, "Whether the law of Scotland was the same in that respect as the law of England." That in another letter he expressed his regard for, and obligation to, Mr. Colvin.

2. Exhibited five letters.

3. That in the latter end of 1816, on Mr. Colvin's endeavouring by letter to reconcile the deceased to Mr. Fraser, the deceased wrote two letters to Mr. Colvin, "expressing great anger at the conduct of Mr. Fraser towards him, and that he was resolved he never should be his heir;" and about the same time wrote to Mr. Fraser to the same effect.

4. Exhibited the letters.

5. Declarations of the deceased that he would make a codicil to his will and appoint his partners in Broad Street executors; that, the day before his departure for Paris and the execution of the codicil of October, 1821, at Mr. Colvin's house, he called on Mr. Drake to give him instructions for a codicil, but did not see him: that the only obliterations which he made in the will on the following day at Colvin's house **[287]** were striking out the annuities to Mr. Fraser (at whose conduct he expressed great dissatisfaction) and to Lady De La Pole: that at the same time he wrote the order on his bankers, exhibited in Mr. Fraser's 19th article.

6. That Mr. Colvin consulted with Mr. Drake on the validity of the said codicil and on the effect of the statutes of mortmain upon the bequests in his will; that the letter annexed to Mr. Fraser's allegation was Mr. Drake's answer, whereupon Mr. Colvin prepared a sketch No. 1 and paper A, and therein added "the form of a bequest to himself of the deceased's house in Gloucester-place, which the deceased had frequently declared his intention to bequeath to Colvin; that the annuities to Fraser and Lady De La Pole having been struck out by the deceased, and some annuitants in the will dead, and the deceased having by his codicil changed his executors, he (Colvin) left the annuities open for the deceased to insert as he might think fit. That No. 1 was not an exact transcript of the will with the exceptions mentioned in Fraser's 9th article."

7. That paper A was not enclosed in an envelope indorsed "Copy of a will of John Farquhar, Esq., and codicil thereto;" but was sent in the same cover with Mr. Drake's letter.

8. Pleaded the deceased's regard for, and confidence in, Mr. Colvin; and exhibited fourteen letters written by the deceased while at Paris and at Fonthill; and in one he expressed an intention "of purchasing lands in France, and that he should thereby avoid the abominable mortmain."

9. That during a journey to Fonthill a ser-[288]-vant boy received from the deceased and gave to De La Hante (a witness with whom the deceased became acquainted at Paris) some provisions wrapped up in a piece of waste paper, and that De La Hante observed that the same contained the draft or form of a will of the deceased's; and which was the draft of a will (paper A) transmitted to the deceased at Paris. That De La Hante indorsed the following words now appearing thereon:—"Given to me by John, Mr. Farquhar's servant, in bringing me a bit of bread on the 12th of July, 1823, at Winterslow Hut Public House, Salisbury," but that he did not inform the deceased of the same being in his possession. It then pleaded the delivery of this paper by De La Hante to Phillips, in whose possession it remained, and that it was never after the 12th of July, 1823, in the deceased's power.

10. That paper of English manufacture is always used in India; and that the propounded will and codicil, and also the duplicates, envelopes, official copies, and several of the exhibits, sent from India, were on English paper.

11 and 12. Referred to arrangements respecting the partnership in Broad Street, to a loan from the deceased to Mr. Colvin, and to the payment of 15,000l. to the administrator; and pleaded, "That on the 7th of May, 1827, Mr. Colvin first received intelligence of the existence of the will in India, which he immediately communicated to Mr. Fraser, and on the 25th, on the receipt of further intelligence, retained counsel."

13. Referred to a correspondence commencing in the middle of August, 1827, between [289] Mr. Fraser and the house of agency relative to the accounts and to this will: and alleged that on the 17th of September, 1827, Mr. Colvin received the official copy of the will and codicil and other papers, together with a letter from Calcutta, dated March, 1827; and that soon afterwards a copy of the said will and codicil and other papers was delivered to Mr. Fraser, who, in a letter of 16th October, 1827, acknowledged the receipt of the same.

14. Exhibited the correspondence and letters.

Two additional articles recited the fifty-first article of Fraser's allegation, and pleaded that the deceased had a ship engaged in trade with India from 1819 till 1826.

The King's advocate and Dodson for Mr. David Colvin, the executor.(*a*)

The question is whether the paper propounded is Mr. Farquhar's last will. It is in a perfect and entire form, and duly executed, so that, laying out of consideration for the present any question as to its being a duplicate, if it had been in the possession of the executors at his death it would have been entitled to probate in common form: for the primâ facie presumption being in favour of such a paper, the next of kin must shew a revocation, express or implied.

The case on the other side rests on this proposition, that the non-appearance of the copy in the deceased's possession destroys the dupli-[290]-cate: this proposition is founded on three presumptions: 1, that the part once in his own possession, but not forthcoming, is destroyed; 2, that the destruction was the act of the testator himself; 3, that such destruction is the revocation of the other part in India. Here is no proof, except from declarations, of any destruction; still less by the deceased; nor is there any evidence of his intention to revoke.

We do not deny that if a cancelled or mutilated will is found among a deceased's papers, the presumption is that such cancellation or mutilation was the deceased's own act; there is a foundation for the presumption—the paper in a cancelled state; but, where a will is merely not forthcoming, it may have been abstracted unknown to the testator (though the Court would not easily presume fraud); it may be still in existence, though mislaid; or it may have been inadvertently destroyed by the deceased, or by some other person. The question, then, is whether this instrument was purposely destroyed by the deceased; the onus is on the next of kin; and, should this matter rest only in dubio, the Court would not pronounce for an intestacy with

(*a*) The report of the arguments has been confined as much as possible to the questions of law.

a perfect paper before it; more especially looking to the history of this case, from which it is extremely improbable that the deceased would purposely have destroyed a paper which embodied his well-known intentions for many years before and after 1814; and from which there is not only no sufficient evidence of departure, but to which there is proof of adherence within two days of his death.

We do not admit the position that the non-appearance of one part of a will in the testa-[291]-tor's possession in England is a presumptive revocation of the other part in India. The ordinary presumptions that arise from a manifest cancellation of a paper by the deceased do not apply. A duplicate of equal date, being for the very purpose of guarding against accident, is an additional proof of the testator's full intention and anxiety to give effect to the disposition, and thus materially differs from an executed draft; for the latter being superseded by the execution of the will, may be said to be utterly extinguished, and would not easily revive by the non-appearance of the will. But even if a draft could be shewn to correspond in all its material features with the will, and there was no proof of a destruction of the latter, animo revocandi, by the deceased, nor of any change of intention; still more, if the draft remained in his care and possession, it might, perhaps, under strong circumstances, be pronounced for.

Per Curiam. The draft would not, in any such case, be valid as a draft; it would only be evidence of the contents of a valid will.

Argument resumed.

It appears in this case that the duplicate in the testator's possession had been much altered. What then would be the inference if the testator had destroyed the paper so altered? that he reverted to the will in its original state, and intended the duplicate in India to operate. The Court said in *Kirkcudbright* v. *Kirkcudbright* (vol. i. p. 327): "If the latter will contains a disposi-[292]-tion quite of a different character, the law may presume such a complete departure from the former intention that a mere cancellation of the latter instrument may not lead to a revival of the former; but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it may be presumed (because it is the rational probability) that, when the testator destroyed the latter, he departed from the alteration and reverted to the former disposition remaining uncancelled."

Addams for the parochial schoolmasters of Scotland.(*a*) The will executed in 1814 was adhered to till 1821. The question, as may be deduced from the observations of the Court in *Davis* v. *Davis* (2 Add. 226), is whether the evidence in this case leads to a "moral conviction" that the deceased did not himself destroy the duplicate. Here the presumptive proofs are irresistible that the [293] deceased adhered to the will in preference to an intestacy. The case set up by the executors is, that he did not destroy the copy in his possession, or that, if he did, it was not done animo revocandi. The positions to establish this case are—1. An early and fixed intention in the testator thus to dispose. 2. The execution of a will in duplicate, which is not denied. 3. That there was nothing substantial to induce an alteration. 4. Recognitions of his will to the latest period of his life. 5 That, latterly, the deceased was careless of his papers, and surrounded by persons who had a great interest in their destruction.

The allegation of the executor being generally proved, is the case changed by the evidence on the plea of the next of kin? They set up—1. That the deceased probably would destroy his will. 2. That he did destroy it. 3. That he recognized its destruction. But there is no proof that he did himself destroy it as laid in the 12th article of their allegation: and if they fail in this principal point, they cannot fall

(*a*) The Court, before the commencement of Dr. Addams' argument, stated that it did not mean to recognize the principle that, when an executor—the appointee of the testator—was before the Court propounding a paper, all persons benefited by that paper had a right to be heard by their counsel without shewing some good and sufficient cause; e.g. suspicion of collusion; want of information; or some other reason which would render the executor less capable than the intervener of conducting the suit. But, in this instance, the Court said it was perfectly ready to hear the counsel for the intervener, but with a reservation of all questions as to his right; and on an understanding that this permission was not to be drawn into a precedent. See, upon the right of intervention, *Wood* v. *Medley*, vol. i. 645.

back on a subsidiary part of their case, viz., the high probability that the testator would destroy his will; nor upon declarations that he had destroyed it. If, however, they could fall back upon this secondary case, it must be established by most unquestionable evidence; and of this there is a total want.

I have hitherto considered this will as if a single copy: I will now consider it as a duplicate. I admit the presumption that the destruction of one part is the revocation of the other part. *Sir Edward Seymour's case*, and **[294]** *Mason* v. *Limbery* (Comyns' Rep. 451. S. C. Viner's Abridgment, tit. Devise (R. 2), pl. 17). But in those cases there was direct proof of the destruction of the instrument animo revocandi. I contend, that when a duplicate is in existence, cancellation or destruction must be proved of the other part; it is not sufficient to shew mere absence or non-appearance, as in this case: for a legal presumption cannot be grafted upon a legal presumption. *Mason* v. *Limbery* shews, from the concluding observations upon that case, as reported in Viner, the anxiety of the law to give effect to a duplicate.

Phillimore and Lushington for the next of kin. We admit that this, being a regularly executed will, is, independent of all extraneous circumstances, primâ facie, entitled to probate unless revoked: there are, however, three admitted facts. 1. That the paper propounded is a duplicate, and was left in India. 2. That the counterpart was in the custody of the testator. 3. That on his death that counterpart was not forthcoming, but what became of it there is no direct evidence. Two presumptions arise. 1. That where a will is left in a testator's possession, its non-appearance is primâ facie proof of a destruction by him animo revocandi. *Loxley* v. *Jackson* (3 Phill. 128). *Wilson* v. *Wilson* (ibid. 552, 3). *Davis* v. *Davis* (2 Add. 226). Here it must be presumed that the deceased destroyed the counterpart himself, **[295]** because he had the power over it; next, because no one else is proved to have had access; and, lastly, because he alone could innocently destroy it on purpose.

2. If the testator destroyed the counterpart animo revocandi, it is not disputed that it was a primâ facie revocation of the other part, not within his own reach. *Rickards* v. *Mumford* (2 Phill. 23). *Sir Edward Seymour's case*, and *Mason* v. *Limbery;* where it is observed, in the report in Comyns—"That it was agreed if A had been completely cancelled, the duplicate would have been thereby also cancelled" (Comyns' Rep. 453). And still further, that it is a revocation of a counterpart in the deceased's possession. *Pemberton* v. *Pemberton* (13 Ves. 290). It is said, however, that one presumption cannot be founded on another. But we deny this: Pothier remarks, "The presumptions of most frequent occurrence are those in which, from certain established facts, an inference is deduced that may or may not be true; but the truth of which being much more conformable to probability than its falsehood, is regarded as sufficiently proved until the contrary is shewn. To induce this presumption, the facts from which it is deduced should be either directly established, or themselves deduced from other facts upon the same principle of inference, so that the ultimate presumption may be connected, either mediately or immediately, with facts established by proof" (Pothier on Obligations, p. 332. Evans' edition).

[296] If then the previous presumption of revocation by the deceased himself arises, the other—of the revocation of the part not in his own possession—necessarily follows, though it may be a presumption of a lower degree than when founded on a fact established by positive proof. The onus of rebutting these presumptions lies on the executor; but the evidence does not rebut them, either by shewing—1. Spoliation. 2. Loss or destruction by accident. 3. The existence of the paper at present. All these are possible, but contrary to probability; and the first has against it the additional presumption arising in favour of innocence.

It is admitted there is no direct affirmative evidence to establish any of these; and the case rests upon a mere inference that it was not probable the deceased would destroy the paper. It may be much doubted whether the general presumption of law can be rebutted in this way: there must be facts "producing a moral conviction." *Davis* v. *Davis:* but here are no such facts. The whole of the evidence here, except one declaration, would equally justify the Court in pronouncing for a draft as for the counterpart in India. On the principle contended for by the other side, whenever a will is not forthcoming, the Court upon mere loose evidence of the improbability of the destruction by the deceased might be called upon to pronounce for a draft.

The question is not between a will and an intestacy, but the will of 1814 and any

other disposition of his property that Mr. Farquhar might choose to make. He might neither like his existing will nor an intestacy; he might [297] have meditated something different from both, or not have made up his mind to any specific disposition. To pronounce for this duplicate it must be shewn that the deceased believed it to be an existing, operative, will: and it must be remembered that this was a will made on the eve of his departure from India, which fixes upon it a more transient character, particularly after an absence from his relations of more than forty years.

The effect of altering the will, and executing the codicil of October, 1821, was a republication of the will, as altered in such very material points, but it was a revocation of the will, as it originally stood, and of the duplicate: the duplicate therefore from that time was altogether extinct unless subsequently revived by circumstances: *Wilson* v. *Wilson:* and of such circumstances there is an entire absence. The case of *Kirkcudbright* v. *Kirkcudbright* is to the same effect, though cited to shew that the part in India would revive. The subsequent destruction of the codicil, if on a separate paper, would leave the part of the will of 1814 in the deceased's possession in its altered state a valid and subsisting will; but would not revive the duplicate.

The King's advocate and Dodson in reply. The question is what is the law applicable to the facts; the case is sui generis: all the cases cited were attended with circumstances leading to a direct presumption of destruction by the testator. The early history shews that the will of 1814 was not a hasty but a mature intention, originating in 1790, consummated in 1814, ad-[298]-hered to till 1821, and for a departure from which there are no probable grounds.

Addams in reply. The main fact set up by the next of kin, viz. the cancellation of the will at a certain time and place having totally failed, their whole reliance is on a subordinate case, which equally fails them. As to the law; it is said the codicil was a republication of the will as altered, and a revocation of the will in its original state; if so, there were then two wills—that of 1814, and the republished will. Unless, therefore, the Court can presume a total oblivion of the will of 1814, there is an end of the question: for a later will, which is not forthcoming, will not operate as a revocation of an earlier will. *Goodright* v. *Harwood* (2 Black. Rep. 937. S. C. 3 Wils. 497).

Rickards v. *Mumford* is also in favour of my position; that where a will is executed in duplicate, and the part in the deceased's own possession cannot be found, the duplicate is not revoked by such absence solely. The doctrine of the civil law is that, where the duplicate is found cancelled, it must be shewn that it was done by the deceased animo cancellandi, and that he intended to die intestate. Dig. 28, 4, 4. So Swinburne, vol. iii. p. 7, s. 16. So *Seymour's case.* The onus probandi, that the will was cancelled animo revocandi, is on the next of kin, and nothing short of establishing that will suffice.

It has been uniformly held that in this sort of case fraud may be presumed. Swinburne, vol. iii. p. 7, s. 16. If it could not, the plea should have been opposed.

[299] *Judgment—Sir John Nicholl.* The amount of property depending in this cause is of a magnitude so great as to impose a painful responsibility on the individual whose duty it now becomes to pronounce the decision of the Court. The bulk of the evidence introduced into the case, not very disproportionate to the amount of the property, increases at least the labour and attention necessary to the due consideration of its just result: but were it a case in those respects under ordinary circumstances, the points to be decided would not in my judgment be attended with any very considerable difficulty; for after maturely examining the proofs, and weighing the arguments which have been so very ably pressed on this most important case, I should, but for the special circumstances already adverted to, feel little hesitation respecting the judgment which ought to be given.

It will be convenient, first, to state the leading facts, so far as they admit of little controversy, or are established by clear evidence: secondly, to advert to those legal principles applicable to such facts, and which lay the foundation of the decision to which the facts lead: lastly, combining the legal principles and the facts, to state the grounds upon which the Court arrives at the sentence which will be pronounced.

The deceased party, John Farquhar, Esq., died on the night between the 5th and 6th of July, 1826, a bachelor: his nearest relations were nephews and nieces, viz. Mrs. Trezevant, a niece—the daughter of his only brother—consequently also his heiress at law, if under no [300] legal disability to inherit—Mr. Fraser and Lady

De La Pole, children of a deceased sister—Mr. James and Mr. George Mortimer, Mrs. Lumley, and Mrs. Aitken, children of another deceased sister. These seven persons, his next of kin, are, if he died intestate, solely entitled in distribution of his personal estate, amounting to about 500,000l.: in addition to which the deceased had realty of about the value of 60,000l.; but the exact amount of either it is not material to ascertain.

In December, 1826, administration was granted to Mr. Fraser—one of the next of kin; and in November, 1827, that administration was called in by Mr. David Colvin, as an executor in an asserted will; the validity of which will and of two codicils thereto is the subject of the present suit.

The preliminary proceedings, for the purpose of getting in all possible testamentary papers, and of calling upon all parties who could have any interest in so large a property, necessarily took up some time. The first plea, which was substantially the commencement of the cause, was given in in February, 1828, and this great cause was brought to a hearing in January, 1829: so that all due dispatch has been used on all sides in pressing the question to a decision.

The will which bears date on the 7th of March, 1814, was executed at Calcutta in duplicate, and the original factum of it is in no degree controverted. The contents are in substance to the following effect:—It bequeaths 500l. a year each to his nephew Mr. Fraser, and to his niece Lady De La Pole—several considerable annuities to friends — salaries to professors of the Universities in Scotland, beginning with Aberdeen, upon **[301]** certain conditions—it directs two observatories to be erected at Aberdeen—and, lastly, it gives the surplus to the schoolmasters of Scotland, in sums of not less than 10l. annually, and appoints executors.(*a*)

Such are the contents of this will, executed just before the deceased left India in 1814.

Mr. Farquhar was born in the neighbourhood of Aberdeen about the year 1750, being from seventy-six to seventy-nine at the time of his death: he was educated at the Marischal College for the medical profession, and acquired some knowledge of chemistry; he went to India about the age of nineteen; was first in the army, in which he was wounded—then went to Calcutta, and having a taste for chemistry and science, engaged in the manufacture of gunpowder. In this undertaking his success was very great, and by that, accompanied with strict frugality, he, in the course of a long residence (altogether about forty-five years) in India, amassed an immense fortune; it being supposed on his arrival in this country to have been equal, if not greater, than at his decease: for some of his subsequent speculations were not quite so successful.

During his residence in India, particularly for the last twenty-five years, and after the death of his parents, he appears to have kept up but little direct intercourse with his family. His brother had gone to America about the time or before he went to India; for in a letter to Mr. Wilson, in August, 1785, he says, "He (his brother) went abroad when I was very **[302]** young—we have never met since—I do not recollect much of him—he has left a daughter, now in London, under the care of his executors resident at Charleston:" and in subsequent letters, near the same period, he expresses much anxiety about the care of that daughter. In one of a still later date, in August, 1789, he speaks of her having gone back to Carolina. His sister, Mrs. Fraser, and her husband were dead, having left an infant son and daughter—two of the parties in this cause. It is not mentioned that Mrs. Mortimer, his other sister, was in correspondence with him. His confidential friend, the late Mr. George Wilson, the King's counsel, was the person with whom he principally communicated upon all concerns, and particularly respecting his family: he was one of the executors named in this will; and a great number of the deceased's letters to him have been laid before the Court; to some of which it may be necessary presently to refer.

In 1814, upon reaching England, Mr. Farquhar took up his abode with Sir William and Lady De La Pole, his niece, formerly Miss Fraser, in Weymouth Street; but he afterwards had a house in Baker Street, and then removed to Gloucester Place, next door to Mr. David Colvin (who appears to have returned from India in the same ship with him); and in 1823 he removed to a house in the New Road, where he died, as already stated, on the 5th or 6th of July, 1826.

(*a*) The Court here read the will. See supra, p. 267, n.

After his arrival in England he continued his correspondence with Mr. Wilson, who at that time had quitted the English Bar and retired to Edinburgh. In these letters he complained of the want of occupation, and talked of employ-[303]-ing himself with land: and in one of them, dated in 1815, he inquired about the mortmain laws, and whether they extended to Scotland: but he did not say a word of the will executed in India, nor of the disposition it contained. He soon after became a partner in Whitbread's great brewery, and also in the India agency house of Bazett and Co., who were the correspondents of Colvin's house at Calcutta, and that agency house afterwards assumed the firm of Bazett, Farquhar, Crawfurd, and Remington; he treated for, and at length purchased, East Mark estate in Somersetshire, notwithstanding the mortmain acts; and he sent for, or at least received, one part of his will from India.(*a*)

It seems rather extraordinary that, subsequent to 1816, the deceased in none of his conversations about a will ever mentioned that one duplicate of his will was still remaining in India; neither to his partner Mr. Bazett, nor to his solicitor Mr. Drake, nor to his banker and friend Mr. Barnett, nor to Mr. David Colvin himself; for at the deceased's death it seems clear from the whole conduct of Mr. Colvin that he was ignorant of the existence of that duplicate: and though Mr. Colvin has pleaded that the deceased declared he had a will in India, not a witness is produced to depose to the declaration except Jane Phillips, who, possibly, misapprehended the declaration; for the declaration spoken to by Mr. Wood is equivocal and will bear a different construction.

The fact however is quite clear and incontrovertible that one duplicate of the will was in [304] the possession of the deceased in England in 1816, the other duplicate was not known to be in India during the deceased's lifetime; it was produced there in the Supreme Court six months after his death, and though there may be no reason to suspect that it had not been there from the time of its execution in 1814, yet there is some reason to suppose that the deceased had forgotten the existence of such a duplicate.

In 1816 the deceased paid a visit to Scotland: his confidential friend Mr. Wilson was then dead, and these friends never met after the deceased's return to Europe. Before his journey to Scotland the deceased deposited in the custody of Mr. Bland, one of the partners at the brewery, a paper which he declared to be his will. Mr. Bland thus deposes to it: "Just before the deceased went to Scotland he called at the brewhouse, and speaking to the deponent, who was then alone (and whom the deceased said he wished to speak to alone), he asked for some paper and wax to seal up a paper which he brought with him; the deponent supplied him with the materials, and the deceased then enclosed in a sheet of paper what appeared to be a single sheet of foolscap paper." The copy of the will itself is written upon a single sheet of foolscap paper, and therefore it might very easily have been so folded up. "The deceased sealed the envelope, and as the deponent now best recollects wrote his name upon it without adding any thing further: he then delivered it to the deponent, desiring him to take care of it for him, saying, 'God, sir, you must take care of it; if any thing should happen to me that is my will.'" Mr. Bland [305] then states, "That he put the envelope into an iron safe, and the deceased after his return from Scotland called for it and took it away."

There seems no reason to doubt the sincerity of the deceased upon this occasion, nor that this was his will: there seems no reason to doubt that it was his Indian will; for no trace exists of his having at that time made any other: and here is the Indian will—a single sheet of foolscap paper—out of its original envelope, put into a new envelope, so that there have been at least two envelopes which have at different times inclosed this will: and, finally, here is this will, whatever it was, traced back again into the deceased's possession after his return from Scotland.

While in Scotland in 1816 he was about purchasing an estate—Balgonie—but no purchase took place: he also made inquiries about professors and schools, and the state of education: Mr. Professor Davidson has been examined; and I will state the substance of his evidence.

"The deponent understood from the deceased that he had raised a fortune by

(*a*) The phrase "Indian will" has reference throughout the judgment to the part transmitted to the deceased from India.

means of saltpetre works and the manufacture of gunpowder and by great frugality, which he described as not being natural to him but an acquired and fixed habit; he appeared to be a man of most uncommonly acute mind and of very varied knowledge." He says upon a subsequent article, "The deponent saw the deceased not less than two or three times in each week"—it is mentioned that he continued in Scotland about eight weeks—"the deceased's inquiries were twofold, the one relating to education in Scotland generally, and the other to the **[306]** system pursued in the college: he inquired respecting the emoluments of the professors and teachers, and respecting the Universities of St. Andrews and Edinburgh (deponent having been at both); and for information respecting the schools in Scotland, not only in Aberdeenshire but in other parts of Scotland." He says, "The limited amount of the emoluments of the schoolmasters excited some surprise, though the deceased did not say that he purposed doing any thing for their benefit, yet he spoke of an increase as that which ought to be done." Upon the 11th article he deposes, "That the deceased repeatedly said he had made a will, though he did not say what the object of it was: the first occasion was when they and Professor Stuart met at dinner at the house of Mr. Burnet: the subject of wills being then introduced, the deceased said 'that he had made a will, but he did not know whether it would be valid.'" And then the deceased referred to a case which he had already mentioned in one of his early letters, of a will that had been set aside because the executors were directed to plant a species of tree with the branches downwards and the roots in the air.

This is the general substance of Professor Davidson's examination: and it thence appears that while the deceased was in Scotland in 1816, he in general terms mentioned that he had made a will, but gave no intimation of the tenor and contents of that will, and even expressed some diffidence of its validity: he made inquiries about professors and schoolmasters, and an observation "that the salaries ought to be increased," **[307]** but no declaration that he had done any thing or intended to do any thing himself for that purpose; nor entered into any consultation on the best mode and plan of effecting such purpose.

After the deceased's return from Scotland, and after again taking possession of his will, nothing more was seen nor heard of it, nor of any other testamentary act till October, 1821: not heard of; for, though he talked in general terms about the improvement of education in Scotland, he did not specify his plan nor refer to it as provided for by his will. Mr. Bazett, the deceased's partner, after speaking of the deceased's will being written for, and arriving, as he supposes, in the year 1817 or 1818, and of its being in possession of the deceased, goes on to state upon the ninth article: "That the deceased did frequently converse on the system of education in Scotland and the improvement thereof: the Greek language and mathematics were his favorite objects, and the study of the former in priority to the Latin; both these branches of learning the deceased frequently expressed a desire to advance in Scotland: he spoke of the deficiency of education in this respect generally, but more particularly in Scotland, and of his desire to correct and improve it in the schools of that country; it was a subject on which he undoubtedly took a great interest." He says upon the eleventh article, "Deponent never conversed with the deceased on the contents of his will in any respect as regarded the disposition of his property."

Mr. Drake also, his confidential solicitor, deposes on the ninth article, pretty much to the **[308]** same effect: "Deponent heard the deceased speak of the system of education in Scotland being bad and as that which he wished to see improved; he spoke of such improvements as a subject on which he plainly took an interest, but so he did of education generally, and not particularly in connection with Scotland." He says upon the thirteenth article: "Certainly, on one occasion, the deceased asked the deponent in a loose general way, not as applying to any business before them or as relating to himself or his affairs, whether the statute of mortmain applied to land in Scotland: but the deponent never heard the deceased make any inquiry as to the effect and operation of the statute of mortmain on the disposition of property for the purposes of education."

Here, again, in these confidential conversations was no reference to the will, nor to the specific plan which it contained.

The deceased went on with various speculations, some with profit, some with loss; he completed the purchase of the East Mark estate—with reference to which Mr. Drake mentions a circumstance that occurred in 1818. After stating on the eleventh

article "that for the East Mark estate 10,000l. in part was paid in March, 1818, and the total purchase money, including the 10,000l., was 26,100l.: the conveyance was executed on the 14th July, 1820:" he says on the thirteenth article, "That in March, 1818, the deceased and he were coming together from Broad-street: as they passed along the Poultry, deponent, with reference to the purchase of the East Mark estate, men-[309]-tioned to the deceased that it was proper he should make a new will, or republish a will if he had one that would pass real estate, as otherwise that estate would pass to his heir at law: the deceased said, 'My heir at law, Mr. Drake, is a vagabond in the back settlements of North America.'"

"The deponent does not remember the same expression being used by the deceased at any other time; but he had heard the deceased speak several times of his heir at law as being in America, because the deponent remembers having had conversations with him as to the right of such heir at law to inherit property."

So that, in 1818, the deceased was distinctly apprized that an after-purchased estate would not pass under his Indian will, but would go to his heir at law, and he was also aware doubts existed as to the right of that heir at law to inherit. Still, he took no steps upon that information till October, 1821, when, being about to proceed to Paris in company with Mr. Phillips, the auctioneer, a testamentary transaction took place, which it may be proper to detail.

Mr. Drake was at that time at Brighton. On the morning of the second of October, at Mr. Colvin's house, while the carriage was at the door, the deceased produced the Indian will, made alterations in it, and wrote another testamentary instrument disposing of the East Mark estate and some other real estate, and appointing new executors. The exact extent of the alterations in the Indian will or of the contents of the other instrument cannot be ascertained; for one is proved to have been destroyed by the [310] deceased himself, and the Indian will is not forthcoming. The amount of the acts done upon that occasion must be collected in some degree from Mr. Colvin's own statement and from his subsequent conduct. Now, according to his own statement, in the 12th article of his allegation, alterations and obliterations were made in the Indian will—to what extent is not set forth: and whether there were not former obliterations or insertions is not ascertained. It is disputed whether the other instrument was written on the back of that will or on a separate paper: and I shall not further examine that point; merely remarking that the weight of evidence seems to be that it was on a separate paper. It has been called a codicil, but there is no proof that it had any reference whatever to the will: it applied to separate after-purchased landed property. The subscribed witnesses have been examined; and Tosdevin heard nothing about a codicil; "something, he deposes, was said by Mr. Colvin about what the deceased was writing being a part of a will he had made in India;" but Alleguen, the other witness, believes it was a will. "To the deponent's recollection it was a will the deceased then made and executed, for he thinks that it began—'This is my last will and testament;' and he remembers that the deceased's partners (Bazett, Colvin, Crawfurd, and Remington) were nominated executors: though what else it contained he does not remember."

Mr. George Barnett says: "In a conversation he had with Mr. Colvin on the subject of the deceased's will (the deceased being at the time of such conversation resident at Font-[311]-hill), Mr. Colvin remarked, 'Oh, there is no will; there was something of a will, which he made when he went to France, but it has been destroyed.'" Colvin spoke of it therefore as a will, not a codicil. "The deponent observed to him 'that perhaps it was safer or better that it was so, as his property would be divided among his relations:' to which Mr. Colvin made no reply. The conversation deposed to was indelibly impressed on deponent's recollection, by the manner in which the observation he made was received by Mr. Colvin."

I may also in this place state what Mr. Tyrrell says to the same effect. "About May, 1825, deponent went with Mr. Colvin in the 'Enterprize,' steam vessel, and they conversed about the relations of the deceased; when Mr. Colvin told him 'that he need not feel at all uneasy about his friend, Mr. Fraser, who would be very well off, for that the deceased would die intestate, and Mr. Fraser would be a rich man: Mr. Farquhar,' he said, 'cannot be persuaded to make a will.'"

I quote this evidence at present, not so much to shew that Mr. Colvin thought the deceased intestate, as that the instrument of the 2d of October, 1821, was spoken of by him and by the attesting witness as a will. I notice this the more, in order to

explain what the deceased probably meant by his having made two wills; for that he had any recollection of the duplicate in India does not appear in these proceedings: in my apprehension, therefore, when he spoke of having two wills, it is probable that he alluded to the Indian will and the will which he made previous to his going to France. How-**[312]**-ever, the fact admitted is that there were some obliterations and alterations in the Indian will, and that there was another instrument at this time executed, which is not proved to have been a codicil, reviving and confirming the will except so far as it was altered, but a testamentary instrument for a distinct object, viz. the disposition of landed property, and the appointment of a new set of executors.

The transaction having taken place in this hasty mode, the deceased set off for Paris, leaving these testamentary papers in the possession of Mr. Colvin. After his departure, Mr. Colvin, without any authority from the deceased, set about preparing an instrument which should consolidate this altered will and this other will or codicil; he consulted and obtained the assistance of Mr. Drake, the deceased's solicitor, as to the form of the new instrument, and the latter, who had returned to town, wrote Mr. Colvin a full letter of instructions on the 4th of October, 1821.

"My dear Sir,—In reply to your letter requesting some hints for the guidance of your friend in making his own will, I would suggest first, that by an act called the Mortmain Act, many restraints are provided against bequests for public charities, and in particular that devises of houses or land for such purposes, and also of all monies secured by the mortgage of houses or lands are absolutely void. In devises of this nature much professional skill is requisite; and therefore I cannot hope to give you such hints as may safely be relied on; but by way of a general caution, I would advise that your friend, **[313]** after framing his will in the clearest way he can, for securing the objects of a charitable nature which he has in view, should add a clause something of this sort." And he then inserts the form of a clause which he recommends for the purpose. He afterwards points out that the word "heirs" is necessary in the devise of real property; that there must be three witnesses; and he remarks about a condition for changing the name that caution should be used to devise the property over, and he then recommends a general residuary clause. In short, the letter contains full and intelligible directions and instructions for the guidance of Mr. Colvin and his friend.

There seems also to have been a draft perused and settled by Mr. Drake.

Mr. Colvin at length prepared, first, a sketch and then a draft, which latter he sent to the deceased at Paris, together with Mr. Drake's letter. The draft so transmitted is brought in by Mr. Phillips: it is paper A, allowed to be the paper prepared by Mr. Colvin from the Indian will and the other testamentary instrument, and sent by him to Paris.

It can hardly be supposed that Mr. Colvin would venture to introduce into this instrument, or exclude from it, any thing except as he conceived in accordance with the deceased's intentions; those intentions being either collected from what was left in the old will, and contained in the new will, or gathered from confidential conversation with the deceased.

In this paper A there are many alterations of the Indian will: it begins with the disposition for the improvement of education in Scotland—it **[314]** alters the disposition of the surplus to the schoolmasters, by confining the bequest to the two counties of Mearns and Aberdeen, instead of the whole of Scotland. Even that plan, then, is in some degree altered, though the time when that alteration was introduced does not appear; it might be before or immediately after the deceased's return from Scotland (see paper A, ante, p. 267, n.).

Other very material and extensive erasures may however be inferred. All the annuitants are omitted; not only those who were dead—not only Mr. Fraser and Lady De La Pole—but all his friends, and even his executors in India. It cannot be presumed, and it would be difficult to suppose, that these annuities were omitted by Mr. Colvin, unless he had found them struck through and erased in the Indian will: and that they were struck through seems to be confirmed from paper A beginning with the education plan and ending with a new set of executors: for not only are all the original executors (except David Colvin) omitted, but a new set, the partners in the house of agency in Broad Street, are substituted, with a blank for the legacy—not the annuity—to be given to each of them.

If all these differences were taken from the Indian will, that instrument must have

undergone much obliteration and erasure: there was nothing left of it but the education plan, and even that, I repeat, in some degree altered; slightly, but non constat when, altered: but every relation, every friend, every former executor is struck out. These circumstances will not be immaterial when the Court comes to **[315]** consider whether the old duplicate can, in point of law, be again set up; and also when it comes to consider the probability or improbability, in point of fact, whether the deceased should or should not himself destroy this instrument.

Among other erasures Lady De La Pole's annuity was erased; so Mr. Colvin expressly states the fact: yet paper A shews that it was not so omitted with the intention to exclude her from any provision, but to substitute a legacy in the place of the annuity; and not only a legacy to Lady De La Pole, but legacies to each of her children It stands thus in paper A: "I give to my niece Lady Pole, wife of Sir William Pole of Shute in Devonshire, the sum of , and to each of her children the sum of , to accumulate for their benefit till they arrive at the age of twenty-one years." So that here is not only an intention to benefit Lady Pole and her family, but those intentions are thus detailed; and not only so, but the deceased intended to give a legacy to his niece in America: for the paper goes on—"I give to my niece Mrs. , in America, the sum of £ ."

This niece, Mrs. Trezevant, was his brother's daughter, his heir at law, if not under a legal incapacity to inherit; and since the deceased had, by devising the landed property to the Mortimers, deprived her of what the law might possibly give her, and had directed them to take the name of Farquhar; he now, it would seem, intended to give this niece a pecuniary legacy; nor was it at all improbable that such should be his intention. But at present I only point out the fact of these alterations, and will **[316]** hereafter consider their effect upon the real question at issue.

Upon the receipt of this document at Paris the deceased abused Mr. Colvin in no very measured language, if Mr. Phillips, who is Mr. Colvin's own witness, is to be credited; and in this respect his account is not improbable, for the deceased was irritable, and when in anger did not care what he said of, or even to, any person.

Mr. Colvin soon afterwards went to Paris, and he and the deceased were again upon good terms; it might be convenient to both; but the deceased never adopted paper A, nor executed any will to that effect; he never in any manner expressed his approbation of its contents, nor ever did any act again giving effect to the education plan which it contained, or to any other testamentary disposition whatever.

The subsequent history of paper A is not exactly traced; it is in some degree mysterious; it never was seen in the deceased's possession after its receipt at Paris; it has been introduced late into the cause, and no less than six different copies of it have been produced. The precise history bears too little on the main question to require my entering into a further consideration of, or detailing the evidence applying to, it after its arrival at Paris. Mr. Drake's letter, however, which accompanied it, remained in the deceased's possession, and was found among his papers after his death; so that, from the arrival of that letter at least, the deceased was pretty fully aware of the operation of the mortmain laws.

The estate of Marshal Bessières being on sale while the deceased was at Paris, he seems **[317]** to have entertained some thoughts of becoming the purchaser—whether to avoid the mortmain act; whether to have property in different countries; whether as a mere speculation, and to employ his capital, does not appear; however, the purchase was not made.

Soon after the deceased's return from Paris in January, 1822, the Indian will and the testamentary instrument of October, 1821, were returned to the deceased in his iron chest; the iron chest was sent to his house and the key was delivered to him. Mr. Colvin so pleads the fact and so states it in his affidavit of scripts. Thus, the Indian will is traced back into the deceased's own custody and possession in his iron chest, and it was never afterwards seen by any human being, unless it was on the same paper with the document of October, which it is admitted and proved was afterwards destroyed by the deceased himself. Mr. Bazett gives this account of the destruction of it.

"After Mr. Farquhar's return from France, he, the deponent, and Mr. Colvin were at breakfast together; and the deponent's attention was excited by hearing the deceased say that something (deponent did not hear what) was very absurd: this was an expression which the deceased was continually using: just afterwards, Mr.

Colvin on leaving the room, and in the act of leaving it, turned round and said to the deceased that 'he, the deceased, was very fond of saying how absurd other people were, but that really no person was more absurd on some occasions than himself,' or to that effect; at which the deponent observed immediately that an angry **[318]** feeling arose in the deceased, who said nothing about it then, but presently afterwards left the house evidently in displeasure. The deponent and Mr. Colvin went together into the city, and he was with him in Broad Street in the room where the partners usually sit when, in the course of an hour or two after they had got there, the deceased came in, to the surprise of the deponent, as he seldom came there. Without noticing Mr. Colvin he came up to the deponent, and telling him that he wished to speak with him, they went together into an adjoining room, where the deceased, producing a paper writing, reminded the deponent of what Mr. Colvin had said at breakfast and expressed a wounded feeling in consequence; he pointed to the paper he held in his hand, and saying, 'You may tell your friend David what he has lost,' he tore the paper several times and threw the pieces into the fire or under the grate."

Mr. Bazett then interfered between those two gentlemen and he reconciled them. He identifies the paper as the instrument of the 2d of October, 1821, by adding, "It was that and that only."

Here, then, the deceased himself at all events destroyed the paper (which, for convenience, I shall call the codicil) of October, 1821; he became intestate as to his real estates; East Mark, and the rest of his landed property, would go to his heir at law; the Mortimers and all his other relations were wholly excluded; the newly appointed executors, his partners in England, were all revoked; if the Indian will, altered and erased as it was in part, was **[319]** preserved by the deceased. It is admitted to have been in the deceased's own possession and custody at this time; it must have been in his hands on this very occasion and under his notice; for the two instruments were together. The conclusion as to its subsequent existence will depend upon what afterwards took place; it was never, as I before said, again seen, though the deceased lived about four years.

The subsequent acts and conduct of the deceased in regard to his property and to his relations, his declarations and the general presumptions and probabilities of the case, will require to be accurately examined hereafter, but at present the remaining history need only be stated generally.

In the latter end of 1822 the deceased purchased the Fonthill estate at the price of 300,000l., whether upon speculation, whether he ever meant to retain it, whether he afterwards resolved to dispose of it on account of the statutes of mortmain, or for other reasons, cannot be exactly ascertained: he remained in possession of it for three years and contracted for the re-sale of most, if not all, of it in December, 1825. Mr. Drake's account of the purchase of that and other property will be sufficient for the present purpose. "The deceased had (as respondent believes) entered into a legal contract for the sale of the whole of his estate at Fonthill some time previous to 1826; he purchased that estate in the year 1822 and gave for it some such sum as 300,000l. —the first contract for the re-sale, of which he has any knowledge, bears date 22d December, 1825. There were three subsequent contracts on the 27th and 30th **[320]** December, 1825, and 2d June, 1826. The deceased in May, 1823, purchased a freehold estate of Mr. Benett in Wiltshire and Dorsetshire for the sum of 100,000l. —whether that or any part of it was re-sold respondent knows not. In June, 1824, the deceased lent 2300l. on mortgage: in Oct. 1824, 20,000l.:" Mr. Drake mentions some other assignments of mortgages taken by the deceased.

The purchase of Fonthill seems to have been made through the agency of Mr. Phillips, the auctioneer; he was employed to sell "the splendid ornaments and other valuable effects" in the following year; he also was employed as agent in the management of the estate. In order to secure the performance of an agreement entered into between him and the deceased respecting these concerns, he procured the deceased to execute an instrument prepared by Phillips' own solicitor in the form of a memorandum addressed to the deceased's executors, appointed or to be appointed.

This memorandum, after shortly noticing the purport of the agreement, proceeded: "Now in the event of my death, I do hereby direct that the said agreement and every part thereof shall be carried into effect and be performed by my executors, as well already named as hereafter to be named as fully and effectually as if I had lived; . . .

"I further declare this memorandum shall be considered a codicil to be added and taken as part of my last will and testament either already made or hereafter to be made, notwithstanding the same is not annexed thereto." This instrument addressed, not to any exe-[321]-cutors by name, but any appointed or to be appointed, and called a codicil to a will already made or to be made, and obtained in the manner, and for the purpose, that it was obtained, does not bear materially on the present case; it does not infer the probable existence or previous destruction of any will; it has been mentioned inadvertently, since, if wholly unnoticed, it might seem to have been passed over.

Mr. Farquhar becoming dissatisfied with the conduct of Messrs. Phillips, they were dismissed from the agency at Michaelmas 1824, and suits at law and in equity took place between them and Mr. Farquhar, which continued unsettled down to the death of the latter.

On the dismissal of the Messrs. Phillips he intrusted the management of his concerns at Fonthill to, and seems to have reposed great confidence in, Mr. George Mortimer, one of the devisees of the East Mark estate in the instrument of October, 1821. This nephew was engaged in a woollen manufactory; and the deceased, on going to Paris, gave him a large credit on his bankers. In 1824 he induced him to erect a factory on the Fonthill estate, though it was represented by his friends as very injurious to the property; and he granted him land and lent him money for the undertaking.

The instruments, exhibited in the 19th, 21st, and 23d articles, which are fully confirmed by the depositions, satisfactorily shew these facts.

It appears that in 1823 the deceased removed from Gloucester Place, where he had resided next door to Mr. Colvin, to a house in the New Road, and at that place and at Fonthill he lived till his death. Mr. and Mrs. George [322] Mortimer were inmates at Fonthill; they resided there principally, except that in the spring of 1826 Mrs. Mortimer came up to lie-in at the deceased's house in the New Road, and returned, as soon as it was prudent to travel, to Fonthill. There are exhibited a great number of the deceased's letters, both to Mr. and Mrs. George Mortimer, written quite in that unreserved stile which would naturally belong to such a near and confidential connexion. I should also have mentioned that Mr. James Mortimer, who had engaged in building some houses in Scotland, was also liberally assisted by the deceased with money to carry on that undertaking.(*a*)

These are some of the facts relating to the conduct of the deceased in respect to his property, and in respect to his relations, between 1822 and his death: and at present it will be sufficient further to state that he went to bed not quite well on the evening of the 5th of July, 1826, and the next morning was found dead in his bed.

His friend and partner, Mr. Colvin, and his solicitor, Mr. Drake, were immediately sent for, and they sealed up all his repositories; and on the next morning those repositories were carefully searched by Mr. Colvin in the presence of Mr. Drake and Mr. Fraser: Mr. and Mrs. Mor-[323]-timer being at Fonthill and not arriving in town till that evening after the search had been made. The deceased's keys were discovered placed in the situation where he usually kept them; two keys, in particular, it was his habit to tie up in separate corners of his handkerchief and place under his pillow; and in that usual situation those two keys were found after his death. No will was found. The only paper, in any degree of a testamentary nature, was an envelope which had contained either "a will" or "the copy of a will."

Four witnesses speak to the finding of that cover: the first is Mr. Drake: "On the day after the death, when search was made, some few papers were found in a cabinet in the deceased's sitting room; one of importance being a bond of David Colvin's: a cover or envelope was there, endorsed 'Will of John Farquhar, Esq.,' which, as well as deponent remembers, was locked up in the drawer." He does not, therefore, speak very positively to the envelope being in a drawer within the cabinet.

Neile, a servant, says: "Deponent was present when the cover of the will was

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(*a*) "London, 28th June, 1825.

"Dear James,—Having agreed to pay for the new houses intended to be built at Ferry-hill, I hereby authorize you to contract with the different artificers necessary, and to draw upon me for the charges of the work as it may be necessary for materials and labour.—I am, dear James, yours truly, "J. FARQUHAR."

found after the deceased's death; it was found by Mr. Colvin in a drawer, the upper one or next to it of several drawers on which stood a cabinet."

Hasler, another servant who was present, states, "That the cover of the will was not found in the (brass-bound) cabinet, but was found in one of some drawers, not in a cabinet: the deponent saw the cover, there was written on it 'The will of John Farquhar, Esq.' The room was almost full of cabinets, [324] drawers, tables, boxes, and all kinds of articles."

Blakemore, a carpenter, states, "The envelope of the will was not found in either cabinet but in a drawer in the corner of, and at the other end of, the room, near the outer room."

These are the four witnesses to the finding of this envelope; and the evidence therefore is that it was found, not in the iron chest, not in any cabinet, but in a drawer. That paper has been accidentally not preserved, nor does it appear of much consequence how it was endorsed: whether it was the envelope that covered the will when it came from India, whether it was the envelope in which the deceased inclosed that will in Mr. Bland's presence, whether it was the envelope that accompanied it in the iron chest when returned to the deceased, or the envelope of any other paper, is neither easily ascertained nor of much importance. The deceased himself took the codicil out of the iron chest in order to destroy it; and this envelope was not found where the Indian will was last seen. Whatever envelope it was and in whatever place it was found there is no proof, nor does it seem to me there is just ground to suspect that it was not placed there, or accidentally thrown or left there, by the deceased himself.

Here, then, are some of the leading facts which hardly admit of controversy. The duplicate of the will propounded was never seen after the year 1822, and even then it was materially altered: it was at that time in the possession of the deceased, in an iron chest, of which he had the key: it was not found either there or elsewhere at his death.

[325] Upon these facts it seems proper to consider what is, primâ facie, the presumption of law? Who did the deed? Who was the person primâ facie that destroyed this instrument? and upon that point there appears to be no solid doubt. It was in the deceased's possession—it was not to be found at his death: the first presumption is that the deceased himself destroyed it: if that presumption of fact be not repelled by evidence, then the legal consequence will also primâ facie be, that the duplicate remaining in India is revoked.

This presumption of fact and this legal consequence may be rebutted by satisfactory evidence; but the burthen of proof lies upon the party setting up the will—whether he sets it up by propounding a draft, a duplicate, or a cancelled will; for whether the paper be found cancelled, or whether it be wholly removed and not found at all, still the first presumption as to the person who did the act is the same. The force of the presumption and the weight of the onus may be different according to circumstances; but the Court, in order to pronounce for a draft or a duplicate, or a cancelled will, must be judicially convinced that the absence or cancellation of the paper once in, and not traced out of, the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act, or it may be established by direct positive evidence in different ways, such as by proving the existence of the instrument after the testator's death—by proving that he himself destroyed it when of unsound [326] mind, or by error, or under force sine animo revocandi—or by proving that it was fraudulently destroyed by some other person: but under this last supposition the proof must be clearer, because a fresh presumption arises—the presumption in favour of innocence: for if a fraud is charged, it must be clearly proved by facts and circumstances leading to a conclusion of guilt.

All these presumptions, if they come to be analysed, may be resolved into the reasonable probability of fact, deduced from the ordinary practice of mankind and from sound reason. Persons in general keep their wills in places of safety, or, as we here technically express it, "among their papers of moment and concern." They are instruments in their nature revocable: testamentary intention is ambulatory till death; and if the instrument be not found in the repositories of the testator, where he had placed it, the common sense of the matter, primâ facie, is that he himself destroyed it, meaning to revoke it: and if he destroyed the part in his own possession, the

common sense of the matter again is that he also intended to destroy the duplicate not in his own possession.

It was argued on behalf of the executor that the burthen of proof lay on the next of kin, that they must shew affirmatively by evidence that the deceased himself destroyed the instrument. The doctrine is new, and no authority was given to support it; and the Court cannot venture to adopt it without authority, and against authority. The passage quoted from Swinburne seems to be quite in the opposite direction: "What if the testament be found cancelled and defaced, but it is not known who did it? **[327]** To whom is this act of cancelling or defacing to be attributed? to the testator who made it, or to some other, who otherwise, peradventure, might be hindered by it?".

He then puts the arguments and authorities on each side, "It seemeth not to be reputed the act of the testator, for change of mind is not to be presumed, especially where a man has done a thing with deliberation and resolution: on the contrary, it seemeth that it ought not to be accounted the act of any other, for that were to presume a fraud and deceit, which ought not to be presumed unless it be proved." He then proceeds to state his own opinion: "In this controversy, therefore, I suppose that the person in whose custody the testament is found is to be adjudged to have done the act, whether it be the testator or another." (*a*)

The opinion then of Swinburne is that primâ facie the act is done by the person who is in possession of the instrument: but this primâ facie legal presumption may be rebutted by the circumstances, upon a full examination, creating a stronger presumption the other way; and it seldom happens that cases, which set out upon certain legal presumptions, require to be decided upon the mere presumption: the general circumstances of the case usually lead to a tolerably satisfactory conclusion of the real fact, either by confirming or by repelling the legal presumption. The correctness of Swinburne's principle is affirmed by adjudged cases.

The Court, for personal reasons, is unwilling to **[328]** rely upon any authority derived from the decisions in this place within the last twenty years. It will be sufficient to say that I see no reason to depart from the doctrines laid down in the cases quoted within that period: but though the point hardly requires authority, I will shortly refer to the decision of Sir William Wynne, in the case of *Freeman* v. *Gibbons*, in the Prerogative Court, Easter Term, 1793, stating the words of that learned Judge from my own note.

Per Curiam. "Heads or instructions are propounded by Lydia Gibbons as the residuary legatee, and it is proved that the deceased executed the will on December the 1st, and died on the 10th." So that the will was only made nine days before the death. "But the executed will cannot be produced, and it is said to have been destroyed after the deceased's death: if that can be proved the instructions may be pronounced for. Two witnesses speak to declarations of the deceased, recognizing the existence of the will a short time before his death: this affords strong presumptive evidence that he adhered to the will, but not conclusive proof, for the declaration may have been insincere." The usual want of sincerity in such declarations I shall have occasion again to notice. "The two persons to whom the declarations were made are, one the brother-in-law, the other the son-in-law of Gibbons. The will was deposited in the drawer of the bureau; and it is not alleged that the deceased was not able to go to the bureau after the execution. Recognitions, because they may be insincere, are no proof of the fact that the will was in existence at that time: it may have been destroyed before: **[329]** it is proved that the deceased was up, and looked out of the window three or four days before his death." Under these circumstances, there being a possibility and ability on the part of the deceased to have destroyed the will, Sir William Wynne pronounced against the instructions propounded.

In *Baumgarten* v. *Pratt*, in the Prerogative Court, Easter Term, 1796, the same Judge pronounced a similar decision. In that case there was a draft produced: the Court said; "A draft may be pronounced for; but it must be proved either that the will remained entire at the death, or, if destroyed in the lifetime, that it was done without the knowledge and approbation of the testator: the presumption is that it was destroyed by the deceased:" and in that case the draft was pronounced against.

Now these are authorities which go further back than the last twenty years,

(*a*) Swinburne on Wills, part 7, s. 16, p. 992, 3.

deciding that the presumption is, where a will is not found, that it was destroyed by the deceased himself.

If, however, we should from the evidence arrive at the fact that this will was destroyed by the deceased himself, the legal consequence cannot be disputed that, primâ facie, the duplicate is also destroyed. That point has been settled in a variety of cases: it is hardly necessary to refer to them. It was so decided in *Sir Edward Seymour's case:* in *Limbery* v. *Mason* (2 Comyns, 453), and it is as expressly laid down in *Burtenshaw* v. *Gilbert* (1 Cowper, 54), where Mr. Justice Aston, after Lord Mansfield had gone through the case, said, "If the duplicate of the will had still remained **[330]** in the hand of the person to whose custody it was originally intrusted, yet the cancelling that part which the testator had in his own possession would have been a sufficient cancelling of such duplicate." In *Pemberton* v. *Pemberton* (13 Ves. 308) Lord Chief Justice Mansfield, Lord Eldon, and Lord Erskine, in different stages of the cause, all held the same doctrine. So in *Welsh* v. *Gowland*, Prerog. Mich. Term, 1804, Sir William Wynne said, "It is an admitted rule that the cancellation of a part, in the testator's possession, would be a cancellation of a duplicate in the hands of another person."

The reason of this rule is obvious; for why should a person destroy or cancel the duplicate of his will if he meant the other part to operate? It may, indeed, be shewn that it was done diverso intuitu, or by accident, or while of unsound mind, or for the sake of peace, and to deceive and impose upon persons who were importuning him; but, primâ facie, the cancellation or destruction of the part in possession infers the revocation of the duplicate.

The main question of fact, then, to be examined is, by whom was this will destroyed? Primâ facie, by the deceased himself, who was in possession of it; and the executor setting up the duplicate must, as I have said, shew either by direct positive evidence, or by circumstances, producing a strong moral conviction that it was not done by the deceased. The executor and his legal advisers seem clearly so to have un-**[331]**-derstood the case by the very course of conducting this suit: they began not merely by pleading the factum of the will at Calcutta, which was never denied, but by giving a long allegation consisting of twenty-eight articles, setting forth circumstances from which it was to be collected that the deceased had not destroyed the will himself. The allegation commenced with the earlier history of the deceased's intentions, from which his adherence to that will was to be inferred: it pleaded the continuance of his intentions to dispose of his fortune in improving education in Scotland; quarrels with, and disaffection towards, his relations; and declarations recognizing the existence of this will to the very end of his life: from all these circumstances, inferring that the deceased himself would not have revoked this will, and thereby repelling the legal presumption.

But the allegation went further: for it pleaded circumstances to shew that it was destroyed by another person, not by accident, not by fire, not by inadvertence, but by a fraudulent spoliation, by taking it out of the deceased's repositories in his life time; and though no direct act of spoliation was charged, so that it could be met and contradicted, yet without specifying any time or place or circumstance attending the act of spoliation it was insinuated too plainly to be misunderstood that Mr. and Mrs. Mortimer, or rather Mrs. Mortimer, was the person meant to be charged. This is a serious moral offence, and in support of such a charge, pretty clear proof should be adduced: the presumption is in favour of innocence: but if this charge be proved there is an end of the case, and it is **[332]** of a personal nature so important that I shall first consider the circumstances and evidence in support of such an imputation.

It is alleged that particularly for the last year of his life the deceased was in the habit of leaving his papers and keys about, and his repositories unlocked, and that Mr. and Mrs. Mortimer were often at his house in town when he was at Fonthill. If this were all true, it would prove nothing; for the will may have been destroyed three years before: but the facts are not quite truly laid, for though the deceased might sometimes omit to lock up his papers, yet in general when his papers lay about he locked his room door: if papers of some importance were occasionally left, yet no testamentary paper was ever seen, not even the envelope: and of some of his keys and repositories he was particularly cautious.

What then would these circumstances amount to? That there was a possibility of a spoliation being committed, which possibility cannot and need not be denied: but

the possibility of committing a crime, unless followed by acts done, affords not the slightest proof that the crime has been committed. No person was ever observed at the iron chest, where the will was last seen, no person at the brass-bound cabinet, where the envelope is supposed to have been found, if found in any cabinet at all. The charge really comes to the evidence of Mrs. Hurst, who probably was the only cause that it ever was insinuated.

This witness, who is an undertaker and upholsterer, carrying on business near Storey's Gate, and who had been employed in her business by **[333]** Mr. and Mrs. Mortimer to the amount of 400l. or 500l., and who was in very distressed circumstances, thus deposes: "In December, 1826, whether before or after Christmas she cannot say, but just about the time the administration issued, deponent called upon Mrs. (George) Mortimer, to speak to her on the subject of the administration and sureties: Mrs. Mortimer told her that her husband was out of spirits and wished to decline having any thing to do with it, but that she was averse to this, and told the deponent that it would be doing her the greatest favour if she could prevail on Mr. Mortimer to insist on being joined in the administration. The deponent then asked her 'how Mr. Fraser would feel about it, whether he would be angry;' to which Mrs. Mortimer replied, 'Oh! I don't care about that; they are all indebted to me for every farthing; for I destroyed the will.' These were, as the deponent believes, the precise words: no other person was present, but Mr. Mortimer came into the room immediately afterwards, and the conversation was discontinued. The deponent had no explanation from Mrs. Mortimer at any time whatever of what she meant, but it did not strike the deponent that Mrs. Mortimer did mean to say that she had done anything wrong thereby."

This is a very safe mode of attempting to fasten such an imputation, for it affords no possibility of contradicting it. However doubtful might be the admissibility of such evidence (see note, supra, p. 277), yet the Court considered it an act of injustice **[334]** to Mrs. Mortimer to get rid of this testimony on that ground.

It seems hardly necessary to state many reasons why the Court cannot venture to give credit to Mrs. Hurst: she is examined as a witness in April, 1828: the words are supposed to have been spoken about Christmas 1826, fifteen months before—yet she pretends to relate the precise words—they are not accompanied with any explanation—there are no circumstances which should prevent misapprehension nor confirm their sincerity—they are spoken just at the end of a conversation, as Mr. Mortimer came into the room. The words themselves are equivocal—they will bear the interpretation that the deceased's regard and sense of Mrs. Mortimer's attentions had induced him to destroy his will, or to make no will, or not to make a will excluding Mr. Fraser.

If Mrs. Mortimer had been guilty of a fraudulent spoliation of this Indian will, or of any other will, it is almost impossible that she should not be aware she had done something wrong; and it is highly improbable she would have disclosed it in this abrupt and unnecessary mode: for there was no inducement. The suggested ground-work and motive to the conversation are improbable and untrue—improbable, that Mrs. Mortimer would employ this distressed upholsterer to try to get security in this large amount; untrue, that it was necessary for Mr. Mortimer to insist upon being joined in the administration; for there was no dispute about the administration at this time: it had been agreed that Mr. Fraser and both the Messrs. Mortimer should take it jointly, and an agreement to that effect **[335]** had been signed by all parties so long before as the 10th of November preceding, that is, seven weeks before Christmas; whereas Mrs. Hurst says, "whether before or after Christmas she cannot say:" so that it was about Christmas she lays the conversation. This is still further improbable, and must be incorrect, because the administration to Mr. Fraser actually passed the seal on the 15th of December. The whole story is therefore very loose and improbable; and the ground-work of the conversation is apparently unfounded.

What, too, is the credit and character and conduct of this Mrs. Hurst? and how did she act? She states, "it did not strike her that Mrs. Mortimer meant to say she had done any thing wrong." But is it credible that, if she had destroyed this will, she should not have been conscious of having done that which was wrong? the witness indeed could not, at the time, have understood Mrs. Mortimer as intending to say she had fraudulently destroyed the will; nor have thought that any thing improper had been done; for she mentioned nothing on the subject for six or seven months.

This person had, as I have observed, been employed by Mr. Mortimer, as an upholsterer, in fitting up a house: she had been paid her money on account from time to time as the work was going on, so that at the end of it very little was due, and her bill was not quite satisfactory: and in June, 1827, she was in very distressed circumstances, and requested Mr. Mortimer to lend her money on mortgage, and to accept bills for her accommodation, which he declined to do.

[336] There are four of her letters exhibited; three, dated respectively on the 6th and 14th of June and on the 14th of August, 1827, are addressed to Mr. Mortimer; the first requesting his advance of the money on mortgage and offering 10 per cent. interest; the two next pressing him to accept the bills. From the fourth letter, dated the 22d of August, it should seem that Mr. Mortimer not having even returned her an answer, she wrote to Mrs. Mortimer for her good offices; but did not, in the slightest degree, suggest that she was in possession of any secret that might be the means of influencing Mrs. Mortimer. At length, not getting pecuniary assistance from Mr. Mortimer, towards the latter end of October, 1827, an anonymous letter was sent to Mr. Colvin that Mrs. Hurst could give important information about Mr. Farquhar's will; she was applied to by Mr. Colvin's solicitor and was brought forward to give this evidence: her memory is not very accurate, for in answer to the ninety-eighth interrogatory she does not quite recollect her own letters: "She did at one period, but not, as she believes, in 1827, apply to Mr. Mortimer to lend her 400l. on mortgage, offering to pay him an interest of 10 per cent. thereon." Yet here is her own letter making the application and the offer. "Respondent has no recollection of having been in August, 1827, in fear of being arrested by four different persons at the same period of time;" and yet here, again, is her own letter, dated in August, 1827, and stating expressly her fears of being arrested by four different persons. In short, no sort of reliance ought to be placed on her evidence. It is there-**[337]**-fore a matter of justice due to Mrs. Mortimer to declare, not only that the imputation is not proved, but that she stands wholly acquitted of it.

No direct proof being then adduced that the will was destroyed by some person other than the deceased himself, the case rests upon the general circumstances, in order to shew that the improbability of a destruction of this will by the deceased himself is so great as to lead the Court to a moral conviction that it must have been destroyed by some other means: of which certainly there was a possibility.

To induce the Court to arrive at the conclusion that such was the case, the grounds taken appear to be the following:—First, that, long before making the will, the deceased had conceived so strongly the intention of devoting the bulk of his fortune to the improvement of education in Scotland as to render it highly improbable he should afterwards depart from that intention: secondly, that after his arrival in England he sent for his will from India—went into Scotland to make inquiries, and still expressed the same intentions respecting the improvement of education in that country—quarrelled with Mr. Fraser, and that the will was in existence in the beginning of 1822: and lastly, that though no direct proof can be adduced of its subsequent existence, yet by declarations down to the time of his death the deceased recognized its existence.

Upon the first head—the probability a priori of adherence to this will—it is to be observed that the proof of general intention to promote and improve education in Scotland goes only a part and not the whole length of the case: the **[338]** fact to be proved is, the existence of the will, and that proof is to be deduced from adherence to this identical disposition, and to the plan contained in this very instrument. It is quite consistent with the destruction of this will that he should alter his plan, meaning still to a certain extent to promote Scotch education, and benefit Aberdeen professors and schoolmasters by the making of another will; but that will might also contain other provisions. The probabilities, therefore, must be examined more closely and with a view to the precise point to be proved.

It is true that in his letter to his friend Mr. Wilson, in November, 1790, he mentions "having wished his father to warn his distant relations against any ridiculous notions of inheriting his fortune, for that he should leave it to a public institution:" and in another letter to him in August, 1791, he adverts to "a scheme he had long had in view to leave his fortune, in case of accident, to the University of Aberdeen, in order to double the professors of what are, in his opinion, the most useful branches of science, so that they might be taught during the whole year." This plan seems to be to double the number of professors, and not to double the salaries of each, though

it comes nearer to the disposition of the will than the crude idea in the former letter: it is in this last letter that he adds, "I have stated my project to some of my friends, who treat it with every mark of disapprobation, thinking I should do as great injustice to nephews and nieces, whom I never saw, as if I were to rob them of their birthright."

He was therefore not much confirmed in his intentions by the opinions of his friends in India, **[339]** nor does he seem to have had more encouragement from his friend Mr. George Wilson; since he did not mention nor allude to the subject again for near ten years—till January, 1800, and then not directly nor explicitly. He then mentions intending to leave his niece an annuity of 500l. rather than a sum of money; this may reasonably infer his intention to leave the bulk of his fortune to other objects—to Scotch education: but he also says, "That your opinions should have changed I own surprises me, but I must wait until we meet to learn the extent of the change: I certainly have looked forward to our meeting as one of the happiest objects of my life." That meeting never did take place: but there is strong reason to suppose that Mr. Wilson concurred with his other friends in disapprobation of the plan, from this circumstance, viz. that the deceased never again wrote to him upon the subject, though he remained fourteen years longer in India.

The fact, however, is that just before his departure from India he put his plan into the form and shape of this will, expressly stating that he was "about to embark for Europe;" and Mr. Colvin in his answers thus describes the mode of preparing this will: "That one part of the will and codicil was written from the dictation of the deceased by Alexander Colvin (to whom the deceased enjoined the greatest secrecy as to the contents), and that the other part thereof was immediately copied by the said Alexander Colvin therefrom."

There seems then to have been but little previous preparation for making this will; and though the subject may have been long floating **[340]** loosely in his mind, it appears to have been done rather hastily at the last. How had his plan been digested and matured? He had been absent from Scotland forty-five years—left it when a youth of nineteen—in 1800 he mentioned a scheme of "doubling the professors"—his friends disapproved his plan as injurious to his relations; he made no inquiries, as far as appears, about the actual state of education in Scotland or at Aberdeen in particular; but with his own crude recollections and notions—upon the point of embarking—he dictated this will containing his scheme for devoting to this plan his immense fortune—giving the whole of it away from his family, except two annuities of 500l. each to a nephew and a niece whom he had educated.

Resting here, this will modo et formâ was not very likely to be adhered to in all its details when he came to Europe, and had an opportunity of further consideration and of more exact inquiries upon the spot: on the other hand, although in his letter of 1791 he did not admit the rights of his nephews and nieces "whom he had never seen;" and that in 1800 he talked of leaving his niece, Miss Fraser, only 500l. a year—when it must be remembered his fortune was of course much less; yet he was not by any means destitute of family affections: his letters to Mr. Wilson, from 1784 to the very time of his leaving India, fully prove this: he furnished supplies to his father and mother so long as either of them lived: upon hearing of his brother's death in America, leaving an only daughter—the present Mrs. Trezevant, who had come to England for her education—he was very anxious for her protection: his sister Mrs. Fraser, and her hus-**[341]**-band, were both dead, leaving two children, now Mr. Fraser and Lady De La Pole—he took charge of their education—he intrusted this to his friend Mr. Wilson, not in a cold and niggardly way, but in a manner that shewed strong natural affection for them.

I do not think it necessary to quote the numerous letters from the deceased to Mr. Wilson; they were pointed out in argument; and a reference to a very few passages will for the present purpose be sufficient. In a letter of the 6th of March, 1800, he thus writes: "I wish my niece might be sent to Bath in order to avoid the inconvenience you mentioned to me. Mrs. Bebb has been so good as to say that she would see her. I hope, when you send her, you will take care that her dress be suitable to the niece of a person of my fortune."

In 1808 he writes, "Should my nephew have made any considerable proficiency in the mathematics and have an inclination for the army, I do not know whether an appointment for the Engineer Corps here would not be the best line for him. But

should he wish to remain at home I hope you will act respecting him as you would in the case of my decease."

Again, in 1810, "I need not trouble you respecting my nephew and niece, hoping to be so soon with you, but should I not arrive I request you will act for them as you would for your own children, and I give you, as I have always done, the fullest powers."

Now, these letters mark the affection subsisting, even in India, towards his nephews and nieces, when he "had never seen them." What took place when he came to England? He went to Lady De La Pole's house, and domesticated **[342]** there for a whole year: she soon after was confined, and he stood godfather to her child; and his letters to Wilson shew that he was quite satisfied not only with her, but also with his nephew Mr. Fraser, and with his progress and diligence in his profession. To Wilson, in a letter of the 10th of December, 1814, he thus expressed himself: "Lady Pole wrote to you some days since—she feels great gratitude for your attention to her. John seems studious, and, although at a distant time, will I hope succeed in his profession; he however much regrets the loss of your advice and assistance." He therefore did not disapprove of their conduct, nor was he disappointed in his first impressions.

Mixing thus in family society, satisfied hitherto with the behaviour of his nephew and niece, engaging in the concerns of this country, in the brewery, in his agency partnership, and in various speculations to employ himself and his great capital, observing the conduct of, and the example set him by the rest of the world, and that great institutions for the benefit of society were erected and supported by the small contributions of the many, and not by the sacrifices of a single individual to the exclusion of the claims of family connexions; is it at all improbable that he should begin to doubt and hesitate about the execution, in all its details, of that plan to which his Indian will had devoted his property? For what did he do? he sent for his will from India—he, in 1815, treated for the East Mark estate—he went to Aberdeen in 1816, his friend Wilson being then dead—he made inquiries about professorships and schools; but he did not in the slightest degree impart his **[343]** plan, nor confirm his intentions; nay, though he mentioned incidentally that he had made a will, yet he did not disclose even its general object. All these circumstances tend to render it by no means improbable that he meant at least to revise and reconsider, and did not contemplate an exact adherence to what he had already done.

From 1816 to 1821 there was nothing done in furtherance and confirmation of this will, though to his friends he spoke in general terms in favour of improving education in Scotland, so as to shew he had not given up all his ideas upon that subject; yet to none of them did he impart the detailed provisions of this will, or recognize the scheme which it contained, or the extent to which he meant to devote his fortune to that object; but he did acts inconsistent with its contents—he invested part of his property in the purchase of land, of East Mark and other property, notwithstanding he was aware that such property would not pass under his Indian will; for Mr. Drake fully apprized him of that in 1818, and for three years he remained absolutely intestate as to that property, which would have gone to his heir at law in America, if she were capable of taking.

In 1821 he made alterations in the will by erasing at least some part, and he executed another instrument by which he became testate as to his real estate, and deprived his education plan at least of that part of his property. This was a departure to that extent by a direct testamentary act: but that instrument he afterwards destroyed.

Now, what is the effect of this destruction, even taking it to have been a codicil? If by a codicil **[344]** he had altered the will, the destruction of the codicil afterwards might be supposed to set up those parts of the will which were altered by such codicil; but the destruction of the codicil cannot have the legal effect of setting up those parts of the wills destroyed by erasure. How much of the will was erased and what were the exact testamentary intentions in October, 1821, cannot with positive certainty be ascertained: as far, however, as they can be inferred from paper A, all the annuities were revoked, all the executors were revoked, and new executors appointed by the codicil. How then is it possible that the destruction of the codicil should again set up the whole of the Indian will as now propounded, even if there were proof that this will was not destroyed by the deceased himself?

But, without considering that legal consequence, what is the effect of the destruction of this codicil upon the main subject of inquiry, whether the deceased did or did not destroy the remainder of this partly erased and partly revoked will? He was again intestate as to his landed property; Messrs. Mortimer, who were to have it, and to perpetuate the name of Farquhar, were wholly cut off; his other relations in England were wholly excluded; he was without the new executors in England: whether he intended to die intestate or not, he at least was intestate in these respects from that time till his death.

It is not to my mind in any degree improbable that at the time he took out the codicil and carried it in a moment of irritation to Broad Street to destroy it, in the presence of Mr. Colvin, he should at the same time have taken the will, altered and erased as it was, and **[345]** thrown it into the fire: looking to the character and temper of the deceased, there is no improbability that both instruments coming under his notice together at that time, he should, under the same feelings that he carried the will of October to Broad Street to destroy it, have in the first place thrown the Indian will into his own fire; whether possibly with the intention, in that humour, of never making another and of dying intestate, or whether with the intention of revising and considering the whole of his testamentary disposition, need not be conjectured: the destruction of the will at that period was much more probable than that he should allow a will to remain, which could not operate on his landed estate; and should consent to remain intestate as to that property, depriving the Messrs. Mortimer to whom he had given it by the paper he now destroyed, and permitting the heir at law in America, alone of all his relations, to be benefited by his wealth.

Now, from that time till his death there was no one act of the deceased, and no part of his conduct, tending to confirm and support the existence of this will: the probability of its existence depends wholly and entirely upon declarations, and declarations only.

Declarations alone unsupported by circumstances strongly marking their sincerity and confirming their probability, would of themselves be very unsafe and insufficient to repel the presumption of law. All declarations, where you are to rely on the exact words of a casual exprcs-**[346]**-sion, are liable to be misapprehended—to be misrecollected—to be misrepresented: a slight bias in the mind of the hearer will render the apprehension and the recollection incorrect: the slightest alteration of the expression by a word, or almost a letter, may vary the whole import of the declarations: an alteration from "I have" to "I had" a will, would completely change the bearing of the words; the one signifying the existence of the will, the other its being no longer in existence: but, above all, the possible insincerity of declarations, particularly about wills, increases the danger of relying upon them. This has always been the doctrine, not only of these Courts but of all other Courts. Sir William Wynne stated in *Freeman and Gibbons*, as I have already mentioned, that recognitions of a will, even a few days before the testator's death, were no proof of the fact of its existence, because the declarations might be insecure. The doctrine is the same in all other Courts.

Thus, Lord Eldon, in the case of *Pemberton* v. *Pemberton*, to which I have before referred, expresses himself:—

"Few declarations deserve less credit than those of men as to what they have done by their wills. The wish to silence importunity, to elude questions from persons who take upon them to judge of their own claims, must be taken into consideration; with a fair regard to the primâ facie import, and the possible intention connected with all other circumstances" (13 Ves. 301).

So, again, Lord Erskine (then become Lord **[347]** Chancellor) in the same case. "After all this evidence the loose declarations of the testator, under circumstances imposing on him no obligation of veracity, are nothing" (13 Ves. 313).

And in *Ex parte Pye* (18 Ves. 148) Lord Eldon quotes Lord Thurlow's authority upon the subject.

"His Lordship (Lord Thurlow) also made another observation of great weight, that having raised the presumption from the fact, you beat it down by declarations, which, from the very nature of mankind, deserve very little credit, viz. what a man has done, or will do, by his will; how much shall stand and how much shall not; declarations are intended generally to mislead: but the primâ facie presumption is established beyond all controversy."

Applying, then, this doctrine to the present case: here the primâ facie presumption, arising from the will being in the possession of the deceased, is, that he himself destroyed it; and declarations alone to beat that presumption down, unless connected with other strong circumstances leading to the same conclusion, would be very unsafe evidence. If, however, the declarations relied upon in support of the existence of the will be examined, they will all of them be found exposed to considerable suspicion of insincerity.

In the seventeenth article Mr. Colvin pleads, generally, declarations made after the deceased returned from France in the beginning of 1822. "That the deceased frequently declared to various persons that he had a will or two wills which he had made in India; that one re-[348]-mained in India, and the other in his own possession; that he kept the latter in the cabinet, and that David Colvin and Dr. Fleming were two of the executors." In subsequent articles Mr. Colvin pleads specific declarations to Mr. Drake in 1823, to Mr. Hume in 1825 and 1826, and to the Phillips' a few days before Mr. Farquhar's death.

It is to be recollected that various persons were anxious that the deceased should make a will; and for different reasons: his partners wished there should be executors to settle the partnership accounts: Mr. Drake very properly thought it his duty to remind the deceased that after-purchased estates would not pass under any will, but would go to the heir at law: the Phillips' had obtained a sort of memorandum or codicil, addressed to the executors of "any will made or to be made," to carry a certain agreement into effect; and consequently if there were no executors, there were no persons to whom this directory instrument could be addressed: they were not aware that a revocatory instrument had been executed by the deceased, as a precaution, on the 7th of January, 1825.

Here were, therefore, different persons for different reasons urging the deceased to make a will, and he for different reasons would wish to evade, parry, and get rid of the subject: he might not, and probably did not, at least for a considerable portion of the time between 1822 and his death, mean to die intestate; but he might be in a state of intestacy, and clearly was in a state of intestacy as to his real estate—the great bulk of his property; for from 1822 to 1825 above 400,000l. was so invested: yet he did [349] no testamentary act; he might not be able to make up his mind as to arranging the disposition of his great property, and he might, therefore, have evaded the subject, either by saying he had a will, or that the law would make a good will for him: and in point of character it appears sufficiently from the evidence that he was not so very scrupulous about veracity as never to sacrifice truth in order to evade questions which he was not bound or was unwilling to answer.

After these observations it may be hardly necessary to travel very minutely through the various declarations: but, in a case so important on account of the great amount of property at issue, the Court is unwilling to pass over, without a full examination, any part of the evidence that has been relied upon.

Mr. Bazett, his partner, with whom he was intimate, and whom he met so frequently, yet says that "the deponent never conversed with the deceased on the contents of his will in any respect as regarded the disposition of his property: the deponent spoke to him about leaving a will of some sort, and as desirous that he should leave executors to settle his affairs with the deponent's house: the deceased told him not to be anxious; 'There is a will'—pointing to some place where it was deposited—and he said, 'Our friend David and a Dr. Fleming are executors.' To particular times the witness cannot depose, excepting it was at the deceased's house in the New Road, where he lived from 1823."

Here there was a manifest object, detracting much from the sincerity of the declaration. Be-[350]-sides, if paper "A" contained a correct representation of what remained in the Indian will, the appointment of Dr. Fleming as executor was revoked, and that of David Colvin also, by the codicil which the deceased had destroyed.

Mr. Bazett says, on a further article, "that he did not know during the deceased's lifetime that he had a will in India: the deceased did not mention that; but he told the deponent that he had a will, and this more than once after he had gone into his house in the New Road. His reason for naming the subject of his will to the deceased was from an anxiety that he should have executors, and he had some misgivings in his mind, from what he had heard Mr. Colvin say about it, that there might be a question as to whether the validity of the will received from India was affected by any altera-

tions he might have made in it: and, further, deponent knowing the great changes his property had undergone, was desirous he should make a will adapted to meet such changes: but the reason deponent put forward to the deceased was the promise which the deceased had given him, that he would leave a will appointing executors." At least, then, Mr. Bazett's impression was, at this time, an impression derived partly from conversations with his partner, Colvin, that at the periods of which he has deposed the deceased had no existing will containing an appointment of executors.

Hence, it is clear, the will in India was never mentioned: the deceased had either forgotten that he had any duplicate made, or he supposed the whole was sent over in 1816. Mr. Colvin also was equally ignorant respecting the will in **[351]** India; he had his misgivings that the will in the deceased's possession was so altered as to be inoperative; and well he might; for, according to Mr. Colvin's own paper A, the executors in the Indian will had been revoked. It is obvious that these persons were urging the deceased to make a will, and that, when he said "there is a will, and there are executors appointed," he was evading their attacks; for in 1823 or 1824 his talking of having a will, when between 400,000l. and 500,000l. were vested in real property, could hardly by possibility be sincere, as in allusion to his Indian will.

The next witness is Mr. Drake, and to him the same observations apply: he states:—

"On the 6th of February, 1823 (deponent has referred to his books), he saw the deceased at his house, not in the New Road: he found him in a room at the very top of the house where he usually sat." This interview, then, was, I think, in his house in Gloucester Place, where the deceased sat in a room at the top of his house. "After their business was over, and just as deponent was coming away, he told the deceased there was one subject on which he wished to speak to him: viz. 'that having often troubled him on the subject of his will, he had determined not to mention it again, but that the purchase of Fonthill made so great a change in the nature of his property that deponent felt it his duty again to remind him that freehold property would not pass by a will made previous to the purchase.' The deceased said, 'Mr. Drake, I have a will in a drawer in one of these cabinets,' holding out his arm to a range of cabinets; 'Dr. **[352]** Fleming and David Colvin are executors.' The deponent told him 'that what he wished him to bear in mind was, that such will would not avail for the real property subsequently purchased, and which would, therefore, go to his heir at law.' The deceased said 'he intended to sell it again:' deponent suggested that 'in the event of death it would be proper to have a will which would pass that estate.' Deceased replied, 'he would think of it, or attend to it another time;' and deponent left him."

Such is the mode by which the deceased attempted to evade the subject: his saying "that he had executors" was no answer to Mr. Drake, though it was to his own partner; and when Mr. Drake pressed him further, he said "he would think of it;" he did not produce any will: he did not enter into the subject, or into any particulars, relating to that will, with his confidential solicitor; but he parried him at last by saying "he would think of it."

The next witness is Mr. Joseph Hume; and the declarations to that gentleman are still more exposed to the suspicion of insincerity. The parties had a slight acquaintance in India: in February, 1825, they met accidentally at Mr. Fairlie's funeral; Mr. Hume began the subject, by telling the deceased "that he intended to call on him respecting a plan for rebuilding the Marischal College at Aberdeen, that it was to cost 22,000l., one-third of which it was proposed to raise by subscription." Mr. Hume developed his plan to the deceased, and states "that he solicited his assistance." Here was a subscription solicited—the deceased approved his **[353]** plans; but said "he had other improvements in view by his will, and if he would call upon him he would shew him its provisions." Mr. Hume had begun by saying he intended to call upon him. Mr. Hume did call; carried his plans, and proposed that the deceased should rebuild the college at his own expence, without applying to government for assistance. A discussion then ensued on the various points: the deceased said "there was one objection; there was one part of the statutes which provided for the performance of particular religious duties:" and, after discussing the various points at considerable length, the conversation was interrupted by some person coming in, and the interview ended. It ended therefore without obtaining a subscription, or a sight of the will.

Now a considerable suspicion arises that the deceased was insincere in the whole of these declarations; that he only asserted the existence of the will, and talked of the improvement of the professorships, in order to evade the subscription and the rebuilding of the Marischal College. Here were the fact and the deceased's conduct; the will was not produced.

Mr. Hume paid him a visit for another purpose—to solicit a subscription for the London University, the deceased being supposed, and professing himself to be, a great friend to education in general. Mr. Hume now proposed various offers—that the deceased should take a hundred shares—that a professorship should be established which would perpetuate his name: the difficulty which had occurred respecting Aberdeen, of "the statutes requiring a particular form of religious worship" was here re-[354]-moved, by stating that "the absence of religious tests" was a part of the plan. The only obstacle, the witness says, suggested by the deceased was, "that it might interfere with the objects he had in view to promote at Aberdeen:" and though Mr. Hume was afterwards supported by two other gentlemen, as a deputation, from the London University, the deceased fenced and parried and defeated all three; for instead of one hundred shares he finally decided to take four; that is four per cent. Here then is strong reason to suspect that the objects at Aberdeen were only hinted at (for there was no reference to the will upon this occasion) as an excuse for avoiding a larger subscription to the London University.

Ann Rogers, the maid servant, proves at once how little the sincerity of the deceased was to be relied upon: for she deposes to the deceased having told her that he had provided for her: "The deceased never told deponent he had a will; though he told her at Fonthill he had left her enough to keep her: she had heard him say that he had a will; when quarrelling with his nephew Mr. George Mortimer, the deceased told him very significantly he had a will: on some occasion or other she heard him speak of three wills, and say he had three."

Either then the deceased had no regard to truth, or the witness was mistaken; for there is no suggestion, nor probability of any other than the Indian will and the will of October, 1821; nor consequently of any provision for this witness.

Mr. Robert Hume merely deposes to the deceased having told him what had passed between him and Phillips: "the deceased was speak-[355]-ing in reprobation of the conduct of Harry Phillips, and he more particularly mentioned Mr. Phillips having had the impertinence to interfere on the subject of the disposal of his property by will; but that he did not want his assistance—he had two wills: whether the deceased said he had two wills at the time he was speaking, or that he had two wills at the time Mr. Phillips was speaking to him, the deponent is not sure, but he believes the former; for he thinks the deceased said 'I have two wills'—this passed either in the spring of 1825 or of 1826."

This witness, with a very proper caution, does not attempt either to fix the precise words, or the time: his difficulty and hesitation shew with how much reserve exact words are to be relied upon, and how uncertainly time is fixed by mere memory unaccompanied by some circumstance enabling a witness to mark it.

The only remaining declarations are those to the Phillips': without entering into any consideration of the degree of credit to which those witnesses are entitled, but, assuming that the declarations are correctly related, to what do they amount? It is clear that they were not confidentially made. The meeting to which Harry Phillips deposes was not of that character; for it appears that the deceased went to him for the purpose of endeavouring to make some arrangement about his suit in Chancery. He thus states: "They talked over the bill in Chancery; the deceased said, 'We will have no more lawyers, you and I can settle every thing.' They talked over the Fonthill property, the estate purchased of Mr. Be-[356]-nett, the East Mark estate, and the situation of his property generally. . . . While talking over his affairs the deponent again mentioned the subject of his will, telling him, as he had often done before, 'that if he did not make a will the estates would go to his heir at law:' He said, 'He had no heir at law:' the deponent told him, 'He certainly must have one, and represented to him what a pity it would be to let his property get into the hands of the lawyers.' The deceased said, 'Why, I have two wills—I have told you so a hundred times.' He, deponent, said no more about it: and they talked about various other matters till they parted."

The sincerity of the deceased during any part of this conversation is, I think, extremely questionable.

In respect to what Miss Jane Phillips says about two wills, one in England, the other in India, as she is the only witness that supports the allegation in that particular, or ever heard the deceased mention that he had a will remaining in India, she must, I think, as I have already remarked, have misapprehended what passed.

If the case rested here, the evidence of these declarations would in my opinion be insufficient to repel the presumption of law that the deceased himself had destroyed the Indian will; for there is nothing in his conduct to render it improbable. After his inquiries in 1816 he took no steps to give it effect; after 1822 he was repeatedly pressed to make a will and the necessity of it was pointed out to him: but he **[357]** did nothing of a testamentary kind—he evaded the questions and advice by saying, "I have made two wills"—"I have a will there"—pointing to the cabinet—"in which Dr. Fleming and Mr. Colvin are executors;" a will which, even if existing at that time, would not answer the purpose, and of this he was well aware: so that his conduct and these evasive answers are quite consistent with his having destroyed this will, and with his being aware that he was in a state of intestacy, and even with an intention either from spleen or from indolence of dying intestate.

But if the Court is to look to the facts and circumstances of a tendency not consistent with the existence of this Indian will, how does the case stand? It is true that a presumption of law does not require to be supported by evidence; but when the evidence offered to repel the presumption is itself met and rebutted by stronger evidence inclining to support the presumption, the conclusion of fact becomes more decisive and satisfactory.

In this case the legal presumption is confirmed: first, by the general probability already adverted to: secondly, by Mr. Farquhar's conduct in respect to his property: thirdly, by his conduct in respect to his relations, particularly towards Mr. George Mortimer: and, lastly, by declarations in strict unison with, and supported by, these previous circumstances.

It is unnecessary again to go over the general ground of probability that a person situated as the deceased was in India, forming these sort of notions about applying his great acquisitions to some scheme of general utility in his native **[358]** country, and who, even in India, by his correspondence with Mr. Wilson, shewed he was not wanting in the feelings of nature towards his relations, should upon his return—associating with his family and their rising offspring—satisfied with the attentions and conduct of several of them, mixing in the general society of this country, engaging in the other great concerns of life and in the employment of his capital—at length find out that devoting his whole fortune to such an undertaking, and in exclusion of his near and dear connexions, was a plan to be much altered and mitigated if not entirely laid aside; and should at an advanced period of life, and after inquiries upon the subject, discover that his scheme would require much modification, and therefore, though he might sometimes talk of it, should never set about it.

But how greatly is the probability of his departure from the Indian will increased, when his conduct in respect to his property alone is considered; he was aware of the statutes of mortmain, he was aware that landed property purchased after the making of a will would not pass under it; yet he bought real estates; he bought East Mark and other property; and in 1821, conscious that these estates would not pass under his Indian will, he disposed of them by a testamentary instrument; he afterwards destroyed that instrument; not from disaffection to the devisee of the East Mark estate, but in resentment against Colvin, knowing that his real estate would devolve upon his supposed heir at law, whom he had never seen, and at that time described as "a vagabond in America." He afterwards purchased estates to an immense amount: **[359]** for Fonthill he gave 300,000l.; for Mr. Benett's property 100,000l.: he took assignments of mortgages, lent 100,000l. on mortgage, that sum was paid off, but he offered to leave it at the same interest, and again lent 20,000l. on mortgage; he well knew that none of this would pass under his Indian will: he was an extremely acute, clever man, though fanciful, capricious, irritable, and passionate: yet, aware that this Indian will could not operate, and urged and pressed to make a will, no new will was made—no testamentary act was done. Such was his conduct in respect to his property: true, he might not wish his heir at law to have it, but he seems latterly to have considered its value only as it contributed to his amusement in the management of it—in buying, selling, and speculating—reckless of what became of it afterwards. His conduct then in respect to his property would lead to a high probability that he had abandoned his Indian will, and would either make a new will or die intestate.

If this is followed up by considering his behaviour to his relations after his return to England, the probability of his destroying the Indian will is still further increased. Lady De La Pole, an orphan niece, whom he had educated, brought up, and in some degree provided for by this will, received him in her house at his arrival: he stayed with her and her husband a whole year; was godfather to one of her children; and continued his intercourse with her. Lady De La Pole and her family left London in 1819, and retired into Devonshire: and Miller on the sixteenth article says, "That when the family were about leaving London, the deceased [360] took leave of Lady De La Pole most kindly; he was quite affected at parting. The deponent knows that the deceased and Lady De La Pole corresponded by letter." In 1823 Sir William De La Pole proposed to pay a visit at Fonthill; and Mr. Farquhar wrote an easy and civil answer in return that he should be happy to see him. He talked also of visiting them in Devonshire: for Mr. Alderman Wood says, "The deceased, shortly before his death, told the deponent of his intention to go into Devonshire to see Lady De La Pole, a promise long made, as he said, and which he should certainly perform." Is it possible then that he could mean to exclude this niece entirely? for even the pittance given her in the Indian will was taken away in 1821.

Mr. Fraser, whom he had also educated, the only son of a deceased sister, though he had irritated his uncle in 1817, not by immoral conduct, nor by inattention to his professional pursuits, but by an independence of mind, not dishonourable to him, though offensive to the deceased, and such as induced the deceased to withdraw his allowance; yet Mr. Fraser was afterwards treated with kindness by his uncle; was received at his house; was met by him in society without any appearance of distance and resentment; he visited at Fonthill for several days together, and was an hour with him at his house in town on the very day before his death; it is not probable that the deceased would allow a will to stand that would cut off even Mr. Fraser without a farthing out of his great property.

But the deceased's conduct towards the Mor-[361]-timers, particularly towards Mr. George Mortimer, is irreconcileable with the supposition of the existence and intended operation of the Indian will: he not only devised the East Mark estate to him in October, 1821, but his whole conduct to him from that time to his death was that of increasing confidence and kindness: he and his family were inmates in the deceased's houses; the care and management of the Fonthill estate were intrusted to him; the deceased assisted him in his manufactory with an almost unlimited credit; he made large advances of money to him, and engaged him in erecting a manufactory on the Fonthill property; and yet if this will was intended to be adhered to, not only would the real estate devolve under the mortmain acts, even East Mark and all—not only would Mr. George Mortimer be excluded from the personalty by this will (for whether any of the mortgages would devolve upon the next of kin could hardly be in the deceased's contemplation), but Mr. George Mortimer would be a debtor to the estate for all the monies advanced to him. The adherence, on the part of the deceased, to a testamentary disposition producing these effects is not more improbable than it would be unjust, and is utterly at variance with the treatment this particular relation experienced from the deceased in all the latter years of his life.

With these foundations of probability—built on the treatment of his property and of his relations—that the deceased should have de-[362]-stroyed the old will, how stand his declarations? Declarations coupled with conduct and with acts, and consistent with them, are of weight in proof of intention: declarations also, not depending upon the precise words of a particular expression, but connected with extended conversation, and more especially if not liable to much suspicion of insincerity, have greater effect; but even still more when made, not upon a single occasion, but repeatedly in the course and current of confidential communications: such declarations are entitled to full attention.

Here is the declaration in 1822 to Mr. Hart Davis, naturally connected with what was the subject of conversation—not easily liable to any misapprehension, nor exposed to the suspicion of being insincere: "In the course of conversation the deceased talked to deponent about his property, and told him of the investment he had made in the house of Whitbread and Co., which, he said, 'had paid him well.' And having gone into several particulars respecting his affairs;" which shewed the deceased was in a communicative mood; "the deponent observed to him 'that it was very extraordinary the world generally supposed that he had made no will, and that with his

immense property it could not be so.' The deceased replied 'that he had made wills,' or 'had had wills.' The deponent said, 'It did not matter what he had had, but what he then had.'" So that there could be no doubt as to the substance of this conversation. The deceased replied, "Oh! the law will make the best will, or a very good will for me." And as this conversation passed after the codicil of **[363]** October, 1821, was destroyed, and before the purchase of the Fonthill estate, the great bulk of his real property, if the Indian will were destroyed, would at that time have been distributable among his relations. "The deponent added; 'Yes, but at a pretty considerable expence.' What then passed was to that effect."

Now, whether this declaration was sincere or not as to "the law making the best will for him," he certainly was intestate as to his real property in 1822; there seems not much reason to question its sincerity as to his having at that time no will, and being in a state of total intestacy, even though he might intend to make a will if he could persuade himself to set about it: he does not deny the fact that he is without a will; but excuses it.

The declarations to Mr. Alderman Wood are still more distinct and decisive: they are, if believed (and there is not the least ground to disbelieve them), quite direct to the very point at issue. "He first knew the deceased soon after his arrival: the deceased dined with him frequently; he was in some degree in his confidence; the deceased consulted him on the affairs of the brewery, and shewed deponent the account of the profits."

"Early in 1825 the deceased spoke to deponent several times on the subject of his affairs; the general tenor of his conversation and declarations was the same; in fact, he repeated what he said again and again: deponent certainly did not introduce the subject to him; he thinks it was in some way or other through Dr. Fleming having expressed great anxiety that the deceased should make a will;" **[364]** so that Dr. Fleming was of opinion the deceased had no will. "The deceased said 'it was not material that he should make a will, for his property would be divided among his relations, and that he wished it to go as the law would dispose of it; the law would make a very good will for him.' . . . The deceased spoke of his heir at law as his great nephew, who was living at Charleston." It is clear, therefore, that he had been making some inquiries for his heir at law. "That he had never seen him, and knew nothing of him, and that he scarcely knew his brother from whom his heir at law sprung; that they had gone to different colleges, and had left home very early, one for America and the other for India." And this history is confirmed by the letters to Mr. George Wilson. "In speaking of his testamentary intentions he told the deponent that it had been at one time his intention to establish a sort of Unitarian College, but that he had found some difficulties in the way, and had abandoned the idea:" which corresponds with what passed between the deceased and Mr. Joseph Hume as to the particular forms of religion required by the Aberdeen statutes: "That he had then made a will in India, bequeathing his property to the schools in Scotland, but that when he made that will he was entirely unacquainted with his family:" and in his letter to Mr. Wilson, when he mentions that his friends disapproved of his education plan, the deceased says "he had never seen his family," "and that being a friend to education and not knowing his relations, he then thought it the best mode of disposing of his property: **[365]** but that since he came to England and had become acquainted with his family, he had considered it right to destroy that will, and that he had destroyed it." Here is an express declaration of the fact: "but he did not enter into any particulars as to the circumstances, or the time when he did so; the deceased, however, distinctly said that he had destroyed that will, and that he had then no will." (*a*)

He says further: "The deponent spoke to the deceased very freely, urging him, in

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(*a*) At this part of Mr. Alderman Wood's evidence are the following passages: in the last sentence is the declaration referred to supra, p. 303 :—

"In speaking on the subject of education, and of the will he had made in India, Mr. Farquhar said 'that it was not the kind of will which he should then make or allow to stand, even if he had not destroyed it for other reasons, because it was inapplicable to the then state of his property.' The deponent believes that the deceased spoke of having made more than one copy of that will, and that he had left one in India, as it was customary for persons to do when coming to England."

consideration of the peculiar circumstances of his property, its magnitude and nature, and the difficulties that might arise out of it, and his declared intention of favoring his relations, that he should make a will, and after some hesitation he said, 'I believe you are right,' and added, 'that he would make one.' Conversations to the effect now deposed of were repeated, and, after the deceased had once said 'that he would make a will,' he never allowed the deponent to leave him without an assurance that he would do so."

Here, then, are declarations deposed to by a witness of unimpeached credit, not depending upon the precise words of a single declaration, [366] nor on any transient impression; but the general tenor of the deceased's conversation repeated again and again, "that his property would go among his relations, and he wished it to go as the law would dispose of it." In this respect he might possibly speak with insincerity, and be merely excusing his own indolence or indecision as to the disposal of his property: but in relating past conduct there is less reason to suspect his truth and sincerity, because established facts concur with the declarations, and corroborate a great part of what he discloses; when, however, he said that "he had made a will, and being a friend to education, and then entirely unacquainted with his family, he at that time thought it the best mode of disposing of his property, but that since he had come to England and had become acquainted with his family, he had considered it right to destroy that will, and had destroyed it;" this was a declaration clear, distinct, and direct to the very point at issue, and quite consistent with the whole of his conduct, with the res gesta, and with all rational probability.

Upon the whole view, then, of this important case, and after all the consideration to which it is entitled, my opinion is clear and without any doubt resting in my mind. Here was a will executed in India in 1814, just before the deceased finally left that country without any intention of returning there—it was executed in duplicate; one part remained there till after the testator's death, the other part is admitted to have been in the deceased's own custody and possession in England; it was never seen after [367] the year 1822; on the deceased's death in 1826 a careful search was made and no will found: the presumptions of law are—first, that the duplicate in his own possession was destroyed by the deceased himself; secondly, that, by destroying the duplicate, he intended the revocation of the other duplicate not in his own possession: to negative these presumptions the burthen of proof lies upon the executors setting up the duplicate; the evidence adduced for that purpose appears to my judgment quite insufficient to repel the legal presumptions.

On the other hand, the legal presumptions are strongly supported by the probability of the fact that the deceased himself would destroy and revoke this will by his conduct in regard to his property, by his intercourse with and treatment of his family, and by his confidential declarations.

The Court must, therefore, pronounce against the will propounded, and that, so far as appears, the deceased is dead intestate.

In respect to costs, I think that I cannot upon principle decree them to be paid out of the estate. The administration had gone out, and was in part acted upon, even by Mr. Colvin himself. When an administration is so called in, an executor proceeds at his peril, certainly at his own risk: here are many facts pleaded which are not precisely proved; here are charges insinuated of a very serious colour, which are not supported by facts; here are great expences occasioned, and great suspence and anxiety at all events excited in the relations: it would be contrary to principle to allow, under such cir-[368]-cumstances, the executor's costs out of the estate. If the executor had made fair inquiry, he must have been satisfied that this will had been destroyed by the deceased himself; indeed, according to the evidence, such were his own impression and belief. Being satisfied of that fact, he could not have been misled as to the law—that the duplicate in India was revoked. He was, then, under no obligation to bring the case before the Court.

With regard to the parties cited to see proceedings, they need not have appeared at all; and it would be a dangerous precedent if, when an executor—the person intrusted by the testator to see his will executed—is before the Court, legatees are to interpose and have their costs out of the estate.

I must, therefore, leave these several parties to the consideration of the next of kin. The Court, having no right to indulge its liberality in disposing of their property, because it happens to be of great amount, would not be justified in decreeing that the

costs should be made a charge upon the estate, unless the sound principles of public justice require it. In the present case the Court makes no order respecting costs.

[369] GOODALL AND GRAY *v.* WHITMORE AND FENN. Consistory Court of London, Michaelmas Term, 4th Session, 1828.—In a suit for subtraction of church-rate the Court will not, at the prayer of the defendants, issue a monition for the production of parish books, which are not shewn to apply immediately to the question at issue: and on the merits, the rate being pronounced for, the defendants condemned in costs.—In questions of subtraction of church-rate the Court having jurisdiction on the subject-matter is bound, unless stopped by a prohibition, to proceed to the trial of a select vestry by which the rate was made. —Costs, though in the discretion of the Court, are in its legal discretion guided by former precedents, and are almost universally decreed in suits for church-rates, where the rate is pronounced to be subtracted.

This was a cause of subtraction of church-rate, promoted by the churchwardens of the parish of St. Martin in the Fields against two parishioners and inhabitants of the same parish.

In Michaelmas Term, 1824, the libel was admitted without opposition: it pleaded the refusal of the defendants to pay a church-rate, to which they had been legally assessed by the select vestry. To this libel the defendants gave in their personal answers; and on their behalf, in Easter Term, 1825, an allegation (denying the legality of the select vestry) was brought in: the admission of which stood over till Trinity Term, 1828, when, on the fourth session, it was admitted.(*a*) Upon this allegation answers were [370] not called for, nor was a single witness produced.

Dodson and Addams for the defendants. It would be useless to discuss the principal merits: the expectation of establishing a defence, by cross-examining the most important witnesses on the libel, has failed; the Court being of opinion that we had debarred ourselves in point of time from administering interrogatories. The order for the production of the parish books being confined to this precise rate, has defeated the object of applying for them: viz. to shew, from the books generally, that the select vestry had no good nor legal foundation. We again apply for their production, and that this case may not be decided without our being allowed to inspect them. If however the Court should now proceed to give sentence, we submit that, under these circumstances, the defendants ought not to be condemned in costs: they are individuals contending against the [371] officers of a parish in possession of large funds.

The King's advocate and Phillimore contrà. Goodall and Gray are not the present churchwardens: they have proved their case, and are entitled to costs; and no sufficient ground has been stated to take this case out of the general rule. The defendants were bound to pay the rate; and the parish is not to incur the expence of enforcing it. The legality of the select vestry had been established by a jury; and these defendants were parties to the suit.

(*a*) In this allegation the illegality of the rate was pleaded, "by reason that it was made by a number of persons falsely styling themselves and pretending to be a set or select vestry; that there was not any lawful select vestry established either by act of parliament, immemorial usage, or prescription within the parish; and that the persons who attempted to make the rate had unduly and illegally assumed to themselves the authority of a select vestry." The admission of this allegation was directed to stand over under the following circumstances:—

Previous to the institution of this suit the defendant, Fenn, had cited the present and past churchwardens of St. Martin's parish to bring into the registry of the Consistory Court an account of their receipts and disbursements, as churchwardens for the years 1820, 1821, and 1822: an appearance was given for the churchwardens under protest, upon the ground that the accounts had been audited, allowed, and passed by the vestry (being a select vestry) of the parish: the legality of this vestry was, on the other hand, denied; a prohibition was then applied for by the churchwardens, upon which the proceedings in the Consistory Court were stayed, and, in Easter Term, 1828, finally stopped by the rule for a prohibition being made absolute, in consequence of a verdict having established that the select vestry was legally constituted. See *Golding* v. *Fenn*, 7 B. & C. 765.

Judgment—Dr. Lushington. This suit was instituted in Michaelmas Term, 1823, by the then churchwardens of St. Martin in the Fields against two inhabitants of that parish for the payment of church-rate. A libel, in the usual form, was admitted; and the cause then stood over for a very considerable period, in consequence of a prohibition having been obtained in another suit that had been brought in this Court upon the same question as was likely to arise in this proceeding, viz. whether the vestry of the parish of St. Martin in the Fields was a legally constituted select vestry: the jury found in the affirmative, and the prohibition having thereby become final, that cause was disposed of. An allegation on the part of the defendants was then offered in the present suit: the admission of that defensive plea was opposed, partly on the ground of the verdict in **[372]** the other suit having, as alleged, settled the question: but the Court was of opinion that it could not refuse to proceed with the cause; and therefore admitted the allegation, except as to that portion of the first article which set forth the misappropriation of former rates.

The defensive allegation, thus reformed, may be comprised in a few words: it pleaded, first, that the select vestry was not legally constituted; secondly, that no repairs were necessary: and in supply of proof two exhibits were annexed; (*a*)[1] but no answers have been given to, nor evidence taken upon, this allegation: the case of the defendants, then, rests wholly upon averment. If, however, the plea had been instructed with proof, this Court must have gone on to a decision, notwithstanding the prohibition in the former suit, to which I have adverted. For, in questions of church-rate, the Court has unquestionably jurisdiction: and the prohibition being granted in another suit, propter defectum triationis only, upon an incidental point, would not justify the Court in declining to take cognizance of all questions arising in this suit. It would be analogous to a tithe cause in which a modus was alleged, but where, in the particular suit, no prohibition had issued: so here, if the defendants had gone into evidence, nothing but a prohibition in this suit would have authorized the Court to refrain from entering into the merits of the question.

[373] The witnesses on the libel were examined in the long vacation: on the first session of this term an application for their re-production, in order to administer interrogatories, was rejected by the Court. (*a*)[2]

On the third session, after publication had passed, the cause having, on the preceding session, been concluded at the petition of both proctors, the application was renewed, and again rejected. It is too late now to discuss the reasons on which the Court came to that decision; but it is sufficient to state that if those motions had not been rejected, the Court would have departed from its ordinary rules, and introduced a laxity of practice very injurious to suitors. The Court is now asked to direct the parish books collectively to be brought in, so that the churchwardens may specify the entries on which they intend to rely: on the last session a similar application was so far acceded to that the production of those books, connected with the rate pleaded in the libel, was ordered: but it is now urged that the books from a very early period should be produced for inspection, in order that the parties **[374]** may, from their contents, make out their defence; that defence being—the non-existence in this parish of a select vestry legally constituted.

I conceive, for many reasons, it is impossible to grant this application. If the inspection of these books is necessary, the proper way is to apply to the Court of King's Bench for an order to inspect—an order always granted when conformable to law. And if such an order had been made, this Court would feel no hesitation in shaping its proceedings so as to give full effect to such an order. But there is

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(*a*)[1] Viz. a copy of two faculties for the appointment and regulation of a select vestry in St. Martin's parish: the first dated 28th June, 1662; the other, October, 1673.

(*a*)[2] Five witnesses were examined on the libel, viz. on the 31st of October, 1828, Mr. Fynmore, the vestry clerk of the parish; on the 1st of November, Mr. Jennings, a clerk in his office; on the 3rd of November, Mr. Cobbett, a parishioner, who had served the office of churchwarden: on the 7th of November, Mr. Stutely, surveyor of pavements in the parish, an office he had held for twenty-two years, but who was not a vestry-man; and on the 8th of November, Mr. Robert Nixon, an inhabitant of St. Martin's, but who held no office in the parish. To the two last witnesses interrogatories had been addressed.

another difficulty. Here is no averment in the allegation, no statement by counsel, that the inspection of these books would effectually avail the defendants. I should, then, greatly exceed my duty if, merely for an experimental investigation, I were to direct all the parish books to be attended with in this case. The question whether this select vestry be legal or not, does not come before me in a shape to enable me to give any opinion upon it. If such a question had been duly submitted to my consideration, I should have endeavoured to have arrived at a just conclusion; remembering, on the one hand, that a select vestry, being in derogation of the common rights of parishioners, can only be sustained by immemorial custom or by act of parliament; and on the other hand, that established custom is not lightly to be disturbed.

On the merits of the principal cause it is now admitted the suit cannot be defended: but it is said that, in respect to the costs, the Court may exercise a discretion: and that is true as a general principle, but the expression must not be **[375]** understood to mean that it is in the power of the Court to give or withhold costs as it pleases: but it means that costs are in the legal discretion of the Court, adhering to general rules and former precedents. Now, it is almost the universal rule to accompany with costs a sentence in favour of churchwardens in a suit for subtraction of church-rate. Are there, then, any circumstances justifiably to induce me to deviate from that rule? The Court cannot proceed on the suggestion that the suit is against private individuals; so it is in all suits of this description; and if such were a true principle, it would amount to this, that costs should never be given in cases of church-rate; which would be contrary to the practice of these Courts, sanctioned and confirmed by the superior Court.

There is, then, in my opinion, no circumstance demanding a departure from the general rule; but, on the other hand, there was sufficient to have induced the defendants to have stopped the suit in last Trinity Term, if they had not intended to bring the real question, viz. the legality of the constitution of the vestry, before the Court. The trial of that question, certainly, would have been attended with considerable risks, remembering that it had been decided upon by a jury. Under these circumstances I pronounce for the rate, and condemn the defendants in costs.

[376] HARRIS *v.* HARRIS. Consistory Court of London, Hilary Term, February 23rd, 1829.—The wife having failed in a charge of adultery, and a recriminatory plea on the husband's part being proved; cruelty, and the introduction of his wife to a female of loose character (the wife's guilt not being connected with such introduction), form no bar to his prayer for divorce.—Where the wife is charged with adultery, her conduct and declarations, on a confession of guilt by the alleged particeps criminis being communicated to her, are admissible evidence on behalf of the husband.

[Affirmed, p. 511, post. Referred to, *Dillon* v. *Dillon*, 1841, 3 Curt. 93; *Otway* v. *Otway*, 1888, 13 P. D. 149; *Hodgson* v. *Hodgson*, [1905] P. 240.]

This suit commenced by a citation on the part of the wife, who charged the husband with adultery: the libel, consisting of twelve articles and an exhibit, having been debated and admitted; an allegation of twenty-six articles, with six exhibits annexed, was admitted, on behalf of the husband. This allegation contradicted and denied the principal averments of the libel, accused the wife of adultery, and concluded with a prayer for a divorce. A responsive allegation was then admitted, which, among other things, pleaded "that Captain Harris soon after his marriage neglected and exposed his wife to improper and unbecoming situations, and to the influence of pernicious society; and that, regardless of her honor and character, he caused her to visit and associate with persons of a character and description altogether improper for her society, and by various means promoted an intimacy between them." In a further allegation, admitted on the part of Captain Harris, these averments were expressly denied.

These several allegations were admitted without opposition; and, on the evidence taken upon them and upon the libel, the cause came on for hearing.

Phillimore and Addams for the wife.

The King's advocate and Dodson contrà.

[377] *Judgment—Dr. Lushington.* This is a suit for a divorce by reason of adultery. The parties in the cause are Anna Maria Harris and Captain George Harris of the Royal Navy; they were married on the 29th November, 1821, and the issue of this

marriage has been two children, both of whom are now living. After the marriage the parties cohabited at different places, and particularly at a cottage situated on Fulmer Heath, in Middlesex.

In the spring of the year 1823 Captain Harris was appointed to the command of the "Hussar" frigate, and in January, 1824, proceeded to the West Indies: he remained on that station until the month of July, 1826, when the "Hussar" was ordered home, and arrived at Portsmouth on the 13th of October in the same year. The cohabitation between these parties was then renewed, and continued at various places, particularly at a house taken by Captain Harris at Brompton, until the month of February, 1827, when Captain Harris deemed it necessary to abstain from cohabitation with his wife; who, on the 20th of March following, quitted the house of her husband and proceeded to join her parents in France, under circumstances to which I shall hereafter more particularly advert.

In June, 1827, Mrs. Harris instituted a suit for a separation by reason of her husband's adultery, as alleged in the libel given in on her behalf. In February, 1828, an allegation on the part of Captain Harris was admitted, in which he denied the charge of adultery imputed to him in the libel, recriminated on his wife, [378] and in conclusion prayed a separation. Mrs. Harris, in another allegation, then accused her husband with culpable inattention towards her, and that he had been wanting in a just regard to the preservation of her purity and of his own honour. And by means of interrogatory, but not by averment in plea, she has imputed to her husband unjustifiable severity.

It appears, therefore, that there are several distinct questions in the cause, and the Court will proceed to consider those questions nearly in the order in which they arise and have already been stated.

The first question is, as to the adultery alleged against Captain Harris, and the substance of the proof adduced in support of it. The first charge of adultery against Captain Harris is in relation to a Mrs. Waverly, in 1824, when he was in the command of the "Hussar" frigate, and stationed in the neighbourhood of Vera Cruz. The libel, indeed, contains a general charge—"that Captain Harris whilst in command of the 'Hussar' in the West Indies, and on the coast of America, when on shore at different places, formed an adulterous intercourse with divers strange women:" but the evidence, I think, is confined to the single charge of adultery with this person of the name of Waverly, or who seems to have passed by that name; for it is not very clear whether it was her real or only an assumed name.

It is established in evidence that this Mrs. Waverly was received on board the frigate some time in 1824; and that she did prove to be a woman of bad character is quite clear from the testimony of the surgeon, Mr. Galloway: it is [379] equally clear that if Captain Harris and this woman were so disposed, they must have had full and convenient opportunities, whilst this person was on board the "Hussar," to have committed adultery. From the disposition of the cabins, or, indeed, from any disposition of the cabins that could have been made, no one can doubt that there must have been ample facilities for the commission of such an offence. But then, before the Court can affix guilt on Captain Harris, it must be satisfied that there was something more than opportunity. There must be some overt acts or some circumstances to shew that he was disposed to avail himself of the opportunity to commit adultery, and that he actually did so.

Now, if there was the slightest proof of any indecent familiarity between the parties, or if the Court was in any way satisfied that undue intimacy subsisted between them, then the Court would travel much more easily to the conclusion that where the facilities were so great, and the opportunity of access so easy, the crime of adultery might have been committed: there is not the least proof, however, of any indecent familiarity nor improper intimacy between the parties, nor of any conduct approaching towards it, and I cannot come to the conclusion that they did commit the crime of adultery without disbelieving the evidence of Galloway, the surgeon, and Wilcocks, the clerk on board the frigate, who were examined to support the charge, but both of whom declare their disbelief in it; and Wilcocks, in particular, states it to be his strong and firm conviction that no improper intercourse was carried on between Cap-[380]-tain Harris and this Mrs. Waverly whilst she was on board the "Hussar." It further appears that this person was only on board the "Hussar" for a few days, and that she came with Mr. Hall, a merchant, who was in the ship at the same time,

and who afterwards died there. Her passage to England, it would seem, was taken in a merchant vessel lying in the roads, and which was waiting for dispatches; and when that vessel was ready, Mrs. Waverly quitted the "Hussar." This is nearly the whole of the evidence in relation to the charge of adultery between Captain Harris and Mrs. Waverly, and the Court has no difficulty in coming to the conclusion that there has been a failure of proof as to this first charge.

The next charge has been truly represented as the most serious in the case, at least so far as regards Captain Harris. That charge is, that for a long series of time Captain Harris carried on a criminal intercourse with the wife of a gallant officer who commanded the Royal Engineers stationed at Barbadoes and the adjacent islands, when Captain Harris was stationed with the "Hussar" in the West Indies. It appears that Captain Harris became acquainted with this officer at Barbadoes on some occasion when the "Hussar" touched at that island, in the spring of the year 1825. The exact period when this acquaintance commenced is not, I think, very clearly stated; but in May, 1826, this officer being desirous of making, what the witnesses call, a tour of inspection to the Leeward Islands, in the fulfilment of his military duties, embarked on board the "Hussar," and was then accompanied by his wife. After visiting seve-[381]-ral of the Leeward Islands they returned to Barbadoes, in July, 1826; and the "Hussar" shortly after being about to proceed to Jamaica, and thence to England, Captain Harris offered the wife of this officer a passage on board his ship.

It is established in evidence that at this time the lady of this officer was suffering under ill health. As to what may have been the precise extent to which she was affected by illness is not by any means material: it is a point on which opinions might very naturally differ, and it is of no further importance in this proceeding than as it shews that this offer of a passage to England arose from that cause, and that her ill health was not stated as a pretence merely. I think it appears from the evidence of Galloway, the surgeon, that she was at this time suffering under dyspepsia and other complaints; and that upon a consultation taking place, she was recommended by her medical advisers to try the effect of a visit to England: and under these circumstances Captain Harris offered her a passage on board his vessel to England.

So far, the Court is of opinion that there was no imputation on any of the parties. There was no impropriety in such an offer having been made, nor in such an offer being accepted. There was no reason, as it appears to me, why the wife of a British officer should not accept of a passage on board a British man-of-war, and prefer the superior accommodation of a king's ship; and there was the less reason when she was an invalid, and when the commander of that ship was a married man and the friend of her husband. The most innocent and useful inter-[382]-course which takes place in society would be destroyed, and great and unnecessary inconvenience would arise, if it was held that a circumstance of this description conveyed any thing in the nature of an imputation on the character of a party. The Court is of opinion that the honour and character of this lady were, and ought to be, considered as safe at least in a vessel of war as in a private ship; and that she would there be protected, at least as effectually as if she had taken her passage home in a packet, or any other description of vessel.

It is true, however, that though this acceptance of her passage to England in Captain Harris' frigate may have originated in perfect innocence, yet the intercourse thus produced may have acquired an illicit and criminal character in its progress; and it therefore becomes the duty of the Court to scrutinize the facts and circumstances given in evidence, and to see whether evil might not have subsequently been engrafted on what was in itself innocent, and whether the consequences were such as have been suggested.

When the "Hussar" arrived at Jamaica her course was varied, and it was ordered that she should procced to Vera Cruz and thence to England, so that the voyage was necessarily prolonged. Now this was a misfortune in no degree attributable to either of the parties whose conduct the Court is now considering, and the circumstance did not, in my opinion, impose any obligation on the lady to quit the "Hussar." She was not called upon, because the voyage was altered and somewhat prolonged, to undergo the inconvenience of a change to another vessel, [383] and to waive the advantage of the superior accommodation of a king's ship. Even if she had evinced no desire, and if no attempt had been made, to procure a passage for her on board another vessel, I do not think there would have been any imputation resting on her upon that account:

but it is in evidence that she was much disappointed upon being informed that the "Hussar" was to proceed to Vera Cruz, and that her arrival in England would be postponed; that she was most anxious to avail herself of another opportunity of returning to this country, and that exertions were made to procure a passage for her in another vessel, but without success. Nothing whatever, therefore, prejudicial to the character of this lady can be inferred from the circumstance of her remaining on board the "Hussar" after the arrival of the ship at Jamaica, and the alteration which was directed to be made in the voyage to England.

What, then, are the circumstances during the voyage home, that are to lead the Court to the conclusion that adultery was committed by these parties when on board the frigate? The counsel for Mrs. Harris argued the case as if they thought that unless what occurred on board the vessel should take its complexion from subsequent circumstances the Court could not conclude that adultery was committed on board the vessel; but that subsequent circumstances gave such a complexion to those which had taken place on board the vessel that the Court must conclude that the adultery did occur there.

In support of this view of the case, it has been said that there was great facility of access, and I think it is so proved; but then this fa-**[384]**-cility of access was not purposely made; it is incidental to the state of a ship; and it is quite evident that on board a vessel, difficulty of access, even when desired, can seldom be effected. If it appeared, however, that any undue familiarity was observed between the parties, or that any improper attentions were paid by Captain Harris to this lady during the voyage to England, the Court would then find less difficulty in coming to the conclusion that, where access was so easy, the parties had availed themselves of the opportunities thus afforded. Upon looking to the evidence, however, the Court sees no one fact or circumstance which could justify it in drawing such a conclusion. The behaviour of the parties in public appears to have been perfectly proper and quite unexceptionable; for no circumstance is stated tending to throw the slightest suspicion on any part of their conduct during the voyage. It is impossible that, because it is in evidence that this lady was a pretty woman, or a vain woman, the Court should suppose that she was criminal, or that it should impute to Captain Harris, without further evidence, the crime that has been charged against him.

It appears that a female servant of the name of O'Brien, and a little black girl, were in the service of this lady, and accompanied her to England; and that for some time after the ship left Barbadoes they used to sleep at her cabin door. However, from the statement of the witnesses who have deposed to the fact, it seems that O'Brien and the black girl did not always sleep at their mistress' door; that their berths were removed for the purpose of accommodating **[385]** the Mexican Minister and his suite, who were on board. Any inference, therefore, which could be drawn from the circumstances of the servants changing their berths is explained away, the fact being thus satisfactorily accounted for: and there is no other occurrence during the voyage to which it is necessary the Court should advert.

The Court is therefore of opinion that there is no foundation for any suspicion that a criminal intercourse took place between this lady and Captain Harris on board the "Hussar;" and it has great satisfaction in arriving at this conclusion; for if otherwise, the Court would have deeply lamented that so distinguished an officer as Captain Harris, whilst on board his own vessel, should have so much forgotten what he owed to himself as well as the sacred duty imposed upon him of protecting the honour of his friend's wife. A lady so committing herself, and being so committed by her husband, as this lady was, to the care of Captain Harris, stood towards him in a relation nearly as close as a ward to a guardian; and any breach of this sacred trust or any violation of confidence on his part would deserve to be reprobated with more than ordinary severity. The Court has great satisfaction, therefore, in relieving Captain Harris from the imputation on his honour which was conveyed by this part of the charge.

The "Hussar" arrived at Portsmouth on the 13th of October, 1826, and nothing occurred at Portsmouth which could lead the Court to the conclusion that an improper intimacy was carried on between these parties. So far the Court is of opinion that this charge of adultery is wholly **[386]** unsupported. As to the circumstances alleged to have taken place at Portsmouth, and the attentions stated to have been paid by Captain Harris to this lady subsequent to her arrival in that port, and before he set

out for London, the Court does not consider it necessary to enter upon them with any minuteness. As proof of a charge of adultery they amount to nothing, and the Court will therefore pass them over and proceed to the next branch of the case.

This lady came to London from Portsmouth on or about the 17th October, 1826, and was lodged in a house situated in the Regent's Circus. At those lodgings she was visited by Captain Harris. The Court cannot but feel that the previously existing state of things was now changed, and that the subsequent intercourse between these parties must be examined by different rules, and is subject to different considerations, from those which were applicable when this lady was a passenger on board Captain Harris' ship. She had now arrived in England, and there was no longer any occasion for the protection or services of Captain Harris: she had a father and mother who were living in or near London: and the intimacy which had necessarily subsisted previously between these parties was no longer called for by the situation in which they were now placed, or by the circumstances of the case. I think therefore that during the remainder of his intimacy with this lady the Court is bound to consider that Captain Harris was divested of his former character, and to apply different principles to his conduct.

The intercourse between these parties must now be judged of by the ordinary rules and [387] principles applied to the conduct of married persons on shore. That a considerable intimacy did continue to subsist, and to an extent which ought to awaken the vigilance of the Court, cannot, I think, be denied. It behoves the Court then, scrupulously to consider and to weigh all the facts, so as to ascertain, if possible, the true character of the intimacy between these parties; whether it was criminal or innocent; whether it was only carried on with heedlessness and a want of due caution, or whether it was carried on with any real intention of committing the crime of adultery.

The fact principally relied on is that Captain Harris slept one night at the before-mentioned lodgings whilst this lady occupied them. It is also in evidence that he slept on another occasion at a house in Sloane-street, to which this lady had removed; but the Court is at present confining itself to a consideration of what took place in the Regent's Circus. Much discussion has taken place as to the period when Captain Harris did sleep at these lodgings; but I think the only result which the Court can come to from the evidence is that Captain Harris did sleep there on a night in the latter end of the month of October, 1826. Whether he had an opportunity of sleeping at Mrs. Cary's house in Berkeley-street, on this occasion, does not very clearly appear; but the admitted circumstances are, that he slept on a sofa in the drawing-room, and that this lady slept up stairs on another floor; that the night was wet, and that Captain Harris went away very early in the morning. This is the amount of the evidence, and nothing further is proved in reference to [388] that night. If the Court were to conclude that adultery was committed on this occasion, it must infer it from the circumstances that I have just stated, for there are no others connected with this part of the transaction distinctly proved.

It has been argued, however, that Captain Harris slept at the lodgings in the Regent's Circus on two separate occasions; and if that fact had been proved in the case, even though it should have come out incidentally in the course of the evidence, and had not been pleaded, the Court would undoubtedly have considered it a circumstance replete with suspicion, and would perhaps have judged it right to afford an opportunity of counter-pleading it, even after publication, so as to give Captain Harris an opportunity of explaining it, if he was so disposed, or if the circumstance appeared to him to be capable of explanation. But it appears to be the result of the evidence on this point that there is no sufficient proof that Captain Harris slept at the lodgings in the Regent's Circus on any occasion but one.

The point arose on the evidence of Mrs. Pinker, a witness disposed to give her testimony with perfect fairness; but I think the Court cannot trust much to her memory, which appears to be exceeding loose as to facts. The circumstances to which she has been called upon to depose were not of such importance in her mind when they occurred as to enable her afterwards to give a detailed account of them, with all the precision which might be desired. I have no doubt, however, I repeat, that this witness meant to depose with perfect fairness.

[389] Before coming to a full determination, or rather a full expression of the opinion of the Court on the evidence as to what occurred at the lodgings in the

Regent's Circus, I shall proceed to consider some subsequent circumstances which have been deposed to, as occurring after this lady removed to the lodgings in Sloane-street from the Regent's Circus.

On the 30th of November, 1826, this lady took possession of her lodgings in Sloane-street, and it appears that Captain Harris also slept there one night. The evidence is that on the evening she entered her new lodgings Captain Harris visited her; that he was engaged for some time in taking an inventory of the furniture; that the night was inclement, and that he remained there till morning. Now, I think it is admitted that at this period Captain Harris had an opportunity of sleeping at Berkeley-street if he had so chosen; that I think is in proof; and the Court undoubtedly cannot find for itself any strong reason why Captain Harris did not avail himself of that opportunity: it has great difficulty satisfactorily to account for the circumstance, or to explain, why Captain Harris did not proceed on this night to Fulham, or to Berkeley-street, to either of which the distance was not great. The mere fact of the night being bad, or the season being inclement, was not sufficient to have deterred an officer, like Captain Harris, from repairing to his home if he had been so disposed. The fact, however, is distinctly proved that Captain Harris slept at these lodgings on this night; and if the evidence of Mary Ann Payne is entitled to credit there is no doubt that the Court is bound to hold **[390]** the adultery as proved to have been committed on that occasion.

But there are many circumstances why the Court should not rely on what has been deposed to by this witness. Her testimony is improbable, and even incredible in many parts, on the face of it. The circumstances to which she deposes could not have occurred, even if the parties were ever so well disposed, in the manner she has stated. She has been contradicted also upon the most material facts by Anne O'Brien, and by the same witness and by Mrs. Aldridge upon other facts, and also by Miss Stewart. The contradictions are of such a nature that the Court cannot attribute the failure of truth, which appears in the testimony of Payne, to a mere accidental lapse of memory or to unintentional variation; but I must conclude that something remains behind, and that this witness was actuated by secret motives, which induced her to forge the tale. That there was something influencing her to state more than she knew or than she could truly state is, I think, clearly established. The Court is obliged to make an election between her and the other witnesses; for it is impossible that the Court could give credit to the testimony of Mary Ann Payne and of the other witnesses also; between these alternatives therefore I must decide, and I think I am bound to discredit her testimony rather than that of the other witnesses.

It cannot be necessary for the Court to travel through all the circumstances adverted to by counsel to prove in what instances the testimony of this witness varies from that of the **[391]** other witnesses, or in how many instances she has shewn herself to be undeserving of credit in this case, and to have deposed to what was not true: it is enough to say that the Court gives her no credit at all. But though the Court gives no credit to the testimony of Mary Ann Payne, yet the fact remains that on the night of the 30th of November Captain Harris slept in Sloane Street, in a room adjoining that occupied by this lady as a sleeping-room: and I think it is proved that he went to Berkeley Street early the next morning, in search of his dog.

There are one or two circumstances which the Court has considered with no small share of anxiety, as tending to throw a light on the conduct of these parties. And, first, it has looked with great attention to the evidence in support of the allegation, that these parties represented themselves as relations, or cousins, in either of the lodgings. If they had so represented themselves, I think it would be an important fact in the cause. Now the evidence is that Mrs. O'Brien did so represent the parties; this fact we have from several witnesses; but there is no evidence in the cause to shew that any such representation was ever made by either of the parties themselves, or that it was ever made at all with their knowledge or concurrence; and I think, in a question of extreme importance, it would be too much to presume that any such representation was made with their connivance, unless it was established by evidence nearly as clear as if the representation had come from the mouth of one or the other.

These then are the undisputed facts, and I **[392]** may say the only facts, on which the Court is called upon to conclude the adultery was committed: I mean the facts which are in proof—that on two occasions Captain Harris slept in the same house with this lady. There is not any improper familiarity proved, upon credible testimony,

to have passed between them: there is no indelicacy, no one act demanding of the Court to conclude that adultery had been committed, or that the parties had availed themselves of those convenient opportunities from which the Court might infer that an adulterous intercourse was carried on between them.

Such being the state of the case, it is not unimportant to consider what would have been the natural conduct of this lady if (as is suggested) she had fallen a victim to the seduction of Captain Harris. It is reasonable, I apprehend, that in such an event she should have been desirous of availing herself of undisturbed opportunities, in which her guilty passion might be indulged. But does she do so? It appears to the Court that she did not; for soon after she commenced her residence in Sloane Street she took Miss Stewart, a young lady, who was seventeen years of age when examined, and who might have been about sixteen at the time I allude to, as her companion. Now, the very circumstance of taking a person of this age and in this situation into the house, which was not an extensive house, but only a lodging-house, must of itself have thrown frequent difficulties and obstacles in the way of any illicit intercourse: and not only this, but it must also have afforded a great probability of detection. Captain Harris then is fully entitled to the benefit of this [393] fact, and the impression of the Court is that it is irreconcileable with actual guilt.

There are other facts which tend to lead the mind of the Court to the same conclusion. Mrs. Harris, though well acquainted with this lady, clearly had no suspicion that she and her husband were actually carrying on an adulterous intercourse. Mrs. Cary, indeed, states that Mrs. Harris felt, or pretended to feel, some jealousy at the attentions which Captain Harris paid to the lady in question; but it is quite evident that Mrs. Harris herself kept up a constant acquaintance with her, and that she never thought, or never mentioned at least, that she suspected any impropriety between them. It appears further that when Mrs. Harris was confined to her bed-room and was in trouble, and wanted a confidante and friend, after her husband expressed his determination of separating from her unless she could explain her conduct, she sent for this very lady, and required her interposition with Captain Harris. Now it is not at all likely—it is scarcely possible, I think—that if Mrs. Harris entertained an idea that her husband and this lady were criminally connected that she would have chosen her to effect a reconciliation with Captain Harris. Another circumstance is that this lady's husband returned to this country in March, 1827, and it is quite clear that no suspicion had entered into his mind as to the conduct of his wife with Captain Harris, for he continues on terms of confidence and intimacy with him.

The alleged adultery between Captain Harris and this lady then, I think, is unproved by any other circumstances than the facts to which [394] I have already adverted, of Captain Harris sleeping in the same house, and the consequent opportunity afforded to the parties if they were disposed to avail themselves of it.

The Court does think that the character of a British naval officer goes some way to explain these facts. Persons on board ship are less accustomed to attend to their personal comfort and convenience—much less than persons who reside on shore—and, perhaps, naval men are less attentive to minute points of decorum. The evidence is that, at the lodgings in the Regent's Circus, Captain Harris had thrown himself on the sofa with as great a disregard for personal convenience as might well be conceived. It is possible, too, I think, that the idea of impropriety, where there is no improper feeling, might not enter into his mind so readily, under such circumstances, as it would be supposed to do into the mind of a person accustomed to a different mode of life. Persons who are accustomed to a sea life are used to the slightest accommodation, and the slightest separation in their sleeping-places; and as their feelings on those matters are somewhat different from persons living on shore, their conduct, in respect to them, should be judged of upon rather different principles. But, however innocent such conduct may have been, and innocent the Court believes it to have been, it cannot be deemed very prudent conduct on the part of Captain Harris. The Court, whilst it acquits him of the charge of criminality, cannot absolve him from the charge of indiscretion, by which he might have implicated the character of the wife of his friend, as well as have [395] endangered his own honour and his rights as a husband.

Being of opinion, then, that Mrs. Harris has failed in her proof on the charge of adultery against her husband, the Court must now proceed to consider her own

conduct and behaviour, and, in doing so, it is only necessary that it should refer to what occurred at Portsmouth when Mrs. Harris visited that place in the month of September, 1826. There is a great deal of general levity of conduct and very gross behaviour on the part of Mrs. Harris; into the particulars of which it is not necessary that the Court should descend. The substantive charge is that an act of adultery was committed by her with Captain Latouche, on the 13th September, in Stanstead-wood, in the neighbourhood of Portsmouth. The most material witness in support of this charge is Mrs. Donald, and, supposing for a moment that the Court ought to give implicit credit to her testimony, I am bound to say that the facts to which she deposes, as having occurred on this excursion to Stanstead-wood, afford full and complete proof of the adultery charged against Mrs. Harris.

After stating the names of the persons of whom this party was composed, Mrs. Donald deposes as follows, on the eighteenth article:—"After breakfasting at an inn, near the woods, the party set out thither. Mrs. Harris evidently wished to remain behind, and did so. She was uneasy at not having Captain Latouche all to herself, as he sometimes walked with Miss Mottley. As the party neared the wood Mrs. Harris took deponent's arm, and [396] still hung behind, and at length proposed to deponent that they should hide away from the rest of the party. Deponent at first objected to it; but Mrs. Harris said 'she would not give a farthing for a party of that kind without some adventure in it;' and they then got over a bank into a private part of the wood, not open to the public, and out of sight from the rest of the party. While there, Mrs. Harris cried out 'whoop,' like a child at play, and sat herself down on the bank while deponent was gathering some nuts hard by. Mrs. Harris at length attracted Captain Latouche by her calling, and he got over the bank and sat down by her on it, deponent remaining behind. Deponent saw them both reclining on the bank, his arm round Mrs. Harris' waist, whispering together, and seeing it, she called to Mrs. Harris, saying, 'that she (deponent) was not going to stop there all day, and begged her to come away.' Mrs. Harris did not pay any attention to deponent, who proceeded over the bank again from the private wood towards the point where she expected to meet the rest of the party."

Now, surely, if any belief is to be given to the testimony of this witness, the Court really knows not what further proof it would have to convince it that a fact of adultery did occur on this occasion. Here the parties were left together, at the very moment when they are seen in the fact of an indecent familiarity, reclining on a bank, his arm round her waist, and whispering together. After they are thus left they have ample opportunity of committing an act of adultery if they were so disposed. Mrs. Har-[397]-ris is called upon by the witness to come away; she refuses to do so; she does not come; and the Court can arrive at no other conclusion but that the adultery had almost begun at the time that this witness quitted the scene.

But it is said that implicit credit ought not to be given to the evidence of Mrs. Donald, nor indeed to the evidence given by any of the parties, as to the manner in which Mrs. Harris conducted herself on this occasion. The Court is certainly of opinion that, as far as the observation applies to the testimony of Mrs. Mottley, Mrs. Mathews, and Mrs. Donald, it is bound not to receive their evidence without a nice examination. The Court does not consider the whole of the representations contained in the evidence of Mrs. Donald as positively proved; but yet the Court does not suppose that this witness came forward with an intention of giving a false colour to the transactions of which she deposes, still her evidence appears to have been given with a feeling disadvantageous to Mrs. Harris, and therefore, if the case rested on her evidence alone, the Court might have had a difficulty in forming a satisfactory opinion. The Court does not think, however, that Mrs. Donald is at all contradicted by the other witnesses on any essential point: on the contrary, her evidence is confirmed by them all, on that fact which is perhaps the most material in the case, namely, the continued absence of Mrs. Harris and Captain Latouche from the rest of the company.

What, then, are the other facts of the case which lead the Court to the conclusion that adultery was committed on this occasion, and [398] which render it probable that the parties availed themselves of the opportunity thus afforded? In the first place, then, there was an avowed attachment on the part of Mrs. Harris, a married woman, to Captain Latouche, who was an unmarried man. This appears upon the evidence of several of the witnesses. There are other circumstances, too, which are

not entirely to be left out of the case, as proving the disposition of Mrs. Harris to commit the crime of adultery. The letters which have been exhibited are of this nature.

Now if it had appeared that before this transaction the mind of Mrs. Harris was pure, and her conduct unexceptionable, the Court would have much more difficulty in coming to the conclusion that she had yielded at once to temptation and given a licence to her passions. The improbability of her at once yielding to licentiousness, and forgetting what was due to common decency, as well as to her moral and religious obligations, would then be much greater. But when the Court read the letters exhibited in the case (I allude particularly to that one marked No. 5), it was impossible they should leave any doubt upon my judgment that a mind more depraved, a disposition more likely to be led into temptation, could scarcely exist in any person than must have existed in the writer of that letter. It will not be necessary for the Court to read any part of those exhibits now; but having read them, I am not prepared to say that more depravity of mind, or principles more completely undermined, could be expected to be found in any situation of life, or any rank of society. The Court does not think that a per-[399]-son, who could have written the letter to which I have already referred, and given it to a young lady of fifteen or sixteen years of age to read, as Mrs. Harris is proved to have done, could have possessed any scruples of decency or delicacy which would prevent her from indulging a criminal passion, whenever a convenient and practicable opportunity offered.

The Court is of opinion, therefore, that the disposition and mind of Mrs. Harris, as proved by those letters, tend greatly to corroborate the evidence of Mrs. Donald, and to render the conclusion come to upon her evidence, that Mrs. Harris did commit the offence charged against her, the more probable.

A declaration alleged to have been made by Mrs. Harris to Mrs. Mottley, some weeks after the excursion to Stanstead, has been observed upon as further proof that adultery was then committed. The declaration was not pleaded; nor is the Court inclined to ascribe to it much weight, certainly not all that weight which the counsel for Captain Harris have in argument demanded for it. There is another part of the case, however, which is of great importance as satisfying the mind of the Court upon this part of the case; I refer to the evidence of Mr. Mottley on the twenty-second article of the husband's first allegation.(*a*) The real and [400] true question

(*a*) In the twenty-second article of Captain Harris' first allegation it was pleaded: "That George Harris, having been in the early part of February, 1827, at Portsmouth, and there, for the first time, informed of some part of the conduct of Anna Maria Harris, his wife, while she was at Portsmouth, prior to and after his return from sea, did, on his return home to Brompton Crescent on the 13th of February, depute a friend to inform Anna Maria Harris, 'that such her misconduct had come to his knowledge, and that he would not again have any intercourse with or see her until she was able to clear up her character;' and that he, from such time, wholly ceased to live and cohabit with his wife: and that on the 22d of the same month he sent his children away. That Anna Maria Harris continued to reside in her husband's house, occupying apartments separate from his, until the 20th of March following, when *Thomas Mottley*, with whom she had been staying at Portsmouth (as before pleaded), *having been sent for by her, informed her, 'that he had been made acquainted with every particular of her conduct during her stay at Portsmouth, and especially with all that had occurred in Stanstead Wood between herself and Captain Robert Latouche.' That Anna Maria Harris asked Thomas Mottley 'from whom he had heard the same?' when he replied, 'from the said Robert Latouche himself.' That Anna Maria Harris did not deny the said charge of Thomas Mottley, but exclaimed 'that Robert Latouche was a dirty scoundrel or dirty blackguard,' or to that effect; and asked Mottley 'whether her husband had been informed of her conduct with Robert Latouche?' That on being told by Mottley 'that he had not then communicated the same to George Harris,' she declared 'that, if he would not tell the same to him, she would immediately leave his house and go to her parents in France:' and she thereupon did quit his house attended by Mottley, and proceed to join her parents in France.* That a long negociation afterwards took place in respect to a formal deed of separation, but which was broken off by George Harris. That the present suit was shortly afterwards instituted by Anna Maria Harris, *and George Harris was after-*

arising upon this evidence is whether it does or does not prove a confession of adultery; and in my opinion the evidence **[401]** of Mr. Mottley proves that or it proves nothing.

Before referring to his testimony the Court **[402]** may observe that it sees no reason to suppose that this witness has not given a fair and accu-**[403]**-rate account of the transaction to which he deposes. Indeed, the fact that he did not communicate what had occurred at Portsmouth, at an earlier period than he did, to Captain Harris proves very clearly, I think, that he was not actuated by malignant or improper feelings towards Mrs. Harris. There is no reason, therefore, to suppose that the account which he has given of what took place between him and Mrs. Harris is too highly coloured or given with any improper bias. As the Court attaches considerable importance to this conversation it may be necessary to refer to it more at length than the Court has done in respect to other parts of the evidence. The witness Mottley states: "That in March, 1827, in consequence of a **[404]** letter from Captain Harris intimating a desire to see him, to consult with him upon the then existing

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wards for the first time informed by the said Thomas Mottley of the actual adultery of his wife with Robert Latouche."

At the hearing of the cause the deposition of Mr. Mottley to the two parts of the above article (which are printed in italics) was objected to. His deposition upon the second part, and the continuation of the first, are subjoined, the evidence to the first part being detailed in the judgment.

"The deponent, as also Mrs. Harris, remained at the house of Captain Harris until the morning of the 20th March, when they left it together; she to proceed to Dover and he to Portsmouth: deponent saw her to the White Horse Cellar. In the intermediate time between the 15th and 20th of March Mrs. Harris and Captain Harris lived separately, she keeping entirely in her own bed-room, where, at her desire, deponent had several further interviews with her, which ended in an arrangement (deponent acting by authority of Captain Harris) that she should proceed to her mother and father in France, and deponent furnished her with money for the purpose on account of Captain Harris. In the previous month of February, 1827, Captain Harris came down to the house of the deponent alone, and told deponent that he had come in consequence of his brother, Mr. Henry Harris, having informed him that he had received intelligence of a variety of improprieties committed by his (Captain Harris') wife, while she was staying at the house of the deponent: the deponent then informed Captain Harris all that deponent had heard at that time of the conduct of Mrs. Harris, and which he believed to be true, namely, of her walking the streets in a conspicuous manner, her writing notes to different officers, and of her general conduct having been the opposite to what it ought to have been; and Captain Harris was, in deponent's presence, informed of a variety of circumstances, specifying general acts of Mrs. Harris' misconduct, by Mrs. Mottley and deponent's daughter, now Mrs. Mathews, from whom deponent had chiefly received the information he at that time gave Captain Harris. The deponent had not, at that time, received any information respecting the adultery of Mrs. Harris. The deponent (Mottley) continued to communicate with Captain Harris from time to time (after he left London in March, 1827), on the subject of the separation; and was, by letter from Captain Harris, informed that a suit of divorce had been instituted against him by his said wife by reason of adultery: it was then for the first time that the deponent, by letter, communicated to Captain Harris that he (the deponent) had been informed by Captain Robert Latouche that he (Latouche) had, after dinner on the 13th of September, 1826, in the wood at Stanstead, carnal connection with Mrs. Harris while they were separated from the rest of the party. The information which the deponent so communicated to Captain Harris, he was in possession of on the 15th of March, 1827, at the time of his interview with Mrs. Harris predeposed of; and it was to that information the defendant alluded in the conversation which he had in the morning of that day with Mrs. Harris already set forth; and the deponent, from the expression of resentment against Captain Latouche which Mrs. Harris uttered on that occasion, and other her conversation deposed of, did at the time, and still does, believe that Mrs. Harris understood that the deponent alluded to an act of adultery committed in the wood at Stanstead after dinner."

Upon reading Mr. Mottley's evidence an objection was taken to the declaration

differences between Captain Harris and his wife, the deponent came up to town from Portsmouth, and whilst he was at breakfast with Captain Harris at his house in Brompton Crescent he received a note from Mrs. Harris"—which is annexed to the witness' deposition—"expressing a wish to see him, she then occupying separate apartments from Captain Harris. After breakfast the deponent went up to Mrs. Harris, who, referring to the state of separation in which she was living from her husband, 'complained that she had been very ill, that her friends had deserted her, and that she had not a friend in the world, and did not know what to do.' She also acknowledged in general terms that she had been very culpable, but did not advert to any particular fact or to any particular person."

Now, thus far the declarations of Mrs. Harris appear to be quite in accordance with the letter which she had previously addressed to her husband, and which is annexed as an exhibit to his allegation. In that letter also she acknowledged herself generally to have been very imprudent, but her actual criminality she strongly and solemnly denied.(*a*) In the same manner **[405]** the witness, Mr. Mottley, says "that

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deposed upon this article: that the first declaration was general; that it applied to no specific transaction and furnished no inference of criminal conduct; nor that Mrs. Harris knew to what Mottley alluded: and that the witness' communication by letter to Captain Harris was no evidence of the guilt imputed to his wife; that Captain Latouche himself should have been examined.

On the other hand: the twenty-second article was explanatory, and the purport of it was to shew the conduct of the husband on being informed of his wife's guilt, and that a communication upon that subject was made at the time and in the manner pleaded. Even supposing that the declarations were not altogether admissible as evidence of Mrs. Harris' misconduct, yet still (whatever might be their effect) her observations were quite admissible: and they proved knowledge of Mottley's allusion. Why was this article of the plea not opposed?

Per Curiam. The objection to this witness' deposition applies to two parts: in both it is founded on the same principle—viz. that the examiner has taken down hearsay, and therefore what is not properly admissible as evidence. But the Court has no doubt that the conversation which passed in Mrs. Harris' presence, and was not denied by her, is evidence: it cannot be considered as hearsay; for the declaration was addressed to her, and she acquiesced in it. In respect of the communication towards the end of Mr. Mottley's deposition on the same article, it certainly would have been more convenient if the examiner had confined himself to the language of the plea, and taken down the deposition in more general terms. But the question is whether it is evidence at all, and if it be so, whether it is evidence as against Mrs. Harris. Now it cannot be received as evidence against her: the communication was introduced, in plea, alio intuitu; and on principle must be rejected as proof of the wife's guilt: nor is it required as explanatory of the husband's conduct: still, however, the Court has some difficulty in striking out the whole of this part of the deposition; it would, by such a course, be doing an injustice to the husband, since the Court has no power of substituting that which would be more general in its terms: it must, therefore, admit this communication to be evidence of the manner in which Captain Harris was first informed of his wife's alleged guilt, but of guilt it is no proof whatever.

(*a*) This letter, pleaded in the 23rd article of Captain Harris' allegation, was received by him two or three days after he had ceased to cohabit with his wife in February, 1827; it was as follows:—

"My mind is so distracted I must write: to see you I have not strength; or if you turned me from you I would attempt it. Oh, Harris! what can I say, what can I do? Have you no love for me left, none that will urge you to consider my wretched state? I own to you I have been foolishly, thoughtlessly imprudent; but as to guilt, not even in thought—by all that I have to hope for in Heaven: never, never have I injured you. My God can witness how deep is my sorrow for my faults; but did you know my heart you would not spurn it. Oh, Harris! I ask you in the name of my blessed children and poor father to forgive me. Was I begging salvation, I could not implore it with more sorrow for my faults, or with a more broken and penitent heart than I now feel. Hear me, hear me, George, thou best of beings; and every hour of my life shall be for your future happiness. I feel my heart so nearly broken I care not for myself, but, my children, they are dearer to me than my heart's blood:

she acknowledged herself generally to have been very **[406]** culpable, but that she did not advert to any particular transaction, or to any particular person."

Afterwards, however, "the deponent, addressing Mrs. Harris, said, 'You must not deceive yourself, I know every particular transaction that took place during your stay at Portsmouth, particularly what took place between yourself and Latouche in the wood at Stanstead after dinner, when you were absent from the party.' Mrs. Harris looked surprised, and said, 'Did Latouche tell you?' Deponent replied 'Yes.' Mrs. Harris then in great anger said, 'He' (meaning the articulate Robert Latouche) 'is a dirty scoundrel,' or used epithets towards him of the like tenor and effect. Mrs. Harris asked, 'Does George' (meaning her husband) 'know it?' Deponent said 'he did not.' Mrs. Harris then said 'that **[407]** she knew it was impossible for her, after what had happened, to live with Captain Harris again as his wife, and that if the deponent would undertake that no further investigation of her conduct either in London or in Portsmouth should take place, she would quit his (her husband's) house.'"

Now it is, in my judgment, quite immaterial in what manner this conversation was introduced; the question is, under what impression Mrs. Harris made this declaration. It is no matter, as it appears to me, whether it was from the declarations of Captain Latouche himself or from any other quarter that Mr. Mottley derived his information, or whether he had any information at all on the point. The real and substantial question that arises upon the evidence of Mr. Mottley is, whether Mrs. Harris did in fact adopt what was said by that gentleman as to the occurrences in the woods at Stanstead, so as, in effect, to admit that she had been guilty of adultery. It is quite clear, I think, that the evidence of Mr. Mottley is admissible for this purpose. In the case of *Burgess* v. *Burgess* (2 Hagg. Con. 233, 4) a declaration of this kind was given in evidence, and that evidence, though objected to, was received by Lord Stowell. In the same case, in reference to a letter which was not in evidence at all, but which

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oh, think of them, look at my poor Jessie—your own image, and pardon her poor mother for her poor sake in years to come. Turn me not from you to the scorn of a heartless world which would brand me with adultery; and what has been my fault? lightness of conduct, and that to no extent. No, Harris, your honour by me was never injured, or I would not ask you to look over what is past. You will find plenty to urge you to think ill of me, you have all your friends near you, I stand alone without one friend in England, without one to take my part or give me one word of comfort; even Eliza has deserted me. Oh, my blessed father, what would be his feelings did he know the state of his poor favorite child whose conduct from her infancy he has prided himself upon. He loves you, Harris, with pride and affection: then break not his poor heart by taking further steps against me; forgive me, take me once more to your bosom. I love you, George, but you will not believe me; I have acted without thought, but I have never injured you. God protect you for your goodness to me since my illness: think not I have no heart to feel and honour your noble conduct; still do I hate to be a burden upon you, nor would I, till I get your pardon, be in the house; but my heart will not let me leave my poor children. I know I am innocent of all crime, I defy all my bitter enemies to prove that I have ever once, during my stay at Mottley's, been out of his house for one minute alone, or any man to say I ever held one instant private conversation: this, as I hope for your and my children's eternal happiness and my own, I swear: After this a woman may have acted thoughtlessly but not guilty: this is all I say to vindicate; see me, George, oh, in your heart you cannot quite hate me. I have seen since your return a coldness in your manners: this I, with agony to my heart, thought arose from your affections being placed on another; but you say you knew of my conduct. Oh! had I known this, all should have been explained; think not, above all, this letter is studied or planned to draw your compassion, it is the impulse of my distracted heart. See me, hear me, once more on my knees I vow my love for you and ask your pardon with a true and fervent heart. Oh, George, could you ever ask mine and be refused? For pity sake have mercy on your poor Anna.

"I have tried to read this over, but it ill explains one half my sorrow for you, or one half my penitence for my faults, but I am too ill to write more.

"Once more receive me, and the blessings of one who has ever loved you."

the party, charged with adultery, had received from the person with whom the alleged adultery was committed, and which she had shewed to her maid-servant, Lord Stowell said, when admitting the allegation in which this transaction was pleaded, "It may be of consequence to **[408]** know how she (meaning the wife) expressed herself on this occasion; there may be something of joint acknowledgment:" and a little lower down the learned Judge—after stating that the husband had informed his wife of the confession of her paramour, and that she admitted "it was too true:" says, "By this acknowledgment she adopts the confession, which was the same as if she had confessed it originally herself" (*Burgess* v. *Burgess*, 2 Hagg. Con. 235, notis).

In the present case it is not what Captain Latouche said, or whether he said any thing: it is what Mrs. Harris said, either directly to Mr. Mottley, or by way of inference. When Mr. Mottley informed Mrs. Harris "that she must not deceive herself, for that he knew every thing that took place whilst she was at Portsmouth, and particularly in the wood at Stanstead; she looked surprised, and asked whether Latouche had told him; and upon Mr. Mottley giving her to understand that he had, she said, in great anger, that Latouche was a dirty scoundrel." Now, the anger which Mrs. Harris evinced on this occasion may be somewhat doubtful. There may have been some familiarity short of adultery in the wood at Stanstead, and which she was indignant that Captain Latouche should have disclosed; but she goes on to ask, "Does George (meaning Captain Harris) know it?" and immediately after she says, "Now I know it is impossible for me ever again to live with my husband as his wife, I must quit his house, and I am ready to do so now if you will undertake that there shall be no further investigation of my conduct."

[409] Previous to the declaration thus made to Mr. Mottley, Mrs. Harris had acknowledged that she had been guilty of levity, and had committed repeated improprieties. These admissions are to be found in her letter addressed to Captain Harris, to which I have already adverted: up to this moment she had denied that the ultimate result had occurred; and because the ultimate result had not occurred she continued to entertain hopes of a reconciliation with her husband; but when she was given to believe that what passed with Captain Latouche in the wood was known to Mr. Mottley, and probably to her husband, she abandoned all hope of a reconciliation; and said "it was impossible that she and her husband should come together again, or that he should ever again receive her as his wife after what had happened, and that she was prepared to quit his house." Now, it is the opinion of the Court that Mrs. Harris would never have so expressed herself—that she would never have abandoned the idea of being reconciled to her husband, and taken again to live with him as a wife—if she had not thought that there was proof of her having committed actual adultery, and that her husband had discovered, or was sure to discover, that proof. I think that the whole of her conduct corroborates this view of the case, and more particularly the circumstance of her leaving her husband's house forthwith and proceeding to join her relations in France.

This is the evidence of Mr. Mottley; and, if it be considered to amount to a confession, it leaves no doubt remaining on this part of the case. It has been held that confession, when **[410]** perfectly free from all taint of collusion, when confirmed by circumstances and conduct, as this admission is, ranks amongst the highest species of evidence. It has been so held on different occasions. It was most truly stated by Lord Stowell, in the case of *Mortimer* v. *Mortimer* (2 Hagg. Con. 315), "that the Court was inclined to view confession, when not affected by collusion, as evidence of the greatest importance;" and the grounds upon which the Court laid down this principle are too obvious to need any explanation.

Upon a combination, then, of all the various circumstances of the present case—Mrs. Harris' want of regard for her husband—her repeatedly avowed attachment to Captain Latouche—their absence from the rest of the company during the visit to Stanstead Wood—the total want of moral feeling on the part of Mrs. Harris, her disposition—so clearly pourtrayed by her letters and conduct, if not to devote herself to the gratification of her passions, at least to act in a manner inconsistent with the preservation of her purity of mind; taking, then, all these circumstances into consideration, together with the letters proved to have been written by Mrs. Harris; her declarations, her admissions, and the situation in which Mrs. Harris and Captain Latouche were left in the wood at Stanstead, amounting, as I have already remarked, almost to an incipient act of adultery, the Court does not hesitate in pronouncing

that the accusation of adultery against Mrs. Harris has been fully and satisfactorily substantiated.

The Court has now then to consider whether any circumstances have been proved in the case [411] which are sufficient to prevent the husband from obtaining that remedy which the law, in the absence of any such circumstances, would afford to him? Captain Harris has been accused of cruelty and of criminal neglect. These are the charges against him, and I must here observe that the first of those charges has been introduced at a late period into the case. The charge of cruelty was no part of the original gravamen. The citation states the suit to have been brought by the wife for adultery alone. The charge of cruelty, therefore, was not pleaded in the libel, nor could it indeed have been pleaded responsively to the allegation, admitted on behalf of the husband, charging Mrs. Harris with adultery; for there is no point, as it appears to me, more settled, than that cruelty cannot be pleaded in bar of a charge of adultery. The charge of cruelty, then, in this case arose incidentally upon interrogatories put to one of the witnesses, viz. Sarah Saunders, the cook; and having arisen in this way, Captain Harris had no opportunity of defending himself against it. As I before observed, even if this charge were proved, it would not be sufficient to repel the adultery committed by the wife; and such being the case, the Court, I think, is relieved from the necessity of entering into a further investigation of this charge.

With respect to the next charge, that of criminal neglect, pleaded to have begun nearly at the commencement of the married life of these parties, the Court, upon considering the whole of the evidence adduced in support of this charge, is of opinion that it is an antiquated charge, and wholly unsustained by suffi-[412]-cient testimony. This charge is founded upon the reception of Captain Vincent, an old and intimate friend of Captain Harris (who was present at the marriage of the parties), at his cottage, at Fulmer, after this officer had been confined with a severe rheumatic attack. It is alleged that at this period Captain Harris was guilty of criminal negligence, by leaving his wife in this cottage, which was very small, alone with Captain Vincent for days and nights together; but it is proved by Captain Vincent, to whom the Court does give credit, that during his stay with the parties at Fulmer, Captain Harris never slept away from home on any occasion. The Court is of opinion, then, that there is no foundation for any part of this charge; nor does it think there is any foundation for charging him with any want of due consideration and caution in regard to his wife's comfort and accommodation at a subsequent period.

When Captain Harris was appointed to the command of the "Hussar" frigate, his public duty obliged him to proceed to the West Indies, and it is in evidence that he then left Mrs. Harris living at Fulmer Heath, and in the neighbourhood, and under the protection of, her own parents. Captain Harris, therefore, was not to blame if a separation between Mrs. Harris and her parents afterwards became necessary under any circumstances, nor was it incumbent upon him to grant permission for his wife to proceed to France, even if he could have perceived or anticipated the catastrophe which did occur, and which induced the parents of Mrs. Harris to leave this country. The conduct of Captain Harris, therefore, in this particular, does not, as it appears [413] to my mind, justly subject him to any imputation.

The most serious consideration, as regards the conduct of Captain Harris towards his wife, still remains behind. It has been alleged, and it is in proof, that Captain Harris introduced his wife to Mrs. Cary, who was at that time actually living in a situation which the Court must consider highly immoral and improper, and which could not have rendered her a fit acquaintance for the wife of a British officer.

To what extent Captain Harris wished this intimacy to go between his wife and Mrs. Cary does not, I think, very clearly appear, though it has been a matter of much discussion. It has been contended on the part of Captain Harris that he wished to restrain the acquaintance within very narrow limits. But if such were his wishes on the subject, it appears that his conduct was not quite in unison with them; for we find that, having introduced Mrs. Cary to his wife before he left England, upon his return from the West Indies he and Mrs. Harris took up their residence at her house, where they remained for a considerable time—it is immaterial to state precisely how long, but the evidence shews that Captain Harris and his wife resided there for several weeks. It is true that Captain Harris had been acquainted with Mrs. Cary for many years, and that his brother, with his children, was residing under the same roof.

On this state of facts, the next consideration is the law applicable to those facts. Upon this point, and upon the inference arising from the application of the law to such facts, I have no **[414]** hesitation in saying that the Court has bestowed much and painful consideration. On the one hand, the Court is most desirous not to relax the obligation, which the law imposes upon the husband, cautiously to protect and guard his wife from all associations that might expose her purity to hazard: or, by lowering her standard of female virtue, prepare the way for the inroads of the seducer. If indeed the Court is not sufficiently alert in maintaining the necessity, on the part of the husband, of jealously watching over the society, conduct, and habits of his wife, it may occasion an irreparable injury to the great bonds of domestic happiness and peace. On the other hand, the Court is equally anxious to introduce no new rule of law, and not to strain any admitted principle of law beyond those limits which have been affixed by the wisdom of its predecessors, and by the Judges of superior courts. If there be defects or inconveniences in the present state of the law, it is infinitely better they should be left apparent for the wisdom of competent authority to remedy, than that individual Judges should accommodate the law to their own notions of convenience, and by compromising admitted principles leave all in doubt and uncertainty. The conduct of Captain Harris in introducing his wife to Mrs. Cary has been termed criminal neglect, but this expression is much too indefinite to enable the Court with any precision to measure out the legal consequences of such conduct.

The principle which I find established, as applicable to the present case, is, that connivance and collusion destroy all claim to a **[415]** remedy by way of divorce. This was held in the case of *Forster* v. *Forster* (1 Hagg. Con. 144) and in a variety of other cases; and it is founded on the obvious principle that no man has a right to ask relief from a Court of Justice for an injury which he was chiefly instrumental in effecting himself. Volenti non fit injuria. This principle is very clearly established; but what degree of neglect, however culpable, short of an actual and voluntary exposure of the wife to the seduction of an adulterer, would be sufficient, in order to bar a suit for divorce by reason of adultery, is nowhere laid down, at least with that distinctness and precision which would furnish a safe guide for the Court to act upon. The Court certainly does not recollect any case of the kind; but it can conceive that a case might arise of such wilful neglect, or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risques so great, as to render a deviation from the paths of chastity the most probable, if not the necessary, consequence. Under such circumstances, perhaps, the Court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct, when the adulterous connexion arose from the society and temptations to which he had introduced his wife.

In the present case, beyond the fact that Mrs. Cary was living in a condition which the law can never sanction, however high the con-**[416]**-nexion may be, there is nothing proved to her disparagement. There is no evidence to shew that through her introduction, or under her roof, Mrs. Harris experienced any contamination of mind from loose conversation, or was exposed to the wiles of a seducer. The adultery of which the Court has pronounced her guilty is wholly unconnected with her acquaintance with this lady; it neither emanated from her directly nor indirectly; if it had, the case might be subject to very different considerations. Under such circumstances, the Court feels it too much to presume that to this acquaintance is to be attributed Mrs. Harris' dereliction of her connubial duties: it cannot find any principle or precedent which would warrant it in saying that the introduction to such an acquaintance alone amounts to connivance, or gives the wife a licence to indulge her criminal passions without affording to the husband such relief as this Court can administer.

The Court cannot but lament that Captain Harris should not have entertained a nicer sense of the delicacy due to the character of his wife: but it does not conceive that, under all the circumstances, the law visits his want of caution with so serious a penalty as to leave him without remedy for her profligacy.

Taking, then, the whole of this case into consideration, I am of opinion that the libel charging Captain Harris with adultery has not been proved; but that Captain Harris has proved the fact of adultery charged against his wife in his allegation, and I therefore pronounce that he is entitled to the separation which he prays.

[417] BUTT *v.* JONES. Arches Court, Easter Term, 4th Session, 1829.—A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked.

[Applied, *Re St. George-in-the-East*, 1876, L. R. 1 P. D. 314; *Re St. Nicholas Cole Abbey*, [1893] P. 68; *Vicar of St. James, Norland* v. *Parishioners*, [1894] P. 257; *St. Andrew, Romford* v. *All Persons having Interest*, [1894] P. 223; *In re Plumstead Burial Ground*, [1895] P. 241; *Vicar of St. John Baptist, Cardiff* v. *Parishioners*, [1898] P. 156; *London County Council* v. *Dundas*, [1904] P. 31.]

On appeal.

This was an appeal from the Consistory Court of the diocese of Gloucester. The suit commenced in October, 1828, when, at the instance of Henry Butt, one of the churchwardens of the parish of Upton Saint Leonard's in the county of Gloucester, a citation was served upon George Jones, a farmer and parishioner thereof, calling upon him to shew cause "why a certain faculty, bearing date the 21st of August, 1828, and granted to him for erecting and appropriating a seat or pew in the parish church of Upton St. Leonard's, should not be annulled."

On the 16th of January, 1829, a libel and exhibit were given in: the libel pleaded:—

1. That Henry Butt and George Jones were, on the 7th of April preceding, duly elected churchwardens of the parish of Upton St. Leonard's.

[418] 2. That the population of the parish was very great, and much inconvenience had been for a long time felt, and complained of, for want of seat room, to remedy which the subject of new pewing the church had been frequently discussed.

3. That George Jones now occupies, and hath for some years occupied, a dwelling-house and estate called Wheatley Court; in right whereof, and as appropriated thereto, he hath been in the habit of using a very commodious pew in the said parish church.

4. That it is the uniform practice of this Court to require that, previous to any application for a faculty to erect and appropriate a pew to a messuage, the minister, churchwardens, and parishioners should be convened in vestry, and the sense of such meeting taken thereon; and that no proclamation for a faculty should pass the seal until a map or plan of the seat be thereto annexed.

5. That, in this case, the proclamation issued, but without a plan, and was read in the parish church, calling upon the minister, churchwardens, and parishioners to shew cause "why a faculty should not be granted to George Jones to enable him to remove two open pews, and erect, on the site thereof, a pew in the said church."

6. That when the proclamation was published the proposal in respect to the said pews had not been submitted to the vestry; that the said two open pews were used by certain poor parishioners; and that the messuage to which it was intended to appropriate the new pew had **[419]** been for many years past, and now was, occupied by Jones' labourers; that immediately upon the issuing of the said proclamation the minister and other parishioners were much aggrieved at the proceeding, and in respect thereof convened a vestry.

7. That on the 7th of August a vestry meeting was accordingly held; when Jones was remonstrated with; and on its being proposed that the propriety of new pewing the church and providing further seat room should be considered on the 14th of August, Jones agreed that a notice should be given on Sunday, 10th of August, to that effect, and all proceedings upon the proclamation suspended till after that day.

8. That just previous to divine service on the 10th of August a paper writing was delivered, by the desire of Mr. Gardner, to Mr. Butt: it was as follows:—"Mr. George Jones wishes Mr. Butt not to give notice about the meeting to-day." That Butt, supposing that something had occurred to make the day fixed for the vestry inconvenient to Jones, and that he would fix a future day, complied with his request.

9. Exhibited the paper writing; and pleaded that it was in the handwriting of Thomas Gardner, the deputy registrar of the diocese of Gloucester.

10. That about a fortnight afterwards, Jones told Butt that it was Mr. Gardner who had advised the vestry meeting should not be held, and had written the note in order to put a stop to it.

11. That, to the surprise of the parishioners, on the 22d of August a workman was employed by Jones to remove the two pews and erect a **[420]** new pew, and he stated that a faculty authorised him so to do: that on the first Sunday after the pew was finished, Jones and Gardner sat therein during service, and that Gardner had

since occupied it. That at a vestry meeting, held on the 7th of September, Jones produced a faculty, under the seal of the Episcopal Consistorial Court of Gloucester, bearing date the 22d of August preceding, "authorising the removal of the said two pews and the erection of a new one, and confirming the same, when so erected, to George Jones and the future owners and occupiers of a messuage and premises called New House, in the parish of Upton St. Leonard's." That Jones did not deny that he had agreed to stay proceedings, and he also admitted his conduct looked like deception; but laughed with a kind of exultation and said, "They might apply to the bishop if they pleased to set aside the faculty, but it was granted, and could not now be altered."

12. That on the 2d of October a resolution of vestry was passed "to apply to the ecclesiastical court in the diocese of Gloucester for a faculty to empower the parishioners of Upton St. Leonard's to alter the pews and sittings in their church for the better accommodation of the inhabitants, and also to do away the faculty obtained by Jones."

13. Exhibits.

14. That, in respect to the grant of this faculty, Gardner had acted contrary to the injunctions of the 123d canon.

15. Exhibited the faculty.

16. That twenty-two days only elapsed be-**[421]**-tween the proclamation for the faculty and the grant thereof.

17 and 18. Formal articles.

19. That the faculty heretofore granted to George Jones, as aforesaid, might be annulled and rescinded, and that Jones be condemned in costs.

Before this libel was admitted an allegation on the part of Jones was given in: it set forth:—

1. That the libel was frivolous and vexatious.

2. That he, Jones, was the owner and occupier of a messuage and good estate in the parish of Upton; and that the faculty was to enable him to take down two open seats occupied by paupers, and, in lieu thereof, secure one for the use of the present and future inhabitants of the said mansion and estate, he and they having no seat or other place in the church belonging thereto.

3, 4, and 5. That the proclamation duly issued; was affixed to the church door, publicly read, and duly certified by the officiating minister of the parish: and, after the usual proceedings, the faculty was decreed.

6. That it being stated in the proclamation that the expences of removing and erecting the said pew would be defrayed by George Jones, and not by the parishioners, a vestry meeting was unnecessary.

7. That no opposition having been offered to the grant of the faculty, and it having been granted in the proper and legal terms, it was not competent to the judge to rescind or revoke the same.

[422] 8. That the libel should be rejected with costs.

On the 12th of March the Judge, having heard objections on both sides, rejected the libel and allegation, and condemned Butt in costs. From this decree the present appeal was instituted.

Dodson and Addams for the respondent. A faculty once granted by a competent court cannot be revoked by the authority of the same court. In *Fuller* v. *Lane* it was held "that a faculty, once issued, is good and valid even against the ordinary himself" (2 Add. 431). A faculty is analogous to a grant of administration; if decreed to a wrong person the grant may be repealed; but if to a person duly entitled, the Court cannot revoke and issue it to another in equal degree, though the second applicant may be more fit. Much inconvenience would arise if a faculty, once granted by competent authority, should be annulled. We admit that if the second article of the libel were proved, it would furnish good reasons why the present faculty should not, originally, have issued, but they cannot avail for the purpose of revoking it.

Per Curiam. For the purposes of the present question I must take the libel as true; but not the allegation—that is given loco responsi, and is merely **[423]** equal to verbal statement. The faculty, in this case, I perceive, is annexed to a messuage; is there any modern instance of an annexation of a pew by faculty to a messuage? No grant of that kind, I apprehend, has been made, in modern times, by the superior Court.

Argument resumed.

Though the Court has on several occasions laid down the proper and correct mode of granting faculties for pews, yet it has never gone so far as to decide that if granted in another form the faculties would not be valid.

The King's advocate and Lushington for the appellant were stopped by the Court.

Judgment—Sir John Nicholl. This is an appeal from the Consistory Court of Gloucester, where the suit was instituted in order to revoke a faculty; a libel was there offered stating grounds to induce the Court to annul it, and the defendant, instead of objecting ore tenus by his counsel or proctor to the admissibility of that libel, gave in an allegation setting forth in the shape of a written statement his grounds of opposition. The Judge of the Court below, after deliberating, rejected the whole proceedings, and thereby confirmed the faculty: from this decision the present appeal has been prosecuted.

For the purpose of considering the admissibility of the original libel the matters therein alleged must be taken as true; and then the **[424]** question is whether, if they be true, this faculty ought to be revoked; and I am of opinion that it ought to be revoked on account, both of the extent of the grant and of the irregular mode in which it has been obtained.

Faculties are to be granted at the discretion of the ordinary, but it must be a sound discretion, having a due regard to times and circumstances, and to the rights and interests of all parties concerned: if an unsound discretion be exercised a party may appeal to a superior tribunal.

Here the faculty, at least primâ facie, is unusual and vicious; it appropriates a seat to a messuage by taking down two pews where the poor were accommodated. Now all pews are for the accommodation of the whole parish, although in ancient times they seem to have been sometimes appropriated by faculty to a messuage, yet in modern times the utmost extent granted is, "to a man and his family so long as they continue inhabitants of the parish." The view taken by the Court of the general law and general doctrine on this subject was stated in the case of *Fuller* v. *Lane* (2 Add. 425, 431); and the Court sees no reason to depart from the opinion it then expressed.

In the present times, and with the increased population of the country, a parish must be very singularly circumstanced to induce and justify an ordinary in granting a faculty of any sort for a pew, so as to preclude the parish from improving the church-accommodation, particularly for the lower classes: but here the Chancellor **[425]** of Gloucester does not appear to have made any inquiry into the special state of the parish and its church-room; but upon a formal proclamation, or decree with intimation, having issued, being read in church, affixed to the church-door, returned into court, and no appearance nor opposition given, this faculty was granted, and to this great extent, which in modern times, I repeat, is become quite obsolete and injurious. Moreover, it is stated in the libel that the parish is very populous; that the parishioners are desirous of altering the church for the purpose of affording more accommodation, and that the two open pews, allowed to be taken down and removed, were occupied by the poor: yet notwithstanding all this, and without inquiring into these matters, the Court granted the faculty. The vigilance and sound discretion of the Judge have been surprized: and from some circumstances alleged in the libel it would seem that his deputy-registrar has been a party in putting that surprise upon him.

By whom also was this faculty obtained? By Jones at the time he was one of the churchwardens, and as such a sort of trustee and guardian whom it especially behoved to protect the interests of the parish at large, and not in this manner obtain a special grant for his own exclusive benefit.

To what messuage is the pew to be appropriated? Not to the house in which Jones resides, but to a farm in which one of his labourers is placed; nor is it for his necessary accommodation; for he has another seat appropriated to the house in which he and his family dwell.

[426] And how was this faculty obtained? Not by any prior consent of the parish in vestry, nor real acquiescence on their part; but on a mere formal proclamation, the nature of which few of the inhabitants would understand as binding them to a real consent. However, the fact is that, when it came to the knowledge of the parishioners, they proposed calling a vestry; they met on the 7th of August; Jones undertook to postpone the proceedings; a notice of a vestry to be convened on the 14th was fixed to be announced on Sunday the 10th, which, by the advice of the

deputy-registrar, Jones procured to be stopped; and in the mean time, by the contrivance of the same individual, the faculty passed the seal. If that part of the history of this transaction be accurately stated this faculty was fraudulently and surreptitiously obtained: and if the whole be true, the deputy-registrar ought to be removed from his office: that, however, is not the object of the present proceedings.

The question for my consideration is whether upon the matters here stated this faculty ought to be revoked; and upon that question there seems to be no room for judicial doubt: and if the averments are likely to be proved, the respondent will do well to give an affirmative issue, and, before they become heavier, to pay all the costs that have been incurred. If, indeed, he has acted upon the suggestions, and under the advice of the deputy-registrar, they must settle the matter of costs between themselves; but it is my duty to pronounce for the appeal, and to admit the libel. I shall also give the costs of the ap-**[427]**-peal, reserving the costs in the court below to the hearing of the cause.

On the first session of Trinity Term an affirmative issue was given to the libel; when the Court condemned the respondent in the costs incurred in the Court of Gloucester, and decreed a monition against him to restore the pews that he had caused to be removed.

[428] GLYNN *v.* OGLANDER. Prerogative Court, Easter Term, 2nd Session, 1829. —Probate cannot be granted of a paper having nothing to give it a testamentary character, not intended to operate upon the death of the writer; but to effect a gift inter vivos.

On admission of an allegation.

Jane Mary Oglander, late of Oxford, died on the 27th of January, 1829, a widow. She left her last will bearing date the 21st of November, 1825, and also a testamentary paper writing of the tenor following:—

"My dear Sir,—Wish to contribute something to those poor children of the two destitute families I do beg you to in the bes mode of doing so I would sell out 5000."

[The remaining three lines could not be deciphered with accuracy; but they were conjectured to be: "thousand pounds for that purpose, which I beg you to divide between them. I rejoice that the Hays will be here so soon."]—"Much yours,

"J. M. O."

[429] "Female children *or all the children* (*a*) of Robert Bathurst and Mrs. De Crespigny *500 or* (*b*) 5000 $\frac{\text{3 per cents}}{\text{A}}$ stock to be sold for their benefit."

Superscribed "WM. BRAGGE, Esq."

This paper writing was propounded as a codicil by Susanna Margaret Glynn, an executrix of the deceased's will. The allegation, in substance, pleaded:—

1. The death of Mrs. Oglander; and that by her will, dated the 21st of November, 1825, she specifically bequeathed £1690 four per cents.; £33,500 three per cent. reduced annuities, leaving £6100 of the same stock, and the residue of her other effects, being at the date of her will, about £4000, chargeable under her will, with annuities of £175; and other legacies and charges to Frances Dorothea Oglander and Susanna Margaret Glynn. That, after the date of the will, she invested in the three per cent. reduced annuities about £3000.

2. That the Reverend Robert Bathurst died suddenly on the 24th of December, 1828, leaving a widow, two sons, and eight daughters, almost destitute; that Mrs. De Crespigny (Mr. Bathurst's sister), the god-daughter of Mrs. Oglander, was also in distressed circumstances, and had two infant sons, and was pregnant at the time of the deceased's death. That on the 12th or 13th of January last the deceased ex-**[430]**-pressed to Mr. Bragge, their cousin, compassion for the destitute condition of the two families.

3. That on the 16th of January the deceased, who was in the 72d year of her age, having been previously indisposed, was confined to her bed; Miss Gray, her friend, attending her. That on the evening of the 25th the deceased desired writing materials to be brought to her; that she was raised in bed, and then wrote part of the paper writing propounded, which by her directions Miss Gray sealed and addressed

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(*a*), (*b*) The words and figures in italics were struck through with a pen. See the 4th article of the allegation.

to Mr. Bragge, the deceased observing "that it was not so urgent as to be sent immediately; that to-morrow morning would be time enough."

4. That on the morning of the 26th Mr. Bragge called and requested Miss Gray to inform the deceased that he required further instructions; that the deceased declined seeing Mr. Bragge, but informed him through Miss Gray "that the money was intended for the two poor families of the late Robert Bathurst and Mrs. De Crespigny;" that Miss Gray then wrote in Mr. Bragge's presence, at the foot of the deceased's note, "female children or all the children of Robert Bathurst and Mrs. De Crespigny 500 or 5000 stock to be sold for their benefit;" which memorandum she afterwards altered, by erasures and by an interlineation, upon further inquiries of, and explanations from, the deceased. That the deceased then directed Mr. Bragge to send for a power of attorney for the sale of the stock; and added, "I feel most for the poor Robert Bathursts; but Caroline (Mrs. De Crespigny) is my god-daughter:" and in the afternoon of the same **[431]** day, alluding to same subject, she said, "The stocks are very high, it will produce a good sum." It was further pleaded that the deceased (it was believed) did not, neither did Mr. Bragge nor Miss Gray, know that Mrs. De Crespigny had not a female child.

5. That the deceased thought her illness likely to be of long continuance; that she gradually became weaker and died about six o'clock on the following morning, viz. the 27th of January. That on the 26th Mr. Bragge wrote to Snow & Co., the deceased's bankers, for a power of attorney, which arrived by return of post.

6. Pleaded the hand-writing of the deceased; and exhibited Mr. Bragge's letter and the power of attorney. The allegation concluded with a prayer that the paper writing propounded might be pronounced for as a codicil to the deceased's will.

Lushington for the allegation.

The King's advocate contrà.

Judgment—Sir John Nicholl. Considerable difficulties present themselves in this case, arising from the form and contents of the instrument propounded. Courts of probate have gone considerable lengths to give effect to instruments, as testamentary, notwithstanding their form, where the intention that they should take effect upon death, has been manifest. But I do not recollect a case (and the learned counsel in support of the allegation admits he is not able to point one out) where a paper, not made to depend on that event as necessary to **[432]** give it consummation, has been admitted to probate.

Here, the paper propounded is in the form of a letter to a friend, the writer wishing to do something for the benefit of two families who are there mentioned. The instrument itself is hardly intelligible for that purpose; but, independent of that circumstance, the whole history and extrinsic evidence, as laid in the plea, shew that it was not a testamentary act, but a sale of stock for some immediate purpose, and to take place inter vivos. If the former were intended, why should the deceased have directed a power of attorney to be sent for? The parol declarations pleaded in the fourth article are full and detailed; but they are of no effect except as explanatory of the objects and amount of her intended bounty: the character of the paper must depend on the paper itself; it is not addressed to her executors; it has no reference to the will; no reference to her death. The whole tenor of the conversations and explanations is that the benefit was intended as a present gift.

There are some circumstances in this case from which the Court would feel strongly disposed to wish it could give effect to the instrument propounded; but the Court must indulge no such wishes at the expense of the residuary legatee. To pronounce for this paper would be going a step beyond any former case. An instrument conveying a benefit, whatever form it may assume, if it has the character of a testamentary paper to be consummated by death, may be admitted to probate (see *Masterman* v. *Maberly*, supra, 235, et seq.). In the **[433]** present instance the whole substance of the transaction is to sell stock for the benefit of the parties named in the paper; and this sale is to take place not by her executors, but by herself; not on her death, but immediately—as soon as the power of attorney could effect it. Upon these grounds I cannot consider this paper as testamentary; and I therefore reject the allegation.

Allegation rejected.

GROOM AND EVANS *v.* THOMAS AND THOMAS. Prerogative Court, Easter Term, 4th Session, 1829.—Where the deceased was admitted to have been insane before the execution of two asserted wills, and where there was evidence of delusion and other indicia of derangement existing shortly before, as well as subsequent to, the acts, proof of calmness, and of his doing formal matters of business, under the sanction of his family, are not sufficient to rebut the presumption against the papers.—Every person is presumed sane till shewn to have become insane: the presumption then changes, and a party setting up any instrument executed after the existence of insanity, has the burthen of proof cast on him, and must shew the mind perfectly restored, and delusion removed.—In civil suits the law avoids every act done during the period of lunacy, even though such act cannot be connected with the influence of the insanity.

[Discussed, *Sutton* v. *Sadler*, 1857, 3 C. B. (N. S.) 94.]

Robert Thomas, late of Fleet Street, silk mercer, the party deceased, died on the 16th of January, 1828: and the present suit was instituted by Thomas Groom and Robert Evans, executors named in a will of the deceased bearing date the 4th of July, 1826, against John Thomas, brother, and Thomas Thomas, nephew of the deceased, two of the executors named in a former will dated the 27th of August, 1825.

Lushington and Pickard in support of the will dated the 4th of July, 1826.

The King's advocate and Addams contrà.

Judgment—Sir John Nicholl. The point in this cause is the sanity or insanity of the testator, a sort of case which always depends on its own particular circum-**[434]**-stances. The principle of law applicable to such a question admits of no controversy. Every person is presumed to be sane until it is shewn that he has become insane: the presumption then changes: it is presumed that he continues of unsound mind, and the party setting up any instrument executed after insanity has manifested itself has the burthen of proof cast upon him: he must shew recovery, and he must shew not merely that the party, whose act is the subject of inquiry, was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off the disease, was again become perfect, was sound upon all subjects, and that no delusion remained.

It is sometimes supposed that rules respecting testamentary law prevail in this court different from the principles held in other courts; but that is not so: and, to shew the concurrence of opinion in all courts upon the present subject, I will refer at some length to the report of the case of *The Attorney General* v. *Parnther* (3 Brown's C. C. 441). The very marginal title, "general principles on cases of insanity," shews that the observations contained in it are of very extended applicability.

The case stated "That Frances Barker, by power of attorney duly executed on the 14th of December, 1780, impowered John Barker, her late husband, to receive certain dividends; that before that day she was of unsound mind, had ever since continued so, and was kept in confinement; that the husband received the **[435]** dividends, made his will, and appointed the defendant executor; that a commission of lunacy had issued against Frances Barker, and that it was found she had been a lunatic, without lucid intervals, from the 17th of December, 1783."

So that this verdict did not embrace the time when the power of attorney was made, the validity of which was in dispute.

"The prayer was for an account of the dividends received by the late husband under the letter of attorney: and the defendants admitted that they knew Frances Barker had been occasionally, before the execution of the power of attorney, disordered in her mind, but that she appeared to the subscribing witnesses, at the execution thereof, to have the use and enjoyment of her senses and mental faculties sufficiently strong to fully understand and comprehend the nature of the acts she then did; and that before she executed it they explained the nature and effect of it, and expressly asked her if she did it with her free will and consent, which she readily answered she did. On an issue at law being directed, the cause was tried before Lord Kenyon and a special jury. A great deal of evidence was given, by Mrs. Barker's attendants, to prove general derangement, though with intervals of sense. On the other hand, her being perfectly sound and competent at the time of the execution of the instrument was spoken to by the subscribing witnesses and others, in habits of intimacy with her, that she had also frequent intervals in which she was perfectly competent to do any ra-**[436]**-tional act." There was, therefore, strong evidence of general competency,

and of the absence of derangement when the instrument was executed: and the jury, without hesitation, found that Mrs. Barker was of perfectly sound mind at the execution of the power of attorney. Lord Kenyon, however, differed from the jury: he thought there was not proof of a sound mind; and upon an application for a new trial the case was very elaborately argued; and in delivering his opinion, Lord Chancellor Thurlow entered very fully into the question; a new trial was granted; and upon the second trial the instrument was held to be invalid.(*a*)

The case, then, of *The Attorney General* v. *Parnther* clearly shews that Lord Kenyon (who differed from the jury) and Lord Thurlow (sitting in a court of equity)—two great authorities—laid down principles and doctrines precisely such as are held in these Courts, and must govern the case before me. Another rule of law is that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound the act is void. The law avoids every act of the lunatic during the period of the lunacy, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself. This, indeed, is also to be collected from the case that I have already quoted.

In the present instance the fact is admitted and is proved that the deceased had been ac-**[437]**-tually insane before any testamentary act was done, or, as far as appears, ever was proposed by him. In the spring of 1825, being subject to fits, he became so deranged that he was attended by a keeper procured from a lunatic asylum. The question, then, is whether before the testamentary acts he had recovered a state of sound and perfect mind: for becoming calm so as no longer to require restraint and coercion; and being so far rational as to be able to converse sensibly upon many or even most topics will not be sufficiently conclusive. There are many persons decidedly lunatic who yet have the entire dominion over themselves and their affairs, and pass in ordinary society as persons of perfectly sound mind. Was this deceased, then, completely restored?

The deceased was Robert Thomas: he died in January, 1828, leaving a widow, no children, three brothers, two sisters, two nephews and a niece by a deceased brother. His real property is estimated at 2500l., and his personalty at 5000l.: this property was acquired by him in trade as a haberdasher in Fleet Street, which business latterly had been managed by his nephew Thomas Thomas. John, the deceased's brother, is his heir at law.

The will propounded by Groom and Evans, the executors, is dated the 4th of July, 1826, and it is opposed by his brother John and his nephew Thomas, two of the executors named in a former will of the 27th of August, 1825: that former will is in a cancelled state, and was so cancelled when the deceased executed the latter will: the former will is not propounded as against the widow and other next of kin.

[438] The deceased's sanity at the time of the execution of the former will is of course set up by the executors of that will, though they maintain that he was insane when he cancelled it, and when he executed the latter will; while the executors of this latter instrument have an interest in admitting and holding out that at the execution of the former he was sane; for his sanity at that time would lay the foundation for his sanity at the execution of the latter. Under these circumstances, though both these parties allege his recovery in August, 1825, yet that admission does not bind other parties entitled as next of kin, or in distribution. The Court, though it has only to decide, directly, upon the validity of the latter will, yet for that purpose must look at the whole case, and must not assume, upon the admission of the present parties, that the deceased had actually recovered a testamentary capacity after the avowed insanity in the spring of 1825. The onus probandi lies on the executors of each will.

Mr. Vincent, an eminent surgeon, and a man of high respectability, gives this account:

"The deponent attended the deceased professionally during the winter and spring of the year 1825; he had known the deceased for several years previous to that time; he the deceased having been in the habit of coming to the deponent's house to consult him for various complaints. In 1825 the deponent attended the deceased at his house in Chancery Lane in conjunction with Mr. Proctor of Fleet Street, who is a general

(*a*) The Court read, nearly verbatim, Lord Thurlow's judgment, as reported in Brown's Chancery Cases, vol. iii. p. 442.

medical practitioner, and for the most part saw him twice during each week from the commencement of his attendance until the deceased went to Richmond **[439]** in the latter part of the month of July in the said year: the deponent attended him on account of eruptions and sores which he had about him, and not on account of the fits to which the deceased was also subject, as the deponent understood at the time, but cannot depose thereto, as he never saw him in any such fit or under the immediate effects of epileptic attacks, though from his knowledge of the constitution and habit of body of the deceased the deponent apprehends the deceased was subject to determination of blood to the head, which rendered him liable to fits; that during the whole of his attendance upon the deceased, as aforesaid, the deceased was in a state of mental derangement and insane, although during the latter part of it, just previous to his going to Richmond, he was more tranquil in his mind than before. The deceased during such period laboured under delusion of mind; he imagined he was haunted by a fiend, and he had a perverted apprehension of facts before him: the deponent did not again professionally attend the deceased from the aforesaid month of July, until the latter end of September, 1826, and only once saw him during the intervening time, which was very shortly before and within a few days, as he now best recollects, of the 29th of September, when the deceased called alone on the deponent in Lincoln's Inn Fields, and of his own accord, gave the deponent a cheque on his bankers for the sum of five pounds in part payment of the deponent's previous professional attendance on him, for which the deponent had not received his fees: the deceased **[440]** only remained a few minutes on that occasion with the deponent, and nothing passed of any moment: the deceased only gave the cheque and talked of his complaints." [The witness afterwards refers to his books, and, on interrogatory, corrects the date, and says it was on the 10th of May, 1826, that he received this cheque.] "The deponent further saith that he again attended the deceased on or about the 29th of September. The deceased was then resident in lodgings in Hyde Street, Bloomsbury, and from thence the deponent continued to attend him so long as he remained there, and subsequently at the house of Mrs. Chevalier in South Audley Street, to which place he removed, and also at Pentonville (where he resided in lodgings, after he quitted Mrs. Chevalier) until February, 1827. During the said period, [that is, from the latter end of September, 1826], the deponent attended him twice each week on an average: the deceased did not on any occasion, during the last mentioned period that deponent attended on him, exhibit any symptoms of insanity: on all the occasions that deponent saw him in the said several lodgings, and on the aforesaid occasion when he called on the deponent, he, the deceased, conducted himself and talked and discoursed in a rational manner and was in the full possession of his mental faculties." All this, it must be remembered, was long subsequent to the execution of the latter will. He says further: "The deceased was a passionate and irritable man, and in the habit of expressing himself impetuously with respect to other persons in **[441]** his conversation, but the deponent never observed him to be violent in his conduct and behaviour; he was usually in a state of nervous excitement, especially if any subject likely to make an impression on his nerves was brought forward: the deponent observed him particularly excited on some occasions when he spoke of his wife (Elizabeth Thomas), and also on other occasions when he spoke of his brother John Thomas."

On this account several observations arise. Mr. Vincent did not attend the deceased for mental disorders, but as a surgeon for bodily disorders: from July, 1825, to September, 1826, he never saw the deceased, except at one very short interview. This period includes both wills. The deceased was subject to fits and determination of blood to the head; but they were not the object of Mr. Vincent's attendance. Some observations were made in argument on the nature and effects of epileptic fits, that they were not likely to produce insanity.(*a*) I do not exactly comprehend the line of demarcation between fits of different sorts—epilepsy, convulsions, apoplexy, paralysis, and other nervous affections: but I apprehend that all attacks upon the brain produce effects upon the understanding according to their degree, and the part of the brain attacked and under pressure. Persons may be subject to epilepsy of a mild sort—the mere falling sickness, which, when sensation is restored, produces scarcely any permanent effect upon the mind; while **[442]** other fits of a severer sort

(*a*) The observations were quoted from Dr. Burrows' Commentaries on Insanity, pp. 155, 6, 7.

produce very different consequences—sometimes paralysis, sometimes delirium and derangement, and sometimes, by a repetition, they reduce the patient to imbecility and idiotcy. But here we have the consequences; here is derangement—here is insanity in its essential quality, viz. delusion. The deceased fancied "he was haunted by a fiend, and had a perverted apprehension of facts before him." Before he went to Richmond he became more calm; but according to Mr. Vincent he continued insane till he went to that place in the latter end of July: and yet during this very period Mr. Young, ignorant of his insanity, prepared a will for him. After the deceased's return to town, when Mr. Vincent saw him in September, 1826, and subsequently, he thought him sane: but Mr. Vincent was not peculiarly accustomed to insane patients, nor to the study and observation of mental disorders: his attention was never directed to ascertain whether the deceased continued to have "delusions in his mind and perverted apprehension of facts."

From repeated cases and high medical authorities which have, from time to time, been laid before this Court, it is clear that persons essentially insane may be calm, may do acts, hold conversations, and even pass in general society as perfectly sane. It often requires close examination by persons skilled in the disorder to discover and ascertain whether or not the mental derangement is removed, and the mind again become perfectly sound. When there is calmness, when there is rationality on ordinary subjects, those who see the party usually conclude **[443]** that his recovery is perfect; and the family and those around the unfortunate person, partly from ignorance of the nature of the disorder, partly from delicacy in interfering, partly from their own wishes to believe him well again, form very incorrect opinions upon the subject.

The Court, then, is rather to look to facts, and to the conduct of the deceased, than to such opinions.

There are many circumstances which, though not of themselves establishing actual insanity, which had not before become decided, are still strong indicia of its continuance, such as great irritability, violent passions, occasionally deep depression, eccentric habits, suspiciousness, inconsistency, changeableness, and the like. If actual insanity never has existed, many or most of these circumstances may occur, and yet not establish positive derangement: but where actual derangement has previously existed, lighter things become confirmations; or, as Swinburne, for another purpose, expresses it, "if there be but one word sounding to folly, it is presumed that the testator was not of sound mind" (Swinburne on Wills, part ii. s. 3).

The Court has fully read the account given by the several witnesses as to the different periods of time, and it is unnecessary to detail all the circumstances to which they depose; they are strongly symptomatic of unsoundness of mind; some of them, indeed, direct proof of it.

In the summer of 1825, as I have before stated, the deceased went to Richmond for change of air, and his wife resided there with him. Before he went he took up the idea of will-making, and **[444]** gave instructions for a will to Mr. Young, his solicitor, who prepared a draft for the deceased's consideration and sent it to him on the 4th of June, 1825. This clearly seems to have been the deceased's own act, and to have originated with himself: but the question which I shall examine presently is, whether it was a sane act, for insane persons are, from depression, often will-makers.

Mr. Young thus deposes, on the third interrogatory: "Early in August (1825) John Thomas called upon the respondent and requested that he would go to the deceased, who was at Richmond and unwell, for the purpose of completing the draft of his will: the respondent went to and saw the deceased, who postponed going into the business of his will at such time. On the 25th of November, 1825, he attended the deceased again, and then found that he had made a will when at Richmond."

At Richmond, then, this will was made, though when Mr. Young first called the deceased postponed the matter.

While the deceased was at Richmond, at the latter end of the summer of 1825, he had another violent fit of apoplexy: from that fit, however, he recovered so far as to execute the will of the 27th of August, 1825, prepared there by a solicitor. On the morning of that day the instructions for the will were taken by the deceased's brother to the solicitor's office; in the afternoon the will was sent for the deceased's approval; and in the evening it was executed: so that the whole matter was done in

haste on the same day; the execution was a mere formal act, and the solicitor hardly saw the deceased.

This is slender evidence in order to shew re-**[445]**-stored soundness of mind so soon after a fit, more especially as no persons are before the Court competent to question its validity. But the history of these different testamentary acts may tend to illustrate each other, and I will consider them presently.

The deceased having returned from Richmond at the latter end of 1825 had subsequently a recurrence of his fits. In March of the following year he went down to Birmingham to visit his friend Groom; this was much against the wishes and inclination of the deceased's family; his brother was at that time from home, but the family begged the guard of the coach, by which the deceased travelled, to look to him. On the road it appears he conducted himself strangely; at Birmingham he was again taken ill; his brother went down there, and accompanied the deceased back to town. In May, or rather later, his shop and business were sold off, and in July he went to lodge in Hyde Street, Bloomsbury; there he continued till the latter end of the year, when he removed to Mrs. Chevalier's in South Audley Street, and afterwards to Pentonville. I have thus passed over the general history very rapidly, because the state of the deceased during May, June, and July, 1826, the most material period in respect to his continued insanity or perfect recovery, is deposed to by a great number of witnesses; and considering their evidence—not merely their opinions, but the circumstances which they relate—it is difficult to believe that the deceased's mind had been restored to a state of soundness.

It has been relied upon that he was treated as a person of sound mind; that he executed in-**[446]**-struments, powers of attorney, deeds of assignment, drafts on bankers; but is his recovery correctly to be inferred from these circumstances? It is necessarily the case where the person is in the hands of his family, who are unwilling to take out a commission of lunacy that, under their sanction, such formal acts should be done and such instruments signed; but it seems that the person and the concerns of the deceased were managed by his wife, his brother, and his nephew, and not by himself. Though they did not coerce his person (except, indeed, when excited into violent paroxysms of passion), yet they watched him closely; they humoured and pleased him by bringing the servant (or rather the apothecary, the brother of the person who was recommended as his attendant), and allowing the deceased apparently to engage him; and they carried him to see the lodgings in Hyde Street; but it was the family and Mr. Young, the solicitor, who managed him and his concerns; they had a general power of attorney to dispose of his business and his property; and though the deceased executed the formal instrument, and the assignments and the drafts, it is quite manifest that the wife, the brothers and the nephew, as I before mentioned, sanctioned by Mr. Young, very naturally and very properly conducted every thing; they, considering it unnecessary to take out a commission of lunacy, as the deceased was very calm, acted for him; they placed him in lodgings in Hyde Street, and they removed him when Mrs. Strutt and her other lodgers would no longer suffer him to remain.

Just previous to his going into these lodgings the deceased fancied that his nephew would be-**[447]**-come insane and wish to murder him: the nephew, to humour the deceased's fancy, and not excite irritation, for a time left the house; still, so strong was the delusion that the deceased would have the house searched at night, and secured in order to protect him from this nephew, "who looked wild and was becoming insane." And yet, with the inconsistency not unusual with insane persons, he suffered this nephew to be one of the persons to dispose of his concerns under the power of attorney. What I have been referring to was about the very period when he was making this will, viz. in June, 1826. The day before the execution of this will he was lodging in Hyde Street; and the account of his general conduct while there strongly marks a continuance of his disorder: among other circumstances, there was one of manifest delusion: the deceased fancied that the statue at the top of Bloomsbury church often nodded at him, and could not be dissuaded from it, nor convinced that it was fancy only. It was, as I have stated, about this period that he again commenced will-making.

It was argued that the deceased was not insane when he made this will because he benefited by it his wife, his brother John, and his nephew; so that it was said there was no evidence of delusion affecting his testamentary disposition: but an

inconsistency of that kind is no proof of the absence of disorder. He suffered his brother and his nephew to manage his concerns; and he suffered his nephew to drive him out in his gig. Insane persons are not consistent with themselves in every particular, nor does the same delusion always haunt them. **[448]** Without, then, entering minutely into the circumstances, I am satisfied by the evidence that the deceased had not recovered into a state of perfectly sound mind, but that his derangement continued generally during these months, so as to require a clear and decided lucid interval to be proved, if indeed it could be established: for where there is not actual recovery, and a return to the management of himself and his concerns by the unfortunate individual, the proof of a lucid interval is extremely difficult.

Insane persons, who have an object to effect, will often set about it with method, and in a manner apparently rational: it is difficult, even for experienced persons, to detect their insanity. It is no reflection, then, upon the solicitor that he was deceived, and did not discover the deceased's derangement. Mr. Young states that he received from the deceased his testamentary instructions; and he seems not to have suspected his sanity; he therefore took no means to ascertain the fact, and why? because he was ignorant of the delusion under which the deceased had previously, and at that very time, laboured, and also of the particulars of his general conduct. Mr. Young himself gives an account of behaviour not far distant from unsoundness of mind: it is thus that he deposes on the ninth interrogatory: "He does not believe that the deceased was at times, either previous or subsequent to the execution of the will of the 4th of July, 1826, of unsound mind: the respondent did not at any time in June and July, 1826, or for several months either before or after the execution of the said will; neither did his fellow-witnesses, or either of **[449]** them to his knowledge or belief, treat the said deceased as a person of deranged intellect or unsound mind:" and yet there is clear proof of it in 1825, by the deceased having been attended by a keeper. "The respondent not being upon terms of intimacy with the deceased, does not know how his family treated him." So that Mr. Young was only resorted to in order to advise the family on formal legal proceedings. Further on, upon the same interrogatory, in reference to some declarations, he says: "After a meeting (the date of which he does not recollect) between the deceased and John Thomas, at which they had quarrelled upon the subject of the affairs of the testator's father, which subject frequently led to violent language between them; the respondent upon that occasion may have said 'that the deceased was not fit to be talked to on business after such disputes,' or to that effect: the respondent always finding that after such disputes the deceased was, from irritability of temper, apt to revert to the immediate cause of the dispute rather than confine his consideration to the business in discussion before the dispute arose. That at different times the respondent has refused to proceed in conversations of business with the deceased, whilst under excitement originating from such disputes with John Thomas and other members of his family; and, at others, respondent, by representing to him that he would not sanction violent language between relations, and if it were persisted in would postpone further conversation, has succeeded in obtaining the deceased to attend to the ori-**[450]**-ginal subject of meeting. He does not know that the deceased was otherwise than of sound mind during June and July, 1826."

The witness, therefore, it is clear, knew nothing of the deceased's delusion as to the statue upon the top of Bloomsbury church, nor in respect to his fancied apprehensions from his nephew.

Again, on the thirteenth interrogatory, Mr. Young thus deposes: "He does in his conscience, so far as his intercourse (limited as it was) with the deceased enabled him to judge, disbelieve that the mind of the deceased was always, after the month of April, 1826, in some degree deranged: respondent scarcely ever having occasion to converse with the deceased except on matters of business, and making allowance for ill health, and allowing him more time for collecting his thoughts and expressing his sentiments than a person in good health would require, found him competent to business: but it has occurred upon several occasions, when the respondent has attended the deceased by appointment upon business, that respondent has considered it right to defer such business either from the deceased being feeble from ill health, or under irritation arising from causes into which respondent did not consider it incumbent upon him to inquire; upon all occasions being aware that the deceased was not upon friendly terms with his family in general. The respondent does not recollect to have

heard that the deceased was in June, 1826, labouring under a delusion that his nephew, Thomas Thomas, would cut his, the deceased's, throat, or that his brother, John Thomas, **[451]** would murder him: but respondent has heard and believes that Thomas Thomas, who for many years lived in the deceased's house, did in or about the said month of June quit the same in consequence of some disagreement with the deceased, but he does not know and cannot form any belief as to the particular circumstances or grounds of such disagreement."

The whole account, therefore, of this gentleman shews that he was quite ignorant of the cause of the deceased's condition, nor did he inquire into it. I infer, then, from Mr. Young's own evidence, that the deceased had not recovered, and that not being intimately acquainted with his family, Mr. Young did not ascertain what was the real state of his mind.

The Court sees no reason to doubt the fairness and sincerity of Mr. Young's conduct and testimony; but he had not before him the whole facts relative to the deceased's condition of mind, and he formed an erroneous judgment.

But what passed in the preceding year? In May, 1825, the deceased went and gave instructions for a will. Mr. Young did not then detect any disorder of mind: he prepared the draft of the will; he sent it to him on the 4th of June; and yet from Groom's and Evans' own witness, Mr. Vincent, it appears the deceased, in May, June, and July, 1825, was in a state of decided insanity; and during a great part of the time was under the care of a keeper, which Mr. Young neither knew nor discovered.

A strong symptom of insanity is fluctuation of mind—unsteadiness—changeableness. Here are three instruments—the draft of June, 1825, **[452]** the will of August, 1825, and the will propounded of the 4th of July, 1826: and there are considerable variations in each. Several of the legacies in the draft of June are omitted, or altered, or added to in the will of August. Not only are the legacies varied in many respects, and without any apparent reason, but some omissions were supplied at the time of execution. Such are the two legacies, the one of 100*l.* to his sister, Elinor Evison, and another to his sister-in-law, Mrs. Wenlock: these two legacies were interlined at the time of the execution. Here are also the legacies to the executors increased from 100*l.* to 150*l.*; and the other alterations are very material. In the will of August, 1825, the wife has an annuity of 150*l.* and a legacy of 100*l.*; but in the will of July, 1826, the annuity is reduced to 120*l.* and the legacy to 50*l.* And the residue, instead of being given, as under the will of August, to his brothers John and Francis Thomas, and his nephew Thomas Thomas, equally, is left to his brothers Francis and Arthur, and to his nephew John, son of Richard, a deceased brother. The legacy also to John Thomas, the brother, is reduced from 500*l.* to 250*l.* It is not then, I think, probable, that as Young had had several interviews with the deceased, that there would have been any fluctuations at the time of executing the will, if his mind had been steady, and sound, and settled.

These circumstances, therefore, strongly mark the unsettled state of the deceased's mind. Let it not, however, be supposed that the Court holds change of mind, and interlineations in a testamentary instrument, to be, per se, a proof of insanity, but, coupled with the previous insa-**[453]**-nity and the general description of the deceased's conduct, they are circumstances carrying symptoms of disorder into the act itself. What says the great poet of Nature and master of the passions upon the subject? What is one of the tests of madness that he suggests? Hamlet, being charged with "coinage of the brain," answers:—

> "It is not madness
> That I have uttered; bring me to the test,
> And I the matter will re-word; which madness
> Would gambol from."

Madness, then, varies and fluctuates; it cannot "re-word"—if the poet's observation be well founded; and though the Court would not at all rely upon it as authority, yet it knows from the information of a most eminent physician that this test of madness suggested by this passage was found, by experiment in a recent case, to be strictly applicable, and discovered the lurking disease.(*a*)

(*a*) The Court was understood to allude to the case referred to in a note to page 242 of the tenth number of the new series of the *Quarterly Journal of Sciences and the Arts.* London, 1829.

In this case the deceased did not "re-word;" he varied and added and omitted without any change of circumstances to account for these fluctuations of intention. He assigned no reason, he was asked no reason, for these alterations and changes. It is impossible to surmise what fancies a deluded imagination may take up and act upon; and, on that very account, the law has wisely ordained that, where any delusion exists at the time, it is not necessary **[454]** to connect that delusion with the act done, and which it is sought to avoid.

Here, indeed, the fancies of the deceased were not wholly unconnected with the testamentary disposition; he fancied his nephew wanted to murder him; he quarrelled with his brother: they were displaced from being executors and residuary legatees, and they have a very inferior benefit; he might not be perfectly consistent in leaving them any thing; and, in doing the act itself, he might be so apparently rational as not to expose his derangement of mind to the solicitor, who had no previous suspicion of it.

Upon the whole, then, for the deceased, after the execution of the will propounded, never once adverted to it in any way, although he lived so long after the act, the Court is of opinion that the will is invalid.

The deceased had been decidedly insane in the spring of 1825; the account given of his subsequent conduct and condition tend strongly to shew that no real recovery had at any time taken place, notwithstanding he had become calmer and could converse rationally upon some matters, yet there were many symptoms of continued disorder; and in the months of May, June, and July he was subject to delusions of mind.

These testamentary acts, first taken up after actual insanity and during its decided existence, are varying and fluctuating, without any change of circumstances or reasonable cause to account for them. I am, therefore, led to conclude that the presumed unsoundness of mind continued, and that the deceased was not in a state of testable capacity, but was non compos **[455]** mentis at the time when this will was made. I must, therefore, pronounce against the will propounded.

The will of August, 1825, was then propounded apud acta, and upon its being stated that no further evidence could be obtained in support of it than was already before the Court, the Court pronounced also against that will; and that, so far as appeared, the deceased was dead intestate.

Lushington prayed the costs of Groom and Evans out of the estate; they had acted under the advice and opinion of Mr. Young and Mr. Vincent as to the sanity of the deceased.

Per Curiam. They were, no doubt, both sincere and honorable opinions; but the executors were not under the necessity of propounding the will; they had ample opportunity of judging of the deceased's state; and should have decided for themselves. I do not at all blame the executors; they have not acted improperly; but it is not the sort of case in which the Court can give the costs out of the estate.

Costs out of the estate refused.

[456] THE OFFICE OF THE JUDGE PROMOTED BY BURGOYNE *v.* FREE, D.D. Arches Court, 1st Session, 1829.—Upon the proof, against a clergyman, of repeated and habitual acts of incontinency, coupled with neglect of duty and other conduct affording just scandal and offence to his parishioners, the Court is bound to proceed to deprivation.—Exceptive allegations after publication are stricti juris; and their object being the credit of the witness, not the proof of the matters in issue in the principal cause; 1st. Facts which might have been pleaded in contradiction to the pleas before publication cannot be pleaded in contradiction to a witness: 2ndly. There must be a contradiction to the depositions clear and capable of proof, and shewing that the witness has deposed falsely and corruptly: 3rdly. The matter must arise out of the evidence (not out of the general character) of the witness. Allegation rejected.

[Affirmed, p. 662, post.]

This suit, instituted originally in the Arches Court of Canterbury, by letters of request from the commissary of the Bishop of Lincoln in and throughout the archdeaconry and commissaryship of Bedford, in the diocese of Lincoln, was promoted by Montagu Burgoyne, Esq., against the Rev. Edward Drax Free, D.D., rector of Sutton. in the county of Bedford.

The citation called upon Dr. Free "to answer to certain articles touching his soul's health and (*a*)[1] the lawful correction and reformation of his manners and excesses, but more especially for the crime of fornication or incontinence; for profane cursing and swearing, indecent conversation, drunkenness, and immorality; for his lewd and profligate life and conversation; for neglect of divine service on divers Sundays, using the porch of the church of the said parish as a stable, and foddering cattle therein, and turning out swine into the **[457]** said church-yard; for refusing the use of the said church for vestry meetings lawfully called; for converting to his own use and profit the lead on the roof of the chancel of the said church; for refusing, and neglecting, and delaying to baptize or christen divers children of his parishioners; for refusing and neglecting to bury sundry corpses, and for requiring illegal fees to be paid to him for baptisms and burials; and further to do and receive as unto law and justice should appertain."

On the 9th of November, 1824, an appearance was given for the party cited, but under protest. This protest was on the 20th of January, 1825, over-ruled.(*a*)[2] On the 3d of February the defendant appeared absolutely, and, on the same day, the articles, thirty-one in number, with five exhibits annexed, were brought in. On the 17th of February the admission of the articles was debated, when the Court rejected two, and directed four others to be reformed. On the 24th of February, a prayer being made that the articles, as reformed, should be admitted, the proctor for the defendant alleged that he had appealed, and he was assigned to prosecute the same by the first session of Easter Term; but upon the 25th of April (viz. the second session of Easter Term), the appeal not having been prosecuted, the Court admitted the articles.

The articles, as they stood reformed and were admitted after the writ of consultation (see post, p. 467), were in substance as follows:—

1. That by the ecclesiastical laws, canons, **[458]** and constitutions of the Church of England, all clerks in holy orders are liable (for the offences set forth in the citation and heading of the articles) to be suspended from the exercise of their clerical functions and deprived of their ecclesiastical benefices.

2. The due and lawful institution and induction of Dr. Free, in December, 1808, to the rectory of Sutton, in the county of Bedford.

3. An authentic copy of the act of his admission and institution. The identity.

4. Rejected before prohibition.

5. That you, Edward Drax Free, in the latter end of 1810, engaged Maria ———, spinster, as a servant, and that she thereupon entered into your service and went to reside in the said rectory house; that you soon afterwards formed a criminal connection with her, and that she thereby became pregnant by you; that you continued to carry on such criminal connection during the time she remained in your service, which was for about six months; that upon her leaving your service she was pregnant, and in the month of August, 1811, was delivered of a bastard child in the workhouse of the parish of Saint George, Hanover Square, in the county of Middlesex; and that in July, 1811, she, Maria ———, made oath before one of the magistrates of Middlesex that she had never been married; and that you were the father of the child or children of which she then was pregnant, and likely to be born out of lawful matrimony and to become chargeable to the said parish; that the said bastard child died soon after its birth, and that you paid all the expences that had been incurred in consequence of the **[459]** delivery of the said spinster of the bastard child.

6. Exhibited a true copy of the said examination on oath.

7. That you, Edward Drax Free, in the latter end of 1812, or the beginning of 1813, engaged Catherine ———, spinster, as a servant, and she thereupon entered into your service, and went to reside in the said rectory house; that you soon afterwards formed a criminal connection with her, and she became pregnant by you; that you continued to carry on such criminal connection for several months during the year 1813; that the said Catharine ——— left your said service, she being at such time pregnant by you, and was on the 21st of November, 1813, at Thundridge, in the

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(*a*)[1] In the heading of the articles the words "your soul's health and," "the crime of fornication or," were struck through after prohibition, agreeably to the order of the Court of King's Bench.

(*a*)[2] *Burgoyne* v. *Free*, 2 Add. 405, 414.

county of Hertford, delivered of a female bastard child; and that on the 26th of February, 1814, she made oath before one of the magistrates of the said county that she was so delivered of a female bastard child on the said 21st of November, and that the same was likely to become chargeable to the parish; and that you did get her with child of the said bastard; and that an order was thereupon made upon you to pay and allow a certain sum for the support of such child, which was accordingly paid by you for some time.

8. Exhibited the said original examination on oath.

9. That you, Edward Drax Free, some time in the beginning of 1814, engaged Margaret ———, spinster, as a servant, and she thereupon entered into your service, and that you soon afterwards formed a criminal connection with her, and she became pregnant by you: **[460]** and that in the beginning of August, 1814, she left your house, and on or about the 14th day of the said month was delivered of a child, begotten by you; that some time afterwards she returned to your service, and that you thereupon renewed your criminal intercourse with her, and she again became pregnant by you, and again left your house, and some time in the month of November, 1815, was delivered of another child, begotten by you, and that shortly afterwards she again returned to your service, and you again renewed your said criminal intercourse with her, and she again became pregnant by you, and again left your house, and on or about the 24th day of March, 1817, was delivered of another child, begotten by you, and that shortly afterwards she again returned to your service, and you again renewed your criminal intercourse and connection with her; that the said Margaret ——— was for about five years in your said service, and during such time you carried on such criminal intercourse and connection with her as aforesaid.

10. That you, some time in or about February, 1818, engaged Ann ———, widow, as a servant, and she thereupon entered into your service, and went to reside in the said rectory house, and that you soon afterwards took indecent liberties with her person, and several times urged her and endeavoured to form a criminal intercourse and connection with her; that she refused to comply with your desires, and resisted your importunities, and quitted your service at the latter end of 1822.

11. That you, in December, 1822, engaged Maria ———, spinster, as a servant, and she **[461]** thereupon entered into your service, and went to reside in the said rectory house; that you soon afterwards formed a criminal intercourse and connection with her, and she became pregnant by you; and in the beginning of May, 1823, she being then about three months gone with child by you, was prematurely delivered of such child, and that she thereupon left your service.

12. That you, in the beginning of June, 1823, engaged Eliza ———, spinster, as a servant, and she thereupon entered into your service, and went to reside at the said rectory house; that you attempted to take indecent liberties with her person, and urged her and endeavoured to form a criminal intercourse and connection with her; that she refused to comply with your desires, and resisted your importunities, and in consequence of such your conduct and behaviour towards her she did, about a week after she so entered your service, quit the same.

13. That you, for several years past have had and kept in the said rectory-house various obscene and indecent books, containing obscene and indecent prints, and particularly Aristotle's Master-piece; that you have frequently shewn the same to divers persons, and particularly to the said Ann ———, Maria ———, and Eliza ———, during the time they respectively resided in your service; that you frequently made use of obscene language in your conversation, and exposed your person indecently to the said females.

14. That you for several years past have addicted yourself to habitual and excessive drinking of wine and spirituous liquors, and par-**[462]**-ticularly rum, so as to be frequently much intoxicated; and also frequently been guilty of profane cursing and swearing; that you have at various times sworn at your servants and labourers, and made use of much profane language and many oaths.

15. That you, on a Friday in the month of February, 1823, about four o'clock in the afternoon, were intoxicated, and being in the church-yard of the said parish, and a lamb belonging to you having been found dead, you swore at James Steers, then employed by you as a gardener and to look after your farming concerns, and called him a damned stupid fool and a damned thief, which expressions you repeated immediately afterwards on the same day in your own yard, adjoining the said rectory-house.

16. That you, on a day on or about Christmas, 1823, were much intoxicated, and that on your then coming out of the said rectory-house you fell down, and on getting up again you went into the church-yard of the said parish, and that both in your said house and in the said church-yard you made use of much profane language.

17. That the duty always accustomed to be done at the said church on a Sunday has been the morning service and a sermon, and that on Sunday the 5th of December, 1819, you, without just cause or impediment, wholly omitted to perform such service, and also on Sunday the 25th of November, 1820, and on every Sunday subsequent thereto, until Sunday the 24th of December following, and that you also omitted to perform any such service on Sunday the 28th of January, 1821, and that on the aforesaid **[463]** Sundays respectively no divine service whatever was performed in the said church.

18. That you for many years past have been in the habit of turning swine, horses, and cows into the church-yard of the said parish, and of using the church-porch as a stable, and foddering cattle therein, and that a considerable quantity of dung has in consequence thereof frequently been collected and remained for a long time in such church-porch; that considerable damage has been done to the soil, and many of the grave-stones in the church-yard have been broken by the said horses, and the ground therein turned up by the swine, and sometimes perforated as low as the coffins therein; that the Archdeacon of Bedford, at his parochial visitation, did, on or about the 18th of June, 1823, admonish you not to turn swine into the said church-yard in future, but that notwithstanding such admonition you have continued to turn swine therein as you had done before.

19. That there are two keys to the doors of the church, one whereof is kept by you as rector, and the other by the churchwarden; that there is an outer door to the chancel of the church, to which there is only one key, which is in your possession, and that by the means of such chancel door you can obtain access to the church; that vestry meetings for the parish have been customarily held in the said parish church, and that at Easter, 1821, 1823, and also 1824, notice was duly given of vestry meetings to be held for the said parish, and that a short time previous to the times of each of such vestry meetings so to be held, you obtained ac-**[464]**-cess to the church by means of the chancel door, and bolted the church door on the inside thereof, and thereby prevented the churchwardens and parishioners from meeting in vestry, and refused to permit the church to be opened for the said purpose; and that you have also at other times prevented the churchwardens and parishioners from entering the church and holding vestries therein in pursuance of due notice previously given for that purpose.

20. That in 1820, the roof of the chancel of the church being covered with lead, you, without any lawful authority in that behalf, caused the roof to be stripped of the lead, and slates to be substituted thereon in its stead; and that you thereupon sold and disposed of such lead, the money arising from which (after paying for such slating) you converted to your own use, and that the same amounted to a considerable sum, over and above the expence of such slates.

21. Rejected before prohibition.

22. That on Sunday the 21st of January, 1821, the child of Thomas Smith and Ann, his wife, parishioners and inhabitants of the parish, was brought to the said church to be christened; that you then refused to christen such child until a sum of money was paid to you for the same; that Smith thereupon paid the sum then so demanded by you; but that, having received such sum, you declared that the same was for the baptism of a former child of Thomas and Ann Smith, which had been performed by you; and you then demanded a further sum of money for the baptism of the child then brought to you; that they refusing to pay such further demand, you refused to baptize the child, and **[465]** such child was not baptized. That in April or May, 1823, the corpse of a child of Thomas Smith and his wife was brought to the church-yard for burial, due notice thereof having been previously given to you; that you then refused to perform the funeral service, and to bury such corpse, until the sum of four shillings, as a fee for such burial, was paid to you; and you then made use of many quarrelsome words; that in consequence of such your refusal the said corpse was kept a considerable time in the church-yard; that you at last buried the same, and compelled Smith to pay the fee of four shillings.

23. That on a Sunday in August, 1823, a child of James Randall, of the parish of

Sutton, and of Amy, his wife, was brought to the church to be baptized; that you at first refused to baptize such child until a sum of mony as a fee was paid to you for the same; that the child was detained some time at the church; that you afterwards baptized such child without a sum of money being paid for the same, but then expressed yourself angrily towards Amy Randall, and desired her never to come to the church again.

24. That a child of John Saville and of his wife, parishioners and inhabitants of the parish, died in or about Michaelmas 1820; that on the following Monday application was made to you to bury the corpse on the following day; that you then declared you were going out, and would not bury it until the Wednesday, and made use of profane language; and on the following day, being Tuesday, the corpse being **[466]** extremely offensive and unfit to be kept any longer without burial, and a grave being prepared, application was again made to you at the rectory-house to bury the corpse on the same day, when you again refused: and that the same was not buried until the next day, being Wednesday.

25. That in October, 1822, the corpse of a child of Thomas Gurry, and of his wife, parishioners and inhabitants of the parish, was brought to the church-yard for burial; and on the 31st of December, 1822, or 1st January, 1823, the corpse of a child of William Giddins, and his wife, also parishioners and inhabitants, was brought to the church-yard for burial; and that in July, 1823, the corpse of a child of Thomas Smith, and Ann, his wife, also parishioners and inhabitants, was brought to the church-yard for burial, due notice thereof having been previously given to you on each of such occasions; that you refused to perform the funeral service, and to bury such corpses respectively, until the sum of four shillings for each of such burials was paid to you as a fee for the same; that such sum of money was paid to you accordingly, previous to your performing the funeral service, and burying such corpses.

26. That by such your excesses, and the gross impropriety and immorality in your conduct, in the several preceding articles set forth, you have given great offence to the parishioners and inhabitants of the said parish; and that by reason thereof they have declined generally to attend, and do not attend, divine service in the parish church; and that for a considerable time past the congregation at such service has **[467]** consisted commonly of one or two poor persons, and of a few poor children only.

27. That at the Michaelmas visitation for the year 1823, held on the 24th of October, by the Archdeacon of Bedford, the churchwarden, overseer, constable, and some of the parishioners of the parish of Sutton made two several presentments to the archdeacon or to his official, wherein they presented several of your excesses and improprieties, and immorality of conduct hereinbefore set forth, and in supply of proof of the premises, exhibits true and authentic copies of the two original presentments.

The 28th, 29th, and 30th were the usual formal articles.

The 31st. That Edward Drax Free be duly and canonically punished and corrected according to the exigency of the law, and also be condemned in costs.

After the Court had admitted these articles on the second session of Easter Term the proceedings were stayed by a rule having been granted, by the Court of King's Bench, to shew cause why a prohibition should not issue to the Ecclesiastical Court (*Free, D.D.* v. *Burgoyne*, 5 Barn. & Cress. 400, 765); and the suit thus remained till the 27th of May, 1826, when the proctor for the promoter brought in a copy of an order of the Court of King's Bench of the tenor following:—"It is ordered that a prohibition issue as to proceeding against the plaintiff for fornication or incontinence, for the purpose only of his soul's health and the reformation **[468]** of his manners; and it is further ordered that a writ of consultation issue as to proceeding against him for those offences, for the purpose of suspension or deprivation or other punishment merely clerical, and also as to all the other matters charged against him in the libel in the Court below." The writ of consultation was brought in; (*a*) but in con-

(*a*) The writ of consultation was in substance as follows:—George the Fourth, &c. &c. to the Right Worshipful Sir John Nicholl, Knight, Doctor of Laws, Official Principal of the Arches Court of Canterbury, greeting: whereas Edward Drax Free, rector of the parish of Sutton, in the county of Bedford, hath shewn to us, in our Court before us, that whereas by a statute made and passed in the parliament of His late Majesty George the Third, in the twenty-seventh year of his reign, it was (amongst

sequence of a [469] writ of error in the matter of the prohibition, all proceedings in the Spiritual Court upon the writ of consultation were, on the 17th of June, directed to be stayed till the 4th day of the then next Michaelmas Term inclusive; but this order not being renewed, the articles as reformed were, on the 20th of November, admitted, and the proctor for the defendant was assigned to [470] answer thereto the next Court, when he alleged the cause to be appealed to the High Court of Delegates. On the 6th of December he was assigned further to prosecute the appeal the first session of next term. On that day he alleged he should not proceed any further in the cause; but the Court having assigned him to answer the articles the next Court, under pain of suspension, on the third session, to save his contumacy, he gave a negative issue, and again alleged that he should not proceed any further as proctor for Dr. Free, another proctor having exhibited on his behalf: on the 4th session the registrar of the Court of Arches stated that he had been served with an inhibition under seal of the High Court of Delegates.

The libel of appeal, in its second article, in substance pleaded: that the Judge of the Court of Arches did, "by his order or decree bearing date the by-day after Hilary Term (17th February, 1825), reject the 4th and 21st; direct the 5th, 11th, 13th, and 19th articles to be reformed; and admit to proof the remainder of the articles; and did further, on the 2d Session of Easter Term (25th April, 1825), also admit to proof the 5th, 11th, 13th, and 19th articles, as reformed, and assign the proctor of Dr. Free to answer to the articles (save the 4th and 21st rejected) the next Court: and did further, on the 3d Session of Trinity Term (3d June, 1826), the proctor of the promoter then alleging the articles to have been reformed, assign to hear on admission of the same, as reformed, the next Court; and also that he did afterwards, on the 3d Session of Michaelmas Term (20th [471] November, 1826), admit to proof the said articles as reformed, and assign Dr. Free's proctor to answer thereto the next Court."

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other things) enacted, "That no suit should be commenced in any Ecclesiastical Court for fornication or incontinence after the expiration of eight calendar months from the time when such offence should have been committed;" yet, nevertheless, that Montagu Burgoyne of East Sheen, in the county of Surry, esquire, well knowing the premises, hath in October, 1824, against the form of the said statute, drawn the said Edward Drax Free into a plea in the Spiritual Court before you, touching and concerning the crime of fornication or incontinence alleged to have been committed by him, the said Edward Drax Free, with divers females in the several and respective years, 1810, 1812, 1813, 1814, 1815, 1817, 1822, as by the libel of the said Montagu Burgoyne, amongst other things, will more fully appear. And whereas the said Edward Drax Free has lately prosecuted and caused to be directed to you our certain writ of prohibition out of our Court before us at Westminster, that you should no further hold the plea aforesaid in the Court Christian aforesaid before you, or any thing further in that behalf attempt, by pretence of which our said writ of prohibition you have from thence hitherto delayed, and yet do delay farther to proceed in the cause aforesaid, as we have understood, to the great damage of the said Montagu Burgoyne, and to the manifest prejudice of the ecclesiastical liberty; wherefore the said Montagu Burgoyne hath in our Court, before us at Westminster, humbly besought us to grant him our aid and assistance in this behalf, and we favourably consenting to the petition of him, the said Montagu Burgoyne, and being unwilling that the cognizance which to the Ecclesiastical Court in this behalf belongs should be further delayed by such false and subtle assertions, because, in our said Court before us at Westminster, it is amongst other things considered by our said Court that the said Montagu Burgoyne may have our writ of consultation to the Court Christian aforesaid, as to proceeding against him, the said Edward Drax Free, for those offences, for the purpose of suspension, or deprivation, or other punishment merely clerical, and also as to all the other matters charged against him in the said libel in the said Court Christian, our said writ of prohibition to the contrary thereof notwithstanding, whereof the said Edward Drax Free is convicted, as it appears to us of record; we therefore being willing that justice should be done to the parties aforesaid, as the law requires, and being unwilling that the said Montagu Burgoyne should be in any wise injured in this behalf, signify to you, and command that you may in that cause lawfully proceed, and further do what you shall know to belong to the said Court Christian as to proceeding against him, the said Edward Drax Free, for those offences, for the purpose of suspension, or deprivation,

On the 26th of May, 1827, Addams on the part of the appellant moved that the Con-Delegates would not assign the cause for hearing before the whole commission until the writ of error was disposed of in the House of Lords.(*a*)[1]

This motion was opposed by Lushington; and rejected by the Con-Delegates.(*b*)[1]

Addams then prayed to be heard on act on petition before the whole commission; but the Con-Delegates said: That they could not make such an order against their own decree; but that, if there was any error in the principle by which they had been guided, the order might be reconsidered when the whole commission was assembled.

On the 6th of June, 1827, this application was renewed before the whole commission at Serjeant's Inn.

Addams and Denman (Common Serjeant) for the appellant. **[472]** If the writ of error had not, in the first instance, been by an oversight moved to the Exchequer Chamber,(*a*)[2] the Ecclesiastical Court could not have now been in a situation to proceed in the cause: and should the House of Lords reverse the judgment of the Court of King's Bench, and the suit, in the mean time, be suffered to go on in this Court, it would be impossible to put the appellant in statu quo, even by resorting to the expensive remedy of a commission of review.

Dr. Lushington, Dr. Dodson, and Mr. Campbell contrà. The writ of consultation is peremptory on the Court of Arches to proceed: and no appeal should be entertained upon what was not an exercise of judicial discretion, but of obedience to the orders of the superior jurisdiction. The Court of Arches could not suspend the cause.

Per Curiam. The words of the writ are: "We signify and command that you may proceed."

Gaselee, J. It is not unusual for the Court of Common Pleas to suspend its decision in a suit until a similar cause in the course of argument in the Court of King's Bench shall have received a judicial determination.

Argument resumed.

The terms of the commission are, however, imperative upon this Court, and command it to proceed "summarily and without the strict **[473]** formality of judicature, considering and attending only to the truth of the matter and the mere equity of the case." At least the Court will order the evidence to be taken in the interim, otherwise justice may be defeated by the loss of essential witnesses. If the appellant were conscious of innocence, he would not have thrown so many delays and impediments in the way of this prosecution.

The Judges Delegate, viz., Mr. Baron Hullock, Mr. Justice Littledale, Mr. Justice Gaselee, Dr. Burnaby, and Dr. Pickard,(*a*)[3] granted the motion; and directed the proceedings in the Ecclesiastical Court to await the decision in the House of Lords.

The House of Lords having affirmed the judgment of the Court of King's Bench,(*b*)[2]

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or other punishment merely clerical; and also as to all the other matters charged against him in the said libel, in the said Court Christian, our said writ of prohibition to the contrary thereof before you directed in anywise notwithstanding; provided, nevertheless, that you do not proceed against the said Edward Drax Free on the charges of fornication or incontinence in the said libel above charged, for the purpose only of his soul's health, and the reformation of his manners. Witness, Sir Charles Abbott, Knight, at Westminster, the 26th of May, in the seventh year of our reign.

(*a*)[1] In the writ of error to the House of Lords the sentence of the Court of King's Bench was prayed to be reversed and annulled for the following among other reasons:— "That the suit depending in the Arches Court of Canterbury against the plaintiff in error, as with respect to any charge of fornication or incontinence therein made and contained, is expressly contrary to the provisions of the 27 Geo. 3, c. 44, and consequently that the judgment of the Court of King's Bench, in prohibition of that suit, as with respect to any such charge of fornication or incontinence, should have been absolute and unqualified."

(*b*)[1] The Con-Delegates were: Dr. Arnold, Dr. Burnaby, Dr. Pickard.

(*a*)[2] See *Free, D.D.* v. *Burgoyne*, 5 B. & C. 765.

(*a*)[3] Dr. Arnold, having been described in the commission as "Henry" instead of "James Henry," and the counsel for the appellant declining to undertake that no objection on the score of irregularity should subsequently be raised to the proceedings from this error, Dr. Arnold, ex abundanti cautelâ, withdrew.

(*b*)[2] *Free, D.D.* v. *Burgoyne*, 2 Bligh (New Series), 65. S. C. 1 Dow (New Series), 115.

an official copy of their Lordships' judgment was brought into the registry of the High Court of Delegates on the 2d of July, 1828; and on the 11th the appeal from the admission of the articles and exhibits was argued.

Delegates, July 11th, 1828.—Addams for the appellant. The cause is now precisely in the same shape as if there had been no writ of error: and the **[474]** question is whether under the order of the Court of King's Bench and the writ of consultation the Ecclesiastical Court can proceed in this suit. The order stands thus: "That a prohibition issue as to proceeding against the plaintiff (Dr. Free) for fornication or incontinence for the purpose only of his soul's health and the reformation of his manners; and that a writ of consultation issue as to proceeding against him for those offences for the purpose of suspension or deprivation or other punishment merely clerical." The order then must be taken in this way: that the suit, so far as "the soul's health" is concerned, must abate; but that (if such a form of proceeding be known, and it is competent to the party to institute it) a suit for "suspension or deprivation" may go on without subjecting the Ecclesiastical Court to a prohibition. The order does not authorize a new form of suit: it puts a stop, in toto, to any further proceeding under the present citation; but does not prohibit a proceeding, de novo, under a citation "for suspension or deprivation." This is the only rational construction of the order, which never was intended to interfere with the established practice of the Ecclesiastical Courts. And in those Courts there is no proceeding, ex directo, for a penalty, as for suspension or deprivation, and if there were, this cause can no longer be prosecuted, for the words "suspension or deprivation" are not to be found in the citation. In *Stone's case*,(*a*)[1] the form of suit was "pro salute animæ," and a criminal proceeding in the Spiritual Courts is invariably in that form. Oughton, tit. 139.

[475] Another fatal objection is that the articles have been reformed after their admission. On the 25th of April the articles were admitted, and the adverse proctor was assigned to answer. The prohibition was afterwards argued; and in pursuance of the order made by the Court of King's Bench the articles were reformed and then again admitted. This is contrary to all principle and precedent; for it is quite established that articles once admitted are incapable of reform. In *Schultes* v. *Hodgson* (1 Add. 318, 321), a proceeding precisely similar to the present, the Court of Appeal admitted additional articles; but the Court in that case said: "Articles when brought in may be reformed and amended under the direction of the Court prior to their actual admission; but when they are once admitted and issue is joined either party is bound by them."

The appellant's counsel then proceeded to argue the point upon which he chiefly relied, viz. that in the Ecclesiastical Court no such suit as for deprivation eo nomine was known; that deprivation was the means of punishment and of producing reformation; but that the proceeding was diverso intuitu—pro salute animæ, which a sentence of deprivation might follow.

To this head of argument the observations on the other side were principally confined.(*b*)

[476] In the course of the argument the Court made several observations, in substance, and to the effect following:—(*a*)[2]

Per Curiam. The order of the Court of King's Bench is understated; it permits the Ecclesiastical Court to proceed to a certain extent, and under certain limitations, to a sentence in the present suit. By the order the Ecclesiastical Court is only prohibited, under the 27 Geo. 3, c. 44, from such proceedings as are applicable equally to a layman and a clerk in orders, but not from such as, under the general canon law, apply exclusively to a clergyman in his clerical character. Supposing no writ of prohibition had issued, or that the promoter had voluntarily abandoned that part of the proceeding, "for the purpose of the soul's health," could not the suit still have been persevered in, and a sentence given? For although the terms of the citation may be restricted, the prayer at the end of the articles is general, and they are to be

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(*a*)[1] *The King's Proctor* v. *Stone*, 1 Hagg. Con. 424.

(*b*) The substance of these arguments is given in the report of what passed on the writ of error before the House of Lords. See *Free, D.D.* v. *Burgoyne*, 2 Bligh (New Series), 65. S. C. 1 Dow (New Series), 115.

(*a*)[2] Mr. Baron Hullock was absent.

taken together. However, even if in the citation "touching and concerning the soul's health" are struck out as surplusage, the words "to do and receive as unto law and justice shall appertain" are quite sufficient to sustain the jurisdiction, and make a sentence under the articles, every one of which is framed with a view to clerical offences, conformable to the citation. In indictments the punishment is never set out.

The alteration of the articles was to make them accord with the rule of the Court of King's **[477]** Bench; and such an alteration hardly comes within the principle of reforming articles, it is merely expunging, as a matter of course, that over which the Court has no jurisdiction; and is to inform the Judge that, in giving sentence, he must not proceed "for the soul's health" of the defendant. It was not necessary to reform the articles, nor in point of fact were they reformed, by an application to the Court of Arches. The reform took place upon the writ of prohibition, and is, therefore, the operation of a superior and controuling jurisdiction.

The Court pronounced against the appeal; affirmed the decrees appealed from,(*a*) and remitted the cause; intimating that from its generality no evidence should be taken on the 14th article.

Arches.—On the first session of Michaelmas Term the remission of the cause was brought in; and witnesses having been examined in support of the articles and exhibits, on the first session of Hilary Term, 1829, publication was prayed; when an allegation on the part of the defendant was asserted. This allegation was debated on the fourth session, and admitted, after some slight amendments by the Court. Upon the admission the Court observed:—

Per Curiam. I am not inclined to strike out any thing that may affect the merits of the case, and ultimately, perhaps, bear upon the costs. The case is founded upon very serious charges; and **[478]** though the defendant has not hitherto shewn himself very ready to meet the charges in a direct way, yet now that he has arrived at his defence, the Court will allow him the fullest opportunity of establishing it. The cause, from the nature of it, is of the highest importance to him as a clergyman; and as the allegation is generally admissible, I am also the less disposed to refer it back to be reformed from the time at which it is offered; because if the plea, when reformed, should be objected to, the progress of the cause might be delayed till Easter Term; whereas now the witnesses will be examined upon it in the course of the vacation; and if a responsive allegation may be considered necessary, it will be ready by the first session of that term. It is, therefore, the most beneficial course, both for the defendant and the promoter, that the allegation should now be admitted with the slight alterations which the Court has already made with the consent of the defendant's counsel.

Allegation admitted.

This allegation consisted of eleven articles; but, in support of it, no witnesses were examined. It denied the charges of criminal connection and solicitation of chastity; of intoxication, and profane cursing and swearing, and pleaded in explanation and justification of other parts of the articles. It admitted "that a book called or known by the name of Aristotle's Masterpiece, having by accident come into possession of Edward Drax Free, was for some time in his rectory house, and might have been there seen by Maria ———, &c., &c.; but it alleged that the said E. D. **[479]** Free did not at any time keep (save as aforesaid, if the said book is an indecent and obscene book, which is denied) or shew to the said persons or either of them or others any obscene or indecent book or print." The allegation concluded by excepting to the credit of five female witnesses (in support of the articles) as persons of notoriously bad character.

In reply to this defensive plea a responsive allegation, consisting of one article only, and pleading in support of the several witnesses whose credit had been attacked, was, on the by-day after Hilary Term, brought into the registry; but its admission was not pressed.

On the first session of Easter Term publication was decreed, and the cause concluded, saving exceptive allegations. The proctor for Dr. Free then declared he should proceed no further.

Easter Term. Exceptive allegation.—On the second session Dr. Free, in person, prayed further time for giving in an exceptive allegation; when the Judge continued

(*a*) As set forth in the second article of the libel of appeal. Vide supra, p. 470.

the assignation to the next session, to allow time for Dr. Free's exhibiting an affidavit of his illness and inability to attend on the last court day. This direction being complied with, the Court, on the third session, assigned Dr. Free to bring into the registry his exceptive allegation three days before the next Court, and to deliver a copy thereof, at the same time, to the proctor for the promoter. The exceptive allegation, coupled with two affidavits, and interrogatories for the purpose of being addressed to the promoter, having been brought in, Dr. Free in person was, on the fourth session, heard in support of their admission.

[480] Per Curiam. The present question respects the admissibility of an exceptive allegation tendered by the defendant. The nature of the case is such that every fair means of defence should be allowed; but there are certain rules and boundaries beyond which the Court has no power to proceed. The suit was begun above four years since; but the defendant, instead of meeting the charge and coming to the true question at issue—his guilt or innocence—has resorted to every practicable means, and to every possible Court, trying to take advantage of forms in order to delay the progress of the suit. If, by adopting this course, he has, in some degree, exhausted his pecuniary means, he cannot expect that the Court, in its investigation of the real justice of the case, can on that account deviate from its regular mode of proceeding.

By the measures resorted to by the defendant the promoter could not get an opportunity of beginning to examine his witnesses till last Michaelmas Term. In Hilary Term, publication being prayed, a defensive allegation was given on the part of Dr. Free, in which he stated, it must be supposed, all the grounds he had to offer on his own behalf. But though he had the whole Easter vacation to prove his allegation he did not examine a single witness. Publication of the evidence actually passed, and the cause would thus have been concluded unless exceptive allegations could be offered. The promoter declared he gave no exceptive allegation. If Dr. Free had meant to offer any exceptive plea, it ought to have been asserted on the second session: he was allowed till the third session; and, **[481]** upon an affidavit then exhibited, the time, under the circumstances, was further extended to the fourth session; but the allegation was directed to be given in and a copy delivered to the adverse party three days before that session. However, the allegation was not brought in according to the order, and, in strictness, the defendant is not entitled now to have its admissibility debated: but if the allegation be really admissible in such a case as the present—more especially where the defendant appears in person and is acting for himself—it would be hardly fitting for the Court to exclude, by a rigid adherence to its order, any thing which might appear of importance to the justice of the case; but, on the other hand, this exceptive allegation must be considered under the ordinary rules and principles of the Court applicable to the admission of such a plea.

Now all exceptive allegations, offered after publication, are stricti juris, because the proofs having been seen there would be great danger of perjury, as well as of endless delays, if further evidence could at that period be loosely or lightly received. Of several rules that apply to such allegations, it may be sufficient to mention one or two.(*a*) The object of these pleas is the credit of the witness, not the proof or disproof of the facts in issue in the principal cause. Upon the facts in the principal cause all matters must be pleaded before publication, and therefore a party cannot plead in contradiction to a witness **[482]** what he might have offered in contradiction to the articles or pleas before publication. Here the defendant not only might have pleaded, but did plead, all defensive matter before publication. He not only might have entered, but actually has entered, into all these articles of charge, and stated his defence. He has, however, produced no evidence: and he is clearly not now entitled again to go over the same ground.

Another rule is that the exceptive plea must contain a clear and distinct contradiction to the deposition, and be capable of being proved by witnesses so as to shew that the witness had deposed falsely and corruptly: for, as I have before stated, the true object of an exceptive allegation is not the facts at issue in the principal cause, but the credit of the witness.

(*a*) Upon the legal nature and object of exceptive pleas, and the principles applicable to them, see *Mynn* v. *Robinson*, vol. i. p. 175; and *Evans* v. *Evans*, 1 Hagg. Con. 95, in notis.

Another rule is that the exceptions must arise out of the deposition, not out of the general character and conduct of the witness. The general character must, if pleaded at all, be pleaded before publication, and in fact it has in this case been already attacked.

Without, then, entering into more detail, yet, upon these rules, which the Court, being bound to administer justice according to law, has no discretion to infringe, there is no part of this exceptive allegation (as it is called) that is entitled to be admitted. A great portion of it is more in the nature of the defendant's observations upon the evidence than any thing which, even before publication, could be admissible. And in truth there is nothing which would really contribute to Dr. Free's defence: the exceptions, if they could legally be sent to proof, would only add to the expences of the suit. I must remark **[483]** that there are some affidavits which have been improperly offered: and the interrogatories to the promoter are still more irregular.(*a*)

On the whole, the Court rejects the allegation, concludes the cause, and assigns it for sentence on the first session of the next term.

Allegation rejected.

Upon the first session of Trinity Term the Court, after Dr. Lushington and Dr. Dodson had commented shortly upon the evidence, submitting in conclusion that it fully established the articles; and after hearing Dr. Free in his own defence, proceeded to give sentence.

Judgment—Sir John Nicholl. This suit against a clergyman for immorality and misconduct, leading, if the charges are proved, to his suspension or deprivation, is of a painful description, both as it respects the individual accused and the body to which he belongs; for a part of the opprobrium will affix most unjustly on that body: most unjustly because, considering that the body of the clergy consists of many thousand persons, it is not extraordinary that a few individuals are to be found who, forgetful of what is due to themselves and the sacred functions they have engaged to discharge, should be guilty of offences disgraceful to their character, even as men; whereas were the subject fairly and candidly **[484]** considered, it would be acknowledged to be highly creditable to the clergy of the Established Church that so few instances of misconduct occur which require the interposition of legal correction.

The present suit has been long depending, and considerable expence has been incurred; but to those who understand the subject it is quite obvious that neither has the time been consumed, nor have the costs been occasioned, necessarily either from the constitution of the Court or from the manner in which its functions are administered, but that both these inconveniences have arisen from the proceedings of the defendant himself. It need hardly be remarked that, where there exists a disposition to take every possible advantage which the law will afford of obstructing and impeding the proceedings, there is no Court in which a party may not harass his opponent by vexatious expence and delay.

In this case the citation was returned on the 9th of November, 1824; and it may be proper to state what would have been the regular course if the defendant, relying upon his innocence, had fairly met the charge. The articles of charge would have been admitted in that term; the witnesses in support of them might have been examined during the Christmas vacation; the defensive allegation brought in in Hilary Term; the defendant's witnesses examined during the Easter vacation, and the cause heard in the Easter, or at the latest during the Trinity Term of 1825. Thus, if each party had been disposed fairly to have proceeded in the investigation of the truth or falsehood of the offences imputed to Dr. Free, the constitution of the Court and the course of its proceedings would have afforded the means of arriving at the jus-**[485]**-tice of the case in three or four terms, occupying seven or eight months, and at no very considerable costs.

Some possible circumstances might have occurred in the course of the investigation fairly extending the proceedings a term or two longer: but not necessarily; for what in fact has taken place? Instead of the articles being admitted in Michaelmas Term, 1824, so that the promoter might then proceed to the examination of his witnesses, he was by various means prevented from producing a single witness till the latter end

(*a*) Upon the application of Dr. Free, after the rejection of the exceptive plea, the Court ordered the affidavit and interrogatories that were annexed to it to be delivered to him out of the registry.

of November, 1828; and here is the cause now heard in June, 1829, while it might have been as well heard in June or July, 1825.

It is hardly necessary to trace the suit through all these steps. There was first a protest against the jurisdiction: that protest delayed the bringing in of the articles till Hilary Term, 1825. In that term the articles were admitted, and from their admission an appeal to the Delegates was interposed. In Easter Term, 1825, the appeal not being prosecuted the articles stood admitted; but then the cause was stopped in consequence of an application to the Court of King's Bench for a prohibition.

The matter having thus got into Westminster Hall, the progress of the suit in this Court was suspended for a year and a half. In November, 1826, a writ of consultation, as far as the object of the suit was deprivation, or suspension, or other punishment merely clerical, having at length issued, and an order to stay proceedings for a limited time which had expired not being renewed, on the 20th of November, 1826, the articles, after a slight reform, were re-admitted; and from this re-admission an appeal was again interposed to **[486]** the Delegates. In February, 1827, an inhibition from the Court of Delegates was served on this Court: but a writ of error having been carried to the House of Lords from the decision of the Court of King's Bench, the cause was suspended in the Delegates till that question was disposed of. At length the Delegates affirmed the decree of the Court of Arches admitting the articles, and the cause was remitted. Thus then in Michaelmas Term, 1828, after a protest against the jurisdiction, appeals to the Delegates, applications for prohibitions, and writs of error, after four years spent in this manner, the cause was in Michaelmas Term, 1828, exactly in the situation it might have been in Michaelmas Term, 1824, if the defendant had at once come forward fairly to meet the charge and assert his innocence: for, in effect, the Court of King's Bench expressed exactly the same opinion on the construction of the statute of the 27 Geo. 3, c. 44, that had been expressed in this Court, viz. that it extended not to a proceeding such as the present; though a few words in the form of the articles—"your soul's health"—might lead to a misconstruction of the view of the statute taken by this Court; as if, provided the charges were established, it were intended merely by spiritual censures to punish incontinences, instead of suspending or depriving the defendant, regard being had to his clerical character.(*a*)

The cause, however, is now arrived at the stage when the Court is to decide on the guilt or innocence of the defendant in respect to the offences charged; but it is clear that neither is he the party who ought to complain of the delay **[487]** and expences incurred, nor is the blame imputable to the constitution or administration of this Court. If any means can be devised consistently with the ends of justice to prevent the interposition of vexatious delays, it would be a valuable improvement for the public, and be highly satisfactory to those who may preside in this Court.

Having thus adverted to the conduct of the cause, it becomes now proper to consider the offences charged and the proofs produced.

Dr. Free is a clergyman, and has for many years been incumbent of the rectory of Sutton in the diocese of Lincoln: his incumbency is not denied; and it is fully proved. He is charged with having carried on criminal intercourse with several of his female servants in successive years—from 1811 to 1822—and to have had illegitimate children by three of them—five children in the whole, three of whom were by the same female. He is charged with the intemperate use of liquor, with swearing and employing other improper language, with neglect of duty, with profaning the churchyard with pigs and cattle, with stripping the lead off the chancel and substituting a slated roof, making of the lead a profit for himself; he is charged also with refusing to baptize and bury till the fees he demanded were first paid; and it is alleged that in consequence of his misconduct in these several respects his church was nearly deserted, and his parishioners were driven either to an adjoining parish church or to dissenting meetings.

Such is the substance of the charges, and in support of the various parts thirty-one wit-**[488]**-nesses have been examined, to each charge several witnesses. To these witnesses very long interrogatories on behalf of the defendant have been administered, which have greatly increased the expence; but the answers, instead of tending to his

(*a*) See the observations of the Court upon this point in *Oliver and Toll* v. *Hobart*, vol. i. p. 46.

exculpation, for the most part only confirm more strongly the imputations of misconduct. In Hilary Term, 1829, a defensive allegation was given in contradicting or explaining the charges, and attacking the credit of the witnesses; but though the defendant now expects his own averments to be received as defensive matters, not a single witness was produced in support of that allegation. It only then remains to state the nature and effect of the evidence in support of some of these charges; it is not necessary to go in detail through the whole.

The first charge of criminal intercourse is with a female in 1810, who became pregnant by him; swore before her delivery that he was the father of the child; was confined in the parish of St. George's, Hanover Square, and he paid the expences. To prove this article several witnesses have been examined, the woman herself, who is since married, and two or three persons who depose that she lived with Dr. Free at that time. Her examination before a magistrate in 1811, when previous to delivery she made oath as to her pregnancy and as to the father of the child, is also produced.

The next offence is with another woman in 1813, and she was delivered of a child in 1814; to prove which fact five witnesses have been examined. This woman, who is also since married, gives a full account of her connection with the defendant. She lived about a year in his ser-**[489]**-vice: it was two or three months before he succeeded in his attempts on her virtue; she became pregnant, went to her father's house near Ware; was there delivered, and there the child was sworn; and from that time to the present Dr. Free has supported it by quarterly payments. Here is the woman's examination after delivery, before the magistrate in 1814; so that the charge is no afterthought to support this suit: here is her father confirming the daughter as to her coming home pregnant, and to her confinement; and here are witnesses who, in corroboration, depose to her having lived with Dr. Free at that period.

The next charge is with another woman who had three children by him; one born in the month of August, 1814, another in November, 1815, and a third in March, 1817. This woman, now in respectable service as a cook and housekeeper, and her sister, who has the care of the second child, the only one now living, have come forward very reluctantly: but the facts are fully deposed to by the former, and are amply corroborated by five or six other witnesses. This woman lived three months in his service before Dr. Free succeeded in having intercourse with her. The defendant and she alone slept in the house; for Dr. Free's domestic arrangements appear to have been well contrived and calculated for seduction and concealment; he kept only one female servant, she was the only person sleeping in the house; his doors and gates were fastened up early in the evening, after which no person was admitted.

One female (the last hired, before the commencement of the suit, in June, 1823), in con-**[490]**-sequence of his attempts, and the danger to which she was exposed, only staid a few days in his service, and left it without notice on account of that danger. This witness, certainly not a woman of strict morality, thus deposes on the 12th article. "Dr. Free used to follow her about the house to kiss her; and sometimes when he got her up into a corner he used to kiss her, and against her will: there were several reasons why it was particularly disagreeable. The deponent left him in consequence of such his conduct (as well as that of which she will depose); for she was alone in the house with him in the evening and through the night; the house being shut up at an early hour every evening; and she felt she should have difficulty in making herself heard. She quitted his house suddenly without any notice; the deponent was afraid to be longer there with him."

To return, however, to the proofs of Dr. Free having had these three children by the third woman to whom I have referred. Several witnesses depose to the facts of her having lived with Dr. Free, of her being repeatedly, in appearance, in a state of pregnancy, and of her afterwards being absent for a time: and from the sister, who, being an extremely unwilling witness, deposes to nothing material in chief, except that her sister lived with Dr. Free, and that he frequently called upon the witness to pay for fish, she being a dealer in that article, the fact comes out upon an interrogatory put to her by Dr. Free, that her sister's child, a boy about twelve years old, was placed under her care by Dr. Free, and that he paid the expences of its maintenance. **[491]** In answer to the 3d interrogatory she states: "She first saw Mr. Montagu Burgoyne in the summer of 1823 or 1824; she is not sure which. He said to her, 'You have the care of a child of Dr. Free,' or to that effect: respondent replied 'that she had,' meaning no more than that it was a child placed under her

care by Dr. Free: the child came into the room, a boy about twelve years old (in November, 1828, as she believes). When Mr. Burgoyne saw the child, he said, 'I need not ask you (the boy) whose child you are;' and he remarked to the deponent how like the child was to his father. The respondent is not sure whether she did or did not then tell Mr. Burgoyne that she did not think that Dr. Free was the father of the child, though she might suspect it; she believes that she said something of that kind to him, for he told her that it was her sister's child by Dr. Free, and that there were others. The respondent told him truly that she did not know that; that all she did know was that Dr. Free had placed the child under her care, and paid for its support and education. The respondent does not remember now more particularly what passed on that occasion; she was taken by surprize, and was flurried at hearing what Mr. Burgoyne said." So that it is quite clear that this child was placed under the witness' care by Dr. Free, and that he maintained it; this, coupled with the evidence of the pregnancy, leaves no rational doubt that he was the father of the child.

It is unnecessary to pursue this disgusting and **[492]** profligate history, or to stop to inquire whether another woman (who deposes to having become pregnant by him and miscarrying in his house in 1823) is or is not deserving of full credit. If the proof of Dr. Free's misconduct had rested on that charge alone it might open the case to some doubt; but here it is fully established that he is the father of at least three illegitimate children; and that for a number of years he has been guilty of carrying on a most depraved and vicious intercourse with his female servants, and of shamefully converting his rectory-house into a convenient place for secretly pursuing his scandalous immoralities. If the act of parliament (27 Geo. 3, c. 44) could be held to cover such gross profligacy as is exhibited in the evidence of this case, how could the Church be protected against such unworthy members? The proof of adultery might frequently rest upon the birth of the child, and that proof would not under ordinary circumstances be fully attained till after the expiration of eight months.

This part, then, of the charge being substantiated, it is needless to investigate the other parts in their details. Though not an habitual drunkard to absolute intoxication, yet it is satisfactorily established that Dr. Free frequently indulged in the intemperate use of liquors. His improper language and passionate abuse of those around him are proved, and were highly unbecoming the minister of a parish: his neglecting to do duty, deposed to by several witnesses, is not accounted for by any evidence shewing that the omission only occurred when the **[493]** church was under repair, or in consequence of other sufficient reason. Here are a cloud of witnesses who prove that the church-yard was converted into a farm-yard and pigstye; his cattle foddered there; the swine rooting up the graves and levelling the mounds so as greatly to distress the feelings of those whose relations were buried in the ground. The stripping the lead off the chancel and replacing it with a light slating of much less cost and value is in no degree explained by any proof of the expediency of such a change. His conduct respecting baptisms and funerals was in some instances extremely reprehensible. Complaints at visitations in the form of presentments were made, but produced no reform nor correction. And what has been the consequence of such protracted forbearance, and of the omission of any early measure speedily to relieve the parish? That which must naturally be expected; that his parishioners became disgusted; that they have deserted their parish church: some go to church at Potton, others go to dissenting meetings; and the greatest possible injury is done to the feelings and morals of the parishioners and the character of the Established Church.

Slight offences, accidental irregularities arising from the ordinary infirmities of human nature, might be corrected by admonition or suspension. The punishment of the individual is but a secondary object. Even the example made of him in order to deter others is, I trust, hardly necessary: because few, if any, ministers of the Church would be likely to pursue the same course: but here is a crying grievance—a disgusting nuisance in the parish: no hope **[494]** exists of bringing back the defendant and his parishioners to entertain those feelings of mutual respect and confidence which ought to subsist. It is therefore the duty of the Court (however painful that duty may be) to pronounce the articles sufficiently proved; to decree that Dr. Free be deprived of the living of Sutton, and to condemn him in the costs of the present proceedings.

The Court then signed the sentence of deprivation, which was, in substance, as follows:—(*a*)

"Whereas there is depending, &c." in which Dr. Free "has been convented to answer to certain positions or articles to be objected against him for the lawful correction and reformation of his manners and excesses, and more especially for incontinence," &c. &c. [setting forth the remaining charges]; "and whereas we John Nicholl, Knight, Official Principal of the Arches Court," &c. [having read the proofs and heard advocates on the part of the promoter, and Dr. Free in his own defence], "having maturely deliberated upon the proceedings had in the cause and the offences proved, exacting by law deprivation of ecclesiastical promotion, do hereby pronounce, decree, and declare that the said Reverend Edward Drax Free, Doctor in Divinity, by reason of the premises, ought by law to be and is deprived of his ecclesiastical promotions, **[495]** and especially of the said rectory and parish church of Sutton; and all profits and benefits appertaining thereto; and do condemn him in costs."

BEARBLOCK AND BEARBLOCK *v.* MEAKINS. Arches Court, Trinity Term, 21st July, 1829.—To set out the tithe of potatoes by the tenth basket, as raised, and immediately remove the nine parts is not sufficient: a reasonable quantity must be raised before the setting out in order to afford to the tithe-owner a fair opportunity of view.

[See *Thompson* v. *Bearblock*, 1832, 3 Hagg. Ecc. 795.]

This cause was instituted by Walter and John Bearblock for the recovery of certain tithes of potatoes. The libel, in substance, pleaded:—

1. The right of New College, Oxford, to the tithes of Hornchurch parish Essex; and that Walter and John Bearblock were the lessees thereof.

2. The 2 & 3 Edw. 6, c. 13.

3. That Meakins occupied, in the parish, two farms (home and Mayland's Green), containing 240 acres, of which, in 1828, he cropped twenty-three acres with potatoes.

4. That in 1826 he cropped three acres of the home farm with potatoes, and took up the crop, leaving the tenth row as tithe; that he was then informed the tithe would not be taken in such manner, but that it must be lawfully severed by heaps, or be measured; which he refused to do: that he afterwards took up the tithe rows and sold the same, and that such tithe is due.

5. That on the 29th June, 1828, Meakins sent the titheman notice that he should take up potatoes on the following day from half past seven till six, but did not mention any hour when the tithe should be viewed, and that he offered that, if sacks were sent, his men should **[496]** sack the tithe for the lessees' accommodation: that on the 30th of June, Brett, the titheman, and George Bearblock attended at the home farm about nine o'clock, when they found the men taking up potatoes and setting out the tithe by the prittle basket, the contents of which were shot down on the ground. That they were unable to compare the tithe, and therefore left the same, whereby it was lost.

6. An offer to sell the tithe at 30s. per acre; that Meakins would not give more than 16s.; that, upon this being refused, Meakins declared "he must go on setting the tithe out as before." That George Bearblock then proposed to take the tithe by equal heaps, or by measure, or by weight, at the end of the day's taking up, or twice a day; that Meakins not agreeing, George Bearblock then said "that if Meakins continued to set out his tithe as he had commenced it would be left on the ground, on which Meakins declared that he had not settled for the tithe of 1826, and that he did not choose to have the tithe set out by heaps or measure."

7. Further notice for 2d July, when the tithe was set out by the 10th prittle basket as before, and left on the ground.

8. That, to harass the titheman, notice was given for the 4th and 7th July to take up potatoes at Mayland's Green farm from seven till six, and to tithe hay at seven, and also hay at the home farm at six o'clock on the 7th July; that on such days the tithe was set out as before.

9. That the tithes of potatoes in Hornchurch parish are for the most part compounded for, **[497]** but, if taken in kind, they have been usually, when dug up, put into sacks, and at the close of the day, or on the next day, the whole quantity has

(*a*) Upon the power of the Judge of the Arches Court to pronounce a sentence of deprivation, see the note to *Oliver and Toll* v. *Hobart*, vol. i. p. 47.

been measured, and the tithe severed in the presence of the titheman; that on no occasion has the tithe been tendered in prittle baskets. That, on the 4th July, George Bearblock inquired of Meakins "whether, by his offer to put the potatoes into sacks, he meant to put the whole into sacks, or only empty the tithe prittle baskets into sacks, instead of on the ground;" that Meakins declared "he only meant to put the tithe in sacks, and that he had no intention of altering his mode of setting out the tithe."

10. Notices for the 9th, 10th, 11th, 14th, 16th, 17th, and 18th of July. That on some occasions when Brett attended he found no potatoes taken up, and, at others, that the tithe had been set out by the prittle basket.

11. Notice, 20th July, to remove the tithe.

12. Notices for 21st, 22nd, 23rd, 24th, 25th, and 26th of July, and several subsequent days. That on the 4th of August Brett attended at the home farm at five o'clock in the morning, and after waiting twenty minutes without the work people coming, he went away.

13. Notices for the 30th of September and following days at Mayland's Green farm, and for the 1st and 3rd of October at the home farm (distant upwards of a mile from the other farm), and for tithing pigs on the 1st. That, on the 3rd, Brett and Wells went to the home farm, and afterwards to Mayland's, where the men were taking up "Manleys," potatoes of early growth and greater value, and separating from them the "stags," which ran from the true sort **[498]** and were much inferior; and that the tithe set out consisted of two heaps of "stags," and the eighteen baskets removed were filled with "Manleys."

14. Notices for the 6th and following days at the home farm. That Brett attended at the home farm at seven o'clock, and found that ten baskets were not nearly filled; that he then went to the other farm, where no tithe was set out, and on his return to the home farm at a quarter past ten he found one basket shot down, nine having been removed; and, on again proceeding to Mayland's, two baskets out of twenty had been shot down; that the tithe could not be compared, and was left.

15. That Brett attended, on the 11th of October, at the home farm at ten minutes before eight o'clock, when two heaps were shot down, eighteen baskets having been carried away. That he then proceeded to Mayland's about five minutes past eight, but no potatoes had been taken up. That, on the 24th of October, George Bearblock attended with Challis, an additional titheman, and found the nine parts of the potatoes dug up already removed.

16. Notice to remove the tithe.

17. The several notices, as exhibits.

18. That the parish of Hornchurch is extensive, and, with the tithing connected therewith, consists of about 7000 acres.

19. That the tithes libellate for 1828 were of the value of at least 40l.

20. That application had been made, without success, to Meakins to satisfy the lessees for the tithe.

21, 22, 23. Concluding articles.

[499] On this libel five witnesses were examined.

Meakins, in his answers, admitted the notices and the mode of setting out the tithe to have been as alleged; but denied any unfairness or vexatious conduct, or that there was any usage in Hornchurch parish of setting out potato tithe by the heap, or by measure.

The Reverend James Bearblock, the father of the promoters, deposed that, for ten years, it was the usage in Hornchurch parish to set out the tithe by sacks or measure; he did not, however, mention at what period: and he also stated that the tithe, when taken in kind, had since 1826 been usually offered in sacks heaps. It appeared from his evidence that Meakins was almost the only farmer who did not compound.

On the part of Meakins an allegation was admitted, which pleaded:—

1. That until 1826 the tithe was, without any objection, for many years taken by the tenth row by Messrs. Bearblock and their father, the former lessee. That the tithes have never, when taken in kind, been set out by measure at the end of the day, but have since 1826 been usually tendered in prittle baskets: that the tithes of potatoes in Hornchurch parish, and vicinity, have been, and still are, frequently taken in kind by the tenth prittle basket.

2. That the tithe rows of potatoes for 1826 were sold in consequence of the Messrs. Bearblock then refusing, for the first time, to take the tithe in that manner; and that they had refused 3l., the produce thereof, after deducting 16s. for carriage and market charges.

3. That, on the 3d of October, no "stags" were **[500]** taken up; but only "Manleys" and "white kidneys" (of equal value); and that the tenth of each sort was fairly set out.

4. That the potatoes were always taken up as near the times appointed by the notices as was practicable; that the tithe was always duly and fairly set apart; the contents of one prittle basket being shot down before the removal of the other nine, which were then carried to another part of the same field, only a few yards distant, for washing and sorting. That the tithe could not have been set out in the manner required by the lessees without losing the next day's market and diminishing the value; and that there was always time for the titheman to compare and select the tithe, if he attended upon notice.

5. The custom in Hornchurch parish, in the early part of the season, to send potatoes to market the evening on which they are taken up; and the necessity of washing and sorting them during the day, which could not be done in time for market if the tithe were set out as required by the lessees; and that great injury would be thereby sustained, and from the exposure of the potatoes to the sun and air. The further custom of preserving potatoes in the latter part of the season, for which some are taken to clamps or buildings during the day: that if the lessees' mode of tithing were adopted they could not be got to clamp the same day, and would be greatly injured from the frost.

6. That the titheman has declared frequently that the tithe was justly set out.

7. Notice to the lessees to remove the tithe, and that, in consequence of their refusal, it either rotted, or was stolen.

[501] 8. The offer by Meakins to compound at 16s. per acre; and that G. Bearblock declared if Meakins continued to set out the tithe, as he had begun, it should cost him 500l.(*a*)

9. The value of the potato tithe in 1828 was not more than 21l. 10s.

10. Concluding article.

On this allegation fourteen witnesses, consisting of landholders, farming men, and potato salesmen, were examined: and they deposed that, by adopting the mode of tithing required by the lessees, great injury would accrue to the crops; that, though tithing by the prittle basket was not in use in Hornchurch parish, it had been allowed; and was the custom in the parishes of Ongar and Chigwell; and that the prittle baskets used by Meakins were all of equal size.

The answers of Messrs. Walter and John Bearblock admitted that the setting out the tithe by the tenth row was, by an arrangement between the farmers and themselves, acquiesced in and never objected to till 1826; that they refused to accept the produce of the tithe for 1826; that notices were regularly given, and that the titheman did not invariably attend; they further admitted the usage in Hornchurch parish as to sending the potatoes to market and the clamping of them; but denied that the setting out the tithe in the mode they required would interfere with a continuance of that usage.

Lushington and Dodson for the Messrs. Bearblock. **[502]** There is no decided case nor direct authority as to the mode of setting out the tithe of potatoes; but, upon general principles, it must be set out on the spot where they are taken up, and in such a manner that the tithe owner's proportion may with fairness and accuracy be ascertained. The farmer cannot legally set out his tithe in single potatoes: but when the tithe owner or gatherer is expected to attend, there must be a reasonable quantity ready for inspection. The mode of setting out tithe in prittle baskets cannot be sustained. There are two objections to it: first, a prittle basket is not a legal measure (it is supposed to contain two-thirds of a bushel, but the size varies); secondly, if such a mode of tithing be sanctioned and pursued, the tithe gatherer, instead of viewing at the close of the day's work, must be on the land all the time the labourers are employed. The lessees have in this case offered that their agents should attend twice a day, and that is beyond what the law requires. The tithe

(*a*) This declaration was proved by the evidence of George Bearblock.

would be properly set out when capable of being taken either by weight, heaps, or sacks.

Per Curiam. Do heaps contain precisely the same quantity?

Argument resumed.

No: but in that mode of tithing the agent has an opportunity of judging from sight and may make his selection. The system adopted by the defendant cannot be sustained even if it were proved manifestly convenient: the con-**[503]**-venience or inconvenience of the farmer will not justify a departure from established rules and principles. Tithe in kind cannot be rendered without inconvenience.

It is alleged that the profits of the farmer are diminished if the potatoes remain exposed to the sun; and that it is necessary to sort them with all possible expedition for market: but it cannot be a matter of necessity that they should thus be sorted in the first instance; and if the article is so tender that in June it requires to be speedily housed, where is the necessity of adopting the same plan in October? Tithe, in general, would be greatly depreciated if any mode should be enforced that would require the gatherer to be constantly on the ground. Suppose, in gardens, the tithe owner were obliged to take every tenth strawberry, lettuce, or root of celery, the value of the tithe would fall infinitely short of the expence of collecting it. If the agent attends at the end of the gathering of each day it is sufficient. In the West of England, in setting out tithe due upon fish, the fishermen are bound to give notice of the arrival of the boats and the time of setting out the tithe, and to strew the fish upon the shore for inspection. *Lord Stamford* v. *Luke* (1 Wood, 526. 1 Eagle and Younge (Tithe Cases), 699).

For the general principles in respect to setting out tithes, and as analogous cases, they cited *Beaumont* v. *Shilcot* (3 Gwill. 944. 3 Wood, 171. 2 Eagle and Y. 226). *Bosworth* v. *Limbrick* (3 Gwill. 1110. 2 Eagle and Y. 310). *Knight* v. *Halsey* (7 T. R. 86. Gwill. 1554. 2 Eagle and Y. 438). *Halliwell* v. **[504]** *Trappes* (2 Taunt. 54. 2 Eagle and Y. 572). *Hall* v. *Macket* (3 Anst. 915. 4 Gwill. 1460. 2 Eagle and Y. 464). *Erskine* v. *Ruffle* (3 Gwill. 961. 2 Eagle and Y. 235). *Shallcross* v. *Jowle* (13 East, 261. 2 Eagle and Y. 607). *Franklin* v. *Gooch* (3 Anst. 682. 4 Gwill. 1441. 2 Eagle and Y. 426). *Tennant* v. *Stubbing* (3 Anst. 640. 4 Gwill. 1438. 2 Eagle and Y. 428).

The King's advocate and Pickard contrà. It is unnecessary to comment upon the cases cited for the lessees, it being admitted that there is no precise or positive rule specifically laid down as regards, in particular, the mode of setting out potato tithes. The uncertainty of the law in respect to the mode of tithing this produce is manifest from what is stated and proposed on the other side, that tithing by sacks, weight, or even heaps, would be more fair towards the tithe owner, and not less convenient to the farmer, than by prittle baskets. But the nature of the crop must be considered; it is such as requires immediate protection from the weather at all seasons. In October the potatoes, when taken up, are housed; and it is illegal to remove the produce before the tithe has been ascertained. The profits of the grower, it is proved, are much diminished if the potatoes become bruised or discoloured: hence the risk of an exposure of his crop to the sun and the weather. The potatoes, when put into baskets, are in a fair and fit state for selection: it is not necessary that the baskets should be of a legal standard and measure; and it is in **[505]** evidence that the prittle baskets used by the defendant are all of an equal size; and fraud is not imputed. In *Fanshawe* v. *Brittain* (2 Younge and Jervis, 575) the mode of tithing young peas in Dagenham parish, not many miles distant from Hornchurch, was recently discussed. The peas were, in that case, gathered in small baskets, and from thence put into sacks, and the tenth marked for the tithe. Each sack was calculated to contain three bushels; and it was proved that tithing this commodity by sacks was usual in the adjoining parishes (as prittle baskets are used for tithing in the neighbouring parishes to Hornchurch); that any other mode would greatly injure the produce, as an exposure to the sun and air for any length of time after they were gathered would destroy the bloom and diminish the value in the market. And Lord Chief Baron Alexander said: "As to the mode of tithing peas under the same circumstances, I find very little authority. It seems clear that it must be by measure. I can see no objection to a three-bushel sack as a measure, it being understood that the tithe owner, if he demands it, shall be at liberty to have the sacks opened and see their contents measured. This appears to be a mode of proceeding agreeable to principle, to analogy, and consistent with what the bulk of the evidence states to be the most convenient to the farmer, and without

any danger to the tithe owner." And again: "The plaintiff has not averred, much less proved, that, if his agents had accepted what was offered, the [506] incumbent would have been injured to the extent of one farthing; while the defendant proves that, by leaving the produce exposed to the sun and air until the evening, it would have been considerably injured." The Chief Baron accordingly held that this was a good mode of setting out the tithe, and directed the plaintiff to pay the costs of that part of the suit.

Per Curiam. The peas in that case were put into sacks found by the occupier, and each sack contained a definite quantity, which, it is said, a prittle basket, in general, does not.

Argument resumed.

One mode proposed for tithing potatoes is by heaps; but in *Blaney* v. *Whitaker*, cited by Le Blanc, J., in *Newman* v. *Morgan* (10 East, 12), Mr. Justice Buller, agreeing with Mr. Justice Ashhurst, said, "That if the farmer put his turnips into heaps for himself, he should do so for the parson; but if he did not do so for himself, he need not do so for the parson." Some crops may, as soon as gathered, be put into sacks; but then it is the first act—cotemporaneous with the severance, as in the case of hops. But the farmer is not bound to find either baskets or sacks for the tithe owner.

Per Curiam. If the grower puts his crop in the first instance into sacks for his own convenience, he [507] is bound, I apprehend, to do the same for the clergyman.

Argument resumed.

It is calculated that, to fill ten prittle baskets, three quarters of an hour would be occupied: it is not then necessary that the tithe gatherers should be in the field all day. The length of time in collecting the tithe must be estimated according to the nature and extent of the crops. Hornchurch contains nearly 7000 acres; and, as the lessees have engaged to take the tithes of the whole parish, they should employ an adequate number of assistants, and avoid subjecting the farmers to inconvenience, difficulties, and loss. The prittle basket, if not a legal, is a fair, measure, and the tithe agent may make his election.

Lushington in reply. *Fanshawe* v. *Brittain* is in favour of the lessees: they are willing to take the tithe when put into sacks. The grower must find the sacks in the first instance; but he need not allow the clergyman to carry them away: so in the case of milk: the farmer is obliged to find pails for a certain time, but they must not be taken away with the tithe.(*a*)

[508] *Judgment—Sir John Nicholl.* The single question in this case is whether certain tithes have or have not been legally set out. The facts which are in any degree controverted, and to which nineteen witnesses have been examined, are not important; the material facts are all admitted in the answers.

The suit is instituted by the lessees of the tithes in Hornchurch parish, suing a farmer for tithes of potatoes, alleged to have been subtracted. It is admitted that the crops were grown and were titheable; and there is no question that the lessees were entitled to receive them; but, on the contrary, it is alleged that the tithes have been in effect paid, by having been legally set out after due notice; and the question is whether the mode in which they were set out was legal.

The law requires that the tithe must be separated from the nine parts on the spot where they arise, and before they are removed; it also requires that notice shall be given of the setting out the tithe, in order that the tithe owner may have an opportunity of viewing it before removal, so as to ascertain that the tenth part is fairly set out. Tithe is not due before the severance of the crop from the soil; it must be set out after severance; but not immediately even after severance, for a certain degree of preparation is required, as with hay which is to be put into cock.

Here, it is not contended that the setting out in rows, before the potatoes are dug, is legal; that mode is abandoned; and the defendant admits that he owes for the tithes of 1826, and [509] has constantly offered to pay the amount which they produced,

(*a*) In *Bearblock* v. *Hancock*, 2 Carr. and Payne, 425, on assumpsit for tithes tried at Chelmsford Spring Assizes, 1826, Graham, B., held: "The time when the tithe of potatoes become the property of the parson is when they are dug up and laid in heaps, and not when 'boughed out,' * while remaining in the ground."

* Boughs placed in the field to mark out the different proportions of the farmer and tithe owner.

viz. 3l. The disputed point is upon the mode of setting out the tithes of last year, of 1828, to which the farmer resorted when tithe owners objected to accept the tenth row.

There is no special custom pleaded to exist in this parish in respect of the setting out potato tithe: but on the 29th of June Meakins, the farmer, sent a notice to the Messrs. Bearblock, the tithe owners, to this effect—"That he should take up potatoes on the following day from half past seven in the morning till six in the afternoon:" so that there was to be a tithing all day as the crop was dug up: the answers to the fifth article of the libel admit that such was the fact.

A great many other notices are exhibited; but they are all to the same effect. On the next morning, the 30th of June, Meakins' men, at the time appointed, dug up the potatoes; they filled ten prittle baskets, then turned out one for the tithe, and removed the other nine; this is also admitted in the answers upon the fifth article; and so they began again by digging up more, setting aside one, and removing the nine. If, therefore, two hundred baskets are dug up in the course of the day, there will be twenty settings out—twenty tithings: and in order to view the tithes so set out, the tithing man must stand by all day to watch and inspect. If, therefore, fifty farmers dig potatoes on the same day, even without any fraud or combination (to which, however, such a mode would be much exposed), the tithe owner must employ fifty tithing men to view and to watch.

[510] Is there any thing in tithe law that, either in principle or analogy, establishes the legality of this mode of setting out tithe? It may be more convenient to the farmer in preparing his crop for market; so it may be more convenient to tithe hay or barley in the swathe, and not in the cock: or to throw aside every tenth sheaf as it is bound and remove the other nine; but that is not the true principle. The convenience on both sides must be looked at, and a spirit of mutual accommodation and mutual sacrifice must prevail. Here an offer was made by the tithe owner to attend twice a day, to tithe all that was drawn before noon and all that was drawn in the afternoon. Such an arrangement, it seems, would furnish all the accommodation of sending the potatoes to market, with very little, if any, additional trouble or inconvenience to the farmer. This, I think, is established by the evidence of Lawrence, Meakins' own witness. It has been held that the farmer is not obliged to cut the crop of a whole field in one day; but it is also held that he must cut a reasonable quantity before tithing it, and fairly and bonâ fide set it out. So, I apprehend, a reasonable quantity of a potato crop must be raised before setting out the tenth for inspection and view.

Without, then, laying down any precise rule what quantity must be raised before the tithe is set out, and the nine parts removed (for I am not bound to decide how the arrangement should take place; and it may in some degree depend upon the circumstances of each case, and must be done with a due regard to fair and reasonable accommodation on both sides; the nature **[511]** of the crop, too, may require, doubtless, some consideration); yet it seems clear that, setting out every prittle basket as soon as that quantity is raised, and then removing the nine parts, and so going on through the day, is not a setting out binding on the tithe owner, and consequently is no payment of the tithe. There is no authority, no principle, no analogy to support such a mode.

The Court, therefore, pronounces for the tithes libellate, and the value proved, which appears to be 26l. 5s.; and also for the sum of 3l. for the tithes of 1826; but allows the sixteen shillings charged for the carriage of the goods, because their value was enhanced by the removal to market: and the Court condemns the defendant in costs.

HARRIS *v.* HARRIS. Arches Court, Trinity Term, 4th Session, 1829.—The wife's adultery being proved, and a similar charge against the husband failing, his relief is not barred by a slight want of caution on his part.

On appeal.

From the sentence of separation pronounced in favor of Captain Harris in the Consistory Court of London (see *Harris* v. *Harris*, supra, 376), Mrs. Harris appealed: and the cause was argued upon the same evidence and by the same counsel as in the first instance. The counsel for the wife submitted that the Court might arrive at one of four conclusions.

[512] First. That adultery was proved against the husband, and not against the wife.

Secondly. That it was proved against the wife, and not against the husband.

Thirdly. That it was proved against both the one and the other.

Or, fourthly. That it was proved against neither party.

That if the Court should arrive at either of the first two conclusions, it must necessarily pronounce a sentence of divorce; but if at either of the latter, there must be a dismissal of both parties: and that, at least, ought to have been the judgment of the Court below. They maintained that the decision was a departure from principle and from precedent; that the charge of adultery, alleged against the wife, was satisfactorily disproved, while of the husband's guilt, there was strong presumptive evidence —stronger than what had frequently been held, in the ecclesiastical courts, to amount to a legal conclusion of guilt: and they cited *Loveden* v. *Loveden* (2 Hagg. Con. 2) to shew that it was "a fundamental rule that it is not necessary to prove a direct fact of adultery." (*b*)

[513] *Judgment—Sir John Nicholl.* This appeal from the Consistory Court of London was, originally, a suit for separation by reason of adultery, brought by the wife against the husband; and the result of the cause in the Court below, though not irregular, was not very common. The husband denied his own guilt, and gave in a recriminatory charge; both parties prayed a separation: and the sentence of the Court was, that the wife had failed to support her libel, but that the husband had proved his allegation; and accordingly decreed a separation. From that sentence the wife has appealed, and the cause has been heard in this Court on the same evidence.

The proceedings are voluminous: several pleas were admitted; and many witnesses examined. The wife gave in her libel; the husband, a defensive and recriminatory allegation: a second allegation on the part of the wife, and a second responsive allegation for the husband, were also admitted. For the wife, twenty-three, for the husband, fourteen, witnesses were examined, making together thirty-seven.

If, on a consideration of this case, after the full and able argument it has undergone, I had been obliged to differ from the sentence of the Consistory Court, it would have been necessary to enter minutely into the evidence in order to shew the grounds on which, in my opinion, the sentence could not be sustained: but as I have arrived at the same result—presuming that the Chancellor of London stated the circumstances in detail—I do not feel called upon to repeat them. I may here observe **[514]** that I was induced to hear a reply, in order to afford Captain Harris' counsel an opportunity of saying any thing further, that they might consider advisable, in defence of the character of the second lady with whom he is charged to have been guilty, and to repel the imputations which parts of the evidence were calculated to reflect upon her.

The parties married in November, 1821: the husband being a post-captain; the wife, the daughter of a gentleman residing near Fulmer, in Buckinghamshire. Soon after their marriage they went to reside near her father's; and have had two children —a son and a daughter. In August, 1823, Captain Harris was appointed to the command of the "Hussar" frigate: after having been employed for a short time at Lisbon, he came back to this country; in December, 1823, or January, 1824, he sailed to the West Indies; and returned to England on the 13th of October, 1826. Upon quitting England his wife and one child were left at Fulmer; and another child, of which Mrs. Harris was pregnant, was born after his departure. During Captain Harris' absence a change of circumstances induced his wife's parents to go to France; she did not accompany them; but, after staying some time at Fulmer, she went to various places—Blackheath; Sloane Street; Brighton; and paid long visits to Mrs. Cary, at Fulham: but of her various residences there is not much evidence before the Court. On the 4th of September, 1826, the "Hussar" being expected, she, at the invitation of Captain Harris' friends—Mr. and Mrs. Mottley—went with her children to Portsmouth to meet her husband: **[515]** there she remained five weeks before the arrival of the "Hussar," which had been detained on her homeward voyage by orders

(*b*) In the course of the argument a part of Mr. Mottley's evidence was again objected to (see ante, p. 399, in notis): but the Court—having directed the ninth article of the libel and the twenty-second article of the first allegation, with Mottley's evidence upon it, to be read—overruled the objections, intimating at the same time some doubt whether the objections could regularly be renewed in the Court of Appeal, as the admission of the evidence by the Judge of the Consistory Court formed no part of the appeal.

to go to Vera Cruz. On the 18th of October the "Hussar" went round from Portsmouth to Chatham: Mrs. Harris did not take a passage in the vessel, but, on the 25th, returned to London by land; and was for some time on a visit at Mrs. Cary's while a house in Brompton Crescent, which Captain Harris had taken on the 23d of October, was preparing. In this house they took up their residence early in December, and continued in it till their separation in March, 1827.

After this short history of their cohabitation I will proceed first to consider the charge brought by the wife against her husband: it has this peculiarity—that the subject of it was not the cause of the wife's withdrawing from cohabitation. For what are the facts here? First, Captain Harris having taxed his wife with imprudence during his absence, she wrote a letter confessing great impropriety and begging forgiveness: afterwards, Captain Harris having, on further inquiry, accused her of criminality, and though still desirous not to expose her publicly, insisted on a separation and obliged her to quit his house, she suggested no charge of adultery against him; but at length—after this admission of her own misconduct, and after thus submitting without a hint of her husband's guilt (either in any declaration to Mottley, or in her letter of February) to be driven from her husband's roof under this degrading imputation on her honor—she institutes a suit alleging adultery on his part, and praying a sentence of separation. Her case, then, does not set out very strongly.

[516] The first charge in the libel is, that while Captain Harris was in the West Indies, and at Vera Cruz, a Mrs. Waverly remained with him on board the "Hussar" for several days; that many familiarities took place between her and Captain Harris, and that they committed adultery. Two witnesses, the surgeon and the captain's clerk, examined to this charge, both negative it: they are the wife's own witnesses; but they depose that they never saw any familiarity, and that they do not believe that any adultery or indecent act occurred. There are, besides, some facts to explain the circumstances under which Mrs. Waverly was received and continued on board, such as will not warrant the Court even in suspecting any criminal intercourse between her and Captain Harris.

The other charge is with a lady of rank and character; and which, if unfounded, is cruel and unpardonable. It appears that while at Barbadoes, Captain Harris became acquainted with the chief-officer of engineers and his lady. In May, 1826, this officer was obliged, by duty, to make a visit of inspection through the colonies; and Captain Harris undertook to convey him. This officer's lady was in ill-health and recommended to accompany them: on their return her health was not improved; and under the advice of medical gentlemen her return to England was determined upon. Captain Harris engaged to bring her to this country; and she came home passenger in the "Hussar," attended by two female servants—an elderly woman and a black girl. When the ship was at Vera Cruz this lady expressed a great anxiety to procure a passage direct to England; but this she did not accomplish. When she landed at Portsmouth **[517]** she went to an hotel, and was there visited by Mrs. Harris and the friends with whom that lady was staying. She then came to London, and took lodgings, first in Regent Street, and afterwards in Sloane Street, near the residence of her own family. There both Captain and Mrs. Harris visited her: Captain Harris shewed her attentions; but they were such as the circumstances would naturally lead to; and did not go beyond that polite and kind civility which was due to her, and which was to be expected from a gentleman intrusted with the protection of a friend's sick wife.

The two witnesses who were on board the "Hussar," and have been produced on the libel, negative any suspicion of improper familiarity during the voyage. The cabins of Captain Harris and the lady in question were on different sides of the ship, though of course that did not exclude a possibility of intercourse. Again, though it is pleaded that Captain Harris visited this lady at her lodgings, and every witness is produced that could be mustered to state some impropriety, yet (with one single exception) there is not a witness who speaks to the slightest familiarity or impropriety of conduct: there is not one that believes any criminality, except a young girl—Mary Ann Payne; and she relates circumstances so utterly inconsistent with probability, and all the other facts, as to deserve no credit whatever, even if she were not contradicted by the other evidence in the cause: her story is so at variance with probability that it is sufficient to defeat itself. The impression made by this witness' testimony on my mind is that, so **[518]** far as it would tend to prove criminality, it is mere

invention and gross falsehood. In this part of the case, without entering into more detail, I fully concur in the sentence that Mrs. Harris has failed in proof of her libel. The charge seems to have been framed upon a notion that the best means of defence was to commence the attack.

I now proceed to the second branch of this case—the charges against the wife.

It is unnecessary for me to trace Mrs. Harris to an earlier period than the beginning of September, 1826, when she and her children went to Portsmouth to await the expected return of the "Hussar." Conduct of greater forwardness, more dissolute short of actual prostitution; expressions, written and spoken, more grossly departing from the modesty of a virtuous matron; passions more inflamed; advances more impudent and barefaced, cannot well be imagined: and the proof depends not merely on the depositions of the witnesses, but is confirmed by her own letters, coupled with admissions of great improprieties, at least, and expressions of deep contrition. Against a married woman—the mother of two children, the return of whose husband, after an absence of two years on the public service, was daily expected, who could write such letters to officers of the garrison, and act and talk as she did, and who had a mind thus tainted—there would not be much difficulty in presuming criminality whenever a favourable opportunity and other circumstances to raise a suspicion occurred. Whether her morals had become corrupted by the society she so much **[519]** cultivated during her husband's absence; whether her passions were inflamed by his expected return; whether she considered there was less risk of detection by pregnancy on the eve of his arrival, it is obvious from her declarations that her affections no longer were directed towards their legitimate object: the meeting with her husband was not the gratification she anticipated; she sought other objects.

Looking to these circumstances as detailed in the evidence—for to state the particulars or to read passages from these letters is unnecessary, and therefore from their corrupting and demoralizing tendency unfitting—the Court has a strong judicial conviction that, on the 13th of September, 1826, at Stanstead Wood, Mrs. Harris was guilty of adultery with Captain Latouche. The subsequent circumstances, if confirmation were required, tend strongly to strengthen that conviction. The "Hussar" sailed for Chatham on the 18th of October, after Captain Harris had slept on shore five nights; she declined to accompany her husband in that vessel, but promised to return to London on the following Monday, the 23rd; yet she lingered at Portsmouth till the 25th.

The day after the vessel had sailed for Chatham a conversation took place between Mrs. Harris and Mrs. Mottley, to which the latter thus deposes on the eighteenth article: "At dinner Mrs. Harris complained of being poorly and could not eat any thing; deponent enquired the cause, and Mrs. Harris said, 'I'll bet you five pounds I am in the family way;' deponent said, 'How can you fancy such a thing?' to which she replied, 'I'll also bet you five pounds that I **[520]** shall be confined at the end of eight months; adding also, 'that she had gone only eight months with one of her children, and that the same thing had happened to her sister.' It then, for the first time, struck the deponent that the party in Stanstead Wood had taken place exactly a month before, and deponent then believed and still believes that such conversation was addressed to the deponent for the purpose of misleading her, and of accounting hereafter for the birth of any child of which she might be delivered within a period less than nine months from her husband's return, and deponent believes an act of adultery was committed on the 13th of September, 1826, between Mrs. Harris and Captain Latouche."

Captain Harris, at the time at which this conversation took place, had been at home only six days, yet she anticipated pregnancy and an eight months' child: these are very speedy suspicions. The opinion and inference of the witness do not guide the Court, but the great difficulty is in not arriving at the same conclusion. Mrs. Harris was, in truth, pregnant; for, in the month of February, she miscarried, which was the reason she was allowed to remain for some little time in the house of her husband after their separation. Upon this part of the case, again, I concur with the sentence of the Chancellor of London.

Against this proof of guilt another ground of defence was attempted to be set up, namely, that Captain Harris was the corrupter of his wife, the author of his own dishonour. Two instances are adduced: first, that, soon after his marriage, **[521]** he invited a friend, Captain Vincent, who was present at the marriage, but who at the

time in question was unwell, to spend some days at the cottage at Fulmer, and that he slept in an adjoining room, between which and Captain and Mrs. Harris' room there was only a thin partition. To rely upon this as any justification of her adultery five years after, or as any bar to her husband's relief, or that it was considered by either of the parties as attended with any impropriety, is hardly worthy of observation; it was not, indeed, much pressed in argument.

The other instance is that he introduced his wife to Mrs. Cary. It appears that Captain Harris and his family had been for a very long period—thirty years—intimate with Mrs. Cary. Mr. Henry Harris and his daughter were residing at her house. Captain Harris and his wife had very little intercourse with her before he sailed to the West Indies; and it was during his absence that Mrs. Harris herself cultivated this acquaintance into very great intimacy. The general conduct and deportment of this lady is described as quite consistent with decorum; though it is true that she was visited by an illustrious individual, now no more, on terms which nothing can justify; at the same time there are circumstances arising from the impossibility of a legal marriage which may, in the eyes of the world, distinguish such from other immoral connections, and may be received in some degree as an extenuation.

It is not necessary for the Court to assent to the strict propriety of Captain Harris making such an acquaintance for his wife. But however much right moral feelings may be dis-**[522]**-posed to censure the overlooking of any departure from female virtue, under any circumstances, and thereby giving a degree of countenance to immorality and vice, yet sitting here to administer the law, it is impossible to hold that the circumstances in this case referred to will bar the husband of the remedy which he claims on account of his wife's adultery.

Upon the whole, the sentence appealed from must be affirmed.

BEARE AND BILES *v.* JACOB.(*a*) Arches Court, Trinity Term, 4th Session, 1829.

The minute of Court, ultimately entered in this case, was as follows:—

The Court "directed Jacob to appear absolutely, but nevertheless on the special ground that inasmuch as the sub-dean of Sarum, by whom the order or decree appealed from in this cause was made, and the chancellor (and, as such, the Judge of the Consistory Court of the Lord Bishop of Sarum) is, and is admitted to be, one and the same person, the appeal from the said order or decree lies to this Court, and not to the Consistory Court of the Lord Bishop of Sarum, as, under other circumstances, it would lie; the Court of the said Sub-dean not being a peculiar and exempt **[523]** jurisdiction as erroneously alleged: and it was further directed that a special copy of this minute should be forwarded to the registrar of the Court of the Sub-dean of Sarum, and also to the registrar of the Consistory Court of Sarum, in order that no misapprehension might occur as to the grounds on which an absolute appearance was directed to be given in the cause."

[524] WAGNER *v.* MEARS. Prerogative Court, Trinity Term, 1st Session, 1829.—Where capacity and volition are established, a party suing in formâ pauperis who after a long acquiescence calls in probate of a will, on a suggestion of incapacity, fraud, and circumvention, may be condemned in costs; and the taxation be suspended.

Curteis on behalf of Mrs. Wagner.

Lushington and Dodson contrà.

Judgment—Sir John Nicholl. The deceased, Ann Jones, died a widow, so long since as the 28th of December, 1821: she left several nephews and nieces of two different branches, viz. three nephews and two nieces of the name of Newbury, and two nieces of the name of Norton. On the 8th of January, 1822, probate of her will dated on the 30th of November, 1821, was granted to Susanna Norton and Sarah Mears (formerly Norton), executors: by this will she left Edward and John Newbury 20l. each for mourning, Samuel Norton 500l.; her plate, household furniture, and trinkets she gave in equal shares to the Nortons; and tied up certain property in trust to pay Edward and John Newbury 2l. a week each; and bequeathed the residue to Susanna Norton and her sister Mrs. Mears. The property was sworn to be under the sum of 14,000l.

(*a*) See this case, supra, 257.

This probate remained undisturbed for seven **[525]** years, and, in the mean time, Susanna Norton died. In 1828 the probate was called in by Elizabeth Wagner, widow (formerly Newbury), a niece and one of the residuary legatees named in a will of January, 1820, and she was admitted a pauper.(*a*) Now, when there had been an acquiescence in a probate for so many years, it was an extreme hardship upon the executrix to be liable to be called upon to substantiate, by proof, the will under which she had so long acted, and that, too, at the instance of a pauper, and where, more especially, no reasonable account was given for the delay. The result of the evidence before me renders this hardship still greater, because it is proved that Samuel Newbury is the real opponent: he applied to all the witnesses, and yet has received his legacy of 500l. under this very will. It would not, therefore, have been convenient for him to have contested this will, because he could not have opposed it without bringing in his legacy, and he would have been responsible for costs: but a pauper sister is put forward, that there is little chance for the executrix, after being harassed with this suit, to get reimbursed the expences.(*b*) After such a course of proceed-**[526]**-ing, every presumption would be in favour of the will that had been acted upon; but, in this case, the proofs are perfectly clear and satisfactory.

The deceased, as I have said, was a widow; and she had lost an only daughter. At Walworth, where she resided, she was acquainted with a gentleman of the name of Whitaker; he became her intimate friend and assisted her in the management of her affairs. In January, 1820, she employed Mr. Whitaker to get a will drawn for her; he took her instructions in writing; he carried them to his solicitor, Mr. Lilley, who, having prepared the draft of a will, brought it to the deceased (whom he had never seen before), settled it with her, transcribed it, and it was executed and attested. By that will the more considerable benefit was given to the Nortons; the same weekly provision was made for Edward and John Newbury; £1000 was given to Samuel Newbury, and the residue was distributed among the five nephews and nieces of that name. Samuel Newbury, who had kept a public house, but had come to reside with the deceased and to manage her household concerns, was, besides his legacy of 1000l., appointed a joint executor with Whitaker; but it appears that he soon lost her confidence, for in September in that year the deceased sent for Mr. Lilley, and by a codicil revoked the appointment of Samuel Newbury as an executor, and substituted her niece, Sarah Norton.

To the validity and fairness of these testamentary acts the Newbury family cannot object; they, indeed, rely upon them. Both sets **[527]** of relations were in habits of intercourse with the deceased, except the nieces of the Newbury branch; but the Misses Norton and Samuel Newbury were not on good terms. In June, 1821, Mr. Whitaker died; he was buried on the 15th of that month; and soon after that occurrence the will and codicil prepared by Lilley, in which Whitaker was an executor, were delivered into the deceased's possession. These facts are not in controversy between the parties.

Mr. Whitaker being dead, it was not improbable that the deceased would set about some fresh testamentary arrangement, and Lilley, not being her solicitor, having never seen her but at the execution of her will and codicil, having never transacted for her any other business, and she having solicitors of her own, Sweet, Stokes, and Carr, whom she had employed for sixteen years, it was natural that she should resort to these, her own, solicitors, for the purpose of altering her will. Mrs. Mears called upon Mr. Sweet to request he would attend the deceased; and if she took the former will off the mantle piece to carry it with her, that conduct was, I think, in no degree suspicious. Mr. Sweet, on the second article of the responsive allegation, thus deposes:—

"On the 21st of July, 1821, Sarah Mears and Susanna Norton called upon the

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(*a*) See *In the Goods of Ann Jones*, vol. i. 81.

(*b*) On the admissibility of a responsive allegation given in on the part of Mrs. Mears, the Court threw out, in reference to the great hardship of this case, whether it ought not (at least before Mrs. Wagner was admitted a pauper to institute this suit) to have required an affidavit accounting for her not having sooner proceeded to call in the probate, and stating her belief that she should be able to set aside the will; more especially when she had been a party to a deed by which she had recognized its validity.

deponent at his office with a message from the deceased, stating that she was very ill and wished him to attend upon her to make her will; and they made an appointment with the deponent to be at the deceased's house, Walworth, on the next Monday for that purpose: they informed him that Mr. Samuel Newbury (whom the **[528]** deponent knew as a nephew of the deceased) would be acquainted that the deponent had been sent for, for the purpose of making the deceased's will. On the appointed Monday the deponent went to the deceased's house, taking with him one of his clerks: the deponent found there Samuel Newbury and Sarah Mears. On being shewn into the deceased's bed room (for she was confined to her bed) and being left alone with her she proceeded to give instructions for her will, and the deponent read each bequest to her as he wrote it down, and so proceeded until the will was complete: it occupied the deponent about two hours altogether; the deponent made no draft of the will but wrote it out at once fit for execution. In the course of the preparation of the will the deponent wished to be informed as to the amount of the deceased's property, and she referred him to Samuel Newbury and Sarah Mears, and the deponent obtained the information he wanted from them and communicated it to the deceased; but she could not then determine as to the mode in which she would dispose of the residue of her property, and the deponent therefore concluded the will by stating that the deceased had not made up her mind as to the mode in which she would dispose of it."

There was, then, no clandestinity in the preparation of this will of June, 1821, for Samuel Newbury was present and privy to it. The disposition of the property is the same as in the will of 1820, except that the legacy to Samuel Newbury is reduced from £1000 to £500, and **[529]** the residue is reserved to be afterwards disposed of. The two nieces, the Nortons, are in this will named executors; it was executed five months before the death of the testatrix; and at that time there is not the least reason to doubt her capacity, or to suggest any influence or imposition.

The deceased was rather far advanced in years; she was about sixty-five, and confined to her bed with a painful disorder, one that rendered moving extremely troublesome, and she grew gradually weaker in body; but, unless the whole account of making this will is a fabrication, and the attesting witnesses are most grossly perjured, her testamentary capacity in no degree failed; and the Court can entertain no doubt of its decision.

As I have mentioned, the deceased resided at Walworth; her two nieces on the Middlesex side of the town: they were her favorite relations; she was confined to her bed, at a distance from them, and with only a young girl and a hired nurse to take care of her. She had no inducement to remain in the neighbourhood of Walworth; Mr. Whitaker was dead, and her nephew, Samuel, could not perform for her those offices which she required, and were only proper for a female attendant to discharge. These considerations quite account for the wish and anxiety of the nieces to receive the deceased into their house, and make it natural that all parties should become desirous of her removal; and it is not unworthy of remark that upon the occasion of her removal from Walworth, Samuel Newbury carried the deceased down to the coach. The residue by the will of July hav-**[530]**-ing been reserved for a future disposition, Mr. Sweet attended the deceased at Miss Norton's house in Charlotte Street, Fitzroy Square: upon that occasion he received from her instructions for a new will; he remained with her a considerable time, while she gave him the necessary directions; he was extremely cautious and particular throughout; and the minute detail of what passed at that interview leaves no doubt in my mind of the volition and capacity of the testatrix; and unless the facts, to which Mr. Sweet has deposed, are entirely fabricated, there is all the necessary proof furnished of the early part of this transaction; and the sequel is taken up and fully established by his partner, Mr. Carr; and the whole of the evidence on this part of the case is corroborated by Hardwicke, a clerk in their house, who was present during the whole of the transaction.

Now against the full and satisfactory evidence of the instructions for, and execution of, this will, and the capacity of the deceased, what is there opposed? Why, three or four old nurses, a young servant-girl, and two great-nephews, who give an opinion that the deceased was childish and incapable; their evidence, however, is extremely loose, and their recollection of facts, after seven years, not to be relied upon: and they depose against, and in contradiction of, the whole conduct of Samuel Newbury, the very person who has brought them forward as witnesses, who was present at the

whole business, whose legacy was reduced from £1000 to £500, and who, therefore, if actual incapacity, fraud, and circumvention existed, was fully aware of all that occurred, and **[531]** had every inducement to bring the matter forward; and yet he acquiesced.

It is indeed to be regretted that he is not the party, and that his legacy has been paid, otherwise the Court might have had it in its power to do more ample justice to the executrix: but all the justice the Court can at present do is to pronounce for the will, and in order to mark that the proceedings are altogether vexatious, to condemn the party, who has called in the probate, in costs: and should she succeed to any property the decree may then be enforced: but while she continues a pauper I shall direct the taxation to be suspended.(*a*)

CRISP AND RYDER *v.* WALPOLE. Prerogative Court, Trinity Term, 19th June, 1829. —A codicil produced under mysterious circumstances eighteen months after the deceased's death—there being no evidence of finding nor of any thing directly connecting it with the deceased—cannot be established on evidence of hand-writing alone, particularly when such evidence is conflicting, and when other circumstances raise a suspicion of the genuineness of the instrument.

This was a cause of proving in solemn form of law a codicil to the last will and testament of William Henry Robinson, late of Denston Hall, Suffolk, promoted by John Crisp and Thomas Ryder, the principal legatees therein named, against the executors of his will. The deceased died on the 12th of November, 1826, and in December following his will (dated on the 6th of December, 1822) and nine codicils were proved. By his will the testator gave certain pecuniary and specific legacies, (amounting in the whole to £1125) to several of his friends **[532]** and servants named in the first codicil. The paper now propounded was alleged to be a further codicil: it was as follows:—

"Denston Hall, September 2, 1823.

"I give and bequeath unto Mr. John Crisp of Denston, Suffolk, the sum of sixteen hundred pounds. I also wish to give to Amy Crisp the sum of two hundred pounds. And I give to Mr. Ryder Charter House London the sum of six hundred pounds. I wish to give to Mrs. Territt Chilton Hall Clare two hundred pounds. I also wish to give to my curate Mr. Seabroke and R. Forbes gardener one hundred pounds each. My will and meaning is that this codicil be adjudged to be a part of my last will and testament. "W. H. ROBINSON."

This paper was propounded (as a codicil in the hand-writing of the deceased) in an allegation of fourteen articles: the fifth of which pleaded: "That on the 19th of May, 1828, a letter or packet sent through the twopenny post-office was delivered to Thomas Ryder, having the post-mark Newgate Street thereon, sealed with a wafer and addressed ——— Ryder, Esq., Charter House; that the said letter, or packet, consisted of the cover or envelope so addressed and the paper writing being the codicil propounded; that advertisements had been inserted in several newspapers, and printed hand-bills circulated at Denston offering a reward for the discovery of the person who put the letter or packet into the post, but **[533]** that no discovery relating thereto had been made."

Phillimore and Dodson in support of the codicil.

The King's advocate and Lushington contrà, were stopped by the Court.

Judgment—Sir John Nicholl. This case lies in a narrow compass; for unless the principles established in these Courts for the security of property are broken through, I can entertain no doubt what decision ought to be given.

William Henry Robinson, the testator, died on the 12th of November, 1826; his will is dated 1822, and he left several codicils of different dates from 1823 to 1826 inclusive. In the month of December, 1826, the three executors, viz. the two Misses Walpole and Miss Jefferson took probate of this will and nine codicils: no other codicil was heard of, nor suggested to have been in existence at that time, nor until May, 1828, when Mr. Ryder received by the twopenny post—in a blank envelope—a paper purporting to be a codicil in the hand-writing of the deceased: this paper is dated September the 2d, 1823; it gives various legacies, and, among others, £1600 to Mr. Crisp, and £600 to Mr. Ryder—the two persons who have since propounded the

(*a*) See *Filewood* v. *Cousens*, 1 Add. 286. *Le Mann* v. *Bonsal*, ib. 399.

instrument in this cause. Where this alleged codicil came from, or who sent it, has never been discovered. Mr. Ryder took all proper steps to trace its history, **[534]** but without success. There rests not the least imputation or suspicion upon Mr. Ryder that he fabricated the instrument, or was in any manner privy to its concealment or to its production. No imputation whatever rests upon him.

But notwithstanding no discovery has been made accounting for this instrument not appearing till a year and a half after the testator's death, these two legatees, Mr. Crisp and Mr. Ryder, have called upon the executors to take probate of it; and have propounded and undertaken to prove it as a codicil. And the true question in the cause is whether there be proof that the instrument is a genuine codicil—the act of the deceased. To this paper there is no attesting witness; the factum depends upon evidence of hand-writing alone; and there is no circumstance that connects the instrument directly with the deceased. Some general regard for the several legatees has been relied upon, as rendering the disposition probable. Now, in the first place, no person would set about the fabrication of an instrument without endeavouring to give the disposition some colour of probability: but looking to all the circumstances in which the deceased stood with reference to these parties at the date of this instrument, it does not appear to my mind even probable that he would have bequeathed these two legacies to Mr. Crisp and Mr. Ryder.

Declarations have also been relied upon; but they are loose and general, not referring specifically to this instrument; and they were made in 1826, when the deceased was residing at Brook House—a lunatic asylum—and labouring under a morbid depression of spirits. The **[535]** proof, then, seems to rest on evidence of the hand-writing.

It is a rule of this Court that evidence of hand-writing alone is not sufficient to establish a testamentary paper without something to connect the act with the deceased: (*a*) and this rule is founded upon the facility there is of imitating hand-writing so closely as to deceive those who are best acquainted with that of the supposed testator. It is therefore required that there shall be something to connect the instrument with the deceased—either that it was found in his repositories at his death, or some direct recognition of it in his lifetime, or else some other circumstances of such strong probability that it was the genuine act of the deceased, as to leave no reasonable doubt on the moral conviction of the Court.

In the present case the evidence of the similitude of hand-writing, even produced by the parties setting up the paper, is not uniform in support of it, while it is opposed by the evidence of other individuals who believe it not to be the hand-writing of the deceased: so that this proof, at best of a loose and unsatisfactory species, is in the present instance conflicting.

There are other circumstances unfavourable to the genuineness of the instrument: the day of the month is written after the name of the month, whereas it is proved to have been the habit of the deceased, almost universally observed by him, to write the day of the month before its name. It was also the habit of the deceased to write his names of baptism at full **[536]** length, and not by initials, to formal instruments, though not to common letters: but to this codicil there are only the initials of the christened names. These, however, are slight circumstances of suspicion, not very much to be relied upon.

But the great difficulty of the case arises from the mysterious appearance of this instrument a year and a half after the testator's death: nor is there any account from whom it came, or from whence it came, or where it was first discovered, or why it had lain so long concealed: no plausible conjecture can be formed in explanation; and this circumstance raises a strong suspicion that the instrument has been a fabrication of much more recent date than the death of the testator. In addition to this, the paper is dated at the head, "Denston Hall, September 2, 1823," which was the testator's usual place of residence. Now it is satisfactorily proved that the testator was not at Denston Hall at that time; but that he had left that place on the 28th of July, had come to town, staid there some time, had then proceeded to Cheltenham, and did not return to Denston till the end of September. That the deceased, therefore, should have formally headed this instrument at Denston Hall, he being for a considerable time absent from thence, is not probable, more especially as there are several other

(*a*) See *Constable* v. *Steibel and Emanuel*, vol. i. 60.

instruments before the Court dated at the place where they were written: but if this instrument were fabricated three or four years after its date, and after the death of the deceased, it is not extraordinary that the person who fabricated it should not have been aware of, or should **[537]** not have recollected, the absence of the testator from Denston Hall on the 2d of September, 1813; and thus have fallen into a mistake, and furnished this additional circumstance of suspicion.

Upon the whole, the judgment of the Court is, that there is a complete failure of proof of this instrument as a codicil of the deceased testator: the Court is not called upon to pronounce that it is a fabrication; but, whether fabricated or not, I must repeat that I fully acquit Mr. Ryder of any participation in the transaction, and that I entertain no suspicion that he was concerned in, or privy to, the fabrication of the paper.

If, however, parties will set up and undertake to establish such a case by proof for the chance of benefit to themselves, they must also be content to do it at their own risk of paying the costs in case of failure. I must, therefore, not only pronounce against the codicil, but feel bound to condemn the parties, who have propounded it, in costs.

HARRISON *v.* STONE. Prerogative Court, Trinity Term, 4th Session, 1829.—The Court of Probate does not admit parol evidence to shew an error in a testamentary paper, unless there be, 1st, some ambiguity on the face of the instrument; 2ndly, the means of obtaining clear and indisputable proof of the deceased's intention.

On protest.

George Harrison, late of the Herald's College, died on the 16th of April, 1821, possessed of considerable personal property. By his will, dated the 8th of April, 1821, and described in the concluding paragraph as "Instructions **[538]** which the testator desires may be formed into his will, and until then, that they should be considered as his last will and testament;" he appointed his nephews, Daniel Charles Rogers Harrison (the residuary legatee), Samuel Harrison (since dead), and Robert Stone, the husband of a great-niece, executors. They took probate on the 27th of April.

In the will was a bequest to Robert Stone in the manner and words following:—"Gives to Mr. Robert Stone all such money as shall be due to *the testator* at the time of *his* decease." (*a*)

On the 30th of March, 1829, a decree issued, at the instance of Daniel Charles Rogers Harrison against Robert Stone, the other surviving executor, citing him to shew cause "why the probate should not be revoked and declared null and void by reason of the omission in the will of the words 'from him' alleged to have been erroneously and incautiously erased; and to accept, in conjunction with Daniel Charles Rogers Harrison, a new probate, with the words 'from him' reinstated in, and made to form part and parcel of, the will, or to shew cause why probate in such form should not be granted to Mr. Harrison."

An appearance was given for Stone under protest, which alleged; "That within two or three days after the deceased's death the will was read over by Daniel Moore, of Lincoln's Inn, the solicitor who prepared it (and also solicitor of D. C. R. Harrison), in the pre-**[539]**-sence of D. C. R. Harrison and others; that D. C. R. Harrison himself gave instructions for the probate of the will without any interference on the part of Stone. That on the 26th of April, eighteen days only after the preparation of the will, Moore made an affidavit that he attended the deceased on the 8th of April, and then by his desire wrote instructions for his will, which, having been read over to, approved and signed by, the deceased, remained in the deceased's possession till his death; that in writing the will deponent committed many clerical errors, and that many alterations were made by the deceased's directions; that having now carefully inspected the will and particularly observed the several alterations, obliterations, and interlineations therein (amongst others, the obliterations of 'me from him,' and interlineations of 'the testator' and 'his' in the bequest in favor of Robert Stone), he saith the whole of such alterations, obliterations, and interlineations were made by him, by the deceased's directions, or with his knowledge and approbation, and previous to the

(*a*) The words in italics were substituted by interlineation. See the judgment, infra, p. 548.

execution of the will." That Stone was not until "several years afterwards aware of the existence of this affidavit; that on the 27th of April probate issued to the three executors, and, when completed, was sent to D. C. R. Harrison, by his directions, who took the sole management of the estate, and that Stone and Samuel Harrison did not interfere in the execution of the will except by joining in the acts of their co-executor for the sake of conformity and under his direction: that very shortly after probate **[540]** was obtained, Stone claimed, under the will, all the money due to the deceased at his death, and that D. C. R. Harrison on such occasion said to him, 'I think you and I can settle it between ourselves, as it would be a pity that any part of the money should be spent in law;' that Stone had since frequently repeated the claim to Harrison, who on such occasions promised to arrange it, and that in consequence thereof Stone had delayed taking legal proceedings to recover the same, but that Harrison at length having refused to settle the matter, Stone filed a bill in Chancery on the 17th of May, 1827, to compel him; and the Master of the Rolls, on the 25th of February, 1829, decreed 'that Stone was entitled to all debts and sums of money due to the deceased at his death.'" It was further alleged, "That Harrison, very shortly after the deceased's death, knew of the alterations in the bequest to Stone, and who was entitled, under the will, to all monies due to the deceased at his death: that Mr. Moore, the preparer of the will, survived the deceased nearly seven years; and that, notwithstanding the premises, no proceedings were taken by Harrison to call in the probate until nearly eight years after the deceased's, and upwards of a year after Moore's, death; nor until after the decree of the Court of Chancery." The protest, in conclusion, submitted, "that under the circumstances alleged it was not now competent to call upon Stone according to the tenor of the decree."

In reply, it was alleged, "That on the 8th of April, 1821, the deceased, being exceedingly **[541]** ill and confined to his bed, caused his solicitor, Moore, to attend him immediately: that on Moore's arrival in the morning of that day the deceased requested him to take down instructions for his will; and Moore, accordingly, from the verbal directions of the deceased, in his presence, and the presence of Sir George Naylor (an intimate and confidential friend of the deceased), wrote such instructions: that in the course, and as part, of such instructions, the deceased said, 'I give to Mr. Stone all the money that he owes me,' meaning a sum of 1500l. due to him from Stone on mortgage with interest; or, in words to that effect, signified his intentions by his will to remit such debt: that Moore immediately wrote down, 'gives to Stone all such money as shall be due to him from him at the time of my death;' but afterwards, in order to make the clause in the third person, made the alteration appearing in such bequest entirely of his own accord, and without having received any directions or instructions to that effect from the deceased: that after the entire instructions had been reduced into writing, and the alterations made, the will was read over to the deceased, and duly executed by him; that the alteration made by Moore in Stone's bequest was made without the knowledge, and contrary to the meaning and intention of the deceased, who never knowingly approved thereof, but remained in ignorance of the effect to the time of his death, and that the deceased never intimated an intention to benefit Stone, beyond forgiving him his debt: that the will was not otherwise **[542]** read over to the deceased, nor was his intention directed to the alteration, and that it was never read over by him; that in the course of the 8th of April, 1821, the deceased observed to Sir George Naylor 'that he thought he had done enough for Stone by forgiving him his debts:' that about two days after the making of the will the same was locked up by Sir George Naylor in a drawer in the deceased's bed chamber, which remained sealed up to the deceased's death." It was admitted "that Harrison took possession of the will, but not to the exclusion of the other executors; and it was averred that the affidavit of Moore was not made at the instigation or procurement of Harrison, who did not interfere therein; and that Stone was not ignorant of such affidavit for several years. It was also admitted that Harrison took the sole management of the estate; but denied that Stone claimed to be entitled to all the money due to the deceased, either shortly after the probate or at any time except as afterwards admitted, or that Harrison ever made the declaration 'that they could settle it,' &c. or that he ever promised to arrange Stone's claims, or that Stone delayed taking proceedings as alleged in the protest; for that Harrison (it being the belief of all the executors that Stone took no benefit beyond the extinguishment of his own debt), with the privity and concurrence of his co-executors, got in and

received all monies due to the deceased at his death, except the debt from Stone, and applied the same for his own use, without any interference or objection by Stone; that, in June, 1821, Harrison, with the privity of Stone, made up the executor-**[543]**-ship account and paid the legacy duty on the residue in which were included the monies due to the deceased at his death. It was admitted that about four years ago Stone observed to Harrison 'that he must have some conversation with him relative to the bequest;' and that, on the 2d of February, 1827, Stone, in a letter to him, intimated, 'that he must have some conversation with him on the subject;' but it was denied that Stone otherwise ever made any claim under the will beyond his own debt, and that he never made any direct claim to the monies due to the deceased until the 22d of February, 1827, when he wrote a letter claiming £4575 as due to the deceased at his death; to which letter Harrison replied, expressing his surprise at the advancement of such a claim, and denying its validity."

It was then stated "that the Master of the Rolls, in pronouncing in favour of the bill of complaint, declared in terms 'that his decree was founded solely upon the bequest to Robert Stone, as it stood in that will of the deceased, of which probate had been granted, not admitting of any latitude of construction, and expressly referred to the Ecclesiastical Court as the proper jurisdiction for trying the question between the parties;' and submitted that the protest be overruled; that Stone be assigned to appear absolutely, and condemned in costs."

On behalf of Stone it was denied "that the executorship accounts were made up, or the duty paid on the residue, with his privity; but that on the contrary they were rendered to the stamp office by Harrison entirely without **[544]** Stone's knowledge, and were not furnished to him by Harrison until 1827. It was further denied that the Master of the Rolls, in any manner, referred the question to the Ecclesiastical Court; and alleged that the decree does not contain any reference of that nature; but it was admitted that the Master of the Rolls said 'that if Harrison wished to impugn the bequest, he must go elsewhere, or to the Ecclesiastical Court for that purpose.' That, in pursuance of the decree, proceedings were still depending in Chancery to carry the same into effect, and that Harrison, by taking steps therein, had acquiesced in the decree."

The act on petition was supported by affidavits on one side and on the other.

Dodson in support of the protest. Where no ambiguity nor absurdity is upon the face of the instrument, extrinsic evidence is not admissible; but where an ambiguity or absurdity manifestly exists and evidently results from error, there evidence, dehors the instrument itself, may be received: but before it can be admitted it must be clear and undoubted that the error was casual. *Bayldon* v. *Bayldon* (3 Add. 232). In that case there was a manifest error in the enumeration of the nephews and nieces of the testator; it was clear, not only by the parol testimony, but from the instructions, that he intended, by this will, to have benefited another nephew. The error was apparent, and there was direct and unequivocal **[545]** proof of intention. So in *Travers and Edgell* v. *Miller* (3 Add. 221) folio 20 of the will was missing: the pages ran from 19 to 21; and, that a sheet was wanting, was proved by the context. There again it was clear that the omission must have been by mistake, and either not observed at the time the will was executed, or that the sheet had, since its execution, been accidentally detached: and the Court was enabled to supply its place by means of the draft will. But, on the other hand, in *Fawcett* v. *Jones* (3 Phill. 434, 495), this Court refused to make a variation in Lady Bath's will, by inserting in it, from the instructions, a residuary clause; and the Court of Delegates affirmed the decree of the Prerogative Court. In the present case there is no ambiguity whatever; nothing that should induce the Court to resort to extrinsic evidence, and which can only be supplied from recollection, and by the conjectures of Sir George Naylor, who was present when the instrument was prepared—eight years ago. No safe reliance could be placed on such testimony, even if admissible, when opposed by the conduct of the parties, and the affidavit of Mr. Moore, the drawer of the will, made recenti facto. The Master of the Rolls did not advise these proceedings; if he had so done, he would in the mean time have stayed the suit in his own Court: but even if a reference had been directed, it would not affect the principles which guide Courts of Probate in cases of this description (see *Draper* v. *Hitch*, vol. i. 678).

[546] Lushington and Addams contrà. If it be true, as is alleged, that

the deceased never intended to benefit Stone beyond the extinguishment of his debt, the protest must be over-ruled, whatever ultimately may come of the case; unless, indeed, something is set forth in support of the protest which is quite conclusive against the ability of the Court to afford relief. At present the Court is not apprized of all the evidence, but enough is disclosed to raise a strong probability of error. We admit, but with certain exceptions, that written instruments cannot be varied by parol evidence: the general rule, however, applies to instruments not regularly executed only, but to instruments regular and formal in themselves. Here the paper required, in the first instance, some extrinsic evidence to give it probate. The factum is informal; the deceased was aged and infirm, and placing great confidence in his solicitor, does not seem to have adverted to the variations in the wording which had been introduced. But can it be successfully argued that there is no ambiguity on the face of the instrument, and in the construction of the bequests to Stone, arising from the words as altered, in comparison with those originally adopted? The variation is considerable, and introduces an important ambiguity and incongruity in the will. It is said, however, that the intentions of the testator cannot now be satisfactorily collected from the contents of Sir George Naylor's affidavit; but his intimacy with the deceased, the declarations subsequent to the execution of the instrument, and the peculiarity of the bequests, will suffi-**[547]**-ciently account for the accuracy of his memory upon the points in question. Mr. Moore's affidavit was made in the usual form to account for the alterations in the paper; but his particular attention was not directed to the effect of those alterations. In *Blackwood* v. *Damer* (*a*)[1] there was a clear omission by the attorney in not inserting a residuary clause: the draft was read over; it remained two days in the deceased's possession, and was executed; yet the Court of Delegates decreed that the residuary clause should form part of the will. *Fawcett* v. *Jones* has been relied upon; but there Lady Bath's attention was called, specially and repeatedly, to the residuary clause; and the will was most carefully prepared and executed by a vigilant testatrix. If there was not a direct reference of this case, it was, in terms, sent by the Master of the Rolls for a decision in the Ecclesiastical Court. There has been no negligence nor acquiescence on the part of the residuary legatee.

Judgment—Sir John Nicholl. George Harrison, Esq., died on the 16th of April, 1821; and on the 27th of that month probate of his will was taken, under £40,000, by Samuel Harrison, Daniel Charles Rogers (now Rogers Harrison) and Robert Stone, the executors. Daniel Charles Rogers was also residuary legatee. The will is dated on the 8th of April, 1821: it is not formally drawn up, **[548]** but was intended as instructions, which, for precaution, were executed and attested by three witnesses. One of the three witnesses was Daniel Moore, a solicitor, the writer of the instructions, who is since dead.

The instrument, being instructions, is for the most part expressed in the third person: it is headed—"Instructions for the will of George Harrison, Esquire:

"He desires to give to his sister, Mary Page, widow, an annual sum of £200 during her natural life; and, after her decease, he desires that the same annual sum be continued to her two sons."

But the present question arises upon a clause containing a bequest to Robert Stone, one of the executors, in these words:—

"Gives to Mr. Robert Stone all such money as shall be due to the testator at the time of his decease."

There are other words which were erased, viz. "him" at the end of the first line; "me from him" at the beginning of the second line; but "me" is carried out to the left. These words are struck through. "My" also, between "of" and "decease" is struck through; and "his" written over it. The probate, however, was taken as the clause stood altered by the erasures; that is—"Gives to Mr. Robert Stone all such money as shall be due to the testator at the time of his decease." (*a*)[2]

This probate remained till March, 1829, when **[549]** a decree calling it in issued,

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(*a*)[1] Cited 3 Phill. 459. 3 Add. 239 (*n*) S. C.

(*a*)[2] The clause with the erasures and interlineations stood thus:—"Gives to Mr. Robert Stone all such money as shall be due to ~~him me from him~~ his the testator at the time of ~~my~~ decease."

at the suit of one of the executors, viz. the residuary legatee, and citing Robert Stone, the other surviving executor and the legatee under this clause, to shew cause "why the former probate should not be revoked and a new probate granted with the words 'from him' inserted as having been erroneously and incautiously struck through."

To this decree an appearance has been given under protest; and the matter comes on by act on petition and affidavits. Whether there was any necessity to appear under protest, for there is no ground to object to the jurisdiction, no ground strictly amounting to any bar, if such circumstances should be stated as would clearly and safely establish error—need not be inquired into by the Court: but the real object is to ascertain whether, upon the circumstances suggested, the Court can legally and securely allow the executor and residuary legatee now to go into proof, in order to shew that the words proposed to be reinstated, were "erroneously and incautiously" struck out without the knowledge and contrary to the intentions of the testator.

The instrument was executed by the deceased, and attested by the witnesses, with the words struck through: primâ facie, then, whether the instrument was intended to have effect, or was only executed as a precautionary measure, yet still I must consider it as containing the final wishes of the testator. There have been instances where a clause, introduced by fraud, has been expunged; where a clause omitted by error has been supplied; but in those **[550]** cases there has been the concurrence of two circumstances—first, some ambiguity on the face of the executed instrument itself; and, secondly, the means of obtaining clear and indisputable proof that the insertion or omission of the clause was contrary to the intention of the testator. These two things must concur before the Court can safely interpose. In the present case some intervening circumstances may be noticed. There is conflicting evidence as to the exact time when Stone first set up a claim to all the debts; but this is not very material, since it will not prove the intention of the testator: at all events the claim is admitted to have been set up four years ago, and, more expressly, in February, 1827, in May of which year a bill in Chancery was actually filed by Stone against the residuary legatee. That bill went to a hearing; and in February, 1829, the Master of the Rolls decided in favour of Stone's application. Mr. Moore, the drawer of the will, died on the 6th of January, 1828, that is after the bill was filed, and before the decision of the Master of the Rolls; so that it is not till after all these events—the bill filed, the decree at the Rolls, and the death of the solicitor—that the residuary legatee sets up in this Court this error in the will. The suit is instituted eight years after the testator's death, and probate had been taken of his will.

The words indeed of the bequest are strong—"not admitting of any latitude of construction"—as expressed in the language of the act on petition.

What, however, is to be the clear and decisive proof of the unintentional erasure? Even the **[551]** drawer of the instrument, Mr. Moore, is dead. His evidence, therefore, the best parol evidence, cannot be obtained to shew error; on the contrary, his testimony, as far as it can be obtained, exists in an affidavit, produced at taking probate by the residuary legatee himself, that the erasures were made by the directions of the deceased, and read over to him previous to the execution. And there are also Mr. Moore's own written document, and his conduct in obtaining the deceased's execution of it in its present state, both as to shape and contents. Now what is there to oppose to this, and to satisfy the judicial mind of the Court that the general terms in which this bequest now stands were not fully understood and approved of by the testator?

True it is, as has been argued, that the nature of the bequest is not very common; and, therefore, the probability upon conjecture would be rather in favor of there being some error, especially as Stone himself was a debtor to the testator's estate for the sum of £1500; (*a*) the release of which debt alone would have been considerable; and Sir George Naylor, in his affidavit, has expressed his belief and opinion that the deceased so intended the bequest.

Sir George Naylor states that the deceased, in giving the instructions, said, "I give to Mr. Stone all the money that he owes me:" and no doubt he has fairly stated his impression: but declarations to be spoken to by a third party are so open to mistake and misapprehension as **[552]** to be very liable to error. What a slight alteration would alter the whole sense and make the bequest conformable to the will as altered.

(*a*) The debts owing to the testator at the time of his death amounted altogether to £3500.

"All that he owes me;" or "all that is owing to me," are easily misapprehended or misrecollected at the end of eight years. Here is no written document suggested to be forthcoming which can in any degree lay a foundation for, and corroborate, the existence of any error. No fair copy, containing the words struck through, was engrossed for execution; no cotemporaneous evidence of that sort on which the Court can rely can be furnished. In *Blackwood* against *Damer* (3 Phill. 459, 485) the Court had evidence of that description: but still what it most relied upon were the written instructions. So again, in *Bayldon* against *Bayldon* (3 Add. 232), there were the instructions: the very draft of the will, in Baron Wood's own handwriting, had the names of the parties who were to be benefited. But upon mere parol declarations, without any thing in writing, after such a length of time, to hold that the words in the executed instrument were "erroneously and incautiously struck through;" and for the Court to reinstate them would be a most dangerous precedent. I therefore feel bound to dismiss Mr. Stone.

Protest sustained.

Upon Mr. Stone's costs being applied for, the Court observed that it was an important question, and declined to grant them.

[553] BIRD *v.* BIRD. Prerogative Court, Trinity Term, 4th Session, 1829.—The costs of exceptive allegations tendered on both sides (the admission whereof was suspended till the final hearing, and then not prayed to be received) not allowed to be taxed against a party condemned in costs.

On taxation of costs.

From the sentence in this cause (see *Bird* v. *Bird,* supra, 142) an appeal was instituted by the next of kin. After the process had been brought into the Court of Delegates the appellants delayed, contrary to established practice, to print it; and on the 29th of May their proctor notified to his parties that he should not proceed further in the prosecution of the appeal. The respondents having printed the process, and no appointment of a new proctor on behalf of the appellants having taken place, the respondents on the 24th of June by their counsel prayed a sentence; when the Court, consisting of Mr. Justice Gaselee, Mr. Baron Vaughan, Mr. Justice James Parke, and Doctors Phillimore, Gostling, Blake, and Pickard, affirmed the decision of the Prerogative Court, with 200l. nomine expensarum, in the Court of Appeal, and remitted the cause.

Upon the remission of the cause the taxation of costs in the Prerogative Court was referred to the deputy registrar in the usual way; when it was objected on the part of the next of kin that the costs in respect to two exceptive allegations, the admission of which, after argument, had been suspended till the hearing of the cause, and which were then not adverted to, should not be taxed as against them.

The matter was brought to the notice of the Court for its directions.

[554] Per Curiam. Both parties offered exceptive allegations; neither of which was then admitted; their admission being suspended till the hearing of the cause; and the cause was ultimately decided without either; both, then, were unnecessary. As neither was admitted the Court will consider this matter as if neither had been offered, and as forming no part of the necessary costs. They are, consequently, not to be allowed on taxation against the party condemned in costs. And this view of the case is, in the present instance, the more just, because it is stated and admitted that the unsuccessful party offered to go to a hearing without any exceptive allegation on either side. The subsequent decision shews the propriety of that offer; and that the offer ought to have been accepted.

Without, then, laying down any general rule respecting costs upon exceptive allegations, not admitted nor rejected, I direct them, in this particular case, not to be included in the costs in which the party has been condemned.

IN THE GOODS OF JOSEPH KNIGHT. Prerogative Court, Trinity Term, By-Day, 1829.—Probate granted to a deed, testamentary in its whole purport and effect, and not to operate till after death.

On motion.

In 1819 Mr. and Mrs. Knight executed a deed conveying property to trustees for the use of the deceased and his wife; and, upon the death of the survivor, to pay over the property in certain parts to different persons. Mr. Knight survived his wife,

and died, not having made **[555]** any will, and without having exercised a power, reserved to him, of revoking the uses and trusts of the deed.

The King's advocate, after stating that the deed was in its whole purport and effect testamentary, and not to operate until after the death of Mr. Knight, moved for probate of the instrument to be granted to the residuary legatees in trust named in the deed, as executors according to the tenor.(*a*)

Per Curiam. Let the probate pass as prayed.

Motion granted.

IN THE GOODS OF BENJAMIN CAMPBELL. Prerogative Court, Trinity Term, By-Day, 1829.—A will, in existence after the testator's death, being accidentally lost and the contents unknown, administration limited till the will be found granted (on justifying securities) to the widow alone, with a minor daughter, entitled in distribution.

[Referred to, *In the Goods of Wright*, [1893] P. 22. Not followed, *Hewson* v. *Shelley*, [1913] 2 Ch. 402; [1914] 2 Ch. 44.]

On motion.

The deceased, late assistant surgeon of the medical staff at Maidstone, Kent, died there in January, 1829; he left a widow and a minor daughter, the only persons entitled in distribution.

Some years prior to his death he transmitted a sealed packet to Mr. Collyer, his agent in London, informing him that it contained his will, and requesting that he would take charge of it. On the 15th of January, 1829, Collyer received a letter from the commanding officer of **[556]** the depot at Maidstone, apprising him of Campbell's death, and enclosing a letter, addressed, "Mrs. Campbell, 164 Trongate, Glasgow," to be forwarded. The letter and packet intrusted by the deceased to Mr. Collyer were, on the same day, put into the post-office in London, and reached Glasgow; but the letter carrier, not being able to find Mrs. Campbell, returned the letter and packet to the post-office. They were never afterwards traced. A diligent search was made at the post-offices at Glasgow, Edinburgh, and London; and various advertisements inserted in the newspapers in respect to the lost packet, but no information was obtained. The deceased's papers were searched, and no draft nor copy of the will could be discovered. Upon affidavit to the above effect Phillimore moved for letters of administration to be granted to Margaret Campbell, widow of the deceased, limited until the original will should be found and brought into the registry.

The property was in the funds and under £1200.

Per Curiam. The affidavit of Mr. Collyer shews that the will was in existence after the death of the testator; and there is no reason to conjecture that it is suppressed. I shall grant the administration to the widow, limited till the original will be found; but I direct the securities to justify.

Motion granted.

[557] ROXBURGH *v.* LAMBERT. Prerogative Court, Trinity Term, By-Day, 1829.—The Court grants administration to a bond creditor who has also a mortgage on leasehold property.

On motion.

William Lambert, a carpenter, died in 1827. He left a widow and one child. On the 29th of June, 1829, a decree issued against the widow and child why administration should not be granted to Francis Roxburgh, a creditor by bond. After the decree had been served it was ascertained that the demands of the creditor were secured by a mortgage on certain leasehold property; and it was suggested in the registry that the security by mortgage might disqualify him from taking administration as a creditor.

Curteis moved for the administration.

Per Curiam. There is no difficulty in allowing this administration to pass. A bond creditor has a lien even on freeholds, yet the Court grants administration to a bond creditor. Here the mortgage is on leasehold property, which is subject to simple

(*a*) A Chancery barrister had given an opinion that the legacy duty attached on the benefits conveyed by this deed.

contract debts and to the claims of creditors generally; and the bond is to be regarded as a collateral security to the mortgage. If the grant were prayed by a mortgagee of real property, there might be a reason why the administration should not pass to him, because it would give him a priority and exclude simple contract creditors. In this case I decree the administration.

Motion granted.

[558] LE BRETON *v.* FLETCHER. Prerogative Court, Trinity Term, By-Day, 1829. —A will may be pronounced for, though both the attesting witnesses depose to the deceased's incapacity.

Phillimore in support of the will.

Lushington contrà.

Judgment—Sir John Nicholl. The deceased, Mary Anne Fletcher, a married woman, died on the 19th of April in the present year; and the will propounded is made under a power, reserved in her marriage settlement, enabling her to dispose of certain property by a will attested by two witnesses. The will in question is dated on the 18th of April, 1829, the day preceding her death; it is propounded by one of the residuary legatees, and opposed by the husband of the deceased. The plea, propounding the instrument, sets forth, in the first article, the power under the settlement, but is, in other respects, a common condidit. This is the only plea in the cause, so that the husband has produced no witnesses, but contented himself with administering interrogatories. Three witnesses have been examined by the residuary legatee; Sir Thomas Harvie Farquhar, the executor who has renounced; Sarah Nixon, and Mary Turner (servants in the family), the two attesting witnesses.

The case depends much on the credit of the witnesses. Sir Thomas Farquhar, who was the deceased's banker, and one of the trustees under her marriage settlement, and also an executor of a former will, gives a full and detailed account of instructions on the 17th of April; for the codicil, written by him in pencil on that **[559]** day, and signed by the deceased, is, in substance, the same disposition as the will now propounded, which is to give effect to the intentions there expressed; there is a mere alteration in form but no deviation in substance.

It appears from Sir Thomas Farquhar's evidence that he shewed this codicil to his confidential clerk, who had prepared the deceased's former will, and that they considered a new will would be more convenient than a codicil. His evidence further states the preparation of the present will with blanks for some of the legacies, his attending the deceased on the 18th, explaining to her the state of her property, her approbation of the will and directions for filling up the blanks, the reading over, final approbation, the calling in of Nixon and Turner as witnesses, the execution of the will by the deceased, and the subsequent attestation of the two female witnesses. Unless, therefore, the whole of this account is gross perjury, there can be no doubt of volition and capacity: and the will, I repeat, is in substance and effect the same as the pencil codicil.

The two female servants venture to swear that the deceased was in a state of incapacity: they were, it must be remembered, merely present at the execution; they have deposed against their own act, and, what is more important (coupled with the general tone of their evidence), they are still in the service of the husband. They have described him as a most affectionate husband, and that the deceased always spoke of him as such.

From the evidence of Sir Thomas Farquhar, who would hardly have deposed to it, if not true, **[560]** the husband had dissipated the greater part of the deceased's fortune, and, according to his account, she spoke of him very differently from what is stated by these women servants.(*a*) Again, Sir Thomas Farquhar deposes that, on the 18th, he brought with him the whole of the deceased's balance; she said she would take £60, and signed a draft for that sum. £50 she put under her pillow for

(*a*) Under the marriage settlement the husband received £2000 on the day of marriage; and, by the will propounded, the deceased left him all her furniture and other effects in the house in which she was then residing; but not her plate and trinkets, which were in the care of Herries, Farquhar and Co.; and she directed her executor to pay all her funeral expences, and such debts and tradesmen's bills as he might be satisfied had been incurred for her sole and separate use.

the use of her husband, and the remaining £10 she gave to Miss Le Breton for the use of the house. This account then, if untrue, might be most easily contradicted; and, if true, it shews capacity, and falsifies and totally destroys the evidence of the two servants.

Upon the whole, I am of opinion that the truth of the case is as represented by Sir Thomas Farquhar; and that the two witnesses, who, without offering the least objection, attested the will, have not given a correct account of the state of the deceased at the time she executed it, and I therefore pronounce for the will.

[561] JOHNSON *v.* WELLS. Prerogative Court, Trinity Term, By-Day, 1829.—A second marriage and the birth of issue is not a revocation of a will made in favour of the children of a former marriage and an illegitimate child, where the second wife has some real property settled on her and her issue under her father's will, and where the deceased had possession and full knowledge of the existence of such will.

[Discussed, *Israel* v. *Rodon*, 1839, 2 Moore, P. C. 66.]

This was a cause of proving in solemn form of law the will of Jacob Wells: and the question was whether, under the circumstances, marriage and the birth of a child was a revocation of a will made (during widowhood) in favour of the issue of the testator's first marriage, and also of an illegitimate child.

The King's advocate and Phillimore for the executor. The presumption of law, by which it has been held that marriage and the birth of issue induce a revocation of a will previously executed, does not apply to this case. The widow has a fund at her own disposal, which, considering the deceased's property and the state of his family, is a fair provision for herself and child. *Talbot and Talbot* is decisive of this case (vol. i. p. 705). If an intestacy be pronounced for, an illegitimate daughter, for whom the deceased entertained the strongest affection to the hour of his death, will be left—contrary to the clear and manifest intentions of the testator—wholly destitute.

Addams and Haggard for the widow. The deceased frequently declared that his **[562]** wife should have all her own fortune, and that he would provide for the child by his second marriage: but he died without completing these intentions. The evidence also clearly proves that, in consequence of his second marriage and the birth of issue, he intended to alter his will: the presumption of law, therefore, that the will is revoked, is sustained rather than rebutted. In *Talbot* v. *Talbot* there was a marriage settlement, and the child was provided for; here, if the will is established, the son born of the second marriage is liable to be left wholly without a provision; while, in case of an intestacy, the interests of all parties will be secured, except of the natural daughter, and she will have an equitable claim on the widow and children.

Judgment—Sir John Nicholl. This case is so clear that the Court cannot entertain a doubt upon it. The deceased, Jacob Wells, died on the 24th of November, 1828: he left a widow, a daughter, and two sons by a former marriage; and one son by the latter marriage. The children are all minors; and the daughter is illegitimate, being born a few months before Mr. Wells' marriage with his first wife. At his death he was possessed of property amounting to about 6500l.: there was also a sum of 2150l. 3 per cents. standing in the joint names of the deceased and his second wife; and a real estate, about 600l. in value, secured, under her father's will, to her and to her issue.

[563] In 1816 the deceased, then a widower, executed a will, leaving his fortune equally between his then three children, including the daughter before marriage; and appointing Edward Wells, his brother, and Johnson, his brother-in-law, executors. In May, 1825, he married a second wife, Mary Rutter, who under her father's will was entitled to two or three thousand pounds (the precise amount is not material to the decision of this case), left to her separate use. Previous to her marriage a settlement was intended, but, before it was fully drawn up, the marriage took place; however, immediately after the marriage, stock in the 3 per cents., to the amount I have already stated, was invested in their joint names. She is now entitled to that stock, and to the little freehold estate for her life, making together from 2 to 3000l. Of this marriage a child was born, who survived the deceased, and who is not two years old.

The question, then, is, whether, under these circumstances, the marriage and birth of a child revoked the will of 1816. It is not suggested that the deceased was unacquainted with the existence of that will: the whole case, indeed, admits his

knowledge of it: the will was in his possession, and he did not cancel it. Nor is it suggested that he intended to die intestate. The effect of an intestacy would be, that one-third would go to the wife, and the other two-thirds be divided equally between the two children of the former and the child of the latter marriage; while the whole of the wife's property would benefit exclusively her and her child; and his illegitimate daughter, from whom **[564]** his regard was not in any degree withdrawn, would be left wholly unprovided for.

The deceased talked of making a new will, and possibly might so have intended; but that will not vitiate the instrument propounded; and it is not inconsistent with the intention and with the belief that the existing will would operate until he revoked it by making a new one. His conduct strengthens this view of the case; for, as I have mentioned, he was fully aware of the existence of the will; it was in his own house, and he preserved it till his death. The declarations, then, are little to be relied upon: they passed in general conversation, and may have been insincere: but the facts are much more material.

Marriage and issue is not an absolute revocation; it is only a presumptive or implied revocation, and the implication may be repelled by circumstances. It has been held in several cases that the presumption does not arise where there are children of a first marriage, and there is a provision for the second wife and her issue. In *Kenebel* v. *Scrafton* (2 East, 530), and in *Ex parte Ilchester* (7 Ves. jun. 348), the presumption was repelled.

Without, then, entering into a minute investigation of the principles on which these rules are founded, and which are fully laid down in several reported cases, the present case is this, that the wife's fortune (whether precisely the whole or not is immaterial) is so placed as to form a provision for her and her child: the children of the first marriage will not partake **[565]** of it. The widow will be exclusively entitled to the 3 per cent. stock, and to the enjoyment of the freehold.

Under these circumstances it seems to me quite clear, both upon principle and authority, that the will of 1816 is not by implication revoked. I accordingly pronounce for it, and decree probate to the executors; but, upon the whole, shall make no order as to costs.

[566] THE OFFICE OF THE JUDGE PROMOTED BY HOILE *v.* SCALES. Consistory Court of London, Trinity Term, By-Day, 1829.—In a vestry-meeting for civil purposes, as a full latitude of discussion must be allowed, mere coarse expressions do not constitute "brawling:" but on proof of an act of "smiting," the Court is bound, whatever may be the origin of the dispute, to proceed to award punishment under the 5 & 6 Edw. 6, c. 4, and 53 Geo. 3, c. 127.—A party pronounced excommunicate, sentenced to seven days' imprisonment, and condemned in costs.

This was a cause in which the office of the Judge was promoted by William Hoile, one of the churchwardens of St. Mary, Stratford, Bow, in the county of Middlesex, against Michael Scales, a parishioner, "for quarrelling, chiding, and brawling by words at a certain meeting of the parishioners of the said parish held in the vestry-room situate in the churchyard and adjoining to, and communicating with, the parish church; and for laying violent hands upon Thomas Bilton in the said vestry-room."

The criminal charge was set forth in the second of five articles, and was as follows:—"That on Thursday, the 27th of November, 1828, a meeting of the parishioners of Bow aforesaid was held in the vestry-room [as before described] for the purpose of receiving the report of a committee of the parishioners appointed to obtain an act of parliament for watching and lighting the parish, and for other matters relating thereto; that John Coward, one of the churchwardens, presided as chairman; that Thomas Bilton, the attorney ap-**[567]**-pointed for the said act of parliament, and for the parish, was present; that Michael Scales delayed and interrupted the proceedings of such meeting for a considerable time by proposing and discussing subjects unconnected with the business upon which it had been called, although Coward requested the attention of the meeting to such business; and that Scales, in a brawling, chiding, and quarrelsome manner, declared 'that no lawyers were wanted there,' and insisted 'that Bilton should leave the vestry-room,' and proposed a resolution to that effect. That Coward declined to put such motion, and stated 'that Bilton was his legal adviser, and that he wished him to remain.' That Scales then in a brawling and quarrelsome manner declared 'that Coward should

leave the chair and another chairman be appointed, as he was unworthy to fill the situation,' and made a brawling noise and thereby caused great confusion in the vestry-room and interrupted the business of the meeting. That Coward thereupon left the chair, and declared the meeting to be at an end."

The article further objected, "That Scales, on Coward going towards the door, did then come from the upper end of the vestry-room and lay violent hands on Bilton (who was at the lower end of the room speaking to Willis, the vestry clerk of the parish), by taking hold of him, Bilton, by the arm and back, and forcibly and violently pushing against him, upon which Bilton sat down, when Scales again laid violent hands on him, by seizing him by the collar of his coat and clasping him round the waist and arm, and dragging him, and **[568]** placing and driving his knuckles against Bilton's face, and endeavouring by force to put him out of the vestry-room to the great offence of the persons therein assembled, and in violation of the statute (5 & 6 Edw. 6, c. 4) and of the laws, statutes, canons, and constitutions ecclesiastical of this realm."

The articles concluded: "That the defendant might be decreed to have incurred the penalty of the statute; be duly and according to the exigency of the law corrected; and admonished to refrain from the like behaviour in future, and condemned in costs."

On the part of the defendant an allegation was admitted; which, after alleging that he did not interrupt the proceedings of the vestry by discussing irrelevant subjects, nor conduct himself towards Bilton or Coward as set forth in the articles, went on to plead:—"That the committee had failed to obtain the act of parliament in consequence of their application for the same not having been made conformably with the Standing Orders of the House of Commons, and had procured the said vestry meeting with a view of obtaining from the parishioners an indemnity for expences to be incurred, and a reimbursement of expences already incurred by them, in and about the matter relative to which they had been so appointed; that at such meeting a report, purporting to be a report of the said committee but which had been prepared by a few members thereof only, and was not sanctioned, but was disapproved of by the majority of the committee, was submitted to the parishioners then assembled, and occasioned **[569]** much discussion amongst them. That the senior churchwarden was the chairman or president of the meeting; that Bilton, although neither a parishioner or inhabitant of the said parish nor, as untruly set forth, the attorney for the parish, insisted that he had a right to be there as the legal adviser of Coward; and that Bilton acting, or pretending to act in that character, frequently interrupted the proceedings of the vestry, and conducted himself in a quarrelsome, chiding and brawling manner therein, making use of very insulting, abusive, and scurrilous language to several of the parishioners then present, and he persisted in so doing notwithstanding he was repeatedly desired by several parishioners to desist. That a motion was at length made by said Scales, and duly seconded, that Bilton should be requested to withdraw from the meeting: but Coward refused to put the same to the vote. That Coward having shortly afterwards left the chair and withdrawn from the vestry-room, Bilton was again requested to leave, but that he obstinately refused, and continued interrupting the proceedings and insisting, contrary to the wish of the vestry, that the vestry clerk should leave the vestry: that still persisting in talking and conducting himself in a passionate, quarrelsome, and brawling manner, Scales (who, amongst others, had before endeavoured to persuade Bilton to leave the meeting), with a view to attract and engage his attention, then took hold of the cuff of Bilton's coat-sleeve, not with violence but in a gentle manner and as having something to communicate to him, and whilst so doing he mildly addressed him: 'Mr. Bilton, I request you **[570]** will withdraw from the vestry, you perceive you are interrupting the proceedings;' or to that effect: that thereupon Bilton arose from his seat in a great passion, and seizing Scales by the collar endeavoured with great violence to force him backwards into the fire, but was prevented in such endeavour by the interference of several of the persons present; that he then struck Scales several violent blows on his side and body with his elbows and on the throat with his clenched fist, and continued to do so until he was taken away, and expelled from the vestry-room. That Coward and Bilton caused great confusion in the vestry, and interrupted the business, and gave great offence to the parishioners."

In support of the articles four witnesses were examined.

John Coward deposed: "That he was senior churchwarden of Saint Mary,

Stratford, Bow, that on the 27th of November, 1828, a general meeting of the inhabitants was held, pursuant to the notice 'to receive the report of the committee, appointed by vestry of the 20th of December, 1827, for the purpose of applying for an act of parliament for watching, lighting, and improving the highways and repairing the drains of the parish.' Deponent was chosen the chairman; there were present about thirty persons, Bilton was present; he was not a parishioner of Bow, but was the parish attorney appointed by the select vestry, and he had been employed by the committee: the report to be then presented to the vestry had been prepared by him, and deponent had expressed a wish that he should at-**[571]**-tend. Scales sat next to deponent on his left hand: he, Scales, read the report by his own desire and made some passing comments as he went on: and afterwards proceeded to speak on other matters, particularly the conduct of the 'churchyard committee,' whom he censured for having run the parish to an expence of five hundred pounds for what might have been had for fifteen, which led to his being contradicted by the vestry clerk and others. Deponent repeatedly admonished the meeting that they were travelling out of the road into matters with which they had nothing to do; but Scales, more particularly, continued to talk on in what the deponent considered a very irregular manner. No motion was made, but there was a good deal of clamour and confusion arising from Scales' observations; in the midst of which Griffiths, a parishioner, apparently asked some questions of, or spoke to, Bilton, who was near him; upon which Scales said warmly, 'We want no lawyers here;' and he desired Bilton to leave the room; deponent desired him to remain as his legal adviser, and told Scales 'that he had a right to the attendance of a legal adviser, as much as he, Scales, had to the attendance of reporters, whom he had on a former occasion insisted should be present.' In the confusion some one, Scales as he believes, proposed that Bilton should leave the room; deponent refused to put the motion to the meeting, stating, as he had repeatedly done, that the vestry was called to receive the report and for no other business. High words ensued, in which Scales took a prin-**[572]**-cipal part, and deponent was hissed for not putting the motion aforesaid. Scales said 'that deponent was unworthy to fill the situation he was in, and that they would have another chairman.' A motion was then made and put by Scales 'that deponent should be turned out of the chair;' and deponent was voted out. Deponent, therefore, declared the business of the meeting ended, and immediately went to the lower end of the room, and desired Willis, the vestry clerk, to shut up his book and go away, as the vestry was over. Scales said 'that Willis should not leave.' Just at that time Bilton stooped apparently to speak to Willis, whereupon Scales came up and seized Bilton by the collar, whom he held fast with his right hand so closed that his knuckles were in Bilton's face. Bilton endeavoured to sit down, and, as appeared to deponent, to slip down from Scales' grasp. Scales, as appeared to deponent, was endeavouring to push him, Bilton, into the churchyard, but by the struggling and the interference of other parties they went across violently to the other side of the room: whether they fell or not deponent is not sure; he did not see that. Bilton, when disentangled, came up to deponent, who observed the marks of Scales' knuckles on Bilton's cheek plainly. Bilton had undoubtedly been used very ill. Willis went out with the minute book in the disturbance, and deponent went away accompanied by Bilton. Scales conducted himself on the occasion in a disorderly, quarrelsome, and offensive manner. The meeting lasted as much as about two hours; but the business for which it was called was not transacted owing to Scales."

[573] Upon interrogatories:—"Respondent was a member of the committee appointed to obtain the act of parliament, in which they had failed: they had not been in time, as he believed, to comply with some Standing Order of the House of Commons, though, as he believes, that difficulty might have been got over but for the opposition in the parish. The meeting (deposed of) was not procured by the committee, or any of them, as he believes, to obtain an indemnity from the parishioners in respect to expences incurred by the committee: nothing, as he recollects, was said about them, except by Scales himself. All who were present of the committee were unanimous in adopting the report. Bilton is the parish solicitor, and was such at, and previous to, the time when the meeting was held. Since his appointment he has been employed in the business of the parish; and had been occasionally before. Bilton did not at all interrupt the proceedings of the vestry: he used no insulting, abusive, or scurrilous language; he did not conduct himself in a quarrelsome, chiding,

and brawling manner; and he was not desired to desist from so doing. The motion that Bilton should withdraw respondent refused to put. Many, and a majority of those present, took part with Scales in his resolution that respondent was incompetent, or, as he believes it was, unworthy to fill the situation of chairman. Respondent did quit the chair; but Bilton did not remain after respondent had left the vestry: he was there after respondent had left the chair, and was about to leave the room with respondent when detained. Bilton did not insist that the vestry clerk should leave the **[574]** room; nor, to respondent's knowledge, at any time interfere with the proceedings, otherwise than by sending a memorandum to respondent, when in the chair, advising him to confine the attention of the meeting to the report: and respondent acted, as far as he could, on that suggestion. Respondent does not know or believe that Bilton did by his conduct endeavour to prevent the vestry from coming to a conclusion on the business for which it had been called: respondent believes that Bilton, considering that the meeting was properly at an end when respondent left the chair, gave an opinion to that effect to the vestry clerk; and that he had no other object in view than to give him good advice. Bilton acted throughout, in all that respondent saw, in a very quiet, inoffensive, and gentlemanlike manner. Ministrant did not endeavour to induce Bilton to leave the room, but seized him at once by the collar: he did not, as with a view to obtain Bilton's attention, take hold of the cuff of his coat-sleeve; he seized him in a violent and outrageous manner. Scales did not say as interrogate, 'Bilton, I request you will withdraw from the vestry; you perceive you are interrupting the proceedings;' or any thing to that effect. Bilton did not arise from his seat, as if in a great passion, and seize Scales by the collar and endeavour with great violence and exertion to force him backwards towards the fire-place: several persons interfered, in consequence of Scales having seized Bilton: respondent does not believe that Bilton struck Scales any blow whatever: Bilton was not expelled from the vestry-room: Bilton's language, conduct, and behaviour did not cause **[575]** confusion in the vestry, nor give offence to the parishioners then assembled; it could not have so done."

Thomas Bilton deposed: "That he was solicitor to the parish generally, having been appointed by the select vestry: the meeting of the 27th of November was only to receive the report of the committee: Scales said 'they did not want lawyers there;' and shortly afterwards desired deponent should leave the room: deponent had forwarded two or three slips of paper to the chairman, on which he had written suggestions to him to recall the meeting to the business of the day, and get it either to receive the report or reject it. On the chairman having stated that he required deponent's presence as his legal adviser, Scales said 'that they were not to be dragooned by lawyers.' When the chairman desired the vestry clerk to close his book and leave, Scales called out that the vestry clerk should not leave; the churchwarden repeated his direction, the meeting being over. The vestry clerk seemed to be in some doubt how to act, and looked at deponent as if to ask what he should do; and deponent, putting his head down, said to him softly, 'You had better leave, you hear what the churchwarden says.' Just at that moment deponent was seized by Scales, who, coming behind him, took hold of him round the waist, and by one of his arms, which he pressed forcibly, saying, 'Come, sir:' deponent turning a little, said to Scales, 'Take care what you are about;' and succeeded in sitting down on a bench close by. Scales then took hold of deponent by the collars of the two coats which he wore, with his right hand, and, by deponent's right arm with his left hand, **[576]** he by force lifted deponent up, and, though with what design he knows not, proceeded to haul deponent about with great violence; pulling and shaking him, and turning his fist over, forced the knuckles of his right hand against deponent's cheek bone: he was thus held and pulled about for two or three minutes: deponent offered and attempted no violence in return: he found himself sore in his back and loins on the following day from the violence."

Upon interrogatories: "The vestry meeting was not procured to obtain an indemnity from the parishioners in respect to the expences of the committee: respondent, from December, 1827, acted as attorney for the parish in parish appeals and other business; he has no recollection of any person having desired him to desist from interrupting the proceedings."

Isaac Willis, of Stratford, Essex, deposed: "He has been vestry clerk of the parish of Bow during the last twelve or thirteen years: at the vestry meeting afore-

said Scales sat on the chairman's left hand, deponent at the other end of the table, and Bilton very near to him, to the left, at the side of the table. It was proposed that the report of the committee should be read by deponent, but Scales said, 'I'll read it:' he made many desultory remarks as he proceeded, and wandered to other subjects, particularly reflecting on the conduct of the churchyard committee, whom he accused of jobbing and making bargains, good for lawyers and surveyors, but very bad for the parish; and he censured their conduct in strong terms: some of his assertions were contradicted, and this led to strife and confusion, being moreover foreign to [577] the business. Scales made an observation to the effect that they were not to be dragooned by lawyers; and the chairman refusing to put Scales' motion that Bilton should leave the room, Scales said 'that if he did not put it they would have another chairman;' and he proposed a resolution to the effect that Coward should leave the chair, being unworthy of the situation. Deponent tried to unhand Scales from Bilton, but he could not; Scales held him too tightly; and deponent then went away, leaving Bilton in Scales' grasp, who was handling him roughly. The business of the day was not transacted; the proceedings were first irregular, afterwards disorderly and riotous, and shamefully so, and all this was entirely owing to the conduct of Scales."

Upon interrogatories: "Bilton did not at all interrupt the proceedings; he did not use any insulting or abusive language. Respondent having stopped him to remark that he felt awkwardly situated, and having asked him how to act, Bilton said privately to him, 'that the vestry being ended, no more business could be done.' It was not the cuff of Bilton's coat-sleeve that ministrant took hold of; it was not the action of a man who did it only to obtain attention."

James Harris, the parish clerk, supported the testimony of the other witnesses, and deposed that he saw marks of violence upon Bilton's face.

Upon interrogatories, he deposed: "Several of the parishioners went with Scales in his objection to Bilton's being present; that he had no right to be there, and was interfering with [578] the vestry. Bilton was desired by one or two of the parishioners not to interfere: he denied that he did interfere; and he did no more than answer a question or two: neither his language nor behaviour was violent, passionate, or quarrelsome."

On behalf of the defendant four witnesses were also examined:

James Meikle, surveyor, deposed: "He was present at the vestry meeting held in November, 1828, to receive the report of a committee to obtain an act of parliament for watching and lighting Bow parish. It appeared to deponent, and was pretty generally believed at the meeting, that the object of the committee was to procure from the parish an indemnity for the expences to be, and reimbursement of those already, incurred in the unsuccessful attempt to procure the act of parliament.(*a*)[1] There was a good deal of discussion, but deponent does not remember the report being read. Bilton claimed a right to be present as Coward's legal adviser; he interfered several times: his remarks appeared to be considered an interruption; his manner, however, was not quarrelsome or brawling in the first instance: he was repeatedly desired not to interrupt the business, but he went on making remarks and dictating to Coward; he endeavoured to forward Coward's views in requiring Willis to go away with the books; for this purpose he spoke in a loud and angry tone. Willis was [579] about taking up the books, when Scales rose from his seat, went towards him, desiring him not to take away the books, as they were the property of the parish. Bilton was standing by Willis at the time, and Scales, as he approached him, took hold of Bilton's arm, just below the elbow, coolly and calmly, and without the least force or violence said to him, 'Mr. Bilton, I request you will withdraw; you see it is the general wish, and you must perceive you are interrupting the business.' Bilton, who was standing up, immediately thrust his elbow with great violence against Scales' chest or stomach, and endeavoured with all his force and might to thrust him into the fire; and deponent has no doubt he would have accomplished it if those present had not prevented it, by catching hold of him as he was falling. Deponent did not see any blows struck: Bilton went away of his own accord, and was not thrust out nor expelled.(*a*)[2] Deponent

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(*a*)[1] The same opinion was expressed by the remaining witnesses.

(*a*)[2] Upon these two points the other witnesses concurred.

considers that Bilton and Coward's conduct was the cause of the confusion at the vestry."

Upon interrogatories: "There was a committee or confederation in the parish in opposition to the select vestry; they did what they considered necessary towards abolishing the select vestry; and they have mainly succeeded, having procured an act of parliament providing a new and better mode of appointing vestrymen. Respondent believes Bilton was appointed by the select vestry the attorney of the parish; he was not acknowledged as such by the [580] general body of the parishioners: respondent has seen him attending at one or two other parish meetings; no opposition was made to Bilton's remaining in the vestry-room until he interfered, as was conceived, improperly: respondent does not remember Scales reading the report; there was a great deal of discussion after it had been read, but whether on subjects for which the meeting was not called, respondent can hardly say. Scales did not appear to respondent to be irritated at any thing that passed. Scales several times told Bilton that he had no right to interfere; and he answered 'that he was only answering a question.' It was said, but whether by Scales respondent does not remember, 'that Coward was unworthy to fill the chair, as he would not put the motion that had been made.' Respondent does not remember to have heard Scales say that the vestry clerk should not leave the vestry, or take away the vestry book, unless he was the strongest man of the two. Scales took hold of Bilton's arm below the elbow; and Bilton said, 'You see how I have been used.' The report was certainly not received by the meeting; it was much objected to, if not rejected. Scales' general conduct was very proper, Bilton's very middling. Respondent was at the trial of the action brought by Bilton against Scales for the assault; no witnesses were examined for the defence; the plaintiff got a verdict with 5l. damages."

John Fairhead, surgeon, deposed: "Bilton interrupted several of the parishioners; his manner was loud and angry; language not [581] abusive; he said 'he would speak so long as any remarks were made on the report which concerned him.' A motion was then made by Scales, and seconded, that Bilton be requested to withdraw; but Bilton called out to Coward, 'Don't put that vote:' deponent does not remember to have heard Bilton make any remark about Willis going away, or conduct himself in a quarrelsome manner until addressed by Scales, who, taking hold of his arm mildly, as if for the purpose of drawing his attention to what he, Scales, was going to say, spoke to Bilton very mildly—'You see, sir, the business of the vestry cannot proceed; I request you will withdraw.' Bilton immediately rose, and by the collar forced Scales back towards the far end of the room, and in the direction of the fire; and he would have gone into it if he had not fallen against the mantle piece: deponent did not observe any one interfere; nor observe Bilton strike Scales."

Upon interrogatories: "Scales, in moving that Bilton should be requested to withdraw, observed that he was not a parishioner, and that they did not want a lawyer there to dragoon the vestry. Bilton said, in replying to Griffith's remarks, 'that he was only answering a question; that Griffiths had made an accusation against him, and he would answer it.' Scales desired Willis not to take the books away, and added 'that Willis should not take them away unless he was the strongest man of the two.' Scales is a man of warm temper, but with great command over himself: his conduct is rather violent at times: [582] he is a very public-spirited man: respondent has known him once, and not oftener, to have been guilty of an assault, and had damages awarded against him."

Charles Newman, lath-render, deposed: "Upon Coward leaving the chair, and telling Willis the vestry was at an end, Coward went towards the other end of the vestry, followed by Bilton; Scales was near him, and on Bilton saying he would not withdraw, Scales took hold of him by the arm and said, 'Do go; you had better go:' he did so in a mild and gentle manner. Bilton came upon Scales with all the force he could, and caught him round the waist: Scales was obliged to take a fresh hold of Bilton to defend himself."

Upon interrogatories: "Coward went from the upper to the lower end of the room, and directed the vestry clerk to close the book: Scales followed, and observed, 'that the vestry clerk should not take away the vestry book, unless he was the strongest man of the two.'"

Jesse Cullum, gentleman, deposed: Scales took hold of Bilton by the arm very gently; and said to him in a cool manner, "Why don't you go out, &c." In the

struggle "Bilton had the first and best hold, which gave him the mastery, though much the weaker man of the two. Scales was quite cool, Bilton very warm and angry."

Upon interrogatories: "Scales went from the upper to the lower end of the room and declared 'that the vestry clerk should not take away the book unless he was the strongest man of the two.'"

[583] After the case had been opened the Court inquired of the counsel for the promoter on what words they relied to prove the charge of brawling.

The King's advocate and Pickard for the promoter. It may be admitted that there are no very strong words of brawling; but the general conduct and language of the defendant establish that charge. It is proved that he used these expressions—"We want no lawyers to dragoon us here:" "The chairman is unworthy to fill his situation," accompanied with a proposition that he should quit it. It must be also recollected that there was a committee or confederation of persons in this parish who caused circulars to be distributed for the purpose of raising subscriptions, with the avowed object of opposing the select vestry. But the most important part of the charge is "the smiting and laying hands" on Mr. Bilton. The articles upon this point are fully proved; and the evidence is borne out and corroborated by the previous demeanour of the defendant, as well as by the verdict and damages awarded by the jury against him in the Court of Common Pleas for the assault. It is true that proceedings are going on in this court against Mr. Bilton, upon a charge of brawling at this vestry meeting; but those proceedings were not instituted till very recently.(*a*) The presence of Mr. Bilton, **[584]** though not a parishioner, was proper and justifiable; he was the solicitor who had prepared the report, and attended the meeting as the legal adviser of the churchwarden, who was in the chair: and the vestry was held exclusively for the purpose of receiving that report. The circumstances of the case sufficiently shew, **[585]** there being contradictory evidence, on which side it is most probable the truth will be found. There can be no reasonable doubt whatever that Mr. Scales, on the occasion alleged, conducted himself in a highly improper and quarrelsome manner; and upon a sentence of excommunication has subjected himself to the penalties pointed out in the 53 Geo. 3, c. 127.

Addams for the defendant. The object of the vestry meeting is stated to have been for the purpose of receiving the report of certain parishioners in respect to an act of parliament for watching and lighting the parish, and for other matters relating

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(*a*) *O. J. by Glover* v. *Bilton.* Trinity Term, 3rd Session.

In this—another suit for brawling, arising out of the transactions of the vestry meeting of the 27th of November, 1828, and instituted against Mr. Bilton, the party charged, in the case in the text, to have been assaulted—an application was made by Addams to the Court that the hearing of *Hoile* v. *Scales* might be suspended, in order that the two causes might be heard pari passu. The evidence, it was said, in this second suit was in great forwardness, and would be completed with all expedition and dispatch. The application was opposed by the King's advocate, on the ground of the two causes having commenced at very different periods; and that they were now in different states of progress.

Per Curiam. Without the consent of the promoter of the office, in *Hoile* v. *Scales*, I cannot accede to the present application, and defer the hearing of that cause for the purpose of consolidation. Indeed, I should have much difficulty, under any circumstances, in adopting such a course. If the court were to take the suits together, I am not aware that I could resort to the facts proved in this—the latter cause—as the grounds of my decision in the first. It would, I apprehend, be perfectly incompetent for me to advert to the evidence in the second cause. Many reasons concur in this view of the matter. Suppose, upon a consideration of the evidence in both causes, I should give sentence; and that one cause only were appealed, the Superior Court would have to pronounce its decision upon different evidence from what was before the court of primary jurisdiction. Other reasons, particularly that which respects the commencement of the two suits, weigh in this particular instance. In *Hoile* v. *Scales* the citation was taken out on the 10th of December, 1828; but in this case of *Glover* v. *Bilton* it was not extracted till the 28th of April in the present year. There is no reason why the promoter, who was active in instituting the first suit, should be guided by the dilatory conduct of the latter promoter. I refuse the application.

thereto. The meeting was therefore called purely for civil and not for ecclesiastical purposes, and it certainly would be desirable to hold meetings for civil purposes in the workhouse or elsewhere. I do not deny that in this parish a committee, or, as it is termed in the interrogatories, a confederation, exists for controuling the select vestry and opposing its acts when wrong or oppressive. That the churchwarden was at this meeting elected into the chair shews that all the individuals present met in proper temper; since a churchwarden is not, as a matter of right, entitled to the chair.(*a*) The only per-[586]-sons entitled to attend at a vestry meeting are those who pay church rate. Willis, the vestry clerk, and Bilton were present, and they are not parishioners of Bow. Whether relevant or irrelevant matter was passing will depend much upon the opinion of different witnesses: but the interference of Bilton was highly improper; he prompted the chairman and suggested to him to keep the meeting to the object for which it had been called. The defendant was perfectly justified in proposing that Bilton should quit the room when the latter was interrupting the business; and he had also a right to move that the churchwarden, upon his refusal to put a regular motion, should leave the chair: and the churchwarden had no authority, either officially or as chairman, to dissolve the meeting, and order the vestry clerk to close the books. The adjournment of a vestry is to be decided by the majority of votes. *Stoughton* v. *Reynolds* (1 Strange, 1045). No quarrelsome nor irritating language was used by the defendant. The words, "We don't want lawyers here to dragoon us," did not partake of the character of brawling, though it might be admitted that the expression was perhaps not refined, and might better have been avoided. But the preponderance of evidence shewed that there was every possible justification for the defendant. The vestry books were wrongfully detained.

In respect to the supposed assault four disinterested witnesses deposed that the conduct of the defendant was temperate, and that he was first assailed: and some confusion or mis-[587]-take may have arisen from there being two persons of the name of Scales. The situation of the parties, when the assault is stated to have begun, is important; for it is clear that Bilton was then sitting at the lower end of the room next to the door. It is impossible that the attack was premeditated, though Bilton might erroneously conceive that it was. The defendant, too, is a much more athletic man than Bilton, and yet Bilton, it is proved, was the aggressor. The res gestæ are all with the defendant: and the presumption is in favor of innocence. Again, the witnesses for the promoter are all interested. Who are they? Coward, the churchwarden, Willis, the vestry clerk, and Bilton, who had been turned out of his appointment under the select vestry, by the act of parliament recently obtained by the efforts of the defendant and his party. The defendant has been exposed to double proceedings. In the Court of Common Pleas no witnesses were called for the defence, in order to save the time of the court, as, in that action, the assault was necessarily proved; but the jury gave merely nominal damages. Here a sentence against the defendant will carry with it a severe penalty: but such proceedings should be discouraged. The proofs shew that the present suit is trifling and contemptible; and that whatever heat and irritation there might be arose from the illegal conduct of the chairman.

In reply. The character of the suit must depend on the facts in evidence. If the present case is established the office of the Judge has been properly promoted, and the Court will award an adequate [588] punishment. It has been argued that the defendant's conduct had every possible justification. We know of no legal justification. *Hutchins* v. *Denziloe* (1 Hagg. Con. 182) shews that, even if there were misconduct on one side, and which might give the first provocation, such a circumstance would not justify misconduct on the other. The brawling, in that case, arose at a vestry meeting for civil purposes.

Judgment—Dr. Lushington. This is a proceeding under the statute of 5th and 6th Edw. 6th, c. 4, instituted by one of the churchwardens of St. Mary, Stratford, Bow, against Michael Scales, a parishioner: and the articles charge "brawling and smiting"

(*a*) The 58 Geo. 3, c. 69 (entitled "An act for the regulation of parish vestries"), s. 2, enacts, "That in case the rector or vicar or perpetual curate shall not be present the persons so assembled in pursuance of such notice [s. 1] shall forthwith nominate and appoint by plurality of votes one of the inhabitants of such parish to be chairman and preside in such vestry."

in the vestry-room situate in the churchyard: the offence, consequently, if proved, is within the statute and within the jurisdiction of this court.

Two questions arise upon the case—first, whether the defendant used words which, according to legal interpretation, amount to brawling; secondly, whether he laid violent hands on Mr. Bilton. I have stated these questions in this manner, in order to dismiss from my mind much upon which the argument has proceeded. A great deal passed at the vestry meeting that is not within my consideration, except so far as these circumstances may illustrate the general nature of the transactions of that meeting, and elicit the truth with respect to the issues I have to try in the course of the present investigation.

[589] It appears there are two parties in this parish, one of which is anxious to overthrow the select vestry: this circumstance, for the purposes of this inquiry, is, in itself, perfectly indifferent; for whatever may be the merits or demerits in such a conflict is quite immaterial, as respects this question, in the decision of which the Court cannot turn aside to examine the character or progress of any proceedings of that nature. An application, it appears, had been made by this parish to parliament for the interposition of the legislature in regard to certain parochial affairs and local arrangements: and, upon the failure of this application, a meeting of the parishioners was held on the 27th of November, 1828, "for the purpose of receiving a report of the committee appointed to obtain an act of parliament for watching and lighting the parish and for other matters relating thereto." Upon that occasion the senior churchwarden presided. Scales, the defendant in this suit, proceeded at his own suggestion to read the report. Bilton, a non-parishioner, but who had been employed by the select vestry to forward the bill in parliament, and who had prepared the report, was present; his presence, however, was objected to by Scales, while, on the other hand, the churchwarden, who was in the chair, expressed great anxiety to retain him, and said he was entitled to have him remain in the room as his legal adviser. Much discussion ensued, but it is not stated that it gave rise to improper language, such as would justly demand the interference of a spiritual court.

[590] It was urged in argument that parishioners alone have a right to be present at a vestry meeting; and this is generally true; but whether the attendance of an individual, in the character which Mr. Bilton claimed, should be allowed as an exception, I am not here called upon to determine. Nor is it for my consideration who was right or who was wrong in these parish disputes; nor whether the observations made by Mr. Scales at this vestry meeting were regular, nor in what degree they might have been so; but the point on which I am to decide is simply whether his conduct was consistent with that decorum which ought at all times and on all occasions to prevail in a sacred place.

The expressions proved to have been used by Scales on this occasion are, "that they would not be dragooned by lawyers;" and that Coward, the churchwarden, was "unworthy to fill the chair." These are the two expressions upon which the first part of the charge is founded; but I cannot regard them as a violation of the law, nor as amounting in legal construction to brawling. The vestry meeting, I must remember, was held for general purposes of a civil kind; they might require, and the parishioners, assembled upon the occasion, are fairly entitled to a full latitude of discussion; and the Court does not feel itself called upon to scrutinize very minutely the expressions used either on one side or the other: for I agree with an observation of Lord Stowell's, that "the vestry, being a place for parish business, the court will not interpose further than may be necessary **[591]** for the preservation of due order and decorum." (*a*)

There were, however, other words uttered by Mr. Scales which came nearer within the language of the statute. I refer to what passed after the chairman had declared the meeting at an end, when Scales is proved to have said "that Willis (the vestry clerk) should not take the books away, unless he were the strongest man of the two." This expression is spoken to by the defendant's own witnesses; and if the words had formed part of the original and substantive charge, and been directly alleged and supported by evidence, I might have had some difficulty in not thinking them within the scope of the act of parliament, inasmuch as they would necessarily lead to heat and irritation; they were, undoubtedly, highly improper, and ought to have been suppressed. But, upon the whole, considering all the circumstances of the case, and

(*a*) *Hutchins* v. *Denziloe*, 1 Hagg. Con. 185.

that these words only came out incidentally in the evidence, I am of opinion that the charge of brawling is not proved.

The most material charge, however, remains: the assault upon Mr. Bilton. The statute prohibits smiting or laying violent hands on any one; and, upon this part of the case, the evidence is conflicting; and should it leave any reasonable doubt in the mind of the Court, the defendant, the suit being criminal, is entitled to the benefit of that doubt; but, on the other hand, if the proofs should be sufficient to satisfy the mind of the Court, judicially, I must proceed, however painful it may [592] be, to carry into execution the enactments of the statute.

The witnesses concur in the fact that Scales touched Bilton with his hand; but whether he did so mildly and peaceably, or with a view of inflicting any degree of bodily violence, is a point on which the witnesses differ, and upon which the court must form its own opinion from the facts and probabilities of the case. Now, under what circumstances did the defendant approach Bilton? The vestry meeting was declared by the chairman to be dissolved, and the vestry clerk directed by him to take away the books. Whether this was in strict conformity with law or not it is not my province now to consider. A few words respecting the removal of the books passed (and in a low tone of voice, it would seem) between the vestry clerk and Bilton; and while they were speaking together, Scales, who had been sitting at another part of the room, came to the spot where they were; and for what purpose did he come?—to possess himself of the vestry books.

It is true the object of the meeting had not been accomplished: the report had not been received; but it had not been rejected. Scales was disappointed and dissatisfied at the dissolution of the meeting. With what disposition, then, did the defendant proceed from his own seat towards the vestry clerk and towards Bilton?—under the influence of disappointment, and with a determination to possess himself of the parish books, "if he were the stronger man of the two." This fact is proved by three of his own witnesses. By his own avowal and declaration, therefore, he was prepared to make a [593] trial of his strength, not regardful of the sacredness of the place, not duly impressed with the necessity of controuling his own passions, but ready to resort to violence if he could not otherwise accomplish his ends. I am then of opinion that Scales was, at this time, in a state of irritation, and that he did not move to the end of the room in a composed manner. And it is difficult to believe that in what immediately followed he had divested himself of this irritation and abandoned all thoughts of trying which was the stronger man of the two.

The vestry clerk was, at this period, hesitating whether he should retire with the books; he had referred to Bilton, and Bilton, stooping down, advised him to follow the directions of the churchwarden who had presided at the meeting. This advice was in total opposition to Scales' own views; and it was advice at that time, certainly, not very likely to conciliate him. Considering then, again, these circumstances, and what had previously taken place between these two parties, Bilton and Scales, the Court has little difficulty in believing that the latter did not conduct himself with all that mildness, forbearance, and calmness described by his own witnesses. The course of the transaction makes it improbable that he should so conduct himself. It is proved that Scales "is a man of warm temper, and rather violent at times;" and he was exasperated on this occasion. But there is evidence in support of this part of the charge, and evidence against it. Three witnesses depose to the violence of the defendant [594] towards Bilton; and the Court cannot divest them of all credit.

In parish squabbles, where there are opposite parties, from the natural frailty of the human mind both sides will be prejudiced: it would be nearly impossible to find any witnesses, in cases of this kind, who could depose without a bias to one side or the other; but neither set is, on that account, to be discredited: this circumstance has, however, rendered the examination of the transaction difficult, and made it imperative upon the Court to look into the evidence with great care and vigilance. I do not, however, perceive any contradiction in the testimony of the witnesses to the articles to induce me to doubt its general veracity: some trifling differences there may be in describing the mode in which the assault commenced; but these discrepancies are such as are probable; they are not in themselves material; and substantially the evidence proves the whole of this part of the case, as laid against the defendant.

The articles were also in some measure corroborated by the evidence for the defence; for Scales' own witnesses differ more as to the manner, degree, and extent

of the occurrences than contradict altogether the facts that are alleged. All were agreed that Scales put his hand upon Bilton; and that a scuffle ensued; and all must therefore admit that by such a scuffle the sanctity of the place was violated.

It was attempted in argument to be shewn "that Bilton was the first aggressor, and that he had the best of it;" but the evidence **[595]** for the defence even proves that, after the scuffle was over, Bilton said, appealing to those around him, "You see how I have been used;" an expression that it is scarcely probable he would have made if he had been the aggressor, and had not been worsted in the conflict.

The verdict in the Common Pleas has been adverted to, but I shall not lay any great stress upon it. Looking, however, to all the preliminary circumstances, recollecting that the intentions and wishes of Scales were about to be defeated, that he was ready to resort to any measures to prevent the dissolution of the vestry meeting, that he was in a state of great irritation, I can come to no other conclusion than that the witnesses in support of the articles are entitled to credit, and that the statute has been violated by the commission of the alleged assault.

Such being the conscientious opinion of the Court, what are the consequences of a conviction in my mind that the proofs established a violation of the statute? Here the Court has no discretion, the words of the statute are imperative—"If any person or persons shall smite or lay violent hands upon any other either in any church or churchyard, then, ipso facto, every person so offending shall be deemed excommunicate" (5 & 6 Edw. 6, c. 4, s. 2). This is the penalty for the offence of smiting in a sacred place; and the Court has no power to alter or vary it.

The law remained in this state till the year 1813, when an act was passed which in some **[596]** degree effected an alteration by changing the punishment annexed to the penalty of excommunication. The Court, however, is not relieved from pronouncing a sentence of excommunication; but the consequences of that sentence are very different from what they were before the passing of the 53 Geo. 3, c. 127. Since the passing of that statute the ancient punishment of excommunication is taken away; the person excommunicated incurs no civil penalties except such imprisonment as the Court in the exercise of its discretion may think proper to direct, not exceeding six months.

In apportioning the imprisonment in the present case the Court finds many circumstances of a mitigatory character. There was undoubtedly much irritation; but it was at a vestry meeting held for civil purposes: and the Court could not fail to consider that brawling at a vestry meeting was essentially different in kind and degree from the offence when committed in church during the time of divine service.

In the discussion of parish matters much irritation may perhaps almost unavoidably arise; and it is upon these considerations that I am anxious not to extend the punishment beyond what is necessary to shew that the law cannot be violated with impunity, and that the sacredness of a church or churchyard must be preserved.

It is the first time that this Court has been called upon to award punishment under the statute in question; and it is desirous to exercise the powers entrusted to it with discretion and **[597]** lenity, earnestly hoping that the sentence the Court is about to pronounce may operate as a warning and prevent all persons from repeating an offence which could not be fully justified, even under any circumstances of previous irritation.

The Court is of opinion that justice will be satisfied in the present case by apportioning a very short term of imprisonment; and it, therefore, pronounces the defendant excommunicate, and that he be imprisoned for seven days and pay the costs of this suit.

The King's advocate suggested that under the 53 Geo. 3, c. 127,(*a*) it was necessary that the Court should certify the sentence to the Court of Chancery.

Per Curiam. It is not necessary for me to certify till called upon to proceed to the execution of the sentence: if called upon, I am aware that I am bound to proceed:

(*a*) The third section enacts, "That no person who shall be so pronounced excommunicate shall incur any civil penalty or incapacity whatever, in consequence of such excommunication, save such imprisonment, not exceeding six months, as the court pronouncing such person excommunicate shall direct, and in such case the said excommunication and the term of such imprisonment shall be signified or certified to His Majesty in Chancery, in the same manner as excommunications have been heretofore signified," &c. &c.

but the promoter of the office will consider whether it is absolutely necessary to carry the sentence into full effect; [598] he may perhaps be satisfied with the sentence as it stands at present.

The King's advocate on the part of the promoter then stated that he did not wish that a significavit should issue; but would rest contented with the sentence of the Court, without proceeding to enforce its further execution.

Excommunication and costs.

WRIGHT *v.* ELLWOOD, CALLING HERSELF WRIGHT. Consistory Court of London, Trinity Term, 1st Session, 1829.—A citation issuing as "in a suit of nullity of marriage by reason of a former marriage," will not found a sentence of separation "by reason of an undue publication of banns," the woman being therein described as spinster, the first husband having died subsequent to the publication of banns but prior to the marriage.

This was a suit of nullity of marriage, by reason of a former marriage promoted by James Wright against Amelia Ellwood, in the citation described as "late wife and now widow of Harlow Ellwood, heretofore calling herself Emma Ellwood, spinster, and subsequently Emma, otherwise Emily Wright, wife of James Wright." The libel was admitted without opposition; it pleaded, inter alia, that in 1825 Amelia Ellwood assumed the Christian name of Emma, and called herself a spinster; that James Wright, believing that she was a spinster, paid his addresses to her and caused banns of marriage to be published by the name of Emma Ellwood, spinster; that banns were accordingly published on the 28th of May, the 4th and 11th of June, 1826; that Harlow Ellwood, her hus-[599]-band, died on the 27th of June, 1826, and that her marriage with Wright took place on the 6th of July following. It further pleaded the 4 Geo. 4, c. 76, s. 22, and that at the publication of the banns Harlow Ellwood was alive; that Wright and the party cited cohabited till September, 1828, when the complainant discovered he had been imposed upon. The libel concluded with a prayer that the marriage de facto might be pronounced null and void. The prayer was not made on any stated ground. Upon the evidence taken upon this libel the cause now came on for hearing.

The King's advocate and Phillimore for Mr. Wright.

Addams contrà.

Judgment—Dr. Lushington. This case offers many difficulties and objections, but it appears to me that upon the face of the proceedings there is one fatal objection to the sentence prayed. The citation describes the cause as a suit of nullity of marriage by reason of a former marriage; but the sentence which the Court is asked to pronounce is a sentence of nullity by reason of an undue publication of banns. There is then a discordance between the citation and sentence prayed. This variance is fatal. The proceedings commenced in the same form of citation as if the husband of the first marriage had been alive when this marriage was solemnized. But what was the fact? It appeared that though the party pro-[600]-ceeded against was a married woman at the time the banns were published, she was a widow, and therefore might legally contract marriage, at the period when this marriage was actually celebrated. It is impossible then, whatever might be the inclination of the Court, that it could pronounce this marriage void by reason of the former marriage. If this marriage upon the evidence before me was illegal, it must be pronounced so on the ground that the party proceeded against was improperly described in the banns; but with the irregularity to which I have been adverting, apparent on the face of the proceedings, I do not think myself justified in pronouncing this marriage void. It is not, therefore, necessary for me to offer any opinion upon many other objections, nor state the difficulties that I entertain in respect to many parts of this case.

In suits of nullity the Court is bound to act with peculiar caution lest the legitimacy of children may improperly be brought into question. Here there are no children, and consequently the rights of issue cannot in this instance be affected: but suppose there had been children, they would have had an interest in upholding this marriage, and might have been prevented by the character of the proceedings. They might have declined to interfere by the cause appearing to be a cause of nullity by reason of a former marriage, and not by reason of undue publication of banns. But the Court must also bear in mind that there may be other parties who may be interested in a suit of this description. I am then of opinion that, if I were to pronounce this marriage

void, I should [601] introduce a laxity of practice that would be extremely detrimental. I, therefore, must decline to sign the sentence that is porrected; and I dismiss the party cited from all further observance of justice in this cause.

MACLEAN *v.* MACLEAN. Consistory Court of London, Hilary Term, 1st Session, 1829. —The Court will not admit an exceptive plea that an indictment of witnesses, for perjury in their depositions in the cause pending, has been preferred and a true bill found, nor delay the hearing till the indictment is tried.

On admission of an exceptive allegation.

This was a cause of restitution of conjugal rights brought by the wife against the husband, in which a responsive allegation charging the wife with adultery had been admitted without opposition. Nine witnesses were examined in support of this plea; and upon the publication of their evidence an allegation of seven articles, exceptive to the testimony of Catherine Hughes and another witness, was offered upon the part of the wife.

This exceptive allegation, after pleading in contradiction to the deposition of Catherine Hughes upon the responsive allegation, set forth in the fifth article: "That at the sessions for the city of London held at the Old Bailey on the 4th of December, 1828, Mrs. Maclean preferred a bill of indictment against Catherine Hughes, charging her with having committed wilful and corrupt perjury in her deposition given in this cause, and that a true [602] bill was thereupon found against her by the grand jury, which, by writ of certiorari, had been removed into the Court of King's Bench."

Phillimore and Dodson for the husband. This allegation is wholly inadmissible. If the testimony of the witnesses excepted to is capable of being repelled it must be by the examination of Mr. Oliveira, particeps criminis. The contradictions, in general, if proved as laid, would be unimportant; they would not establish that the witnesses had sworn wilfully and corruptly. The fifth article is extremely objectionable. The attempt to introduce into these courts "the finding of a true bill" is quite novel and cannot be sustained. The introduction even of a verdict was long resisted. That a true bill was found only shews that the case was entitled to a further investigation; and the witnesses examined before the grand jury must have been the party herself and Oliveira. The admission of this plea will add to the expences which the husband must sustain in this suit.

The King's advocate and Nicholl contrà. The husband's allegation was not specific in its averments: and if, upon a plea of circumstances laid generally, the witnesses depose to particular facts, the other side is entitled to plead in contradiction of those particular facts as soon as the evidence is disclosed; and in respect to them the party is much in the same state after publication as before. There is no [603] reason why Mr. Oliveira should not be examined after the publication of the evidence. To reject him as a witness would be to assume the guilt of Mrs. Maclean, which is the issue to be tried. The conviction on an indictment for perjury renders a witness incompetent in every court of justice; it is not like a verdict against the particeps criminis, res inter alios acta. That an indictment has been preferred and a true bill found (though we admit that being on ex parte evidence they are no proof of guilt) are properly brought to the notice of this Court: for if, upon this allegation, the hearing of the cause be not postponed till the indictment is tried, this Court may pronounce a sentence on evidence which, it may afterwards be proved, was not entitled to credit.

Judgment—Dr. Lushington. In order to form a correct opinion of the admissibility of this exceptive allegation it is necessary to consider the nature of the cause and the steps that have been taken in it.

The commencement of these proceedings was a citation served at the instance of Mrs. Maclean upon her husband in a suit for restitution of conjugal rights. This application was met by the husband, who charged his wife with adultery, and, in an allegation responsive to her libel, detailed the grounds of his accusation. Upon the admission of that allegation Mrs. Maclean knew the nature of the charges against which it was necessary to defend herself; she knew that she was charged with receiving in her husband's absence clandestine visits from [604] Dominic Oliveira, and that he remained with her alone from an hour to an hour and a half at each visit. Mrs. Maclean, however, left her case to the defects, if any, of her husband's plea, offering no exculpatory allegation, and making no attempt whatever to contradict the mis-

conduct imputed to her till after the publication of the evidence. If it had been Mrs. Maclean's intention to have examined Mr. Oliveira (the alleged paramour, and upon whose testimony almost exclusively this exceptive plea, if allowed to go to proof, is avowedly to be sustained), she should have done that upon an allegation specifically denying the husband's charges.

It is not necessary to advert to the general principles which guide the Ecclesiastical Courts in pleas of this sort; but it is well established that, to entitle them to admission, "falsitas cum corruptione" must be alleged; and it must also be set forth to the satisfaction of the Court that the matters upon which the witnesses are to be contradicted are material to the general issue. Although sometimes it may be essential to justice to try collateral issues in a cause, yet it is the duty of a Court to avoid them unless the necessity is extremely clear. Is it, then, absolutely necessary for the purposes of justice that this plea should be admitted? The Court will not disregard the observation that the whole expence of these proceedings falls upon the husband; but that remark must give way to higher considerations; it is a burden incidental to the marriage state.

[605] It is alleged that Catherine Hughes has deposed falsely in respect to a declaration: but the declaration is immaterial to the issue; and if the plea on this point should be fully established it would not prove the witness guilty of wilful and corrupt perjury. It resolves itself into mistake and error—not sufficiently stringent to be of importance. I admit that the principle as to contradictory evidence of particular facts upon a general plea is truly stated; but, at the same time, if pleas were to be extended so as to include all particular facts, it would lead to an inconvenient and oppressive length: it is sufficient that they should furnish enough to open the means of defence. Here no plea in exculpation was given by the wife prior to publication; yet she now alleges that she has not committed adultery. This is a direct averment which should have been brought forward in an earlier stage of these proceedings, and is not now entitled to be received.

The chief matter for consideration is the fifth article: it is there pleaded that a true bill has been found against Catherine Hughes for perjury in this cause. This averment, according to my present recollection, is novel: I am not aware of any precedent upon the point. If I were to admit it, to what sort of weight would the proof of it be entitled? It has been truly observed that the bill was found on ex-parte evidence without any opportunity of contradiction; and that the mere finding of such a bill was not sufficient to extinguish the credit of a witness. But it was suggested that the hearing of this cause should be deferred till after the indictment **[606]** had been tried. If the Court were to yield in this instance, the same means of delay might be resorted to in every cause. It would be desirable, for the purposes of considering this matter, to ascertain on whose testimony the bill was found. If on the evidence of Mrs. Maclean herself, it would enable her to be a witness in her own cause. In *Thurtell* v. *Beaumont* (1 Bing. 339) a verdict had been given for the plaintiff to the amount of certain goods sworn by his brother to have been on the premises at the time they were burnt down. A new trial was afterwards moved for, supported by an affidavit from the defendant that true bills had been found against the plaintiff's brother and others for a conspiracy to defraud the fire office in this very matter, when Parke, J., said—"I find many applications for new trials on the ground of bills found by the grand jury, but none in which the application has succeeded. In one case, where the ground of the motion was that a bill for perjury had been found against the principal witnesses, Lord Mansfield said that the granting the rule for such a reason would have a most dangerous tendency, as it would open a door for constant scenes of perjury, and tempt a person to delay execution by indicting his adversary's witnesses. In *Warwick* v. *Bruce* (4 M. & S. 140) Lord Ellenborough discharged with costs a rule to stay execution till after the trial of an indictment against the plaintiff's witnesses for perjury; and in *Bartlett* v. *Pickersgill* (4 East, 577, n.), in Lord **[607]** Henley's time, a plaintiff having petitioned for leave to file a supplemental bill, because the defendant had, on the evidence of the plaintiff, been indicted and convicted for perjury on his answer to the original bill, Lord Henley dismissed the petition." Another case was referred to by Dallas, C. J., in support of the same principle, and the application was refused.

How, then, do these cases apply to the present? That if the finding a true bill, or the conviction of a witness, be no ground at common law for a new trial, nor in

equity for a supplemental bill, they cannot avail to the postponement of the hearing of a cause depending in these Courts. I do not say that a plea alleging the conviction of a witness of perjury would in no case be admissible; but the Court would require that the conviction should not have proceeded on the evidence of the party in the suit, or of the alleged particeps criminis. I reject the allegation.

Allegation rejected.

[608] MORSE *v.* MORSE. Consistory Court of London, Michaelmas Term, 1st Session, 1828.—A party cannot plead the contents of an instrument unless it is destroyed or in the possession of the adverse party.—The Court will not depart from its regular practice by directing a list of witnesses to be delivered, some time anterior to their production, to the other party, residing voluntarily in France.

On admission of the libel.

This was a suit of separation, by reason of the cruelty and adultery of the husband. The thirty-first article of the libel pleaded, "that in 1822, 1823, and 1824, and more particularly on the days when any thing occurred to prevent his (the defendant) being much alone with A. W., he continually passed a considerable portion of his time in writing and sending *love* letters and notes *of a very amatory description* to, and receiving *similar* letters from her, &c.; such *love* letters and notes being generally conveyed between the parties by a little girl." (*a*)[1] The letters were not annexed to the libel, nor was it pleaded that they were not in the possession or control of the wife. The admission of this article alone was opposed.

Per Curiam. The attention of the Court is directed to the thirty-first article only; and the objection is, that it pleads a correspondence between the defendant and the party with whom he is charged to have committed adultery. The general character of that correspondence is set forth, but none of the letters are exhibited. The libel does not allege the letters to be in the husband's [609] possession, nor that any one has seen them and is acquainted with their contents, though somebody, it may be presumed, would be examined to depose in support of the article.

It is, I apprehend, a settled rule that a party cannot plead the contents of an instrument, unless it is destroyed, or in the possession of the adverse party. If the article had pleaded that the letters were in the husband's possession, or that any one had seen them, and could identify the handwriting, I should have allowed the description of the letters to stand, and admitted the article. But, in the absence of all such averments, I must direct the article to be reformed, by striking out the epithets attached to the letters: and I am the more inclined to pursue this course because, if it can be shewn by the wife that her husband kept up a constant correspondence with this woman, she will have all the effect from that proof, that the article in its present shape could supply.

Libel reformed.

4th Session.—The libel being admitted, a motion, founded on an affidavit that the husband was in France, was this day made to the Court, that it would direct a list of the witnesses intended to be examined on the libel to be given to his proctor, in order to enable him to communicate with his client upon the interrogatories. An affidavit on the part of the wife (who opposed the motion) was also before the Court.

[610] Per Curiam. This is an application to order the proctor for the wife—the party proceeding—to furnish to the adverse proctor a list of witnesses some time anterior to their production. The general practice is quite otherwise.(*a*)[2] It is incumbent, therefore, upon the husband to shew some good ground for so unusual an application; but what does the affidavit state? "That the deponent received a communication this day, and also a letter last week, from Mr. Morse; and to the best of the deponent's knowledge, information and belief, he (Morse) is at the present time residing in France." The charges are said to be serious, and to run through several years; and that it is, on that account, the more requisite to have a full opportunity of preparing the defence. But all the difficulty arises from the absence of the husband himself: the whole matter rests upon that fact: and it is said that he did not quit this country till long after the institution of the present suit. The question, then, is

(*a*)[1] The words in italics were directed to be struck out.

(*a*)[2] Oughton's Ordo Judiciorum, tit. 80. See also *Ingram* v. *Wyatt*, vol. i. 94, 97.

whether a mere voluntary absence is a sufficient justification for the Court to depart from its ancient practice, and at the same time inflict a hardship upon the wife—the complainant—in the postponement of her cause.

In matrimonial suits the power of the Court is in personam. The Court cannot enforce a decree upon a party who is out of the kingdom. Here the absence is voluntary; no cause is assigned for it; and nothing further is stated to [611] induce me to violate an established rule of practice. If the absence were occasioned by particular circumstances—from illness or urgent business—the Court might then be induced to afford every facility for the proctor to communicate with his party: but if I were to accede to this application, it would occasion great inconvenience and delay to the wife, not only in this, but in every succeeding stage of her cause. The more serious the charges, the more proper it is that the husband should be ready and prompt in his defence. Without looking into the counter-affidavit, I am of opinion that there is no sufficient ground before me to sustain this application.

Motion rejected.

[613] THE PAROCHIAL SCHOOLMASTERS OF SCOTLAND *v.* FRASER AND OTHERS. High Court of Delegates, June 18th, 1829.—The appellants (interveners in the court below) being described in the commission of Delegates as "the Parochial Schoolmasters of Scotland," quære whether, notwithstanding the absolute appearance of the respondents, the inhibition ought not to be relaxed, on the ground that the appellants, not being a body corporate, had no persona standi in their collective capacity. Administration pendente lite and limited to certain property granted, by consent, to one of the parties.

This was an appeal from the Prerogative Court of Canterbury in the case of *Colvin* v. *Fraser* (ante, 266).

To a decree (issued at the instance of Mr. Fraser) "against all persons in general having or pretending to have any right, title, or interest under or by virtue of the alleged will and codicil of John Farquhar, Esq., the party deceased, to appear and see proceedings if they should consider it for their interest so to do," an appearance had been given in the court below, on the first session of Hilary Term, 1828, on behalf of "the Parochial Schoolmasters throughout Scotland:" and a proctor alleged them to be the residuary legatees named in the will of the deceased, and prayed an answer to their interest.(*b*) But the assignation, to answer to such interest, was never complied with.

On the 1st of February, 1828, a proxy under the hands and seals of ten parochial schoolmasters of the county of Haddington; and, on the 23rd of April, similar proxies from sixty-four of the parochial schoolmasters of eleven other Scotch counties were filed in the Prerogative re-[614]-gistry; and after the sentence in that Court a petition for a commission of appeal, presented to the Lord Chancellor on behalf of "the Parochial Schoolmasters of Scotland," was granted; and an inhibition having been served, a citation dated on the 5th of May, 1829, issued, calling on Mr. Fraser and the other next of kin "to answer to the said Parochial Schoolmasters in their cause of appeal; and further to do and receive as unto law and justice should appertain; under pain of the law and contempt thereof, at the promotion of the said Parochial Schoolmasters."

On the first session of Easter Term, the 8th of May, 1829, appearances were given for the parties cited; a proxy on the part of John Farquhar Fraser, Esq., was exhibited, and the proctor for "the Parochial Schoolmasters" was, at the prayer of the adverse party, assigned to libel and bring in his appeal next court and to exhibit a proxy.

On the second session the proctor for Mr. Fraser alleged "that the Parochial Schoolmasters of Scotland were not a body corporate, and he moved the Con-Delegates to direct the appellants to give security for the costs of the appeal, and also to decree letters of administration under certain limitations, and pending the appeal, to be granted to Mr. Fraser or Edward Vaughan Williams, Esq., his nominee, on giving justifying security."

These applications were grounded on two affidavits made by Mr. Fraser: the first concluded by stating in substance "that in consequence of the decrees (issued at his instance) appearances were given in the said cause on behalf of the Parochial Schoolmasters of Scot-[615]-land, as interveners, respectively claiming interests under the

(*b*) The will is printed, see ante, p. 267, et seq. notis

alleged will (ante, 292), that on the 25th of February last the judge of the Prerogative Court pronounced against the alleged will and codicil, and decreed the letters of administration to be re-delivered out to this deponent; that the present appeal was interposed, not by the executor, the party principal in the aforesaid cause, but on behalf of the Parochial Schoolmasters of Scotland, whose proctor had appeared in the aforesaid cause as an intervener on their behalf; that such parochial schoolmasters were not, as he had been informed and believed, a body corporate, and that he verily believed that every individual member of the said society resided in North Britain, and out of the jurisdiction of this court."

The second affidavit, in order to move for an administration pending the appeal and limited to the receipt of certain rents of leasehold premises, interest on mortgages, and the principal of a mortgage (the mortgagee having become a bankrupt), set forth circumstances shewing that the estate was incurring great risk from the want of a personal representative.

On these applications being made to the Court of Con-Delegates, it was suggested that the petition to the Lord Chancellor was on behalf of the "Parochial Schoolmasters of Scotland," and not in the names of certain individuals of that body; that the commission, inhibition, and citation all followed the petition, but that it now appeared that the "Parochial Schoolmas-[616]-ters" were not a body corporate,(*a*) and under these circumstances a very considerable doubt arose whether (even admitting, that as individuals, they had a sufficient interest) they had collectively a persona standi for prosecuting the appeal, and whether the inhibition ought not forthwith to be relaxed.

The counsel for the schoolmasters contended that even if they had not a right to appeal in their collective capacity, the persons who executed the proxies were entitled to proceed as individuals; that they had originally appeared in conformity to a decree to see proceedings issued at the instance of the next of kin, that the objection was now taken too late, as their interest had been admitted in the court below, both by the judge and by the adverse party in consenting to their intervention and to their being heard by counsel; and, further, that if the objection could be taken at all in this court, it ought to have formed the ground for an appearance under protest to the inhibition.

The counsel for the next of kin contended that the formal instruments, viz. the petition, commission, inhibition, and citation, shewed that the appeal was prosecuted on behalf of the body and not of individuals of the body, and that this rendering all the proceedings vicious, the present objection was fatal. They denied that the interest of the schoolmasters had been admitted in the court below; for that, on the contrary, all questions respecting their right [617] had been specially reserved by the court (see ante, 292, notis); and beyond that, as it now appeared on the face of the proceedings, that they were not a body corporate, the court was bound ex officio to notice the fact, even if the parties were barred from raising the objection, owing either to their having appeared absolutely and not under protest, or to any other cause.

The Con-Delegates referred the consideration of this question and of the two affidavits to the whole commission; but on the 3rd of June, the motion for the limited administration being renewed, they decreed it (the other parties not opposing the same) to Mr. Fraser, limited as specified in the affidavit, and until the hearing of the matters referred to the whole commission, or until some further order.

The Judges Delegate were: Mr. J. Bayley, Mr. J. Park, Mr. Baron Garrow, Drs. Arnold, Gostling, Blake, Haggard, Chapman.

The cause was called on for hearing before the whole commission on the 18th of June, when the counsel for the appellants declared that their parties proceeded no further in the appeal.

The limited administration, granted on the third of June, was then brought in; and the court decreed the inhibition to be relaxed.

Mr. Brougham and Dr. Addams, counsel for the appellants.

Dr. Phillimore, Dr. Lushington, and Mr. E. V. Williams, counsel for the respondents.

(*a*) Quære whether, if a body corporate, the appearance as given was good. It ought to have been by A. B. Syndic of the Parochial Schoolmasters of Scotland. Oughton, tit. 13 (*n.*).

[618] HAMERTON *v.* HAMERTON. High Court of Delegates, July 11th, 1829.—In a suit for separation by reason of the wife's adultery, after the arguments of counsel are closed and after the court has delivered its opinion that, though culpable and suspicious conduct had been, adultery had not been, proved, it is a fit exercise of discretion to rescind the conclusion, for the purpose of admitting an allegation pleading further matter to establish the wife's guilt.

[See further, 3 Hagg. 1.]

This was an appeal prosecuted on the part of the wife, from the Arches Court of Canterbury (ante, pp. 8 and 24); and the præsertim of the appeal was, "that the Judge had, on the third session of Hilary Term, 1829, rescinded the conclusion of the cause, and given leave to the proctor of William Medows Hamerton to bring in a certain allegation theretofore by him tendered."

The allegation was immediately, upon the same session, brought into the registry.

After the usual proceedings in the Court of Delegates the cause stood assigned for informations and sentence before the whole commission; (*b*)[1] and now came on for argument.

The King's advocate, Mr. W. E. Taunton, and Dr. Addams for the appellant. There is no principle of justice and of common sense by which judges are more invariably governed than an extreme jealousy of admitting cases to be amended by supplemental evidence. In every case, whether criminal or civil, whether to be decided by a judge in a court of equity, or by a jury, if a cause is suffered to be opened for the purpose of being instructed with fresh proofs, it leads necessarily to consequences of a most dangerous and of obvious tendency. Suppose, for instance, an action for criminal conversation, would a judge, while **[619]** charging the jury, stop the cause and enable the party to call fresh evidence?

Burrough, J. No; but the plaintiff would be nonsuited; and could then bring a fresh action.

Argument resumed. Some dates and facts are important. The suit was instituted in April, 1827; and the libel admitted on the second of August. Upon the appeal to the Arches Court, additional articles to the libel were, on the first of March, 1828, admitted; (*a*) and, on the third of May, further additional articles were also, upon Major Hamerton's petition, admitted.(*b*)[2] Twenty-nine witnesses were examined upon the libel and additional articles; and, after argument, the Court was of opinion that the evidence did not sustain the imputation charged against Mrs. Hamerton; but that it did establish against her a case of great impropriety and **[620]** culpability; and this we do not deny. The Court, then, had expressed its opinion; and nothing was wanted but a ratification of that opinion by a formal sentence of the dismissal of the wife. The proceedings, then, shew that Major Hamerton has been allowed ample opportunity of proving his case: and there is no appeal, on his behalf, as to whether the evidence was, or was not, sufficient to support the charge; but the only question

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(*b*)[1] The judges under this commission were: Mr. Justice Burrough, Mr. Baron Hullock, Drs. Arnold, Chapman, and Curteis.

(*a*) These additional articles merely contained a more full and formal pleading of the marriage of the parties.

(*b*)[2] The further additional articles plead as follows:—1st. "That shortly after Isabella Frances Hamerton quitted the house of William Medows Hamerton (as pleaded in the 19th article of the libel) she went to Tours in the south of France, where she continued to reside with her mother until in or about the latter end of January, or beginning of February, 1828, when she removed to Paris, where she is now residing. That John Bushe, whose name is frequently mentioned in the libel, is also residing at Paris; that since the arrival of Mrs. Hamerton in that city Bushe and Mrs. Hamerton have carried on, and still continue to carry on, their adulterous intercourse; that they have during such time frequently called and still continue to call upon each other at their respective lodgings, and have remained, and frequently do remain, alone together therein for considerable spaces of time, during which times they have frequently had and continue to have the carnal use and knowledge of each other's bodies, whereby she, the said I. F. Hamerton, has committed, and still continues to commit, adultery."

respects the discretion exercised by the Court in abstaining from a dismissal of the wife, and in rescinding the conclusion of the cause.

The decree or order, from which we appeal, is a departure from all principle; it is unsupported by precedent, and it operates with extreme hardship and injustice towards the wife. The suit had been going on for two years, abundant time had been allowed for establishing the husband's case by a proof of his libel; he was not taken by surprize, and his prayer for the publication of the evidence shewed that he was satisfied and content to rest his case upon the result of the depositions, as they then stood, without examining a second witness to sustain his further additional articles, nor applying for further time for that purpose. Upon the evidence, the Dean of the Arches inclined to the opinion that the case was not proved, and at his suggestion the cause stood over, either for new proof upon the old plea, or for a new plea.

The allegation that has in consequence of this decree been given in was not seen by the Court of Arches, and we have declined to re-[621]-ceive it; we have not, therefore, legally seen it; and we much doubt whether it ought properly to have been printed and annexed to the papers before the court. If we had seen the allegation it might have subjected us to this remark, that we opposed the order of the court from a conviction that we could not resist the fresh charges; but we appeal on the ground of the order being novel, irregular, and leading to fraud, stratagem, and subornation of perjury. In ordinary course, Mrs. Hamerton ought to have been dismissed; and there is no instance of further time being allowed for the production of additional evidence, unless there is proof of a corpus delicti. Admitting, therefore, that the conclusion of a cause may be rescinded in certain cases, it must be done in the exercise of a good and sound discretion, guided by principle and by precedent. But no case, we conceive, can be cited that resembles the present.

The ecclesiastical law, it is well known, demands for full proof the testimony of two witnesses; but suppose a case of this nature, in which, on the evidence of one witness, the Court is morally (for judicially it cannot be) satisfied of the guilt of the party charged: in such a case, we apprehend, the conclusion may properly be rescinded for further proof. Such was *Searle* v. *Price* (2 Hagg. Con. 191); in its character and circumstances differing widely from the present. For that was a suit of nullity of marriage where the interests of third parties are affected; not so in suits of adultery; and the defect was in the proof of identity. In *Middleton* v. *Middleton* (Supplement, infra, p. 134) the Court had not arrived at a knowledge of the [622] evidence; the cause was not absolutely concluded: there the wife was not proved innocent, here her guilt is disproved, and notice is now given to the husband what defect is to be removed, and what further evidence is required. In *Donellan* v. *Donellan* (Supplement, infra, p. 144) a criminal connexion between a man and a woman was proved; the circumstances established would have satisfied a court of common law, and were sufficient to impress any mind with a moral conviction of the guilt of the wife; but there was no proof of her identity, and the only question was whether the woman in the lodgings was the party in the cause.

Hullock, B. There was only evidence of a woman in bed: the corpus delicti could not be established without the identity. It might be another woman.

Argument resumed.

A corpus delicti was in that case sufficiently in evidence before the Court. And in all the suits of adultery in which the conclusion of the cause has been rescinded for the purposes of identity a proof of guilt has existed. *Cargill* v. *Spence* (ibid. p. 146), and *Henley and Dudderidge* v. *Morrison* (ibid. p. 147), only shew that the conclusion of the cause may be rescinded in order to prove identity. Are there any special reasons for giving the permission of pleading de novo in this case? Is there any precedent to warrant it? The cause was not conducted wholly in a provincial court. To affirm the decree would be to go further than is recognized by practice; [623] and if the discretion is pronounced to have been soundly exercised in this case, the Court will warrant a similar discretion in every diocesan jurisdiction. The great danger of affirming such a decree is the inducement it furnishes to parties to suborn witnesses, in order to reconcile contradictions in the evidence that before existed; because the Judge points out the particular parts where the cause is defective in proof. A reversal of this decree will be no hardship nor injustice to the husband.

Mr. Campbell, Dr. Lushington, and Dr. Dodson for the respondent. It is not disputed that the ecclesiastical court can rescind the conclusion of a cause: and if it

were, the cases that have been cited would remove all doubt upon that point, and shew it to be an acknowledged and established practice. The cases lead, necessarily, to an affirmance of the decree of the Court of Arches, and to a dismissal of the appeal. There is little or no analogy between the practice of the common and civil law courts. In the ecclesiastical courts, on an appeal, a fresh allegation may be introduced, and fresh proofs in support of it. A recent instance shews that, even in Westminster Hall, a rescinding of the conclusion of a cause is not unknown. Upon a rule last term to shew cause why a mandamus should not issue to admit a parish clerk, Mr. W. E. Taunton shewed cause on affidavits (and the affidavits being filed, the cause is concluded against a party); when the counsel (Mr. Campbell) on the [624] other side suggested on motion that a difficulty might be cleared up by further affidavits; and the court granted the motion.

It has been argued in this case that the decree now under consideration was not the result of a sound discretion: the practice, however, has been perfectly recognized; and the authorities cited on the other side go further than what is necessary for the decision of the present case. The only distinction between this case and *Searle* v. *Price* is that the suit was there for nullity of marriage, a more severe and strict proceeding than the present, because in that the issue would be bastardized if the suit were sustained; whereas, in suits of adultery, if the separation is pronounced for, the status of the children remains the same. In *Middleton* v. *Middleton* (see Supplement, p. 134), at the time the rescinding was permitted, the stage of the cause was tantamount to the conclusion of the cause. "The parties had renounced all further allegations unless exceptive, which undoubtedly is the virtual conclusion of the principal cause, as far as the rights of parties extend." Indeed, every word in *Middleton* v. *Middleton* that fell both from Lord Stowell and Sir William Wynne is important in its bearing upon this case. There the new matter was to be "explanatory of much obscurity which appeared to hang over the cause on the face of the libel;" and the object of our allegation is to shew that a direct correspondence was carried on between Mrs. Hamerton and her alleged paramour.

After examining at length the cases commented upon by the counsel for the appellant, and citing the observation of Lord Stowell as [625] to the great and incurable grievance, in the ecclesiastical courts, that parties may appeal from every step, and that causes, by the occupation of the Court of Delegates, may be hung up long before an interlocutory decree can be pronounced, the counsel for the respondent continued: The argument, drawn from a fear of stratagem and subornation of perjury, would apply to every case, under all circumstances, in which the conclusion of the cause was rescinded: it would equally apply to the cases of *Middleton*, and of *Donellan*, as to this. But wherever the Court, in its sound and legal discretion, grants such a permission, it always watches, with the greatest vigilance, the evidence that may thus be introduced.

It was said that the inclination of the opinion of the learned Judge of the Court of Arches was in favor of Mrs. Hamerton; and that she was entitled to have been dismissed from the suit; but still it has been admitted to-day that her conduct was highly blameable; and, as it may be presumed that the court of appeal has read the evidence taken in the cause, we may confidently assert that the case, established against Mrs. Hamerton, is so pregnant with suspicion, that it is all but proved; and sufficiently so, at all events, to allow of the exercise of that discretion which, it is not denied, belongs to the ecclesiastical court. The inferences from the letters annexed to the libel are so strong that they cannot fail to have a considerable influence upon the mind of any one who reads them: the letters are such as would satisfy a jury of the truth of the charges laid in the libel. To avoid debateable ground, [626] we abstain from adverting to the allegation that now stands upon admission, and is printed in the process, since some objection has been made to its introduction into the cause; but confining ourselves to the affidavits, which clearly were before the court below, and which refer to the allegation, it cannot be doubted that the averments, if proved, coupled with the previous circumstances, are most stringent, and fully justify the decree of the Court of Arches.

The Court pronounced against the appeal, and in favor of the order or decree appealed from, and remitted the cause.

SKEFFINGTON *v.* WHITE. High Court of Delegates, July 16th, 1829.—An administration de bonis non, granted in 1827, of an intestate who died in 1790, limited to assign a leasehold property not severed in the deceased's lifetime, and only mortgaged during an original creditor administration (which was granted on the renunciation of the next of kin at the time of the death and which expired in 1806) revoked; the next of kin for the time being (in whom all the beneficial interest in the deceased's estate was vested) not having been cited when the limited grant was made, and there being a suggestion that such grant was surreptitiously obtained, and that there was a surplus belonging to the deceased's estate.

[Applied, *In re Johnson*, 1880, 7 L. R. Ir. 1.]

This was originally a cause or business of citing Henry John White "to appear and bring into and leave in the registry of the Prerogative Court of Canterbury the letters of administration of the goods, chattels, and credits of Thomas Hubbert, deceased, left unadministered by Alexander Hubbert, whilst living, a creditor of the deceased, and limited so far as concerned all the right, title, and interest of Thomas Hubbert in and to several pieces or parcels of ground, messuages, warehouses, buildings, hereditaments and premises with the appurtenances, situate in the parish of Saint Mary Magdalen, Bermondsey, Surrey, described and comprised in certain indentures of lease bearing date the 23rd of June, 1788, **[627]** and 7th of March, 1791, and the residue and remainder of the terms of years therein granted,(*a*) and all benefit and advantage to be had, received, and taken therefrom, but no further or otherwise, theretofore granted by the court to Henry John White, as a person for that purpose named by and on the part of William Davis, Benjamin Shaw, Sir Charles Flower, and John Green; and to shew cause why the same should not be revoked and declared null and void." (*b*)

[628] To this decree an appearance, under protest, was given for Mr. White; and on the by-day **[629]** after Trinity Term, 1828, the cause having been argued on the statements contained in the act on petition, and on the affidavits, the Court rejected the petition of Sir Lumley Skeffington, and condemned him in costs (1 Hagg. Ecc. 699).

From this sentence an appeal was prosecuted to the High Court of Delegates; and

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(*a*) The lease of the 23rd of June, 1788, was for the term of seventy-nine years. The demises under the lease of the 7th of March, 1791, were for various terms; some had expired, and the longest term was for forty-eight years. These leases were stated on the part of Sir L. Skeffington to be of considerable value.

(*b*) Previous to the grant of limited administration two affidavits, the substance of which was as follows, were filed:—

John Green of Blackheath, Esq., made oath, "that he is one of the parties on behalf of whom application has been made for administration of the effects of Thomas Hubbert, deceased, limited to all the deceased's estate and interest in certain hereditaments and premises (as comprised in the two above mentioned leases): that by indenture dated the 23rd of June, 1818, the freehold and inheritance of the said hereditaments and premises became vested in the deponent, together with W. Davis, A. Jordaine, B. Shaw, and Sir C. Flower, subject to the said two indentures of lease and three annuities of 115l., 125l., and 420l. thereon charged, and in manner therein mentioned; the two former annuities being payable to Leonora Logie, widow, and the latter to Arabella Spriggs, widow; that the said indenture of lease dated the 23rd of June, 1788, with other title deeds relating to the said hereditaments and premises, has been in the possession of the deponent and said other parties or their agents from 1807; and the said indenture of lease, dated the 7th of March, 1791, from 1824 to the present time; and he and they have been in the possession and in the receipt of the rents of the said premises, and have paid and discharged the taxes, rates, and other out-goings from 1818 to the present time; and the said several annuities have been from time to time paid by the deponent until their determination on the death of the said annuitants respectively; Mrs. Logie having died in 1821, and Mrs. Spriggs in 1824; that the said A. Jordaine is dead, and that B. Shaw is his surviving executor; that he (the deponent) verily believes that certain original indentures dated the 31st of December, 1790, the 27th of September, 1802, and 6th of September, 1805 (referred to in the proceedings with respect to the grant of

after the usual formal steps the cause came on for argument at Serjeant's Inn, before the whole commission, consisting of Mr. Justice Bayley, Mr. Baron Garrow, Dr. Daubeny, Dr. Blake, and Dr. Pickard.

The allegations in the act on petition and in the affidavits may be sufficiently collected from the judgment of the court below, and from the arguments of counsel in the Court of Appeal.

Dodson and Haggard for the respondents. The first point is, whether Sir Lumley Skeffington, the appellant, is entitled to call in the administration: he has no beneficial interest in the property in question; and all acts done under the administration granted to Alexander Hubbert, the general administrator, are valid. Upon the death of Thomas Hubbert, who died **[630]** insolvent, a deed of arrangement was entered into with the creditors of the estate, and they agreed to accept fifteen shillings in the pound payable within two years; and it is clear they would not have entered into this composition if there had been the least prospect of their obtaining a full discharge of their respective debts. In 1793, when the period for paying the last instalment of the composition expired, the premises, contained in the lease of 1791, had been assigned over as a security for an annuity of 420l. per annum, purchased for 4000l.; and the lease of 1788 had also been assigned for a loan of 1500l.; yet still the administrator had not, at that period, been enabled to pay out of Thomas Hubbert's estate even 11s. 3d. of the composition; for to make up that sum the payments had exceeded the effects by 2500l. A further arrangement was then made, and six years more were granted in order to pay off the remaining 3s. 9d.; Mr. Rowcroft and his partner (the administrator) agreeing to add 2000l. in aid of the insolvent estate, out of their own separate funds: and the creditors at that time covenanted to accept this 3s. 9d. or so much as the estate would yield in six years (together with the 2000l. to be advanced), in full satisfaction of their several debts. Soon after this fresh arrangement Alexander Hubbert, the administrator, went to reside at Ostend. In 1795 the lease of 1788 was assigned over in trust for his partner Rowcroft; and from that time to 1818 (when the two leases passed from Rowcroft into the hands of Sir Charles Flower, Mr. Davis, and others) Rowcroft was in the sole receipt of the rents and profits; he had paid all **[631]** rates and outgoings in respect to it, erected large premises, and much improved the property both in magnitude and value. On the death of the creditor administrator in 1806 no account was demanded by the next of kin; and till the year 1826 nothing

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the limited administration), are so lost or mislaid that they cannot now be found, and that there are not any more authentic copies in the possession of the deponent, or of the said other parties, or their agents, than those produced. That in respect to a certain original deed poll, dated the 31st of January, 1805, referred to, and to be produced, and appearing cancelled, the same is now in the same plight and condition as when it came into his possession with the other title deeds as aforesaid: and, lastly, that he has been legally advised that the said administration of the unadministered effects of Thomas Hubbert, deceased, should be granted to a nominee of the deponent, and the aforesaid other parties, by reason that such grant of administration to them or either of them might operate in law as a merger of the aforesaid leases, and be thereby rendered of no effect."

Joseph Jones, of Bermondsey Wall, made oath: "That in 1796 he entered into the employment of Thomas Rowcroft, then a London merchant, and he continued in such employment until 1818; and when he so entered into the said service he, Rowcroft, was in the possession and occupation of certain premises and warehouses situate in Cherry Garden, Bermondsey, and deponent was employed to superintend and take care of the same, and which hereditaments and premises are, as deponent verily believes, the same concerning which an application is now making to this court for administration of the unadministered effects of Thomas Hubbert, to be granted under certain limitations, as to the interest which he, the deceased, had in the same: that Rowcroft continued in possession of, and had the sole and exclusive management and control of, the said hereditaments and premises, and, as deponent believes, was in possession of certain leases therein granted, and also in the sole receipt of the rents and profits thereof from 1796 to 1818; and, during the whole of that period, paid all rates, taxes, assessments, and outgoings whatsoever chargeable thereupon, and until the said premises were in the latter year conveyed by Rowcroft to Davis, A. Jordaine, B. Shaw, Sir C. Flower, and J. Green."

was done by them or by their representative, the appellant, in respect to this property. The transactions, then, connected with this property, the lapse of time, and the laches of the appellant himself are sufficient to bar him upon the present question.

Without minutely tracing the legal title to this property through its various assignments, we contend that this limited administration was rightly granted to the nominee of Flower, Davis, and others. The want of a previous citation or decree is a mere technical objection; there was, under the circumstances to which we have referred, no legal necessity for such a process to precede the present administration. An administration, we admit, either general or limited, cannot, unless under some special considerations, be granted without citing the next of kin; but that rule is confined to next of kin at the time of the intestate's death.(*a*)[1] If they renounce and die, their representative has not the same right. The Court may then exercise its discretion, and decree administration to a stranger in preference to kindred. This we apprehend to be a principle recognized and acted upon in the Ecclesiastical Courts. Indeed, its existence and propriety seem to be conceded on the part of Sir Lumley Skeffington; for in the act **[632]** on petition it is not alleged that, before a limited administration is decreed, it is the universal practice of the Court of Probate (when an administration de bonis non, and limited for a certain purpose, is applied for) to cite those entitled to a general grant; but it is merely stated that, "under the circumstances," Sir Lumley Skeffington should have had a legal notice by citation; no infringement then of any invariable rule of practice is averred. It may be further admitted that the Ecclesiastical Court would usually grant an administration to a representative of a next of kin, if the application were made in due time; but in this instance there has been extreme delay. No application was made on behalf of the present appellant till after the letters of administration were parted with by the nominee and annexed to the title deeds. The letters of administration are now out of the grantee's possession and control; and if he were ordered to bring them into the registry of the Court, it would not be in his power to obey the monition.

But the Prerogative Court has not exceeded the limits of a just discretion in this matter: it was fully authorized and at liberty to make the grant. Vigilantibus non dormientibus lex succurrit. Here was no clandestinity nor surprize upon Sir Lumley Skeffington, and no concealment of facts from the Court. The various deeds were before it; and that the appellant was apprised of the intended application for the grant is clear from the documents in the cause;(*a*)[2] yet he directed no caveat to be

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(*a*)[1] Vide appendix, and the cases there reported.

(*a*)[2] In a letter dated the 14th of July, 1826, from the solicitor of Flower, Davis, and others, to Sir L. Skeffington's solicitor, there was a passage as follows:—"Mr. Rowcroft's claims upon the estates of both A. and T. Hubbert must put beyond all doubt the total absence of all beneficial interest in the next of kin of T. Hubbert. My clients therefore wish the friendly concurrence of Sir L. Skeffington, by his making a similar renunciation at the present time to that made by his mother and Mrs. Donovan in 1791; and as they are advised that the Court would, were it prayed for, grant a limited administration confined to this particular property (to which their title is so clear), but at a great expence both to the next of kin and to the partner entitled to this property, and with serious delay; and as T. Hubbert left no other property whatever, I trust Sir L. Skeffington will not hesitate to accede to this request, and thereby enable my clients to obtain by an easy and speedy means that which they must otherwise seek, and will undoubtedly attain by an expensive and dilatory process. Should this request not be complied with, I shall of course immediately apply in the ordinary way for limited letters of administration to the effects of T. Hubbert, and resort to such means as may be necessary to authenticate the usual allegations in these cases." And an affidavit, made by the clerk to the solicitor (first above referred to), thus concluded: "On the termination of the correspondence [between the two solicitors] the deponent made several applications to Sir L. Skeffington's solicitor for the papers delivered to him, which he refused to deliver until his charges had been paid; that at some of the interviews between the deponent and the said solicitor on the said applications the deponent stated to him that as Sir L. Skeffington declined giving his assistance in the business, his (the deponent's employers) clients would accomplish their object without it, as there was no doubt of their right to the said leasehold premises."

[633] entered; and neither he nor his solicitor (who had been constantly communicated with upon this business) took any precautionary measure to prevent the grant. Nor can any advantage accrue to the appellant by revoking the administration; for all acts done under it are good. **[634]** There are various authorities to that effect. *Packman's case* (6 Co. 18, 19. Cro. Eliz. 459). *Blackborough* v. *Davis* (1 Salk. 38. 1 Lord Ray. 684).

For upwards of twenty years the appellant has been in a condition to obtain an inventory and account of Thomas Hubbert's estate, and to see to its proper administration; and yet till the year 1827, when he was applied to upon the subject of this grant, he had never interfered in the management of this property, nor advanced any claim in respect to it; but, on the contrary, he had allowed his rights, if rights he has any, to remain so dormant that it was only after the most diligent and laborious search that it was discovered he was the representative of the intestate's next of kin. And during a long course of years Mr. Rowcroft remained in quiet possession; the property was improved by him, and dealt with in a variety of transactions, and it has now passed to a bonâ fide purchaser for a valuable consideration. Under these circumstances the limited administration has been properly decreed; and the appellant has failed to shew any title in order to impeach the grant.

Mr. Knight on the same side. The administration under discussion not being one granted in contravention of any statutory provision, the only substantial question is whether it was an act in which a judicial discretion was unsoundly exercised, on the part of the Court below, to such an extent as to render **[635]** it fit to be corrected on appeal; for the Court below certainly was entitled to exercise a discretion: there is no positive rule or clearly settled practice giving preference to kindred in cases of this description; and there are familiar instances of frequent occurrence in which an administration, in such exercise of discretion, is granted to strangers in blood in preference to claims of affinity and kindred. The whole question then turns upon the exercise of the discretion.

In the present case nothing is suggested against the solvency or respectability of the administrator; he was nominated on the part of persons in the apparent ownership and peaceable possession of the property. And what did the grant of administration confer on him? a burthen or liability merely, and no benefit. The Court, granting the administration, neither did nor could give or strengthen any beneficial right, or do more than render the administrator a trustee for those really entitled (whosoever being); and he is bound to assign or distribute accordingly. Did the grant vary, or in any respect prejudice any remedy or right of Sir Lumley Skeffington? Not in any sense. If he were in possession of the administration he could bring no ejectment; he must apply to a Court of Equity; and in support of his claim he might have filed his bill against White as soon as the administration passed the seal.

Thomas Hubbert had the terms in question, but Alexander was his administrator, and assigned them; and the whole matter to which the present administration relates is an equitable, or a possible or a supposed equitable, right to **[636]** call back the terms from the legal holders of them (of course not before the Court on this occasion), that is, to call them back for the benefit of the person or persons representing the general personal estate of Thomas Hubbert. Sir Lumley Skeffington's sole remedy therefore in respect of the property (the possession of which is admitted to be, and to have long been, adverse to him and his family) must be in any event, and in any event must have been, by filing a bill in equity. Has he that right the less by means of the existing grant? Certainly not. Could he have had, or can he have, it the more had the grant been to him or were it now to be made to him? Certainly not. Has the act of the Ecclesiastical Court been such as to throw a difficulty in his way or a slur on his title, if any? Clearly not. The functions of that jurisdiction are not of a nature to be allowed that effect, nor does any Temporal Court give any such effect to any such act. The grant may have rendered it necessary to make the administrator a party defendant to any suit in equity by Sir Lumley Skeffington; but that is too weak a ground to afford an argument; and such must have been the consequence of nominating any administrator except Sir Lumley Skeffington himself, who, in fact, does not allege himself to be the personal representative of either his father (who survived Lady Skeffington, and became entitled to her personal estate) or of Mrs. Dawson. In fact, however, the administrator has actually assigned the terms, which were the whole object of his administration, and so remains without estate or

interest; and it is clear law that the validity of that as-[637]-signment will not be affected by a revocation of the grant of administration.

How, therefore, independently of any question as to the ultimate validity of Sir Lumley Skeffington's claim of property, can it be said that the Court in a matter of discretion has gone so wrong as that it is fit to reverse what has been done? In such cases where the beneficial right of property is not concerned, and a mere matter of official duty is in question, a Court of Appeal ought not to interfere unless on very strong and cogent grounds. It ought to act as the Courts of Equity do in the case of receivers, holding it not sufficient to say that the inferior judge has, of two persons proposed to him, selected the worse, or has selected one than whom fitter persons could be suggested, unless a positive case of unfitness can be established against the person appointed.

But if the question of the probability of the ultimate success of Sir Lumley Skeffington's claim of property be considered, it will be found not worthy of countenance or attention. His claim is founded on the allegation that the terms not only were, but continue to be, as to the beneficial interest in them, part of Thomas Hubbert's personal estate. As has been said before, this claim, if tenable, can only be prosecuted in equity in any event; but is it one which a Court of Equity will assist? Is not Sir Lumley Skeffington bound to shew that it is or may be so, before he can ask for a revocation of the grant? If every fact stated in Jones' affidavit should appear in a Court of Equity, a bill filed by Sir Lumley Skeffington in respect to this claim would be demurred to. A Court of [638] Equity however does not assist stale demands, and generally considers twenty years of adverse enjoyment as a complete bar. In the present case Alexander Hubbert became administrator of Thomas in February, 1791, on the renunciation of Thomas' next of kin; and it is manifest on the whole evidence that from that time down to the year 1826 neither of the next of kin, nor any claiming under or in right of either of them, ever had or sought possession or enjoyment of the property, or any part of it, or any interest in it. The possession and enjoyment have continued and are still adverse. How, then, even upon Sir Lumley's own shewing, can a Court of Equity act? The disabilities of infancy, imprisonment, and foreign residence are out of the case; and that of coverture does not apply; for not only is the question one of personal estate, but Donovan, who must have died before the year 1808, as his will was proved in March, 1807, survived his wife; and as to Lady Skeffington, she too was survived by her husband, though when he died or when Lady Skeffington died, their son avoids mentioning. But was it not his duty to inform the Court, and is any thing to be intended in his favor in a case such as this? In fact, however, upon the question of length of time, it is immaterial under the circumstances when Lady Skeffington or her husband died.

The present, then, is not a case in which, on Sir Lumley Skeffington's application, the Court ought to revoke a limited grant of administration such as this is—a revocation which may do harm and injustice, but cannot advance any right, nor do any party any good.

[639] He cited *Packman's case* (6 Co. 18), *Squib* v. *Wyn* (1 P. Wms. 382), *Beckford* v. *Wade* (17 Ves. 87), *Macleod* v. *Drummond* (ib. 165), *Chalmer* v. *Bradley* (1 Jac. & Walk. 51), *Lord Cholmondeley* v. *Clinton* (2 Jac. & W. 1), *Price* v. *Copner* (1 Sim. & Stu. 347), *Hickes* v. *Cooke* (4 Dow, 16).

Lushington and Addams for the appellant. The first question is whether the Court could grant such an administration at all without first citing the next of kin or their representatives, and giving them the option of taking a general grant de bonis non. Secondly, whether this proceeding be justified by the general law, or by the particular circumstances of the individual case.

It was not competent to the Court to grant any administration at all in this case, without first citing the next of kin or their representative, the present appellant; he had a prior right to the administration, a right of which he could not be deprived. For grants of administration are not to be considered according to what may be the interests of parties in Courts of Law or of Equity. It is perfectly clear that, on the death of Thomas Hubbert, the Court was bound to grant the administration to the next of kin, if they had chosen to take it; but they renounced. The effect, however, of that renunciation was not to renounce any benefit from whatever surplus there might be after payment of the debts. We allow that during the life-[640]-time of the creditor administrator the next of kin could not have taken the administration

from him; but on his death the right of the next of kin revived. The renunciation was not perpetual. This was admitted in the sentence of the Court below.

Many reasons occur why a next of kin will renounce an administration in favour of a particular creditor, as confidence in the individual, affairs embarrassed; and in this instance the creditor administrator was the deceased's partner, and the transactions were extremely complicated. It does not follow that an estate is insolvent because the next of kin renounce. In West India and mercantile estates solvency may be, and often is, doubtful. Such a state of property will lead to a temporary renunciation of the right to administration. The next of kin then being entitled to the grant on Alexander Hubbert's death, how can they be deprived of that grant without their own consent or without a citation. Where a party has a title to a prior grant, whether of probate or administration, the universal practice of the Court is to cite that party before a grant can issue to any other person. In cases of probate the executor is cited before a grant to a residuary legatee; a residuary legatee is cited before a grant to a specific legatee; so in administrations, the next of kin are cited before a grant to a creditor. Such is the universal practice, and so strictly held, that there must be a citation on the Royal Exchange when the parties are out of the kingdom. On what principle could this grant be made without a citation? We contend that for want of a citation, **[641]** and upon the ground of a prior right in the appellant, this grant must be repealed. It has been said that the statute of 21 Hen. 8, c. 5, applies only to the next of kin at the time of the death; but no decision to that effect has been cited. On the other hand, it is clear that if this grant had not been a departure from ordinary practice, it would not have been moved in Court; and usage and a long course of practice will make a law.

The Court below said that the next of kin had lost their rights by time, by events, and by their own laches. But the principle is not applicable to such a subject matter. Invariable practice proves the contrary: the executor or next of kin can only be barred by a renunciation, or by an actual service of a decree, and a refusal to appear: but not even by that, in the case of an executor. But what time is a bar? Where is the rule? how is this to be decided? If there is no specific period, what a field of litigation is opened! Is time to be a bar at the end of ten, fifteen, or twenty years? or is it to be a bar to next of kin, and to no one else? Will creditors be barred? In the present case there is equal laches. Again, what events—what circumstances shall bar? This is also too indefinite; the Ecclesiastical Court has no such discretionary power.

The present claimant has no title whatever: he is not a creditor of the intestate; he is not a nominee of the creditors: he is simply a nominee of persons in possession of the intestate's property. There is no authority which lays down that possession for a certain length of time will give a title to an administra-**[642]**-tion. But this administration was not granted on the ground of title: that was expressly disclaimed.

The consequences of such a grant are most serious. Here is a very large property to which administration has been taken under 50l.; and to whom is the administration granted? What security does this grant to White, a mere nominee, afford to the rights of others? Much confusion must ensue if it be sustained: every distinct leasehold estate will have its separate grant; and upon these, a cæterorum grant. We do not admit that all mesne acts done under this administration would be good; but if they are, what prejudice will the repeal of the grant occasion to those on whose behalf it was made? If the parties in possession of this property have a good title, no possible injury can result to them from the refusal of a grant to their nominee; they may compel the administrator to perfect this title; but they never would have resorted to this strange mode of proceeding if it had not been to cover some latent defect. It was not necessary to enter a caveat, because no such grant had ever been made without a previous citation.

The grounds stated in the protest are, that the premises are sold, and that the vendors were entitled "to the sole equitable right, title, and interest" in them. No account was ever rendered by Alexander Hubbert of his administration: he mortgaged the leaseholds and paid the creditors, but made no assignment of the property. An untrue representation of the state of this property was made in the first instance, and, after the unsuccessful negotiation with Sir **[643]** Lumley Skeffington, was still persisted in, and carried on by clandestine proceedings.

Preston on the same side. Although the next of kin of Thomas Hubbert

renounced for the purpose that letters of administration might be granted to Alexander Hubbert, this renunciation was only for the convenience of collecting the assets. The beneficial interest in the surplus assets after payment of the creditors remained with the next of kin, and now belongs to the appellant as their representative, and it conferred on him a right to require letters of administration of the assets, remaining unadministered at the death of A. Hubbert, to be granted to him. Though he should obtain administration cæterorum, the limited administration granted to White would suspend the right to sue at law, if the remedy were legal; and will supersede, except through the medium of a Court of Equity (even if a Court of Equity will have jurisdiction to act), the right to require a conveyance from the persons who now have the legal estate.

The letters of administration to White are not in the ordinary form of letters of administration, obtained by the owner of the inheritance when an assignment is requisite of a term attendant on the inheritance; they are of a mixed character. They assume that all the beneficial interest in the leases, or terms, had become vested in Thomas Rowcroft by payment of debts to the value of the leases, and through him in Davis and others, his assignees, and who applied to have administration granted to their nominee. Aware of the difficulties to which the case was **[644]** exposed, the letters of administration treat the terms as an asset to be administered, and yet the stamp is as for a nominal asset, and not proper for an asset of value to be applied in a due course of administration.

The material statement in the administration is that which will be noticed in the progress of the argument; and on which it will be necessary to offer some detailed observations, and yet from the history of the transaction it is evident that this asset never was duly administered: it remained part of the assets of T. Hubbert, even down to the death of A. Hubbert. Instead of being sold it was pledged partly by way of security for several annuities, and partly by way of mortgage, in consideration of sums raised to obtain money to be applied in part payment of the composition with the creditors of T. and A. Hubbert. The statement that W. Davis and others became entitled as well to the freehold and inheritance as to the sole equitable right, &c., to and in the remainder of the said term of years, granted as aforesaid, founded as it was on the allegation that "although no actual assignment of the leases was made by A. Hubbert to Rowcroft, yet he, Rowcroft, was in possession, and had the sole management and controul of the premises therein granted, and was in the sole receipt of the rents and profits thereof, from or before the year 1795 to the year 1818," is a mere fallacy. It is language which states facts, but not the spirit, the truth, or the legal result of the facts. It conceals the real character of the transaction. It treats Rowcroft as being, and being allowed to be, the beneficial owner. It follows up the **[645]** history of this possession by a statement that during such period he paid the several annuities charged on the premises, and all other outgoings. Compare the dates and real character of Rowcroft, and this statement is devoid of all foundation in truth and in law; as the root of an equitable or adverse title. Rowcroft was the partner of A. Hubbert, and had embarked in his speculations, and, for the convenience of their partnership concerns, he had joined with him as a surety to pay a composition to the creditors on their debts, claimable out of the partnership assets of T. and A. Hubbert, and, in aid of them, out of the separate assets of T. Hubbert. Rowcroft resided in England, while A. Hubbert (from about 1794) resided at Ostend, where he died.

On account of A. Hubbert's residence out of England, and the partnership and the guarantee given by Rowcroft jointly with Hubbert, and the annuities which had been granted (and for which Rowcroft had made himself liable), Rowcroft was entrusted or authorized to receive the rents of this leasehold estate; more especially as the means of answering the annuities, as they became due. He was a mere agent of the administrator. The fact of granting annuities, secured on the leases, as an asset, instead of selling the leases, is of itself a ground of equity in favour of the next of kin; and meets, and completely refutes, any notion that Rowcroft had made the asset his own individual property by paying debts beyond the value.

In opposition to the cases cited in support of the argument on the other side Sir Lumley Skeffington relies on the case of *Pickering* v. *Lord* **[646]** *Stamford*,(*a*) to shew that this asset was unadministered, and that time does not run against the claim of

(*a*) 2 Ves. jun. 272, 581. See also *Cubbidge* v. *Boatwright*, 1 Russ. 549.

next of kin, to call for the due application of an unadministered asset. How could an administrator, by granting annuities which might determine at an early period by the deaths of the lives, realize to himself the profit, if any, of a transaction so irregular, and so contrary to the duty of an administrator in the due and proper discharge of his office, which makes it imperative on him (unless he takes a different course for the sake and benefit of the next of kin) to sell, and by that means ascertain and obtain the full and actual value of the asset. By granting annuities, instead of selling the terms, the administrator has, in fair inference and in the contemplation of a Court of Equity, made a bargain to secure an ultimate advantage to the next of kin and to himself. The composition was also for the benefit of the next of kin; and not of the administrator quà administrator. Whatever the administrator might have done, Rowcroft was without any power, without any right, except so far as he was entitled to be indemnified from his suretyship to the creditors and to the annuitants. He was only the deputy, the agent of the administrators, except so far as an equity arose to him to be indemnified as surety; and his receipt of rents, down to the death of A. Hubbert, was as such agent, deputy, or surety: and whether in one or in the other character, his possession was not adverse in the lifetime of A. Hubbert, **[647]** but was a possession under the title of A. Hubbert. From the death of A. Hubbert there was a suspense of the representation to T. Hubbert, and by a settled rule of law (*a*) time or adverse possession could not begin to run until there was a representative to Thomas, and no such representation has existed since the death of A. Hubbert, in 1806.

At his death the annuities were existing; also the mortgage for 1500l. made by A. Hubbert to Margaret Smith, who assigned in 1795 to Davis, a trustee for Rowcroft; and then Rowcroft assumes the new and additional character of mortgagee: and yet his equitable title is not by the letters of administration placed on that footing: nor could it have been done with any color of reason or equity, since he had also the duty to collect and receive the rents, to answer the annuities while they continued; and one of these annuities determined in 1821 and the other in 1824. Besides, neither A. Hubbert nor Rowcroft ever attempted to assume or to claim this asset as their own property. The statement in the letters of administration of equitable merger is devoid of all principle, for Rowcroft had in 1797 purchased the reversion of the property, subject to an interposed interest; and there was not any merger at law or in equity. Instead of treating Rowcroft or Hubbert as beneficial owner, there was a recital in the mortgage to Smith in 1805 (only one year before A. Hubbert's death) that A. Hubbert had taken out administration of the effects **[648]** of Hubbert, and was indebted to Rowcroft in 7878l. and upwards: and Rowcroft being indebted to Smith and Co. in 15,000l., he deposited the title deeds to the freehold interest he had purchased, and an attested copy of the two leases, as a security for repayment of the 15,000l.; and he assigned to Messrs. Smith the debt due to him from A. Hubbert, whether in his own right or as administrator of the effects of T. Hubbert; and without distinguishing the amount due from the administrator as such, from the sum due from A. Hubbert individually. This deed repels every presumption, every notion, that Rowcroft had a beneficial interest in the leases on the ground of purchase; or as having made the asset his own: indeed he had not, whatever A. Hubbert might have had, any right to treat the asset as made his own property, by payment of debts beyond the value. And Rowcroft, and those who claim under him, could not avail themselves of any title, as owners, under A. Hubbert; since, as against A. Hubbert, they claimed to be creditors on the leases, and not owners of them: and the existence of the debt, as a debt, is recognised as late as September, 1805, while A. Hubbert is living, when Rowcroft granted an annuity to Mrs. Logie: but the terms of the deed are not stated, and it is to be inferred that they are injurious, not beneficial, to the title asserted on the part of Rowcroft. And the terms of the security for an annuity to Charles Logie, in September, 1802, are also withheld in the statement of the history of Rowcroft's title. Another important feature in this case arises not from inference, but from documentary state-**[649]**-ment. It is that the money for the annuities, and the money advanced by Mrs. Smith on mortgage, were raised to be applied in part of the composition to the creditors. And by the new arrangement with the creditors in March, 1793, for payment of the remaining part of the composition, it appears that

(*a*) *Stanford's case*, cited Cro. Jac. 61. *Murray* v. *East India Company*, 5 Barn. & Ald. 216.

A. Hubbert and Rowcroft were in advance 2500l. only. They state their own insolvency, and exhibit a particular of the outstanding debts of the partnership (being sums to a considerable amount), and they specify these leasehold estates as a remaining asset, without affixing any sum as the value of the same; it was, of course, the asset of the administrator as such. And when Rowcroft paid Mrs. Smith in 1795, his motive for so doing was expressed to be, that "Rowcroft was unwilling that the mortgaged premises of A. Hubbert should be immediately sold."

All these statements and transactions negative the claim of Rowcroft to be, or to be considered, as in adverse possession, or to be treated as owner, in or after 1795. And unless he became owner in the lifetime of A. Hubbert, there has not existed since his death any representative who could confer a title on him, or against whom time could run. Even after the death of A. Hubbert, Rowcroft, still acting honestly and honourably towards the persons interested in the assets of T. Hubbert, assigned not the leasehold estate as a property, but the debt of 7878l. due to him from A. Hubbert, and afterwards assigned his interest to them in trust to sell. This was so late as the 19th January, 1815, while the annuities were still continuing. In 1818 Davis and others obtain a release of the equity **[650]** of redemption in liquidation and discharge of their debt; and this release or conveyance was made subject to the annuities and to the leases. Now even an administrator in full power and right cannot sell or mortgage in consideration of a debt due from himself personally, so as to prejudice the next of kin. That the release was made subject to the leases fully proves that they were not, and were not treated to be, merged in the inheritance as attendant. The leases could not be noticed for any other purpose than to shew that Rowcroft did not mean to assert a title to the benefit of them, as against the representatives of the next of kin, the rightful owners of them. Thus the equity, on which the letters of administration were granted, entirely fails. And such equity, if it had existed to the fullest extent in which it is asserted, would not, in point of law and ecclesiastical jurisdiction, support the grant.

The grant has been made improvidently, and been obtained by surprize. It is in contravention to the rights of Sir L. Skeffington to be the sole and general administrator, unfettered by a grant which would exclude him from the only advantages he seeks to obtain from a grant, full and unlimited, of letters of administration to himself. What is his right? His right is to have this asset administered, and to call for the legal estate, and to settle all the demands of A. Hubbert and of Rowcroft, and the persons claiming to be incumbrancers on this asset.

It was urged that the limited administration did not interpose any impediments to the prejudice of an administrator cæterorum. That argument was offered without due consideration. **[651]** In the first place, White is constituted the representative of Thomas Hubbert as to these terms. No suit can be instituted in equity in respect of this asset, without making White a party. To increase the number of parties to a suit in equity is in itself a difficulty, an evil, an injury. Besides, a Court of Equity cannot treat Sir L. Skeffington, being only an administrator cæterorum, as having a right to administer this asset, or control the assignment of the terms, or require an assignment of the legal estate, or to settle the accounts so as to clear this asset of its incumbrances. The answer of a Court of Equity to the suit of Sir L. Skeffington for these objects would be—You must displace the character of the special administrator before you can, in respect of this asset, be a plaintiff in this Court. It is obvious, then, that these letters of administration are injurious to the appellant. The grant is the commencement of a new and bad system. It is not warranted by law, or sanctioned by practice. It brings the appellant into conflict with a stranger who has not any right to administer any part of the assets as assets. It makes it at least necessary that White should be a party to every suit in equity in respect of this asset; and perhaps, and probably, the grant, if continued in force, will impede and bar his right to institute any suit concerning this asset or the accounts with which it is connected. It gives to White, while the administration is in force (and so his counsel have argued his case), the power to administer this asset, to call for an assignment of the legal estate, and to adjust and settle the accounts of the incumbrancers.

[652] These letters of administration are, in their tendency and in their object and effect, a release of the equity of redemption, and an attempt to exclude the investigation of a long and intricate transaction, involving an equitable title which ought to be open for examination in a Court of Equity.

The Prerogative Court, assuming a jurisdiction which exclusively belongs to a Court of Equity, has decided on the equitable title as between opposing and conflicting parties.

The merits of the appellant are clear: he has a right to have general letters of administration, and to be unfettered with any difficulty from the Ecclesiastical Court, in the assertion of his equitable title as administrator.

By decreeing the nullity of their administration, no person will be injured or prejudiced; the rights and interests of all parties will be restored to a proper footing, leaving the administrator at full liberty to prosecute any just and lawful or equitable claims; and leaving to Davis and others all the powers which of right, and by the rules of law or equity, belong to them of resisting and defending themselves, if they can, against the claim of the administrator.

The Court pronounced for the appeal, directed a monition to issue to call in the limited administration, and condemned the respondent in costs.

[653] WESTMEATH *v.* WESTMEATH. 15th July, 1829.—The Court will pronounce an Irish peer in contempt for non-payment of costs, and direct such contempt to be signified, leaving the Lord Chancellor to decide whether the writ de contumace capiendo should issue.

[See Supplement, p. 1.]

This was an application to pronounce the Marquess of Westmeath to be in contempt, and to direct his contempt to be signified for not obeying a monition to pay the costs incurred, on behalf of Lady Westmeath, in the Court of Delegates. The costs had been taxed at 201l. 4s. 8d., and a monition for the payment thereof had been personally served upon the marquess, and returned into Court on the 25th of May.

Lushington and Addams in support of the application. Unless Lord Westmeath is protected as an Irish peer, the Court must pronounce him in contempt: and the question is whether, as an Irish peer, it ought on that account alone to refuse this application? By the fourth article of the Union with Ireland, Irish peers, except in certain cases, are to be sued and tried as peers, and to enjoy all the privileges of peers as fully as peers of Great Britain (40 Geo. 3, c. 67, art. 4). And we are not aware that, as relates to this case, any distinction can be made between an English and an Irish peer. An Irish peer is exempt from arrest on ordinary civil process. *Coates* v. *Viscount Hawarden* (7 B. & C. 388). Considering, then, that Lord Westmeath is entitled to the same privileges as a **[654]** British peer, would this Court pronounce a British peer in contempt? The consequences of such a decree need not be regarded by this Court, for it would be a matter for the Court of Chancery to determine whether the writ de contumace capiendo should issue. It is only incumbent upon this Court to decide whether Lord Westmeath has, or has not, been guilty of a contempt in not paying the taxed costs. To pronounce a peer in contempt is no breach of privilege; it is not an arrest of the person; it is only an initiatory process. The 53 G. 3, c. 127, has substituted the writ de contumace capiendo for the writ de excommunicato capiendo. The same regulations govern the latter as applied to the former writ. And the language, both of the 5 Eliz. c. 23, and of the 53 G. 3, c. 127, is general. There is no exemption for peers. In definitive sentences the Ecclesiastical Court can still pronounce a party excommunicate: and in the statute of 5 & 6 Edw. 6, c. 5 (s. 2), against quarrelling and fighting in the church, it is enacted, "That if any person shall smite or lay violent hands, &c. that then ipso facto every person so offending shall be deemed excommunicate." Privileges of peers may avail in cases of small but not of great importance. 2 Hawk. P. C. 152. For the purpose of this argument there is no distinction between a spiritual and a temporal peer: and in the *Bishop of St. David's case* (*a*) the bishop was taken upon several significavits, and on one for non-payment of costs.

[655] Bayley, J. Were the costs incurred before or after he became a peer?

Argument resumed.

They were incurred after: the bishop pleaded his privilege as a peer. In *Rex* v. *The Bishop of St. Asaph* (1 Wills. 332) the Court said: There is no doubt but an attachment "may issue against a peer." And Viner, citing *Harris* v. *Lord Mountjoy*

(*a*) *Lucy* v. *The Bishop of St. David*, 2 Ld. Raym. 817, 7 Mod. 56, 117.

(2 Leonard, 173), says: "For execution on a stat. staple merchant, on the stat. of Acton Burnel, or on the stat. of 23 Hen. 8, the body of a baron shall be taken in execution; for by these statutes such persons were not exempted" (Viner, tit. Peer (D.), s. 3). It is laid down that a peer shall not be arrested in debt or trespass, *Countess of Rutland's case* (6 Co. 52); and the reason is that a peer is supposed to have sufficient property by which he may be compelled to appear. But the Ecclesiastical Courts have no jurisdiction over property: and the only mode they have of enforcing their decrees is by proceeding against the person: they cannot touch the goods. In some instances those Courts might proceed in pœnam; but if this monition be not enforced, the effect will be to release all peers from the operation of the matrimonial and testamentary law of this country. For instance, the husband could never be compelled to appear in a suit for the restitution of conjugal rights; or, if he did appear, he could not be compelled to proceed one step further than he pleased: he might continue before the Court so **[656]** long as he entertained hopes of success, and no longer: he might disregard the judgment of the Court; so that, being a peer, he might at pleasure separate from his wife. Thus, in suits for nullity of marriage; adultery; cruelty. And in all these cases the costs of the wife are a necessary part of the proceedings; she cannot obtain justice without them. So also in matters of testamentary law. A peer might retain an original will in his custody, or keep an administration improperly obtained; and the Court could not, in either case, proceed effectually against him. And this reasoning applies to all cases in every other branch of ecclesiastical jurisdiction. But, it being clear that contempt is substituted for excommunication, and that a peer enjoys no absolute privilege of exemption, the Court, we apprehend, cannot in this case decline to enforce its monition.

Bayley, J., referred to Comberbach's Reports, p. 62; and also to the case of *Lord Cromwell*, who, in the time of Queen Elizabeth, was discharged after an attachment had issued against him (and been returned) for disobedience to an injunction in Chancery. Selden—Of the Privileges of the Baronage—vol. iii. p. 1543, c. 4 (fol. ed.), S. C. Dyer, 314.(*a*)[1]

The Court directed the case to stand over for a further argument upon three points:—

1. Whether, before the stat. of 5 Eliz. c. 23, the Ecclesiastical Courts could put in force any **[657]** further proceeding against a peer, after excommunication.
2. Whether the 5 Eliz. applied to peers, and made any alteration in that respect.
3. The effect of the 53 G. 3, c. 127.

5th November.—Lushington. Prior to the stat. of 5 Eliz. c. 23, excommunication might be pronounced by the bishop, or by his judge, or by the Court of Delegates; and, on the excommunication being signified into Chancery, the writ de excommunicato capiendo issued; but not till after an expiration of forty days from the time that the excommunication had been published. In ancient times interdicts were also issued by ecclesiastical authority, and these included towns and cities. The writ de excommunicato and the imprisonment that ensued were only one consequence of excommunication. Other consequences and disabilities necessarily attached to a decree of excommunication, whether a significavit issued or not. The party excommunicate could not sue or be a witness; he was disabled from being an executor, or at least his service of that office was suspended. And that a plaintiff had been declared excommunicate and not absolved was a good answer to an action.(*a*)[2] These were among the civil disabilities attaching upon excommunication only.

The 5 Eliz. c. 23, was "an act for the due execution of the writ de excommunicato capiendo;" that is its heading: and the object of the statute was to enforce the writ and make it **[658]** more effectual; not to diminish any of the former powers, but to increase them; nor did it supersede the writ de excommunicato capiendo at common law; that still remained. The writ was originally returnable only into the Court of Chancery; but this statute, by its second section, directs that it shall be returnable into the Court of King's Bench. Penalties in certain specified cases were superadded. Sect. 13 enacts that there must be the same additions as were required by stat. 1 Hen. 5, c. 5, and it may be a question (not necessary for me now to discuss) whether this statute extends to peers.

(*a*)[1] The fullest statement of *Lord Cromwell's case* is in D'Ewes' Journal, 203.

(*a*)[2] Of excommunication, its division and effects, see Lyndwood, lib. v. tit. 17. Ayliff's Parergon, p. 255, et seq.

Bayley, J. You cannot have a capias against a peer, because you may have a distress infinite.

Argument resumed.

Prior to the 53 G. 3, c. 127, a sentence of excommunication, independent of the writ, carried with it other severe punishments. There is nothing to shew that a peer might not be excommunicated; and, putting the writ de excommunicato capiendo out of the question, be subjected to all the other consequences of excommunication. The precedents from the Delegates (*a*) prove that the judges, sitting under [659] respective commissions in this Court, have executed such a power: and why should not the writ de excommunicato capiendo follow upon the decree. Excommunication in this class of cases is now taken away by 53 G. 3; and [660] if the writ de contumace capiendo is not substituted for it in the case of peers, then this statute has abridged and nullified the power of the ecclesiastical courts over peers: for, before that statute was passed, those courts exer-[661]-cised over them excommunication and its penal consequences. It cannot be presumed that the legislature intended to reduce the power of the ecclesiastical courts, and leave them without any remedy against peers.

(*a*) The precedents cited were as follows:—

Countess of Meath v. *Earl of Meath.* Delegates, 6th Feb., 1724.

A bill of costs porrected and taxed against the carl. Monition decreed for payment sub pœnâ excommunicationis.*[1]

Delegates, 27th Jan., 1725.—The earl was condemned in expences under pain of excommunication.

28th Apr., 1726.—Holman and Duthick alleged that the monition for payment of expences had been served upon the earl upwards of thirty days.*[2]

Lady Cavendish Harley (by her Guardians Lords Paget and Pelham) v. *The Dutchess of Newcastle and Lord Clare.* 27th May, 1715.

The Dutchess of Newcastle condemned in costs, and a monition decreed against her to pay the same sub pœnâ.

Earl of Leicester v. *The Countess of Leicester.*† 6th November, 1738.

Joselyn Earl of Leicester being thrice called, and not appearing, the judges directed him to be excommunicated for not giving in his personal answers; but not to be extracted till after next Court.

Lady Cranstoun (Wife of Lord Cranstoun) v. *Marshall.* 9th May, 1770.

Monition for costs was decreed against Lady (or Lord) Cranstoun, fifteen days after service.

15th November, 1770.—Collins left in the registry a schedule of excommunication against Sophia Lady Cranstoun, wife of James Lord Cranstoun, in case costs were not paid pursuant to the monition.‡

Countess of Ilay v. *The Earl of Ilay.* Consistory, Mich. Term, 1st Session, 1718.

The judge, at petition of Sayer, pronounced the Earl of Ilay contumacious, and assigned to hear upon Sayer's petition, and continued the certificate to the next session.

Note.—From that day the cause stood out, and on each Court the pain of the earl was reserved.

Consistory, Trinity Term, 1st Session, 1719.—Proclamation was made for the earl, and he not appearing, Sayer alleged and prayed as "in chartâ;" and upon his petition the certificate was continued.

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*[1] There appears a void of fourteen months in the assignation book, but this cause is set out in June, 1725, in the next book without reference to the monition, and so continues.

*[2] The rest of the assignation was indistinct; but the words "eum pro excommunicato denuntiavit" seemed to form a part of it. It was, however, impossible to ascertain whether a significavit followed.

† This cause is described in the assignation book, *Sidney* v. *Sidney.* Costs and alimony were given; but the excommunication does not appear to have been extracted. A monition by ways and means for costs was extracted; but no further proceedings.

‡ No further assignation in respect to this case.

Daubeny, LL.D., referred to the Articuli Cleri (9 Edw. 2, st. 1, c. 12), with Lord Coke's Commentary upon it, 2 Inst. 630, to shew that in respect to tenants in capite —summoned to Parliament to attend the King—the writ de excommunicato capiendo was never denied.

Bayley, J. If the Court should pronounce Lord Westmeath to be in contempt, and direct a significavit, not only the Lord Chancellor has an opportunity of considering what he will do in the matter; for he may refuse, in the first instance, to grant the writ or quash it afterwards; but, before the writ issues to the sheriff, it goes into the Court of King's Bench, to be entered **[662]** of record, and that Court may annul it, if there is any thing apparent on the face of the instrument to nullify it.

Park, J. As the statute prevents the Court from qualifying its certificate and adopting any other than the prescribed form, the significavit should not issue merely in common course from the office, but the attention of the Lord Chancellor should be called to it.

The proctor for Lady Westmeath informed the Court that the order in the cursitor's office was, that in all cases where a significavit was prayed against a peer the seal should not be affixed without notice to the Lord Chancellor.

The proctor then exhibited his affidavit, stating that the costs had not been paid to Lady Westmeath nor to himself; and the Court pronounced Lord Westmeath to be in contempt and directed the certificate to issue.

Lady Vane v. *Lord Vane.* Mich. Term, 3rd Session, 1736.

Cheslyn returned citation, and prayed an appearance, or that Lord Vane be pronounced in contempt. The judge pronounced Lord Vane in contempt, but reserved his pain, and continued the assignation to next Court.

Lady Ferrers v. *Laurence Lord Ferrers.* Mich. Term, 2nd Session, 1757.

Proclamation for Laurence Earl Ferrers, and he not appearing, Crespigny accused his contumacy and prayed him to be decreed excommunicate for not giving in his answers.

The assignation and certificate to next Court, upon which day Earl Ferrers being thrice called and not appearing Crespigny accused his contumacy, and the judge (Sir Edward Simpson) at his petition pronounced him contumacious for not giving in his answers, but reserved his pain and continued the certificate and assignation to next Court. From which day the assignation was continued to the by-day, when the earl not appearing, Crespigny accused his contumacy, and porrected a schedule of excommunication, which the judge read and signed in the presence of Stevens, and continued the rest of the assignation to the first session of next term.

11th January, 1757-8.—A requisition, to take Lord Ferrers' oath for absolution, decreed at the petition of her proctor, and also for his answers.

Lady Ferrers v. *Robert Lord Ferrers.** 23rd May, 1792.

Heseltine alleged that Lord Ferrers had not paid the alimony due to his client pursuant to the monition with which he had been personally served; and therefore prayed the Judge to decree Lord Ferrers excommunicate, and porrected a schedule of excommunication which he prayed the Judge to read and sign; but the Judge (Sir Wm. Scott) declined doing so, and continued the certificate to next Court.

Note.—The certificate was continued for several Court-days; and the alimony was at length alleged to have been paid.

After these cases Lushington referred to 3 Selden, p. 1478, for the case of the *Earl of Cromwell*, in Edward the First's reign, who, in Westminster Hall, was served, as he was going to parliament, with a citation out of an Ecclesiastical Court, at the suit of Bogo de Clare and the prior of St. Trinity, London. The earl sued them for the contempt, and recovered a thousand marks damages. And in the same parliament the Master of the Temple petitioned that he might distrain for rent in a house in London, which the Bishop of St. David's held of him: "In qua non potest distringere in tempore parliamenti." But the answer was "non videtur honestum quod rex concedat quod ille de consilio suo distringatur tempore parliamenti, sed alio tempore distringatur per ostia et fenestras, prout moris est."

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* See 1 Hagg. Con. 130.

FREE, D.D. *v.* BURGOYNE. High Court of Delegates, February 15th, 1830.—A clergyman may be deprived for fornication without previous monition or suspension. Sentence of deprivation affirmed with costs.

[Referred to, *Martin* v. *Mackonochie*, 1883, L. R. 8 P. D. 201.]

From the sentence of deprivation pronounced against Dr. Free in the Court of Arches, in Trinity Term, 1829 (*O. J. by Burgoyne* v. *Free, D.D.*, supra, 456), Dr. Free prosecuted the present appeal: and on this day, before Gaselee, J., Vaughan, B., James Parke, J., Sir Herbert Jenner, LL.D., Dr. Phillimore, Dr. Gostling, Dr. Haggard, and Dr. Chapman, the cause was argued, on the same evidence as in the Court of Arches, by Lushington and Dodson, LL.D., for the respondent; and by Dr. Free.

[663] In the course of the argument a doubt was suggested by the Court whether deprivation, without any antecedent monition, or suspension, was the proper punishment for fornication; but—after a reference to various passages in the canon law, to reported cases,(*a*) and upon a **[664]** consideration that if a monition was not necessary to precede a sentence of deprivation on account of adultery, nor a sentence of suspension for any offence, no reason nor principle seemed to exist why it should be required in respect to deprivation for aggravated and notorious fornication (more especially in a case where there was full proof of such a series of offences, and that in consequence thereof the parishioners had, for a length of time, almost wholly ceased to attend their parish church)—the Court affirmed the sentence of the Court of Arches with costs, and remitted the cause.

On the by-day in Hilary Term the proctor for the respondent brought in the remission, when the judge, at his petition, directed a certified copy of the sentence of the Court of Arches to be transmitted to the Consistorial and Episcopal Court of Lincoln, in order that it might be officially communicated to the diocesan.

(*a*) Among the authorities referred to were the following:—

Mandamus quatenus Clericos qui in Subdiaconatu et supra fornicarias habuerint, studiosè monere curetis ut à se illas removeant. Si vero acquiescere contempserint, eos ab ecclesiasticis beneficiis usque ad satisfactionem congruam suspendatis, et si eas, suspensi presumpserint detinere, ipsos ab eisdem beneficiis perpetuo removere curetis Decretal, 3, 2, 4.

Decernimus ut ii qui in ordine Subdiaconatûs et supra uxores duxerint aut concubinas habuerint officio atque Ecclesiastico beneficio careant. Decreti, pars 1. Distinctio, 28, c. 2.

Si quis Clericus adulterasse aut confessus aut convictus fuerit, depositus ab officio in monasterio toto vitæ suæ tempore detrudatur. Decreti, pars 1. Distinctio, 81, c. 10.

Romanus, Ecclesiæ Theanensis, Clericus pro crimine adulterii quod admisisse perhibetur à Clericatûs ordine depositus in monasterio ad agendam pœnitentiam ex nostra jussione detrusus est. Ibid. c. 11. Presbyter aut Diaconus, qui in fornicatione captus est, deponatur. Ibid. c. 12. Si quis Episcopus aut presbyter aut Diaconus fuerit fornicatus aut mœchatus deponatur, et ab Ecclesia projectus inter Laicos agat pœnitentiam. Ibid. c. 13. Si quis Sacerdotum officium contumaciter deserens fœminam sibi potius elegit sicut sponte ob fornicationem dimittit officium ita ob prevaricationem dimittere cogatur, etiam invitus, beneficium. Ibid. c. 17. Qui, ut fornicari eis liceat, Divinum officium derelinquant, sicut se ab officio justissime alienos faciunt, ita beneficio Ecclesiarum privatos esse adjudicamus. Ibid. c. 18. Si quis ex illis adulterii, scortationis aut incestus convictus fuerit—the Reformatio Legum prescribes first, forfeiture of goods: deinde, si quod illi beneficium fuerit, postquam adulterii vel incestus vel scortationis convictus fuerit, ex eo tempore protinus illud amittat nec illi potestas ullum aliud accipiendi: præterea, vel in perpetuum ablegetur exilium, vel ad æternas carceris tenebras deprimatur. Reformatio Legum, 24 b. c. 2, tit. "Ordiamur ab Ecclesiarum Ministris."

12 Eliz. Burton, parson of Isboch in Leicestershire, was deprived for adultery. 6 Co. 13 b. Latch, 22. Hobart, 293.

16 Eliz. Another case—without the name. Ayliffe, 47.

27 Eliz. A case occurred in which it appeared that one Fox had been deprived for incontinency. Cro. Eliz. 789.

Ayliffe says: Since the Reformation we have had, in our law books, some instances of clergymen being deprived for adultery [referring to those just mentioned]. These cases are enough to shew that the ecclesiastical law in this point is allowed by the Judges of our Common Law to continue in sufficient force amongst us for deprivation

[1] SUPPLEMENT.

THE EARL OF WESTMEATH *v.* THE COUNTESS OF WESTMEATH. Consistory Court of London, Easter Term, 2nd Session, 1826.—In answer to a suit for restitution of conjugal rights brought by the husband, legal cruelty being established, but a reconciliation and matrimonial intercourse having afterwards taken place the Court enjoined the wife to return to cohabitation, holding that there was no proof of subsequent misconduct by the husband, sufficiently removing the bar of condonation and reviving the previous cruelty, to entitle the wife to a sentence of separation.—Reconciliation will supersede the ground of complaint in the Ecclesiastical Court, as it annihilates articles of separation at common law.

[Reversed, p. 61, post. See *Russell* v. *Russell*, [1897] A. C. 395.]

This was a cause of restitution of conjugal rights brought in the Consistory Court of London by the Marquess of Westmeath against the Marchioness of Westmeath, his wife, in which the citation was returned on the first session of Easter Term, 1821; on the fourth session of Trinity Term a libel in the usual form, and consisting of seven articles, was admitted; it pleaded "the marriage on the 29th of May, 1812, cohabitation at various places, and the birth of two children; but that on the 14th of June, 1819, the Marchioness of Westmeath quitted his house and had since refused to cohabit with him." On the first session of Michaelmas Term the marriage was confessed; and on the first session of Hilary Term, 1822, an allegation consisting of thirty-three articles with ten exhibits annexed was admitted, wherein Lady Westmeath, after pleading the marriage, cohabitation, and birth of children, by way [2] of further answer to his libel, alleged in substance: "That soon after July or August, 1812, Lord Westmeath began to treat her with great cruelty and harshness, and was guilty of acts of violence and indignity on several occasions in 1813 and 1814; that in 1815 her health was much affected; that notwithstanding this the marquess continued without cause to quarrel with and abuse her; that on such occasions his language and behaviour were most violent, and she was kept in a continual state of alarm and fear, till at length she intimated to him, that unless he ceased so to treat her she should be compelled to proceed for a legal separation; that he persisted in that his ill treatment, but that, in September, 1815, on his promising to alter his conduct, and on the intercession of a mutual friend, she agreed to forego her intention of applying for a divorce, and consented to continue to live with him." It further pleaded "a specific act of violence in December, 1815, a continuance of his ill conduct, and that in consequence thereof in the summer of 1817 she declared her intention to apply to the laws for protection, but that on his proposition it was agreed that he should execute a deed of separation on his return from Ireland, whither he was then about to proceed; that during his absence in Ireland he wrote certain letters (six of which were exhibited) expressing his contrition for the cruelty of his conduct, and that the marchioness moved thereby, expressed by letter a disposition to forgive him; and that he in answer thereto wrote another (exhibited) letter, alluding to an arrangement he contemplated making, to provide against a recurrence of his ill treatment to his wife; that shortly afterwards an indenture, dated the 17th of December, 1817, [3] was drawn up, by which that arrangement was carried into effect; and wherein it was amongst other things recited, 'that disputes and differences had existed between the marquess and his wife, and had arisen to such a height that they were on the point of separating, living apart, and not cohabiting together; but by the intervention of mutual friends the said marchioness had consented to live and cohabit with the said marquess after he should have executed the said indenture, and thereby made such provision for their issue, and also such provisional maintenance for his wife, the marchioness, as therein after mentioned;' and it contained a proviso, 'that in case it should happen that, by a renewal of such disputes and differences, the said marchioness should find herself compelled to cease to cohabit with her husband, that then such an annuity should be raised by the trustee from the marquess' estates, as should, by the advice of their mutual friends, be agreed upon to be a proper and

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on the score of this crime. Parergon, 47. And in page 208 he mentions, among the causes of deprivation, gross scandal, incontinency, drunkenness after monition.

Incontinency is stated also as a cause of deprivation in Godolphin's Abridgment, p. 307, 2 Burn. Ecc. Law, 143, 405, 8th ed.

sufficient sum for her separate maintenance.'" It further provided, "that a separation was only to take place in case of ill-usage or gross abuse from Lord Westmeath to his said wife."

The allegation then pleaded "a renewal of cohabitation in January, 1818, and a violent menace at Easter, 1818; and that in May, 1818, further articles of separation were drawn up, which were executed on the 8th of August, though purporting to bear date on the 30th of May; that at the earnest intreaty of the marquess, and by the advice of her friends, the marchioness reluctantly consented to allow the marquess to have a separate bed-room in her house; that he still con-**[4]**-tinued frequently to quarrel with and abuse his wife, and used gross and insulting language to her when in the last stage of pregnancy:" it then pleaded "sundry other specific instances of harsh and violent behaviour and language; and that by one of such instances happening on the 20th of June, 1819, the marchioness, being very much alarmed and terrified, immediately quitted her house, and sought the protection of her friends; and that since the 30th of May, 1818, being the day of the date of the aforesaid indenture of separation, the marchioness had not cohabited with her husband, and since the 20th of June, 1819, had wholly lived separate and apart from him."

On this allegation thirteen witnesses were examined; and Lord Westmeath's answers were taken: and on the 14th of January, 1823, a further allegation, consisting of twenty-five articles, and charging adultery with five different persons from the year 1817 to the latter end of 1822, was admitted on the part of the Marchioness of Westmeath, and on it twelve witnesses were examined.(*a*)

On the 24th of March, 1824, a defensive allegation, consisting of forty-nine articles with forty-two exhibits annexed, was admitted on the part of the Marquess of Westmeath: the first twenty-five denied or explained the several charges contained in Lady Westmeath's first allegation; the remaining articles contradicted her second allegation. On this allegation twenty-five witnesses were examined. On the first session of Trinity **[5]** Term the Court admitted an allegation exceptive, first to the credit of one of the witnesses to the charge of cruelty, on the ground that she had negatived an interrogatory, inquiring specifically whether she had made a certain declaration respecting Lady Westmeath's conduct, which declaration it was now pleaded expressly that she had made; and, secondly, to the credit of three of the witnesses examined on three out of the five charges of adultery on the part of Lord Westmeath, on the ground that they had been convicted of, and sentenced to fine and imprisonment for, a conspiracy by corrupt means and false oaths to establish that Lord Westmeath had committed adultery with one of the five persons. The copy of the record of conviction was exhibited. On this allegation three witnesses were examined. To these two pleas Lady Westmeath gave in her answers.

The cause came on for hearing in the Consistory Court of London on the third and fourth sessions of, and the by-day after, Michaelmas Term, 1825; on which days the evidence was read; and on the first, second, third, and fourth sessions of Hilary Term, 1826, the cause was argued by Jenner and Phillimore for the Marquess of Westmeath: and by Lushington and Addams contrà; and on the second session of Easter Term judgment was pronounced.

Judgment—Sir Christopher Robinson. This is a suit of restitution of conjugal rights brought by Lord Westmeath against Lady Westmeath, in which the citation was taken out on the 11th of April, 1821, and returned the 11th of May; and on the 27th of June a libel was given **[6]** in, pleading the marriage in 1812, and cohabitation till the 14th of June, 1819, when it is alleged "Lady Westmeath quitted Lord Westmeath's house, without any just cause, and has since refused to live or cohabit with him, though application has several times been made to her for that purpose;" and it concludes with the usual prayer "that she may be compelled to return and cohabit with him, and treat him with conjugal affection."

This is the substance of the original complaint in this cause, which has since branched out into a great variety of particulars. On the part of Lady Westmeath an allegation was admitted in January, 1821, in justification of her conduct, pleading

(*a*) It will be hereafter observed that the charges, as to three of these persons, were abandoned; and, as to the other two, were held both by the Judge of the Consistory, and by the Dean of the Arches, to be not established.

sundry acts of cruelty and insult, and alleging "that since the 30th of May, 1818, she had ceased to cohabit with Lord Westmeath, under a deed of separation, and that since the 20th of June, 1819, she had been compelled to leave her house, and in consequence of his continued ill usage had lived separate and apart." In January, 1823, a second allegation was admitted, consisting of twenty-five articles, pleading sundry acts of adultery committed by Lord Westmeath between the years 1815 and 1822, with several women, viz. Anne Connell, Jane Smyth, Catherine Flinn, Mary Brenan, Anne Hythe. Those which relate to Anne Connell, Catherine Flinn, and Anne Hythe have not been insisted on. The charge respecting Anne Connell has been proved to have originated in false information, for which three persons, Anne Connell, Patrick Farley, and John Monaghan, have been convicted of conspiracy, and are now suffering punishment in Ireland. It will not be necessary for me to go into the evidence on those charges which have [7] been abandoned, and without doing that, it would be improper to make any particular observations upon them to the disadvantage of the other parts of the case; but I think I am bound to say that the information on which they have been constructed has been collected or adopted with less caution than ought to have been used in a matter so deeply concerning the honour and reputation of both the noble persons who are affected by it.

I shall proceed, first, to examine the evidence on the charges of adultery, according to the order observed in the argument, and also because it will be more convenient for the discussion of the several parts of this case. The first charge relates to Jane Smyth. The remarks, which have been made on the want of caution in collecting the information on which some of the charges of adultery have been founded, apply strongly to the commencement of the history of the connexion with this woman, as it is set forth in the allegation. Things are pleaded relating to the intimacy alleged to have been formed in the family of Lady Glengall, the aunt of Lord Westmeath; to her being pregnant, and being delivered of a child, and to the manner in which Jane Smyth was introduced into the service of Lady Westmeath, which appear to have had no existence in fact. Lady Glengall deposes "that Jane Smyth never lived in her family;" and that all which is stated on that part of the case is unfounded.

It is alleged, however, in the fourth and following articles of the allegation, that in March, 1821, Lord Westmeath was lodging in the house of a person of the name of Winsor, in Bolton Street, Piccadilly, where he occupied a sitting room, two drawing rooms, and three bed rooms; one for Mr. Jeffries, who was living with him, and two for [8] himself and his servant: "That on a day in that month he told Mrs. Winsor he expected an Irish gentleman to visit him, and requested another bed room to be prepared: that this was done accordingly, and on the same day, during the absence of Mrs. Winsor, Jane Smyth was introduced into the house, and her boxes were taken up to her room, which was a back room on the upper story, over the bed room of the marquess, and not far from the room in which Mrs. Winsor herself slept; that many indecent familiarities passed between the marquess and the said Jane Smyth, and on several nights after the family was gone to bed she staid in the bed room of the marquess until two or three o'clock in the morning; that on one night in particular Mrs. Winsor staid below till one o'clock; that on going up stairs, in passing Lord Westmeath's bed room she heard him and Jane Smyth conversing together; that she afterwards watched to see when she would go to her bed room, but that she did not do so, and that she remained in Lord Westmeath's room all night, and that she slept with him; that in the month of April, the marquess having removed to lodgings in Woodstock Street, Jane Smyth frequently called on him there, and they were alone together in his bed room for a considerable time; that she visited him also in the same manner in other lodgings in Cavendish Street, Cavendish Square, and in Bury Street, Jermyn Street, in January, and April, 1822." These are the acts alleged with respect to Jane Smyth.

The twentieth article pleads: "That, in March, 1822, the marquess being in Ireland at his house at Clonyn, directed Bennett, his servant, to enquire where one Mary Brenan, who was a [9] common prostitute, resided, and sent a message by him and an offer of money if she would come to him at Clonyn House; that she accordingly came on the next day, being Sunday, 31st of March, and was privately admitted by him, and went again, and was admitted in like manner several times, during the following week; that she staid with him alone for a considerable time, and that they then committed adultery.

These are the only specific charges of adultery which have been insisted on. The witnesses produced on the first are Mrs. Winsor and Mary Wheaton, her maid servant, Benjamin Wall, and Mary Smith; and on the latter, Edward Bennett and Mary Farley.

The account which Mrs. Winsor gives is, "That the Marquess of Westmeath took her lodgings from the 22d of February till the 22d of March, 1821; that his uncle, Mr. Jeffries, occupied one of the bed rooms, which he changed for the back drawing room when Lady Rosa came; that Lady Rosa, being a child of seven years of age, was brought by her governess every morning to see the marquis; that one morning, after he had been there about ten days, he detained Lady Rosa, and the governess went away without her, though with great reluctance; that on the same day the marquess came into the kitchen, and desired her to go into Piccadilly to get some raspberry jam for Lady Rosa; that deponent wished to send the servant, but he desired particularly that she would go herself; that during the time of her absence, which was not more than a quarter of an hour, a woman (Jane Smyth) was introduced into the house, who was afterwards employed in waiting on Lady Rosa."

[10] The witness seems to consider the manner of this woman's coming into the house as a feint practised upon her; but her language is not very accurate. She says only "it must have been, she has no doubt, in her absence that the female came into the house." She did not see her on the first evening, and she did not come down stairs for two or three days. The servant, Mary Wheaton, says "Jane Smyth came in the evening." However that fact may be is not very important, as the Court cannot consider that circumstance as furnishing any inference as to the purpose for which Jane Smyth was brought into the house. It is certain that the primary object must have been to attend Lady Rosa, and there could be no surprise on the part of Mrs. Winsor in this respect, as when the governess went away she must have expected some female would come to attend her. There seems to have been no motive for any artifice, and there is no appearance of any such effect being produced on Mrs. Winsor; for she seems to have provided for her as one of the family, without requiring any explanation respecting her; and Carbery says she ordered him to carry her boxes up stairs without expressing any surprise or dissatisfaction to him. The account which Mrs. Winsor gives of the adultery is, "That she observed no indecent familiarities, but that the marquess and this woman behaved to each other in terms of great freedom: she never called him 'lord;' she paid no respect to him as her superior, though she was a very common woman, and not fit to be about Lady Rosa; his lordship was just as familiar with her, and spoke to her with unbecoming freedom and familiarity: it was not the courtesy of a superior to an inferior, but the freedom and **[11]** familiarity of an equal." She says, "Jane Smyth came to her room very late sometimes; as late as two or three o'clock; and that on one night, happening about a night or two before Lady Rosa went away (which must have been about the 16th of March), between the hours of one and two, as she was going up stairs to bed, quietly, because it was late, as she passed the door of the marquess, she heard the voices of the marquess and Jane Smyth, in his lordship's bed room; they appeared to be talking and laughing in a very familiar way. She stopped a moment or two and listened, to be sure that she heard them, and to be sure of the voices; she did not pay attention to them in order to hear what they said, and she does not remember that she did hear so distinctly as to have understood what they, or either of them, said. She staid but a very short time, a few moments, and all that she can depose is that, from the sound of their voices, she did distinguish the said marquess and Jane Smyth were talking and laughing familiarly together in his lordship's bed room. She could not judge from what she heard whether they were in bed or not: she did not hear the said Jane Smyth come to her room all that night, and knows not whether she went to her own bed or not: she did not watch or listen for her, but being fatigued she went to sleep. Till that night, though she had often thought their conduct improper, and unbecoming in their manner of speaking to each other, it never crossed her mind that any thing of a criminal nature passed between them. Jane Smyth had some dresses that she was making up, and she thought she might sit up and work **[12]** at them in Lady Rosa's room: but after what she heard, as before deposed, she thought differently, and her belief was, from all she has deposed, that a criminal and adulterous intercourse was carried on between them, and it was in furtherance of it that she was in his lordship's room that night." She says on the interrogatories

"that Lady Rosa's room was adjoining to the marquess'; that they were small rooms with very thin deal partitions; that the door was usually open; that Lady Rosa went to bed about eight o'clock; that the marquess retired to his bed room about that time, after tea; that he dined at home every day, and spent every evening at home." She gives an account of the position of her own room and Jane Smyth's, from which it appears they were not adjoining rooms; but that there was a small intermediate room in which her servant slept. She says "that she will not swear that she ever saw any indecent familiarities pass between them; that Jane Smyth came to bed at a late hour almost every night; that she cannot depose that she knew from what room she came—whether the marquess' or Lady Rosa's; that on the particular night to which she has deposed she did not watch whether Jane Smyth would go to her own room." This is the whole of her evidence. Her maid servant, Mary Wheaton, is examined only to the 2nd, 3d, and 4th articles of the allegation; neither of which point in any manner to any fact of adultery, and therefore her evidence adds little to the account given by Mrs. Winsor. She speaks only to a woman named Jane Smyth, coming to wait on Lady Rosa, in the manner described. On the 3d, 16th, and 17th interrogatories she says "she never **[13]** saw them alone together, or knew of any thing improper, nor ever saw any indecent familiarities between them: she does not know that Jane Smyth ever staid in Lord Westmeath's bed room till two or three o'clock in the morning."

On the effect of this evidence it is impossible to say that it amounts to the proof that is usually required to support the charge of adultery. There is no act spoken to which indicates any thing like passion or personal attachment. The woman is described as a very common person, not fit to be about Lady Rosa, and as not possessing any particular personal attractions. The purpose for which she came into the house was avowedly of another kind. The governess continued to come to the house, backwards and forwards repeatedly. No suspicion appears to have been excited in her mind, nor in Mrs. Winsor's, till the night shortly before Lady Rosa and the marquess went away, and on her going away Jane Smyth was discharged.

The whole effect of this evidence resolves itself into the description which Mrs. Winsor gives of the "talking and laughing" which she heard on the night described as she was going to bed. That in itself is scarcely more than what may be supposed to have passed, according to the account of the familiarity subsisting between his lordship and this woman, in the many hours that she was attending Lady Rosa in the adjoining room; and though I cannot disbelieve the fact altogether, nor explain it satisfactorily, so as to reflect any credit on his lordship's prudence or sense of propriety; it furnishes scarcely any inference of an act of adultery at that time committed; it points rather to a habit of intimacy than to any thing **[14]** specific occurring at that time. As to habitual criminal intimacy, the inference is contradicted by the train of thinking which Mrs. Winsor describes herself to have entertained respecting them; and when I consider the manner in which Mrs. Winsor acted, in not making any communication to her servant; in not pursuing her suspicion, even to the indulgence of the most ordinary curiosity; that she made no complaint to the marquess, but has acted so as to exclude all confirmation or test of the accuracy of her suspicions, it would be too much for me to adopt her conclusions as legitimate proof of an act of adultery. I cannot attribute any such effect to it.

But it is said that it is not on one intimacy subsisting between them that the inference of adultery is founded; that Smyth continued to be in his service till April or May, 1822, and visited him at the different lodgings which he occupied. The only other witnesses who speak to any connexion between the marquess and Jane Smyth are Mary Smyth, the mistress of the house in Woodstock Street, at which the marquess lodged for about ten days, from the 27th of April, 1821, and Benjamin Wall with whom he lodged in Bury Street, from the 20th of April to the 18th of May, 1822, and Carbery, Lord Westmeath's servant, who is examined on Lord Westmeath's defensive allegation.

Mary Smyth says, "That Mr. Jeffries had been lodging with her for a fortnight or three weeks before, and continued there some months after the marquess went away, and had been before a customer of her husband's." She says that "Jane Smyth's mother washed for Mr. Jeffries; that Jane Smyth came to the house sometimes for **[15]** the linen for her mother, and at other times, when the deponent did not know why she came. She came quite as often when Mr. Jeffries only lodged there as when

Lord Westmeath was there. She does not know that she ever came to see Lord Westmeath; that she always asked for Mr. Jeffries. That she never saw her with Lord Westmeath, and she cannot depose that she ever was alone with Lord Westmeath, or was ever in his apartments." She says on the second interrogatory, "That she told Lady Westmeath in answer to her enquiries what she has now deposed, and that she thought Jane Smyth came more to Mr. Jeffries than to the marquess." This evidence is the more important, as it negatives the habitual intimacy which is supposed to have existed between the marquess and Jane Smyth, as it applies to a period of time shortly after the act described by Mrs. Winsor; and it is perhaps not entirely immaterial to observe that it was after the commencement of these proceedings when Lord Westmeath must have been apprized that it behoved him to be most particularly cautious with respect to his own conduct.

Benjamin Wall says, "That Lord Westmeath lived in his lodgings from the 20th of April to the 10th of May, 1822; that on one day, being either the next day or the day but one before he left his lodgings, Lord Westmeath, on coming in about noon, said, 'When my maid servant comes, shew her up stairs.' That in about five minutes a female, whom he had never seen before, came and asked if Lord Westmeath was come in; he directed her to the second floor: she went up stairs, and in about an hour afterwards she went out alone. She was about **[16]** twenty-three; he has never seen her since, and was not up stairs whilst she was there; he does not know that she went into his bed room; he does not know a female of the name of Jane Smyth; he does not know that any female called on his lordship more than once."

There is nothing in this evidence that applies particularly to Jane Smyth; and it is much too slight to support any suspicion of adultery committed at that time. Carbery admits that Jane Smyth called on Lord Westmeath at Mr. Smith's lodgings, but he does not know that she called at Mr. Wall's occasionally or ever; and I see nothing that identifies Jane Smyth as the person calling on him on that occasion. It is said that he admits there were opportunities on which they might have committed adultery, but he denies strongly all knowledge or belief of the fact; and therefore he cannot be said to assist the evidence which has been relied on in proof of this charge.

With respect to the adultery pleaded to have been committed with Mary Brenan, the witnesses are Bennett, the servant, Mrs. Farley, and her husband; but the last witness' deposition has not been referred to, as he is one of the persons convicted in Ireland of a conspiracy with respect to the charge of adultery with Anne Connell. Of the two former it may be sufficient to say that they do not speak to any act or behaviour approximating to proof of adultery; but I think it is due to the marquess that the amount of the evidence on this charge should be more particularly stated.

Bennett says, "That he had lived many years in the service of Lord Westmeath; that in the end of March or beginning of April, 1822, the marquess asked him if he knew a girl of the name **[17]** of Mary Brenan who had lived with the widow Wren, and had a child by her son; that he desired him to go and tell her to come to him, and he would give her a guinea, and if any body asked where he was going he was to say he was going to see if there were any wild fowl on the lochs. That he went, and thinking that he knew what his lordship wanted he gave her an idea of the business, and she refused to go, and would by no means go with him." This does not very well agree with the description of this woman as a common prostitute. "He then returned and told Lord Westmeath, who seemed disappointed, and asked 'how he could get her to Clonyn.' He replied 'that if he sent her word that he wanted to see her about Wren, and that he would make him marry her, she would be likely to come.' That he did so, and she agreed to come the next morning at 10 o'clock. The deponent did not see her then: he met her between 11 and 12 o'clock going away to mass; he saw her at Clonyn the next day, on Monday, and Wren was with her; Lord Westmeath told him afterwards 'that the girl had been crying to him to make Wren marry her; but I can't make him, or I can't do it for her.' Excepting what he has deposed, he does not know that they were ever together. He cannot depose that he believes the marquess did commit adultery with Mary Brenan. He does not know that she is a common prostitute; she had a child by Wren, being a single woman, but he knows nothing more against her than that."

This is the substance of his deposition. In his answer to the fifty-third interrogatory he says, "That he did not tell Mary Brenan that Lord **[18]** Westmeath would give her a guinea, though his lordship had told him to tell her so. That offer

was not made, though Lord Westmeath had authorized him to make it." What he means by giving her an idea of "the business" on which Lord Westmeath wanted her, as he had said before without mentioning this chief inducement, is not very intelligible; and I think it is very probable that what he has said about "that business," as he calls it, is entirely an invention of his own. The facts that are stated respecting her going to Clonyn shew clearly that she had another object in going there, and do not in any manner support that part of this man's evidence.

Mary Farley says, "She never saw Mary Brenan before the Sunday: all that she saw then was that she was in the yard at ten o'clock: how long she was there, or what she came for, or whether she was in the house, or in company with the marquess, she cannot say. She saw her there again on the Monday about ten o'clock with a young man of the name of Wren, and also Wren's uncle: they were there about half an hour; neither of them went into the house. She watched them on that day, but not on the Sunday. She only just saw Mary Brenan enter the yard, and that was all; she does not know that she was a common prostitute. She never heard that of her."

Carbery and Michael Beatty, who have been examined on the defensive allegation of Lord Westmeath, admit that Mary Brenan came to Clonyn on the Sunday morning; but Beatty swears "that he heard Lord Westmeath ask her what she wanted: she seemed to be telling her story, and he heard Lord Westmeath tell her he [19] could give her no summons then, and he desired her to send Wren to him the next day." He says "she was then but a few minutes talking, and, as he believes, in the passage all the time." Wren also speaks to the fact of going on the Monday or Tuesday with his uncle and Mary Brenan in consequence of her complaint to the marquess, and in obedience to his lordship's orders or summons. The complaint, therefore, must have been made on the Sunday morning, when Beatty says the orders were given to attend the next day.

It is clear from all the evidence on this part of the case that the marquess had an honourable and meritorious object in his mind, as one reason for sending for Mary Brenan. As for any purpose of criminal gratification there is no evidence but what rests on the inconsistent account given by Bennett. This man, though in the confidence of his lordship, according to the first part of his evidence, does not pretend that Lord Westmeath told him that any thing of that kind had actually passed, though he speaks to a declaration "that he could not effect his object of inducing Wren to marry her."

Nothing which has been said by these witnesses, or by any other, supports the representation of gross or habitual profligacy against Lord Westmeath which is the colour and complexion of the charges in the allegation. The description of Mary Brenan as a common prostitute is completely negatived. She had been confined not long before this transaction is supposed to have taken place; as Patrick Farley says, "It was at the end of 1821 or beginning of 1822 that she left the place to lay in, for she was far advanced in pregnancy." She is anxious to be made an [20] honest woman, as it is called, by marrying Wren. Lord Westmeath was also solicitous to effect that union; yet he is represented to have been basely adding to her injuries, and heaping disgrace on the man whom he was endeavouring to persuade to do an honourable act by making all the amends in his power to an injured woman; and this on the very eve of his departure for England on the Wednesday following. I think this imputation on Lord Westmeath is not in any manner credible.

It may be proper to advert also to what is the account which is given by Patrick Farley, who, as I have said, has been convicted of a conspiracy on another charge. He says, "He was steward to Lord Westmeath; that on the 30th of March, having occasion to find fault with Bennett for neglecting his work, Bennett mentioned to him the message which he had carried from the marquess to Mary Brenan: at first he could not believe it, but he repeated his statement, and added she was to come to-morrow at 10 o'clock. That he then determined to watch her himself in the stable opposite his lordship's study window: in a few minutes he saw Mary Brenan coming towards the house across the lawn, his lordship then opened a door leading to the lawn, admitted Mary Brenan and took her into his study; that he then went up to the window about ten minutes after they went in, and saw them on the floor in the act of adultery; that he went away immediately to his business in the yard, and about three-quarters of an hour afterwards he saw his lordship let her out, in the same manner that he had admitted her; that he saw her again at Clonyn on [21] the Tuesday, coming out of the house with young Wren; that Lord Westmeath put on

his great coat, came out of the house and followed her very carelessly, but how far he cannot say." This is an account which might agree very well with the gross and habitual profligacy charged in the libel, but I think it does not accord with any view which the Court is warranted to form as to his lordship's conduct, or with the evidence which I have before stated respecting Mary Brenan's habits, her positive rejection of the first offers that were made to her, and the avowed object of her interview with Lord Westmeath. I make this observation, not to reject the testimony of this man because it has not been relied on, but to justify the opinion which I feel myself bound to express, not only that the charge of adultery with Mary Brenan is not proved, but that the whole surmise of such a purpose, so far as it rests on that part of Bennett's evidence which cannot be contradicted except by Lord Westmeath himself—and his answers on the second allegation have not been called for—is not deserving of any credit.

I come now to the charge of cruelty, alleged on behalf of the marchioness, in her first plea, as her justification for not returning to the society of her husband; and in so doing I shall examine the facts as they are to be collected from the evidence, without defining a priori the principles of law to be applied to them. I have prescribed this rule to myself, in order that I may avoid the danger of appearing to bend my view of the evidence in the slightest degree to any standard of principle so assumed.

I have been under the necessity of abstracting **[22]** the evidence for the most part from the voluminous bulk of the papers and the disconnected arrangement of the several parts, but I have endeavoured to do it principally in the words of the witnesses, and, if I should appear to be inaccurate in any part, I shall hope to be reminded of it.

The allegation pleads, in substance, "The marriage in 1812, and cohabitation at different places, first in August, 1812, at Black Rock near Dublin, when it is stated the marquess began to treat his wife with great cruelty and harshness; that he frequently quarrelled with her without just cause, and on such occasions behaved to her with great violence, and used the most coarse and insulting language; that in January, 1813, they returned to Hatfield House, where, shortly afterwards, he quarrelled with her and abused her in very opprobrious language in the presence of Sarah Mackenzie, and that in order to conceal the same from her family she desired Sarah Mackenzie not to mention it to any person."

Sarah Mackenzie denies altogether any knowledge or observation of improper behaviour at Black Rock; she says "she neither saw nor heard any thing particular in her presence at Hatfield; but having observed that at the Black Rock the marchioness was dull and apparently unhappy, and also at Hatfield, seeing there was a coolness between them and that Lady Westmeath was unhappy, she took an opportunity of speaking of it to her ladyship and lamenting it; that Lady Westmeath referred it to the behaviour of Lord Westmeath to her, but begged her not to mention it: she gave no reason for saying so, but only desired her not to **[23]** mention it." No other witness speaks to this period.

The sixth article pleads, "The return to Ireland in May, 1813, to the Earl of Westmeath's house at Clonyn. That, during their residence there and about the end of that year, the marquess took possession of her pin-money, and refused to supply her with money to defray the necessary expences; that he kept her destitute of money for several months together; that when she applied to him for money he flew into a violent passion and behaved to her with the greatest brutality; that he used the most opprobrious language, swore, and called her a damned bitch, and threatened that he would kick her to hell, and beat and kicked her with great violence, so that she was much bruised thereby and suffered great pain."

Sarah Mackenzie is the only witness on this article. She says "she was in the situation of lady's maid and housekeeper." She deposes to a great want of money, and describes in strong terms the privations which the marchioness suffered on that account. But she knows nothing of the marquess' means of supplying her with money; and therefore the Court can draw no inference from that circumstance. It is stated by counsel that their income was something more than £2000 per annum; and there is certainly no appearance of extravagance in the description given of their manner of living. It is suggested that the money was misapplied to other objects; but there is no proof on that point from which the Court will be justified in drawing any particular conclusions.

Sarah Mackenzie goes on to say, "That when **[24]** Lady Westmeath asked his

lordship for money he abused her; he never abused the deponent, but she has heard him abuse Lady Westmeath on such occasions; she has heard him call her 'a damned bitch,' and say that he would 'kick her to hell;' he put himself into the most violent passions; he was more like a madman than a reasonable being; she never saw or knew of any provocation that Lady Westmeath gave him; she wished for a quiet life, and the deponent has known her leave the room to avoid any thing unpleasant when he was inclined to quarrel; Lady Westmeath is a quick-tempered woman, and, when irritated, she would shew it, but she was never inclined to quarrel, and never began by giving any provocation, to the deponent's knowledge. The deponent never saw Lord Westmeath beat or strike Lady Westmeath, but she has seen marks of violence on her, and knows that he did beat her as she will depose." She speaks again of the want of money, and says "that Lady Westmeath was obliged to cut up her own body linen to make some for her child; that he would be kind to her at times, but then his passion got the better of him, and his evil disposition, and he would quarrel with Lady Westmeath as though it was for the sake of it, and he behaved like a brute to her; though she bore so much for him, he did not take common pains to provide her with such comforts as might have been had, and deponent can truly say that her ladyship's life was then only wretchedness. She cannot depose more particularly to words of abuse which she has heard Lord Westmeath use towards his wife, but he would curse and swear at her many times."

[25] I have stated this woman's evidence thus much at length, because it may be necessary to say a word or two as to the credit which is due to her: she has been described as a prejudiced witness; she appears to have been much in the confidence of Lady Westmeath, to have obtained a situation for her husband from Lady Westmeath's influence, and to have been employed in providing for some of the Irish witnesses during their stay in England for several months. There is the less occasion, however, for the Court to be minute in estimating her credit, because the counsel on the other side have admitted that they rely on her only so far as she may be confirmed by Lord Westmeath's letters or other evidence. That certainly is a very fair criterion. It may be fit that I should say, however, on the general character of this person, that I see nothing to impeach her credit: she had been a very old servant in Lord Salisbury's family and had gone to live with Lady Westmeath on her marriage: she appears to have obtained some degree of respect from Lord Westmeath, as there is one instance of a message from her in one of Lady Westmeath's letters that implies at least a favourable acceptance of it on the part of his lordship: but I think the evidence which I have read is liable to some exception on account of the very general terms in which it is expressed.

She describes, so far, no particular incidents, but rather her own conclusions, drawn from an indiscriminate reference to indefinite periods of time. For although the subject of the sixth article is confined to the events of 1813, and particularly the close of that year, it is evident, from what she says of Lady Westmeath cutting up her own linen for her child, that she has gone forward **[26]** and anticipated many things of which, in her own words, "she is hereafter to depose"—being things that happened after the confinement of Lady Westmeath in May, 1814. None of the witnesses on Lord Westmeath's allegation refer to this period except Dr. Barlow, who was examined as to the state of Lady Westmeath at that time, but on which he has nothing very particular to say. I have looked over the letters of this period, which are the first fourteen; and it is admitted that they contain no complaints; perhaps they go a little further. No. 13, on the 31st September, 1813, contains minute calculations as to domestic expences in the most free and affectionate terms, which are scarcely reconcileable with the supposition of any hardships or injury sustained by Lady Westmeath at that time on account of Lord Westmeath's misapplication of the common funds; for in No. 14, which is of the 3rd November, 1813, she rebukes him for unnecessary anxiety about her health; she says, "My health is as usual, why so ready to accuse me of wishing to torment you?"

It has been said of the letters that they give but a very imperfect view of the state in which the parties lived, as they are selected from favourable periods. That is true, undoubtedly, as to other periods; but it is to be recollected that, in this allegation, the disputes are said to have prevailed in the first year of the marriage, though they have not been proved or insisted on: and for the purpose of contradicting that part of the charge these early letters are not immaterial.

I have now gone through the first eighteen months or two years of this inauspicious marriage; and the statements as to this period must be pro-[27]-nounced to be not supported by any proof. I come next to a more specific act of violence, charged as happening about the time of the marchioness' first confinement—in April or May, 1814. That is described in the argument as the first act of violence. It is pleaded on the seventh article of the allegation that "on a night, happening in the month of April, 1814, the marquess, without any cause or provocation, after they had retired to rest, quarrelled with Lady Westmeath, who was then near to her confinement, that he used violent language towards her, struck her several blows, and kicked her on the side, by which she became extremely ill and suffered great pain; that, being alarmed at her manifest illness, he then called up Sarah Mackenzie to her assistance; that she declared to Mackenzie, in the presence of Lord Westmeath, that her illness was occasioned by his having beaten and kicked her, and he admitted that he had done so."

The account which Sarah Mackenzie gives of this act is nearly in the words of the plea: she says, "She was called up about four o'clock; that on entering Lady Westmeath's chamber she found her in bed, and Lord Westmeath standing in his dressing gown; that she asked Lady Westmeath if she was taken ill? Lady Westmeath said 'that Lord Westmeath had beaten and kicked her, and she was in very great pain.' He said, 'Emily, you provoked me to do it.' Lady Westmeath looked at him but said nothing. She then asked the deponent why she had come, and bid her go to her own room again. Lord Westmeath appeared to be frightened."

This is the whole of her evidence, and there is no confirmation of this account by any other [28] witness. Elizabeth Kernan is examined, on Lord Westmeath's allegation, to contradict it by proving that she knew nothing of it; but it is doubtful whether she was in the house on the particular day. She speaks, however, of the manner in which they lived together during the time that she lived in the family—from the middle of April, 1814, for nine months. She speaks very respectfully of Lady Westmeath, and appears not to depose under any prejudice against her: she says, "She had frequent opportunities of knowing and observing how they lived together; she never saw him behave with violence or unkindness, and that she never saw a happier couple." Mary Macarthy, who was the monthly nurse, and commenced her attendance in May, and Dr. Barlow, the medical attendant on Lady Westmeath in her confinement, speak generally to the same effect. The utmost, therefore, that the evidence on this article can prove, if taken without deduction, is only the admission of some act of unbecoming violence on the part of Lord Westmeath; but it does not shew the circumstances attending it, by which the Court may be enabled to form an accurate judgment of the nature or extent of the injury inflicted.

Amongst the letters are two which were written on the 18th and 19th of April; they are filled with domestic occurrences; and in another letter of the 9th of August in the same year, which has been the subject of observation, there are chidings for too great a solicitude to hear from her; and in it there is the expression, "You know when we are friends I never omit to write." But it would be straining the interpretation of those expressions too much to suppose that they referred [29] to any such causes of disagreement as are described in this article.

The next article describes the use of intemperate language, rather than an act of personal violence during the confinement of Lady Westmeath; he is represented to have abused her for not suckling her own child, asking, "Why the devil she could not?" and to have refused to procure a nurse, and to have threatened at the same time to disinherit Lady Rosa, and settle all his property on his brother. On this article there is no witness examined who was present at the time. Sarah Mackenzie does not speak to it. The nurse and Dr. Barlow strongly contradict that part which relates to the refusal to procure a wet nurse, for two were actually procured, and it appears clearly that previous arrangements had been made for that purpose. If any words were used of the import of those pleaded, they could only have applied to the short time which might pass before the second nurse could be procured to supply the place of the first, who was dismissed as insufficient. There would have been no proof of violence on this charge if it had not been for the recital of it by Lady Westmeath, in the presence of Lord Westmeath, in the interview described in the evidence of Mr. Wood. The silence, or want of denial of the charge at that time, on the part of Lord Westmeath, implies that something had passed, as may be collected also from the manner in which the eighth article is counterpleaded and explained in his responsive

allegation. I shall have occasion to read Mr. Wood's deposition on the following charges, and will not stop to advert to it now, as it does not, I think, substantially prove any thing like a malicious or determined [30] purpose to expose Lady Westmeath to inconvenience in any thing that passed relating to the suckling of the child: it relates at most to the indulgence of a pettish and peevish spirit, and of intemperance of speech, of which there are but too frequent indications, and perhaps on both sides, in the history of these parties.

Mr. Wood describes the threat of disinheriting Lady Rosa to have been referred to the time of the confinement; and Lord Westmeath admits that something of that kind passed, which was undoubtedly very harsh and unkind, particularly at that time; but the notion of disinheriting an infant daughter, in favor of a brother, when there was a prospect of a numerous issue of sons and daughters, was an extravagant suggestion, and could only have been a transient threat, uttered without any serious meaning, and I should imagine without effect in occasioning apprehension or anxiety to Lady Westmeath.

I approach, now, to a period which appears to me to present greater difficulties. On the former part of the case, to which I have hitherto adverted, I have expressed my reasons for considering the evidence in support of the several charges to be defective, either in substance or in certainty. But on the facts pleaded to have occurred between the summer of 1814 and December, 1915, inclusive, I am bound to confess that I think the result of the evidence is of a different character. It relates to the matters pleaded in the 9th, 10th, 11th, 12th, and 13th articles of the allegation, and is spoken to by eye witnesses; it is explained, or palliated, rather than contradicted, in the counter allegation; and it is confirmed by the admissions, on the part of Lord Westmeath, in his own letters, and in the expres-[31]-sions which are attributed to him in the deposition of Mr. Wood.

The account given by Sarah Mackenzie of the occurrence pleaded in the 9th article is, "That in July or August, 1814, they went to dine with the Earl of Westmeath in Dublin, intending to go to the play. Lord Westmeath came home early, ordered horses to be at the door the next morning, and the deponent to pack up Lady Westmeath's things. They returned home late, and Lady Westmeath, being informed of what had been done, said that she was not to be spirited out of the town in that manner: the deponent saw something had been amiss. At an early hour the next morning Lord Westmeath came to the door of the adjoining room, called her up, desiring her to go and ask Lady Westmeath to forgive him, as he had often done; but Lady Westmeath had fastened her door, and they stood as long as an hour and a half; he begged her to let him in, and promised that he would not beat her any more; at last she opened the door and he went in. In a little while she heard Lady Westmeath call 'Murder;' she went in, and they were both out of bed, and he was about to strike her, which she prevented. He was swearing and abusing Lady Westmeath, and talking so fast that she could not well know what he said. Lady Westmeath said he had been beating her, which he did not deny. She prevailed on them to go to bed, and left them; and, as she says, the next morning Lord Westmeath himself procured a lotion which was applied to her breasts for several days, as she was much bruised, and they were fearful it would [32] end in a cancer." This fact, as to the procuring the lotion, he himself admits.

The tenth article of Lord Westmeath's allegation states this matter a little differently; but does not substantially contradict it. It alleges "some provocation in the abrupt return of Lady Westmeath from his father's house, before dinner, whilst the company were assembled in the drawing room, to Leinster House, where they were residing; that he followed her in order to prevent a repetition of such conduct: he determined to leave Dublin the next day, and gave the orders for packing up;" as described by Mackenzie, "but soon afterwards countermanded them; that in the evening the marchioness having been informed of such orders became very much exasperated, and for several hours, and until day-light, refused to permit him to come to her chamber; that she used gross and insulting language, and finally, in order to prevent a continuance of such abuse, he placed a pillow over the face of Lady Westmeath, who was then in bed, but he did not attempt to smother her, nor had any intention to injure her, but instantly took it away again." On this statement I have to observe that it does not fill up the whole time to which it refers; and of the two statements I must confess that of Mackenzie appears to be more natural and credible.

Lord Westmeath admits the placing the pillow over the mouth of Lady Westmeath; that she called out, and Mackenzie came into the room; but he denies the striking and the other parts of that charge. There is no witness examined on that part of his explanation which relates to the **[33]** previous circumstances that led to this dispute, and might be capable of proof. The act of placing a pillow over his wife's mouth, by force, and in such a manner as to make her scream out for assistance, was in my opinion a most violent act; it was a most unfortunate act, to say the least of it, in this respect, that it is almost incapable of being justified by any explanation whatever, coming only from the party himself. A further test of the truth of the evidence of this act will be found, I think, also in what is admitted by the marquess as to procuring the lotion, and the reference to it at the meeting described by Mr. Wood.

The eleventh article pleads a disturbance of a similar kind, occurring in October or November, 1814, in the middle of the night, at a visit at the Duke of Leinster's seat; but on this charge the evidence of Sarah Mackenzie is not so distinct: she does not specify the time further than as being between August, 1814, and the journey to France in December, 1815; she says only "that she was awakened by Lady Westmeath running into her room, followed by Lord Westmeath: she was flying from him, and he was endeavouring to induce her to go back, saying the servants would hear them, but he did not otherwise make any promise of good conduct in future, nor did he express any sorrow for what he had done. Lady Westmeath appeared very much frightened, but she does not know that she was hurt. They returned to their room:" and she speaks to the confusion in which she found it—"the water had been emptied into the fire: the bed was in confusion, and the clothes." There is no appearance of exaggeration in this account, as it does not go quite so far as the facts **[34]** pleaded. It closes the evidence of this woman, and I think in a manner not unfavourable to her general credit. What she says afterwards about Lady Westmeath's health, in attributing it to the ill usages she received, is less material, as the fact is admitted in the adverse plea that she was in a low and nervous state of health, though not owing to such a cause; and if there is any truth in the conclusions which I have drawn from the facts of the case, it is impossible that they should have occurred without producing some effect on her spirits and, as may be presumed, also on her health.

I come now to read the deposition of Mr. Wood, against whom strong exceptions have been taken with respect to his credit, on account of the enmity which he is represented to bear to Lord Westmeath. He appears to have been formerly a friend of the family, and to have been so treated; but it is said that Lord Westmeath has been in confinement, in the King's Bench, at his suit, since 1819. That cannot have proceeded solely from malice on his part; nor do I see reason to suppose that a gentleman of respectability, as he appears to have been, would so far forget the obligations of his oath, or his honour, as to be influenced by any such considerations in the testimony that he may be called upon to give in a Court of Justice. It is said also that he has shewn a disposition unfavourable to Lord Westmeath in the part which he has taken in reading the allegation of Lady Westmeath to his daughter, observing on the parts to which she could speak. I shall certainly be on my guard against placing too much reliance on any witness in a cause of this description; but I see no reason to reject, or substantially to disbelieve, the testimony of this gen-**[35]**-tleman, or of his daughter; and I will here also dispose of the exception which has been taken to her evidence. It is founded on a conversation with Mr. Giles at a ball, and the circumstance that she did not recollect it when put to her on interrogatory. The substance of it was that Mr. Giles asked her in familiar conversation, and as a friend to Lady Westmeath, what Lady Westmeath was about in resisting Lord Westmeath in his proceedings in Chancery. She replied, "Lady Westmeath had always succeeded in getting what she wanted by bullying him, and she supposed she was doing the same now." She has denied that she used such words, and has sworn she did not know to what conversation the interrogatory could allude. Mr. Giles, in his examination on the exceptive plea, disclaims any imputation on her credit from this denial; as he says from the tone and manner in which the conversation passed it is probable Miss Wood might not recollect it. Both Mr. Wood and his daughter have enjoyed the confidence of Lord Westmeath; and all they know relating to this case has arisen out of that confidence. The manner in which Mr. Giles addressed himself to Miss Wood, in the conversation relating to Lady Westmeath, shews that he did not treat

her then as a prejudiced person; and with these observations I will proceed, cautiously, certainly, but not with distrust affecting their general credit, to examine the evidence of Mr. Wood and his daughter.

Mr. Wood speaks to no particular act of cruelty. He says, on the 10th article, "That after the death of Lord Westmeath's father, in the latter end of 1814, they came to Dublin, and the intercourse between them and the depo-[36]-nent's family was then continual. Lady Westmeath was then in a weak and nervous state, and entertained apprehensions of a consumption; she was attended by Dr. Hervey and Dr. Percival, who are since both dead. He says that he witnessed no aggressions, but he was repeatedly solicited by Lord Westmeath to intercede for him with Lady Westmeath; that in September, 1815, he was a fortnight in Dublin, and saw them frequently. On one occasion, at the Waterford Hotel, there was a serious misunderstanding between them. Lady Westmeath was threatening that she would proceed against his lordship for a separation, or rather was making a declaration of the necessity of such a step; that she enumerated various instances of ill-treatment and cruelty, the principal features of which had been acts of violence, which had not been the subject of previous interference on the part of the deponent. That he remembers particularly she complained of his treatment during her confinement, his threat to disinherit Lady Rosa, and his discontent and anger at her for not nursing her child, but she mentioned he had beaten her several times, and particularly at Leinster House; and also upbraided him for not making the settlement on the children, as he had promised to do, on the death of his father. During that time he was walking about the room apparently annoyed by the recital, and striking his head occasionally; but he acknowledged distinctly the truth of what she said: he denied nothing; he did not recriminate or accuse her; he appeared to be sensible of the impropriety of his conduct, and expressed his regret and contrition, and pro-[37]-mised to make amends and that he would never repeat his ill-treatment of her. That on this assurance a reconciliation took place, and he left them reconciled."

This is the substance of his deposition in chief: he speaks to no act of cruelty committed in his presence; but he heard much on the occasion described. Interrogatories are addressed to him, which suggest other causes of disagreement, rather than imply any contradiction of the existence of unhappy differences between the parties; but the witness adheres firmly to the above account, and positively asserts that Lord Westmeath acknowledged that he had been guilty of personal violence to Lady Westmeath by actually beating her. The effect of this however alone is not very precise; it goes principally to confirm the accounts of other witnesses, and supplies a test by which the Court may judge of the real state in which the parties were living, so much at variance with many parts of the correspondence which have been exhibited.

That correspondence has been opposed to the credibility of this account; and the attention of the Court has been particularly called to No. 22 and No. 23, being letters written by Lady Westmeath on the 7th of April and 19th of August, 1815; and it is said that the discussion must have related to the settlement of Lady Rosa rather than to any enumeration of grievances, or to any mention of a separation, and that it is incredible that any thoughts of separation should have been entertained at that time. The allusion to a separation occurs however previously in that letter; and in one before, which is dated on the 3d of April; and therefore that observation is not founded. In the thirteenth article of the marquess' allegation also [38] it is said that the meeting was for the purpose of discussing the propriety of making the settlement on Lady Rosa; that the differences and disputes and disagreements, referred to at the meeting, related to two natural children which the marquess had before marriage, and to no act of unkindness, and it was, on this subject alone, that he expressed his regret that any such disagreements should have arisen. We have the fact however of such a meeting, and of the temper prevailing at it fully established; and the only question is as to the immediate subject of the disagreement. Considering the temper of the parties, it is probable that any disagreement, however originating, would not be confined to one topic: and I collect from Lord Westmeath's answer that the complaint became eventually more general. The sentiments of affection and kindness, which the letters exhibit, are not more at variance with the supposition of disagreements of one kind than of the other. I think, therefore, that this charge is by no means effectually repelled.

The next act of cruelty is that alleged to have been committed at Granvilliers, on the journey to Paris in December, 1815. The thirteenth article of the allegation charges, very summarily, that on that occasion "he abused the marchioness and swore at her in a most outrageous manner, and then struck her a most violent blow with his fist, pushing her at the same time with great force, so that she would have fallen on her head in the fire-place if she had not been caught and prevented by Miss Wood." The witnesses who speak to this fact are Miss Wood and the servant maid, Janet Service, who were the only persons present. They differ a little in circumstances. Miss Wood says "that Lady Westmeath, herself, **[39]** and the servant, were in the bed-room, and that the door was not opened immediately for five minutes to Lord Westmeath, but that the delay was unavoidable." The servant says "she came up stairs with Lord Westmeath, and the door was opened immediately on his knocking." Miss Wood says the blow was on the upper part of her breast near the shoulder. The servant says it was on the lower part of the back. They both agree that they came late to a bad inn at Granvilliers, and Lady Westmeath complained, in the hearing of Lord Westmeath, though not to him, that it was more like a brothel than an hotel. The expressions used to him were only, "What a place is this that you have brought us to." Miss Wood does not even speak to any conversation, but she says "that Lord Westmeath came into the room with wood for the fire: that her back being turned, she did not see what passed, but heard a blow given by Lord Westmeath, which would have knocked Lady Westmeath down if she had not caught her: that he exclaimed at the same time, 'Go to hell, I wish I had never seen you.'" Service says "the blow was struck in consequence of the question asked by Lady Westmeath —'What place is this that you have brought us to?' It was about the small of the back that he struck her, and the blow seemed for a time to take away her ladyship's breath." No further account is given of what passed afterwards, except that Lady Westmeath retired into the inner room, in which Miss Wood slept, and staid there till five or six o'clock in the morning, when by the persuasion of Miss Wood she returned to her own room, and it appears they went on to Paris the next day.

[40] It is not denied in argument that something of this kind occurred, but no satisfactory explanation is given on the part of Lord Westmeath of what actually passed. From the different accounts given of the part of the body on which the blow was struck, by Miss Wood and Service, I may infer that it was not so violent as to occasion bruises, or leave any visible marks; but I think I am bound to conclude from the evidence that violence was used on that occasion, and that a blow was given, either with the fist, or with the open hand, as seems to be suggested, which was unjustifiable. Miss Wood and Service say they did not witness any other act of violence, nor any other instance of gross or abusive language in France, though they describe the general temper of Lord Westmeath to be very irritating and blameable in their opinion. They attribute the illness of Lady Westmeath at Paris to the effect of this conduct. In this, however, I think they betray a little of the exaggeration which usually accompanies the testimony of partial witnesses: for they admit particular instances of great attention and kindness in the behaviour of Lord Westmeath to his wife during her illness, and witnesses examined, on the part of Lord Westmeath, as to the manner in which they lived in Paris, describe Lady Westmeath to have been much in society, and in general good health and spirits, taking the diversion of hunting, and partaking of all other amusements.

On this review of the evidence respecting the scene at Granvilliers I should be glad enough to make any deduction in the evidence of the two witnesses, on the score of partiality, if I knew where I was to stop; but being furnished with no **[41]** explanation that appears to me more satisfactory than the account given by these witnesses, I think I am not warranted entirely to disbelieve them. Lord Westmeath himself admits, in one of his letters, occasional intemperance of speech on other occasions, and particularly that he had threatened "to turn Lady Westmeath out of doors." The same threat is complained of by her in her letter marked thirty, though I do not perceive that in that letter she adverts to his behaviour at Granvilliers. The expression is not, therefore, so incredible or irreconcileable to the habits of Lord Westmeath as I might have expected. On the whole of the evidence applicable to this part of the case, I do not feel myself at liberty to disbelieve the account given by Lady Westmeath's witnesses, and if that is believed, there can be but one opinion of the impropriety, and, I think, of the legal character of the act of violence described to have been committed on this occasion.

They stayed about nine months in Paris, and afterwards went to Spa, and returned to Ireland about the end of 1816. Nothing particular occurred during that period. The fourteenth article charges "violent conduct and gross and opprobrious language on an occasion happening in December of that year, when they were proceeding to embark for England." Janet Service is the only witness examined on it. She says "they came down in the carriage to embark; Lord Westmeath being on the box: he was for going back as it was too rough: Lady Westmeath said it would be better to enquire if there was any danger; he would not attend to her, but put himself in a great passion, and ordered the coachman to [42] drive back. Lady Westmeath said, 'Will you just hear me for a moment—only just hear me,' on which he became quite furious, and ordered the footman, who was down waiting at the door, to get up again, and pay no attention to her, saying 'he was master and would be obeyed.' He was much vexed, and seemed as if he would have struck her, or pushed her down in the carriage; deponent was alarmed for the child and cried out. Lady Westmeath sat down, and the carriage drove back to Dublin." On this statement, which has the appearance of being rather inflamed, it was an accidental occurrence growing out of his anxiety for their safety, according to the judgment which he had a right to form of the danger of embarking at that time. There was no actual violence, nor any threat or opprobrious language which the witness is able to describe. The witness says "it was bad enough at other times, when the witness only was present, but she thought it much worse on this occasion, because the men-servants were witnesses to it, and it was insulting and degrading Lady Westmeath before them." Her comments on this occurrence bear the appearance of being overcharged; and however much the description may keep up the colouring as to the hasty and intemperate habits and manners of Lord Westmeath, it states no acts of personal violence, and adds very little to charges of actual cruelty.

I now come to a part of the case which is rather of a novèl kind. The fifteenth and following articles relate to a series of negociations, and acts done, in effecting a voluntary separation between these parties, which exhibit rather an extraordi-[43]-nary specimen of matrimonial law. There is a continual charge of frequent quarrelling and abusive language, but the specific acts that are pleaded are very few, and of those some are not proved. They plead "that in consequence of the aforesaid ill treatment, Lady Westmeath in the summer of 1817 again declared her intention of applying to the laws of her country for protection, but agreed to abandon such intention on his proposing to execute a deed of separation; and instructions for such an instrument were accordingly given to Mr. Sheldon; that in October in that year Lord Westmeath, being in Ireland, expressed his contrition for the cruelty of his aforesaid conduct towards her, in sundry letters" that are exhibited: "that Lady Westmeath being moved by such letters expressed a disposition to forgive him, and he promised to execute a deed to provide against any recurrence of his ill-treatment." A deed was accordingly executed in December, 1817, for a separate maintenance, and which is also exhibited. "That they thereon lived and cohabited together: that about Easter, 1818, he renewed his ill-treatment; she complained to her friends, and implored their interference that legal measures might be adopted on her behalf to obtain a separation: that a meeting took place between Mr. Sheldon, Mr. Stephens and Mr. Wood. The draft of articles of separation was prepared in May, 1818; it was delivered to a stationer to copy; Lord Westmeath obtained possession of, and destroyed, it." The conduct of Lord Westmeath in attempting to destroy that agreement has been the subject of strong and severe animadversion in the argument; but that is not [44] strictly a point in the case which I have to determine, and therefore I shall not advert to it further than as it is an incident in the general history of the parties. It has not been the practice of the Ecclesiastical Courts to consider such agreements as affecting in any way the legal relation of the parties; (*a*) and, therefore, a breach of such an

(*a*) In *Smith* v. *Smith* (Consistory, 1781), in a suit by the husband for restitution of conjugal rights, the wife pleaded articles of separation with a clause that the husband should not proceed in the Ecclesiastical Court. This plea however was overruled, and the Court (Dr. Wynne) observed "that it believed it was the first time the question had come directly before it, and was surprised that it should be brought forward." That case was cited by the same learned Judge in *Fletcher* v. *Fletcher* (Consistory, 1786), where, on a suit for restitution by the husband, the same point was raised, and decided

engagement can hardly enter into the strict and accurate examination which I am bound to take of the evidence, as it may support the charge of cruelty. Another draft, however, was prepared and executed in August following, making a separate provision of £1300 per annum for Lady Westmeath, and containing the usual engagements not to require cohabitation, or to resort to the process of the law for that purpose. During the whole of this time, from the summer of 1817 to August, 1818, no specific act of cruelty is pleaded, except one about Easter, 1818, occurring at Hatfield, in which Lord Westmeath is described "to have seized a poker and to have brandished it over her head, threatening to kill her." But on this charge no witness is produced. Sarah Johnson lived with Lady Westmeath from June, [45] 1817; but she speaks to no specific act at the time. The Marchioness of Salisbury expressly denies that Lady Westmeath made any complaint to her of the violence described in this article.

The letters of Lord Westmeath, which form the introduction to this part of the case, are seven in number, written from Ireland in the months of September and October, 1817. They are written, in a very impressive strain of the deepest and most intense self-humiliation, to an offended and injured woman. They ascribe to Lady Westmeath the character of an affectionate wife, and many excellent qualities, and, in so doing, remove from her much of the blame of this unhappy quarrel. The terms are general, however, in most parts, and for that reason not very distinct in their application: No. 5 acknowledges that he threatened to disinherit Lady Rosa and turn Lady Westmeath herself out of doors; which seems to refer to the acts of violence charged to have been committed in April, 1814, during the confinement of Lady Westmeath, and afterwards acknowledged, in the conference with Mr. Wood, at the Waterford Hotel, as spoken to by that witness. It implores compassion and pardon for the brutality which he had shewn to her in individual instances; and expresses "an earnest anxiety that arrangements might be made to secure her in case of any unfortunate recurrence." These are his own expressions. He adverts to the suspicion entertained of his continued intimacy with the mother of two natural children, which he had had before marriage, and admits that appearances might justify the supposition that it was the cause of [46] such threats. He disavows the fact, however, and it is strongly disclaimed by counsel, and there is nothing before the Court that shews any such intimacy was continued. The tenor of these letters does, I think, very much confirm the account given by Mr. Wood of similar confessions at the meeting at the Waterford Hotel in Dublin in September, 1815. The result of this correspondence, however, leads to a reconciliation which was granted in Lady Westmeath's letter of the 18th October, 1817, and was most gratefully acknowledged in Lord Westmeath's answer of the 26th.

He returns to England and cohabits with Lady Westmeath; and in November, 1818, Lord Delvin was born. In the meantime it appears that Mr. Sheldon was employed in preparing the deed of reconciliation, as it is termed, to which I have before adverted. That instrument recites the marriage settlement by which Lady Westmeath was to have a jointure of £3000 per annum, and that no provision had been made for the issue: it then recites, "That whereas disputes and differences had existed and arisen to such a height that they were on the point of separating and living apart, but by the intervention of friends she had consented to live and cohabit with him after he had executed these deeds, and thereby made provision for their issue." It then covenants that, "in consideration of such consent he settles his estates as is therein described, with a proviso that in case it shall happen that by a renewal of such disputes and differences as had already caused their separation she should find herself compelled to cease to cohabit, she shall [47] receive yearly such sums as by their mutual friends shall be agreed to be a proper and sufficient maintenance, with a further proviso that the payment should be suspended during any subsequent reconciliation, and be resumed on any future separation to take place in consequence of ill-usage and gross abuse." All that is specific is the arrangement for a separate maintenance. The sum of money, and the nature of the ill-usage which is to give effect to it, are left to the arbitration of friends. Lord Westmeath covenants that in any

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on the authority of the former case. And the principle of those decisions has been acted upon in subsequent cases. See further upon this subject, Roper on the Law of Husband and Wife, vol. 2, c. 22, 2nd edition.

separation he will execute the usual articles; and such an instrument was prepared in May, 1818, which contains articles to that effect, and assigns to Lady Westmeath a specific sum of £1300 per annum.

The depositions of Mr. Sheldon and Mr. Stephens relate principally to the execution of these deeds. Mr. Sheldon was the confidential agent of Lord Salisbury and of Lady Westmeath, and was adopted also as a common friend by Lord Westmeath, notwithstanding Mr. Sheldon's request that he would employ some other professional person. He speaks to the acknowledgment on the part of Lord Westmeath, in the summer of 1817, of his own ill-treatment of Lady Westmeath as the cause of the separation which Lord Westmeath had prevailed on Lady Westmeath to abandon, by the most humiliating concessions and promises of amendment. The depositions of these gentlemen, however, relate principally to the execution of the deeds, and to the admissions of the marquess as to past misconduct. They did not see Lord Westmeath use or threaten to use any personal violence to Lady Westmeath; and it is not an insignificant circumstance in **[48]** this case that Lord and Lady Salisbury have not appeared as the natural protectors of their daughter in these disputes; as it is said, "Lord Salisbury would have nothing to do with them." The present marquess, then Lord Cranborne, was named trustee in the settlement, but without his consent; and he says he was not privy to the arrangements. He speaks, but very generally, as to his knowledge of the conduct of the parties. He says "he was in the habit of going to their house in Bolton Street, and so far as he saw of the conduct of Lord Westmeath during Lady Westmeath's pregnancy in 1818 he did not actually see anything amiss, but he does not mean to depose that there was nothing amiss in it."

The twenty-fifth and twenty-sixth articles relate to the manner in which they lived in separate apartments in Stratford Place. The twenty-ninth pleads an attempt to compel her to give up the deeds, with a declaration that he would force her to give them up, and threats to challenge Mr. Wood, who was a trustee. The thirtieth pleads the last act of violence in his conduct towards Mrs. Wetherly the housekeeper, and towards Lady Westmeath, on the 20th of June, 1819. These latter instances may be classed together, as they constitute the principal or only charge of personal violence in the latter part of the case, as they happened about the same time, and proceeded from the same cause, from an impatience of the state in which he had placed himself, and from a desire to reclaim and assert his marital authority. The account which is given of them by the witnesses, Johnson and Wetherly, is very similar, and there is no reason to question the truth of their **[49]** evidence. Sarah Johnson says, "She lived as lady's maid with the marchioness from April, 1817 to 1821. She went with her to Hatfield in July, 1817, where they staid seven months. She then removed to Stratford Place, and in January, 1819, to a house in Bolton Street. During the first part of the time Lord Westmeath and the marchioness slept in adjoining rooms, and communicating with each other; and they held intercourse, for Lady Westmeath became pregnant. It was on the 18th of May, 1818, that they separated, and the door of communication was fastened. She says they were continually quarrelling, but of the particulars of any quarrel in Stratford Place she cannot depose, as they spoke principally in French. In Bolton Street Lord Westmeath had a sitting room and a bed room adjoining to that of Lady Westmeath, but the door was secured. There were violent disagreements between them; how they began she cannot depose; he used to threaten that he would assume his rights again and be master, and bring down her little ladyship to her proper level, and shew her to the world in her true character. On one occasion his lordship found his way into her bed room, when she was dressing for an evening party; the deponent was with her; he began in French; he was quite frightful from rage, and stormed and raved like one that was mad; he proceeded afterwards in English. It was against Mr. Wood, her ladyship's trustee, that he was most violent, applying to him all odious appellations; he said he would challenge him, and make him fight in France; Lady Westmeath was much terrified. He continued there as much as half an hour. This was in May, 1819." **[50]** But it is to be remembered that in April, 1819, Lady Westmeath had sent a message to him by the cook "that she would not dine with him any more." Johnson speaks also in part to what happened in June, 1819; but it will be more convenient to refer first to Mrs. Wetherly, the person principally concerned in that scene.

Mrs. Wetherly says, "She lived as housekeeper to Lady Westmeath in Bolton

Street. One day in June his lordship desired her to come into the dining room, which was his sitting room; he asked her what wages were due to her, as he was about to discharge her, having given her warning about six weeks before (as is stated by another witness); he desired to see her books, keys, and accounts. She told him she was her ladyship's servant, and could not give them up; he was in a great passion, and flew out at the deponent; he called up the man servant, and sent him for a constable, and as he had used personal violence to her once before, she did not know but he might do it again; so she made her escape and went to Mr. Wood's house, where Lady Westmeath then was, and told her what had passed, and she did not return to Bolton Street for some days." Miss Weldon, who was the governess in Mr. Wood's family, fills up this account. "She accompanied Lady Westmeath to her own house; they went into the housekeeper's room; it was plain from the state of the presses and drawers that they had been forcibly opened; Lord Westmeath was in a most violent and extraordinary passion, amounting almost to fury; though apparently a good deal exhausted; he was as pale as a sheet of writing paper, his lips quivered, his whole frame **[51]** shook with rage; Lady Westmeath asked him 'what he had been about;' he replied, 'I have been breaking open your presses, and I will do it again; I will shew you that I will be master in this house.' She said 'she should apply to her trustees.' He said 'he should like to see the trustees that would dare to interfere.' Lady Westmeath left the room, and returned again in about a quarter of an hour, when she and the deponent went away together to Lord Salisbury's house, and Lady Westmeath has not since resided in the same house with Lord Westmeath."

Sarah Johnson describes what passed when Lady Westmeath went up stairs; "Lady Westmeath called to her, and she attended her in her bed room: Lord Westmeath was then with her: Lady Westmeath said, 'I desire, Lord Westmeath, you will leave my room:' he said 'he would not; he would come into her room when he pleased; that he would have no more of their separate doings; that he would be master of his house, and would have no more interference of that family in his concerns.' He went down accordingly; Lady Westmeath took away some papers, and went to Arlington Street, and has not since cohabited with him." This account of Lord Westmeath's determination to enforce his marital authority is confirmed by Mr. Stephens, who says "that when he was in England in March and April, 1819, Lord Westmeath was living in Bolton Street in separate apartments; that he complained of it to him as a grievance; and expressed his intention to enforce his marital rights, as he understood, by proceedings at law." These are the only specific charges of **[52]** cruelty spoken to by any witnesses after the reconciliation. On the other side, Lady Salisbury and Lady Glengall, Lord Francis Hill, and the Rev. Doctor Wellesley, who frequently visited the parties at their residences in 1817, 1818, 1819, strongly negative the imputation of any acts of violence, according to their knowledge or belief.

On this review of the general conduct of Lord Westmeath, I am constrained to say that there appears to me to be much in the evidence relating to his conduct in the years 1814 and 1815 which borders closely on legal cruelty, according to the strictest definitions which have been given of it. And I think the acts of personal violence then inflicted might have sustained a suit for divorce on that ground, if they had then been made the subject of legal complaint. But it must always be remembered that a natural test of injuries of this kind is the sense in which they are received: if they are not resented as injuries at the time, a state of things intervenes which either detracts from the weight of particular evidence, when brought forward at a subsequent period, or may introduce quite another view of the relative situation of the parties. Reconciliation will supersede the ground of complaint in these courts, as it annihilates even special articles of separation at common law.(*a*) It is true, however, that past injuries may be revived; and the real question appears to be whether the acts, proved against Lord Westmeath in the latter parts of this history, will have that effect.

Mr. Wood says "there was a reconciliation in **[53]** 1816." The letters that passed in the autumn of 1817 establish the same fact: and the events which followed in 1817, 1818, 1819, do not furnish any instance of personal injury, or amount, in my opinion, to more than disagreements of mutual ill-temper and ill words. What

(*a*) See Roper on Husband and Wife, vol. 2, c. 22, 2nd edit.

will be the result of such a state of facts? The law was explained in the case of *D'Aguilar* v. *D'Aguilar*, by my learned predecessor, to this effect; "That though condonation might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence." (*a*) In a late case of *Durant* v. *Durant* (vol. i. 763), the present very learned Dean of the Arches, adverting to that dictum in *D'Aguilar*, qualified those expressions as too large, by referring to what occurred in the final judgment: but, from what fell from the Dean of the Arches on that occasion, I infer that the facts, though slighter than might be required to found or support a sentence of divorce alone, must be such as partake of the nature of legal cruelty, being such in character and effect as might justly revive the fear of injury attributed to the original acts.

The whole question will turn, then, on the application of the principle so explained to the circumstances of this case; and I sincerely lament that it has fallen on me to draw the very nice and delicate distinctions on which such a question may depend. Then what has been the reconciliation? and what the revival in this case? Mr. Wood says "the **[54]** conference at the Waterford Hotel ended in a reconciliation:" and whatever might have been the effect of the violence committed at Granvilliers, cohabitation followed uninterrupted during the two following years. In the Christmas of 1816 there is this remarkable declaration of Lady Westmeath to her father, "That Lord Westmeath had been so uniformly kind to her that she could not bear to see him unhappy." This was said indeed on the occasion of a request to obtain a loan of money for their common use; and the immediate object of the declaration may a little detract from its sincerity; but it shews the placable state of Lady Westmeath's feelings as to the past, and proves that present grievances were not intolerable. The renewal of complaints on her part, in 1817, as appearing in her letters, was founded principally on the subject of the natural children, and the demand of a settlement. The settlement is conceded in December, 1817, and the parties live together: Lady Westmeath becomes pregnant, and is delivered of a son in 1818: they visit together at Hatfield in January, 1819: Lady Westmeath declares to Lady Salisbury "that they are well together:" they live in the same house and at the same table till April, 1819, when Lady Westmeath sent a message by the cook "that she would not dine with him any more."

In May, 1819, the scene occurs which is pleaded as an attempt to make her give up her deeds, and is described by Sarah Johnson. It is confined to a dispute of words, originating in a resolution on the part of Lord Westmeath, whether prudently or imprudently acted upon I will not say, to reclaim his marital authority. The last disagreement was of the same **[55]** kind. Lord Westmeath asserts his authority over Mrs. Wetherly, and discharges her. The breaking open of drawers and presses in the housekeeper's room was a violent and unseemly act, but it was directed principally against the housekeeper, who resisted and denied his authority; and the scene which ensues with Lady Westmeath was incidentally occasioned by her coming in, and exhibits little more than passionate words and ill-manners.

The counsel have represented these acts as a breach of the deed, and as cancelling the reconciliation, and reviving the former complaint, even if the particular acts done should not be deemed sufficient to constitute an original case: but I do not feel myself warranted to adopt that construction. The test of legal cruelty, on which the judgment of this Court must be founded, is of a severer kind. If the husband could with safety be admitted to daily intercourse, in a state of subordination and subjection, there must have been an absence of any apprehension of danger to life, limb, or health, the ordinary criteria of legal cruelty in these Courts; and the breach of that subjection alone, without cause of reasonable apprehension of personal danger, though accompanied with rudeness and ill-manners, will not in my judgment constitute a case of cruelty, or revive former injuries. Whether such conduct was a breach of the articles of separation, I will not venture to determine. However improper it might be, it was not an injury of a personal nature: it was not only an injury infinitely slighter than the original acts of cruelty, but not of the same character, nor threatening the same consequences.

(*a*) *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Con. 134, notis. But, for the substance of the libel, and of Lord Stowell's observations upon its averments, together with his final judgment in that case, see vol. i. 773, et seq.

In the case of *Beevor* v. *Beevor*, Arches, 1803, Sir William Wynne said, "The Court would [56] hesitate a long time before it would go a step further than it had hitherto gone to decree a separation on mere suggestion of violence, of temper, and ill words. A reference was made on that occasion to the case of *Salisbury and Salisbury*, in the Arches in 1721, in which Dr. Bettesworth held that a libel might be admitted without blows; but the cruelty there pleaded, of constant threats and abuse, was not deemed sufficient to authorize a separation, or operate as a bar to a suit of restitution of conjugal rights, which was the nature of those proceedings. The principles laid down by Lord Stowell are to the same effect. In the case of *Evans and Evans* that eminent Judge thus explains them—"That mere austerity of temper, petulance of manners rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offences in the marriage state; but still they are not that cruelty against which the law can relieve." And again, after stating what is not legal cruelty: "These are negative descriptions of cruelty: they shew what is not cruelty, and are perhaps the safest definitions than can be given, in the variety of possible cases that may come before the Court. I take it that the rule usually referred to in our books of practice is a good general outline of the canon law, the law of this country on this subject: the danger of life, limb, or health is usually inserted as the ground on which this Court has proceeded to separation. The Court has never been driven off this ground" (1 Hagg. Con. p. 38, 39). And on an attentive comparison of all the cases that have been alluded to [57] I think I may affirm that the Ecclesiastical Courts have, hitherto, been uniformly strict in requiring proof of actual injury, or of real apprehension of injury, as it may affect the safety or health of the person, to justify divorce on the ground of cruelty.

Looking then to the obligations of marriage, and of nuptial cohabitation, so strongly upheld by the ecclesiastical law; looking to the great interests that are connected with it in the institutions of this country; and reflecting on the importance of adhering strictly to the principles which have heretofore been held in these Courts on this subject, and which are incidentally made the test of civil rights in the construction of the courts of common law and of equity, I do not feel that I can conscientiously pronounce a sentence of divorce in this case.

Foreseeing the possibility of such a result, I was desirous that the parties might reflect on the situation in which they and the Court might be placed. I intimated a wish also that it might be considered in argument whether any state of facts, short of legal cruelty, would warrant the Court to hold its hand, and dismiss a suit of this kind, without a positive decision on the point put in issue between the parties. The counsel on both sides have concurred in thinking that there is no middle course; and there would undoubtedly be great difficulties in the way of such a distinction, under the very strict rules which this Court has always applied to uphold the sacred obligations of marriage.

In the case of *Sir George and Lady Warren*, in 1771, and in the case of *Evans* v. *Evans*, in 1790, which were cases of great animosity and [58] strong recrimination, the Court adhered simply to the line of its duty in pronouncing on the insufficiency of the charge of cruelty, leaving the law to take its course. In the former case, restitution was actually enforced by the authority of this Court. In the latter, divorce being refused, the disagreements probably subsided in terms of private separation, which had been before proposed. But the Court was no party to such a compromise: it did not disown the feeling of disinclination to incur the risk of provoking further disagreements between the parties; but it vindicated, in strong and forcible language, the necessity of upholding the general policy of the law in opposition to such feelings, and in disregard of an over anxious solicitude for the effect on the particular case.

A dictum of Lord Stowell, however, has been cited, in which that eminent person is represented to have said "that it had not been decided in these courts that there must be legal sævitia to bar a suit of restitution, or that something short of legal cruelty might not have that effect" (*Gregg* v. *Gregg*, Consistory, Trinity Term, 1821). That observation was thrown out, on the admission of the wife's defensive allegation, to a suit for restitution, and with reference, I think, more especially to a particular article, which pleaded threats and menaces to compel the wife to part with her property. In my note of that case the learned Judge observed, "I have not said there might not be cases so near to sævitia as to warrant the Court to forbear, but

I lay down no proposition on that point at present." The case did not come before Lord Stowell again, and [59] nothing, as I understand, occurred to raise that point at the final hearing. The inference to be drawn from the words of Lord Stowell, therefore, are rather adverse to such a distinction; if it is considered that, in the long and accurate experience of that learned person, who presided in this Court for more than thirty years, his memory did not furnish him with any authority for a more explicit declaration on this important point. Without saying that such a distinction may not be justified, under very strong circumstances, and in the wisdom of a superior Court, I feel myself compelled, in the conscientious discharge of my duty, to adhere to the principles on which this Court has hitherto acted; and to declare that in my judgment the evidence in this case does not warrant me to assume such a discretion.(*a*)

Great, therefore, as the responsibility may be, [60] as I am reminded, in pronouncing that this lady is bound to return to the society of her lord, it is a responsibility which the law imposes upon me, and I must support it. The same law lays on her the obligation of complying with its injunctions; and I close this painful discussion with the consolation of thinking that she will have ample means of correcting my judgment by appeal, if it is wrong; or that it will rest with herself to reconcile it with her own happiness and comfort, if it is right.

The Court pronounced that Lady Westmeath had failed in proof of the allegations given and admitted on her behalf, and assigned her to return home to the Marquess of Westmeath, and restore to him conjugal rights, and decreed a monition against her so to do.

From this sentence an appeal was immediately interposed to the Arches Court of Canterbury. On the first session of Trinity Term, 1826, the inhibition and citation were returned; on the first session of Michaelmas Term the process was brought in; and the cause was argued at the close of Michaelmas Term; and on the third session of Hilary Term, 1827, the Court proceeded to give sentence.

[61] Arches, Hilary Term, 3rd Session, 1827.—In answer to a suit for restitution of conjugal rights the wife (having pleaded cruelty and adultery) proved several acts of personal ill-treatment, violent behaviour and language, from 1813 to 1817; a separation was then agreed upon, but, on a reconciliation, matrimonial cohabitation and intercourse were renewed. The Court, on appeal—holding that adultery was not proved; that cruelty up to 1817 was proved, and that though afterwards there was no personal violence, his conduct, exciting reasonable apprehension of it, revived the former cruelty—decreed a separation, and condemned the husband in the costs in both Courts, except those incurred by certain charges of adultery.—If legal cruelty be established, a subsequent reconciliation and matrimonial intercourse form a legal bar to a separation for such preceding cruelty. And the question then is whether any subsequent acts take place furnishing fresh grounds of legal complaint, or at least reviving former wrongs, and, in connection with those former wrongs, creating reasonable apprehension of a renewal of ill-treatment.—The force of condonation as a bar varies according to circumstances. The condonation by a husband of a wife's adultery, still more repeated reconciliations after repeated adulteries create a bar of far greater effect than does the condonation by a wife of repeated acts of cruelty.

(*a*) On this general question the "Reformatio Legum" remarks: "Si rixæ, contentiones, injuriæ, concertationes, acerbitates, contumeliæ, luxus, pravitates multiplicis generis tam vehementer exæstuant, ut in eisdem ædibus conjuges commorari nolunt, nec cætera matrimonii jura sibi mutuô præstare, pœnis implicentur ecclesiasticis, et in easdem ædes compellantur, et etiam revocentur ad pia inter se communicanda matrimonii officia, modo nulli tales casus inciderint propter quos ipso jure divortium petere liceat." De Matrimonio, cap. 11. See also De Adulteriis et Divortiis, cap. 11, 12. The French law appears to have allowed, on account of the husband's ill-treatment, "la separation d'habitation" upon slighter grounds than the Ecclesiastical Courts of this country. Pothier, "Traité du Contrat de Mariage," chap. 3, s. 1, 4th edit., vol. 3, p. 374. And the general principle of the ancient canon law seems to be expressed in these terms: "Si tanta sit viri sævitia, ut mulieri trepidanti non possit sufficiens securitas provideri, non solum non debet ei restitui, sed ab eo potius amoveri." Decret. Greg. lib. 2, tit. 13, c. 13, ad finem.

—Cruelty generally consists of successive acts of ill-treatment, if not of personal injury, so that something of a condonation of the earlier ill-treatment necessarily takes place.—If a wife, after legal cruelty, consents to a reconciliation and to matrimonial cohabitation, former injuries would revive by subsequent misconduct of a slighter nature than would constitute original cruelty, though the reconciliation would be a bar if no further ill-treatment took place.—A deed of separation, upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, is no bar to such a suit.—On the execution of articles of separation, not followed by matrimonial intercourse, the wife's reluctant assent to the husband having a bed-room in her house, at the earnest intreaty of him and of mutual friends, and on his declaring "that he should be merely under the roof by sufferance," is no continuation of a former condonation.

Judgment—Sir John Nicholl. This appeal from the Consistory Court of London was, in the first instance, a suit for restitution of conjugal rights, brought by Lord Westmeath against Lady Westmeath, his wife. In answer to this demand Lady Westmeath pleaded that Lord Westmeath had treated her with cruelty; and she afterwards, in a second allegation, charged Lord Westmeath with adultery committed subsequent to their separation. Lord Westmeath gave in a defensive plea denying both charges. On each side a great number of witnesses, on the whole exceeding fifty, were examined.

The Judge of the Consistory Court pronounced that the wife had failed in proof of both her allegations, and decreed that she should return to matrimonial cohabitation. From that judgment Lady Westmeath has appealed, and I am now to determine whether the sentence ought to be affirmed or reversed.

By the counsel on both sides the case has been characterized as one of a very painful description. It has been very elaborately and, I may truly add, very ably argued here; and it has been stated that it underwent a most ample discussion in the Court below; and that the learned Judge, in delivering his sentence, adverted to all the circumstances alleged in plea, and to the several parts of the evidence on both sides, expressing very fully the precise grounds of his decision. Those grounds were:—

[62] First: That the adultery was not proved.

Second: That the cruelty, in the first instance, was proved, but that its effect was removed by subsequent cohabitation.

Third: That after this condonation, as it is technically called, there were no acts of cruelty proved, sufficient either of themselves, or as a revival of former cruelties, to entitle the wife to a sentence of separation.

And finally: That as she was not entitled to such a sentence the law knew no other course than to compel a return to cohabitation.

These also are the positions upon which the counsel have mainly relied here.

As the case, then, is of this distressing character, as every part of it has been so thoroughly investigated, and as the grounds of decision in the Consistorial Court were so distinctly laid down, I could have wished to consider myself relieved from the necessity of going, in detail at least, over those points respecting which I clearly concurred with the Judge of the Consistory, reserving myself to state, more at length, those other points, if any, upon which I might have entertained some doubts; if not even a difference of opinion; but as it has been urged in argument that Lord Westmeath has not been proved guilty of any cruelty, and that he is anxious to have his character cleared from that imputation, it becomes my duty to enter more at large into that branch of the case than inclination would otherwise have led me.

The parties were married in May, 1812, and finally separated in June, 1819; and this period, therefore, embracing seven years of cohabitation, must be examined. The cause has been depend-**[63]**-ing above five years, and is loaded with an immense mass of evidence. For the purpose of tracing the way more readily through this maze of facts, an outline of some prominent features may be stated with convenience, adopting the division of the history made by counsel.

First: From the marriage in May, 1812, to the latter end of 1815.

Second: Thence to the latter end of 1817.

Third: Thence to June, 1819, when Lady Westmeath finally left her husband.

During the greater part of the first period, namely, from May, 1813, to September, 1815, the parties dwelt at Clonyn, in Ireland, the Westmeath family seat; but the

late Lord Westmeath, the father of the party in this suit, was then residing at Dublin, where he died towards the close of the year 1814. About the end of May, 1814, Lady Westmeath, then Lady Delvin, gave birth to a daughter, Lady Rosa Nugent, who is still living. Unhappy differences arose between these parties during their abode in Ireland, and had nearly produced a separation; but, in September, 1815, upon a discussion of the subject, and by the interposition of a friend, they were reconciled, and came over to England, intending afterwards to proceed to France. At the end of 1815, when the second period commences, this intention was carried into execution. They continued abroad till the autumn of 1816, then returned to England, paid a short visit to Ireland, and again came back to England.

In the course of the years 1816 and 1817 their unhappy disputes were renewed, and reached such a height that Lady Westmeath insisted on a separation; but a reconciliation again took place, **[64]** upon the execution by Lord Westmeath of a prospective instrument, which was signed in December, 1817. The parties then resumed their cohabitation, and lived part of the time in Saville Row, and part in Stratford Place; and Lady Westmeath again became pregnant, and gave birth to a son in November, 1818; but long before that event the differences between the parties had recommenced, and formal articles of separation were entered into, bearing date the 30th of May, 1818. Subsequent to these articles, by which 1300l. a year was settled as a separate maintenance for Lady Westmeath, no matrimonial cohabitation took place between the parties; but at the earnest desire of Lord Westmeath, and by the recommendation of friends, in order that the separation might not be known to the world, Lady Westmeath was prevailed upon, reluctantly, to consent to Lord Westmeath having a bed in the house where she resided. About Christmas, 1818-19, Lady Westmeath removed to Bolton Street, Lord Westmeath still being allowed the use of a bed-room: for a time they generally dined together, but in April that intercourse was broken off, and, at length, in June, 1819, in consequence of certain transactions which then occurred, Lady Westmeath withdrew altogether from her husband's society.

Neither party, however, had recourse at that time to the Ecclesiastical Court. Lady Westmeath, relying on the validity of the deed of separation, and on the separate maintenance provided by that deed, did not bring any suit for divorce by reason of cruelty against her husband; nor did Lord Westmeath apply to the Spiritual Court to interpose its authority to compel the return of his wife to cohabitation; but he applied to the Court **[65]** of Chancery to enforce the delivery up of the articles of separation,(*a*) and it was not till after proceedings of nearly two years' duration in Chancery, and just before the matter was finally decided, and when it was pretty well ascertained that he could not succeed there, that he instituted a suit in the Consistory Court against his wife for restitution of conjugal rights. The wife, then, as matter of defence, charged the husband with cruelty, and on that ground prayed a sentence of separation; a prayer which, according to the established rules of these Courts, she had a right to engraft on the proceedings commenced by the husband. But in consequence of this delay in resorting to the proper tribunal, the Court is placed under the disadvantage of having to decide upon facts spoken to by witnesses, whose memory and recollections may have become in some degree faint and confused by the interval that has been suffered to elapse between the transactions and the time of making their depositions.

After this general view of the history of the parties and of the suit, the Court has to consider the case, and to pronounce whether the husband is entitled to its aid in order to compel his wife's return to him; or, on the other hand, whether the wife, in her defence, has established a right to a sentence of separation, or is on any ground to be released from the effect of the proceedings instituted on the part of her husband.

Before entering upon the particular points of the case it may be proper to notice one or two **[66]** occurrences tending to create a strong prepossession in regard to the merits. One is that a part of Lady Westmeath's family is unfavourable to her defence; so far, that her mother, who would most naturally be expected to be strongly prejudiced in her behalf, has been called as a witness in support of the husband's plea. A feeling against Lady Westmeath's cause might well be excited by this circumstance, but too much weight must not be given to it; for if it should appear that Lady Westmeath

(*a*) *Westmeath* v. *Westmeath*, Jacob's Rep. 140.

was anxious, perhaps generously and wisely, to conceal from the knowledge of her family any ill-usage she might experience; that the commencement of her unhappiness, which had nearly produced a separation, took place during a considerable residence in Ireland; that yet the causes of complaint after discussion were for a time extinguished by a reconciliation before their return to England in September, 1815; that the mother was so averse to publicity, and to the affair becoming "town-talk," as to urge her daughter to a renewal of cohabitation, even after Lord Westmeath had consented to sign articles of separation; that this feeling became almost a morbid sensibility upon the subject; and that at length she became for some cause highly offended at her daughter; the fact, so much calculated at first sight to produce an unfavourable impression against the wife, would, on a view of all the circumstances in evidence, lose much of its effect on my mind. I see no impropriety, nor any injudiciousness, nor want of proper feeling on the part of Lady Westmeath, in resorting for assistance to Mr. Sheldon, the old friend and legal adviser of her family, rather than to the family themselves; or in declining to annoy [67] her father with her grievances, who seems to have been extremely averse to interfere in any such domestic matters; or in abstaining from application to her mother, who was indisposed to listen to any remedy that might give publicity to the affair, or to her brother, who might have involved himself in a personal quarrel. None of these persons could give her legal counsel; it was that of which she stood so much in need; and properly enough she applied to the legal as well as the friendly advice of old Mr. Sheldon—the very person to whom her own family would probably have recommended her if they had been consulted.

The other occurrence, tending to spread a heavier cloud of prejudice over her defence, is the production of a set of witnesses from Ireland in support of the charge of adultery; which witnesses have since been indicted for, and convicted of, a conspiracy against Lord Westmeath; and their depositions in this cause tend strongly to support the propriety of that conviction: yet, looking at all the circumstances connected with that part of the case, I see no sufficient ground to believe that Lady Westmeath herself was privy to that conspiracy, or to the falsehood of the charges to which the witnesses were brought to depose. She might be too credulous; but situated as she was, and looking back to some past events, it was natural she should lend an unsuspecting ear to such tales. Even her agents and advisers would readily give credit to them; but the conviction of these witnesses was calculated to occasion a prejudice greatly to the disadvantage of the defence set up by Lady Westmeath; and the Court itself, warned by the discovery of this per-[68]-jury, must look with greater caution and reserve at other parts of the evidence.

The witnesses referred to were produced in support of some of the charges of adultery; and as I concur with the Judge of the Consistory Court, that no part of the adultery has been proved, it may be convenient at once to dispose of that branch of the case.

The accusation of adultery with three of the persons has been distinctly and properly abandoned. As far as it relates to another person, of the name of Brenan, there is no proof by any credible witnesses of any fact from which adultery can be inferred. And although, in respect to the remaining person, Smyth, the evidence of Mrs. Winsor, could it be fully relied upon in all its parts, coupled with the subsequent calls of Smyth at three several places where Lord Westmeath lodged, would furnish grounds of pretty strong suspicion; yet considering that no indecent familiarity was ever seen, and that the circumstances deposed to are not in themselves so unequivocal as to exclude explanation consistent even with entire innocence, connecting them also with what has occurred respecting the other witnesses to adultery, I concur with the sentence already given—that the wife has not proved her second allegation, so as to entitle her to a sentence of separation by reason of the adultery of her husband.

In proceeding, then, to the consideration of the charge of cruelty, the original defence set up, and the material branch of this cause, it is necessary to examine—

[69] First. The law that applies to such a charge.

Second. The character of the misconduct charged.

Third. The proofs in support of such charge.

In respect to the law, the question naturally occurs, What constitutes cruelty in the view of the law? It is difficult and hardly safe, and at the same time it is unnecessary, to define it affirmatively with precision. It can only be described generally, and rather by effects produced than by acts done; even the quotation from Clarke is very

loose, and adopts this mode of describing by effects. "Si maritus uxorem inhumaniter verbis et verberibus tractaverit, et aliquando venenum loco potus paraverit, vel aliquod simile commiserit, propter quod mulier, sine periculo vitæ, cum marito cohabitare aut obsequia conjugalia impendere non audeat." (*a*) What amounts to "inhumaniter?" What is "aliquod simile?" What is the conduct "propter quod obsequia conjugalia impendere non audeat?" or (as the effect of this passage is stated in another authority) "per quod consortium amittitur?" These definitions leave the matter very undefined and loose. Clarke himself, though a highly respectable authority, yet only professes to write upon practice; and, in many respects, the practice of his day is become obsolete. The law may more satisfactorily be sought in adjudged cases, especially in the principles laid down by that highly gifted individual, the noble Lord who long presided in the Court **[70]** where the matrimonial law of this country is most frequently discussed. A very valuable collection of his decisions has been made. They have been accurately reported, and are entitled to be received as of the highest authority, not as making the law (for no Judge ever more carefully abstained from assuming such a power), but as declaring what the law is; and I must add that my own knowledge and experience, as far as they go, lead me fully to concur in the principles propounded in those passages which I am now about to quote. In the case of *Evans* v. *Evans* Lord Stowell said, "What is cruelty? In the present case it is hardly necessary to define it, because the facts here complained of are such as to fall within the most restricted definition of cruelty. I shall, therefore, decline laying down a direct definition. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged, for the duties of self-preservation must take place before the duties of marriage" (*Evans* v. *Evans*, 1 Hagg. Con. p. 35). Further on he says, "Proof must be given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable, not arising merely from diseased sensibility of mind" (ibid. p. 40). So in *Harris* v. *Harris:* "There must be something that renders cohabitation unsafe, or is likely to be attended with injury to the person, or to the health of the party. Words of menace may **[71]** warrant the Court to interpose, and prevent the actual mischief; but when such violence of language is accompanied with blows, it is a more aggravated case" (*Harris* v. *Harris*, 2 Hagg. Con. 148. S. C. 2 Phill. 111). Again, in *Waring* v. *Waring:* "The usual principles require that such complaints should be supported by proofs of violence and ill-treatment, endangering, or at least threatening, the life, or person, or health of the complainant" (2 Hagg. Con. 154. S. C. 2 Phill. 132). The same doctrine is held in the case of *Holden* v. *Holden:* "The Court has to decide whether the conduct of the husband amounts to that sævitia which authorises a separation. On this point the Court has had frequent occasion to observe that every thing is, in legal construction, sævitia which tends to bodily harm, and in that manner renders cohabitation unsafe. Whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected. It is not necessary to inquire from what motive such treatment proceeds; it may be from turbulent passion, or sometimes from causes which are not inconsistent with affection. If bitter waters are flowing it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own controul as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated.

"Secondly: The law does not require that there should be many acts; for if one act should be of that description which should induce the Court to think that it is likely to **[72]** occur again, and to occur with real suffering, there is no rule that should restrain it from considering that to be fully sufficient to authorise its interference.

"Thirdly: It is not necessary that the conduct of the wife should be entirely without blame; for the reason which would justify the imputation of blame to the wife will not justify the ferocity of the husband" (*Holden* v. *Holden*, 1 Hagg. Con. 458). These, then, are the principles by which these Courts have been governed, and according to which it is my duty to decide. There must be ill-treatment and personal injury, or the reasonable apprehension of personal injury. What must be the extent

(*a*) Clarke's Praxis, tit. 107. Oughton, tit. 193, s. 18.

of injury, or what will reasonably excite the apprehension will depend upon the circumstances of each case. So likewise what may aggravate the character of ill-treatment must be deduced from various considerations, in some degree from the station of the parties, in some degree from the condition of the person suffering at the time of the infliction. The complexion of individual acts may be heightened; nay, the acts may also change their very essence by the accompaniments. Not only particular stations and situations and the feelings almost necessarily arising out of them, but even acquired feelings may be entitled to some attention. In *Evans* v. *Evans* Lord Stowell's remarks establish (ibid. p. 38) that what wounds not the natural but the acquired feelings will not absolutely be excluded by the Court where they are stated merely as a matter of aggravation. A fortiori, then, feelings which naturally belong to a wife or to a mother of every station constitute a part of the consideration.

[73] What, then, is the character of the facts charged; between what parties, and in what situations? It may be sufficient to state that personal violence is charged; blows—blows repeated and severe, and aggravated by the high rank and station of the parties. The acts imputed, if proved by credible evidence, come directly within the strictest definition of cruelty—of aggravated cruelty. A blow between parties in the lower conditions and in the highest stations of life bears a very different aspect. Among the lower classes blows sometimes pass between married couples who, in the main, are very happy and have no desire to part; amidst very coarse habits such incidents occur almost as freely as rude or reproachful words: a word and a blow go together. Still, even among the very lowest classes, there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the discipline of which emollit mores and tends to extinguish ferocity; if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affection, the friend of his bosom, the mother of his offspring—such conduct in such a person carries with it something so degrading to the husband, and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable. The particular situation of the parties when the ill-treatment is inflicted may create a still further aggravation; but it is unnecessary to anticipate the descriptions of such situations.

The peculiar nature and main features of the cruelty imputed may, however, be here conveniently noticed: it is not that of cold malig-**[74]**-nity, or savage, continual unfeeling brutality of disposition; it is not that of satiated possession producing disgust and hatred: the acts charged are not inconsistent with occasional kindness, with the existence and continuance of strong attachment; nay, even with violent affection; but the main features of the alleged cruelty are great irritability of temper, producing ungovernable passion, ending occasionally in acts of personal violence, and, of course, attended with the danger of a repetition of personal mischief. Such is the nature of the misconduct of which the husband is accused; and it is not extraordinary that Lord Westmeath should be anxious, if he can, to clear his character from such a stigma.

The principal witnesses to the direct ill-treatment and violent behaviour are domestic servants. Such must of necessity, for the most part, be the sort of evidence in causes of this description; for ill-usage of the species imputed is of a domestic nature. It generally takes place in secret, sometimes in the retirement of the night. Servants, more especially those about the wife's person, are alone likely to witness those acts. Even by them the acts themselves are not very frequently seen, and can only be inferred from the accompanying circumstances or the resulting consequence, or be proved by the husband's acknowledgments. From experience, the Court is well aware of the degree of caution with which it is necessary to listen to evidence of servants on such matters. Allowance must be made for some degree of bias, more especially when they are deposing to general treatment after a long lapse of time. In that case, circum-**[75]**-stances happening only occasionally are recollected prominently, and are heaped together in the mind so as to appear continuous in the memory even of a witness meaning to depose correctly. But, notwithstanding these objections, the testimony of such witnesses is not at once to be repudiated; for it may be the only means of arriving at truth and justice. If they give their evidence with reasonable fairness, without too much forwardness, and still more if they are confirmed upon facts capable of corroboration, they become entitled to credit even upon circumstances incapable of extrinsic confirmation. The Court, then, must weigh the deposi-

tions in this cause under these considerations, and must examine how far they are mutually supported, and particularly how they are corroborated by the admissions of the husband himself and by all the res gestæ.

It thus becomes necessary to travel through the facts in their detail, pursuing the order in which they occurred, and the outline already given.

Soon after their marriage the parties visited Ireland, came back to England the latter end of the same year, and about May, 1813, went to reside at Clonyn. During the remainder of the year there were occasional quarrels, but no acts of personal violence, so far as appears from the evidence. Mackenzie, who was Lady Westmeath's own maid, is the principal witness to the early part of the history: she had lived in the father's (Lord Salisbury's) family from her ladyship's childhood, and accompanied her when she married: she was, of course, much attached to her mistress, and has a strong bias in her favour; but she gives her evidence with considerable fairness, and is corrobo-[76]-rated and confirmed in most of what she states. She gives the following account of the earlier part of the cohabitation:—"About twenty-six years ago she went to live in Lord Salisbury's family, and lived there till Lady Westmeath married in 1812, when she went to live with her as her maid. In 1814 deponent married; then became the housekeeper at Clonyn; and so continued till 1819, when she and her husband, who was also in Lord Westmeath's service, were dismissed by his lordship. In 1812, and beginning of 1813, the parties resided partly at Black Rock, near Dublin; partly at Hatfield. In May, 1813, they went to reside at Clonyn, and continued there till September, 1815, when they came to England in their way to Paris, leaving deponent at Clonyn with the child under her care. At Black Rock and Hatfield she observed Lady Westmeath at times apparently unhappy, but she witnessed no quarrel and heard no improper language by Lord Westmeath. Observing that Lady Westmeath continued unhappy, deponent took an opportunity of speaking of it to her ladyship, who referred it to the behaviour of Lord Westmeath to her, but begged the deponent would not mention it. They had not been long at Clonyn when money for housekeeping was not to be had: Lady Westmeath was literally without money for months together. She cannot depose that Lord Westmeath positively refused to let her have it, but Lady Westmeath was continually fretting about it. Deponent has heard her beg him to let her have some; and say that if he would but let her have her pin-money she should not be so distressed as she then was. When tea and sugar and such articles were [77] wanted from Dublin there was no money to send for them, and Lady Westmeath has gone without them: she lived for economy whenever Lord Westmeath was from home as poor as any poor person could; and when she asked his lordship for money he abused her; deponent has heard him. On such and other occasions deponent has heard him call her a damned bitch, and say he would kick her to hell." These surely are words of menace. "He put himself into most violent passions; he was more like a madman than a reasonable being." Here is turbulent passion, not under his own controul! "Deponent never knew of any provocation Lady Westmeath gave him: she wished for a quiet life; and deponent has known her to leave the room to avoid any thing unpleasant, when he was inclined to quarrel. Lady Westmeath is a quick-tempered woman, and, when irritated, would shew it: but she was never inclined to quarrel, and never began by giving any provocation, to deponent's knowledge."

She then mentions "her misery for want of fuel, and from the wretchedness of the place; that she bore it with great fortitude;" adding, "that if Lord Westmeath had been kind to her, and whenever he was good tempered, she did not care what she put up with."

Here, then, if the witness be credited, is harsh treatment, unnecessary privations, words not only of reproach, but of menace: while, on the part of the wife, there is forbearance—no provocation. She is not the prior lædens, but shews every disposition to endure her privations with patience, "if his lordship would but be kind." The want of money will, however, be found, in Lady West-[78]-meath's apprehension and belief, to have been connected with another very galling circumstance, which will presently be noticed.

That there were quarrels at this time, and that Lord Westmeath admitted himself to be the aggressor and the person to blame in these quarrels, is confirmed by Mr. Wood, the near neighbour of the family (Rossmead, his residence, being about a mile and a half from Clonyn), who is appealed to and called in as the friend and inter-

cessor of Lord Westmeath. He is considered as his friend throughout the transaction, and during all the cohabitation of these parties, or, at least, he ceased only to be so just at its very conclusion. He commences, at all events, as the friend of Lord Westmeath. If he became at length the friend and protector of Lady Westmeath, what is the inference? Why, the conduct of Wood bears testimony that Lord Westmeath was the offending party. It is true, however, that at the time of giving his evidence Lord Westmeath was imprisoned at his suit. That he was obliged to prosecute Lord Westmeath for conduct, the particulars of which do not appear, is no reason why his testimony should be discredited: a prosecutor's own evidence is received in direct proof of the injury for which he prosecutes. Mr. Wood is under some degree of bias, and is to be listened to with care, particularly in matters of mere opinion; but he is credible in regard to the facts to which he deposes, and, besides, he is fully corroborated.

There being, then, no sufficient ground for objection to this gentleman's testimony, I find him stating "that he was from time to time called on by Lord Westmeath to interfere on his behalf and to intercede for him, and to prevail on her [79] ladyship to overlook his aggressions, Lord Westmeath uniformly acknowledging that he had misconducted himself." I shall have occasion presently to refer to Mr. Wood's evidence more in detail, and to see how he is confirmed.

Lord Westmeath being sometimes in Dublin, during the year 1813 his wife wrote to him constantly. Fourteen of her letters of that year are exhibited; they are written in the terms and tone of an affectionate wife, and they are relied upon as a disproof of the facts deposed to. To me they appear in no degree inconsistent with occasional quarrels, and fairly to bear a construction very different from that which has been attempted to be put on them, and not discreditable to Lady Westmeath. In that view, they would tend to shew her good sense and good disposition in making no allusion to those occasional acts of harshness; and to evince that by conciliating conduct she hoped to soften the violence of her husband's temper. This rather seems the true view of them when connected with other parts of the case.

The transactions of the early part of the following year, 1814, become more material. Besides the endurance of many privations during the severe winter of 1813-14, when in a state of advanced pregnancy, an act of personal violence occurs which is thus deposed to by Mackenzie on the seventh article: "About a month before Lady Westmeath's confinement Lord Westmeath called deponent up, about four o'clock one morning, to go to Lady Westmeath; when deponent went, Lady Westmeath was lying in bed, and Lord Westmeath standing by in his dressing gown: deponent asked Lady Westmeath if she was taken ill: she said, No; but that Lord Delvin had been beat-[80]-ing her, and had kicked her in the side; and she complained of being in pain from it. Lord Westmeath then said, Emily, you provoked me to do it. Lady Westmeath looked at him, but said nothing to him; but asked deponent why she had come? Deponent said, Lord Delvin had called her. Lady Westmeath said she might go to her own room again. Lord Westmeath appeared by his manner, when he called her, to be frightened." An admission of the truth of the charge is here then necessarily implied from his observation, "You provoked me to do it." It is true that when he has done it he himself is frightened, and calls the maid; but he in effect admits that her statement is correct. How ungovernable must be the passions of a husband who, scarcely a month before his wife's confinement of her first child, can be hurried away to such an outrage: it requires no definition of cruelty to pronounce this to be an act of aggravated cruelty. "You provoked me to do it:" no provocation could justify or palliate it. It will hereafter be seen what calls forth similar inflictions of personal violence, when witnesses are actually present at the commencement of the quarrel. It may also be proper at this stage to enquire what is suggested on the part of the husband as the sort of provocation given by the wife to excite him to ill-treat her.

It appears that before the marriage Lord Westmeath had two natural children. This was not at that period communicated to his intended wife, as in candour as well as in prudence it ought to have been. He did worse than entirely conceal it; for that might have been imputed to a feeling of delicacy: he communicated one half of it; he [81] desired her brother, then Lord Cranborne, to mention it to her, that he had a natural child; not informing even him that he had two. The wife, however, afterwards discovered the fact. This shewed contrivance and deception, as well as conceal-

ment; and he asserts that she was constantly reproaching him because he had two natural children, instead of one only. This assertion, again, is only half the truth; or, rather, it is much less than half the truth. She complained that he had one of those children whilst paying his addresses to her; she complained that he had kept up a clandestine communication with this woman (a married woman) and her children, even after his marriage; she complained that a considerable part of his income, instead of being employed on its legitimate objects, namely, to provide for the comfort of his pregnant wife during the severe winter, was diverted in an unreasonable degree to the support of this woman and her children. What could be more galling and even heart-breaking to an attached wife than the belief, or even suspicion, that such was the case?

Mackenzie, to the eleventh interrogatory, answers: "Lady Westmeath did sometimes talk to the respondent about these two illegitimate children, unburdening her mind; for she was very unhappy about them and their mother." Lord Salisbury, to the tenth interrogatory, says: "Lady Westmeath has used very strong language in speaking of Lord Westmeath, in consequence of the deception practised upon her by him in having concealed a part of the truth from her; and her belief that further deception, respecting the mother of these children and his lordship's connection with her, was still prac-**[82]**-tised." To remonstrate on this supposed violation of her husband's duties was natural, and was justifiable. The evidence sufficiently proves, indeed Lord Westmeath's own letters shew, that she had some foundation at least to make remonstrances, without any very great proneness to jealousy.

The temper of this lady is suggested to be extremely violent; and it should seem that, when irritated, she could express herself with warmth, and even bitterness and acrimony, for she was not insensible to injuries and to insults; but she had considerable self-command, and her natural temper and disposition are described as being good: so say those who know her best, and upon interrogatories put to them by Lord Westmeath.

Lord Salisbury, to the seventh interrogatory, replies: "Lady Westmeath is of an amiable and easy temper; under circumstances of serious provocation she manifests great warmth, even to violence of temper; but not otherwise." So Mr. Sheldon, to the fifth interrogatory: "Lady Westmeath is not, to the respondent's knowledge or belief, a woman of a most violent and ungovernable temper; she is warm-tempered, but not an ill-tempered warmth; she is a woman of a very ardent and anxious, but affectionate, disposition, capable of being irritated by ill-usage; she is naturally of a most amiable disposition; she has, in the deponent's presence, reproached Lord Westmeath with considerable acrimony, but it was done with more of dignity than violence; though the respondent has seen her evince considerable irritation towards her husband, not unprovoked, as he believes."

[83] The Rev. William Stephens, Lord Westmeath's agent, gives nearly the same description of her temper, in answer to the seventh interrogatory: "He has seen violence of temper displayed by Lady Westmeath on the occasion of her complaints against Lord Westmeath, under her sense of his ill-treatment; he has heard her express herself in strong terms of contempt of what had been, to respondent's knowledge, Lord Westmeath's conduct, and which could not but excite the feeling in her mind."

It may be gathered from the general result of the evidence, and of the facts that these several accounts are not an unfair representation of Lady Westmeath's character and tone of mind. I shall not state the opinion of the servants, but their conduct speaks to the same effect. They live long with her, and are attached to her. Her own maids, three in succession, live with her till they marry, nearly three years each. I see nothing of a fretful, peevish, and worrying temper in her letters, still less of a perverse and malicious disposition that took delight in irritating and provoking a husband without cause. Behaviour which wounded her mind in its tenderest and best feelings—in her affections as a wife—in her fondness as a mother—afflicted her acutely; and she had spirit to remonstrate upon mal-treatment, and when it was aggravated by repetition she had firmness and resolution to insist upon redress and protection: but in all these letters in 1813 and the beginning of 1814 (and the fact is particularly deserving of my attention) there is no reference to complaints or quarrels, no spiteful allusion to the subjects even **[84]** that hurt her most—to this woman and her children.

I will proceed, then, to the charge in the eighth article of ill-treatment during her

confinement in May, 1814. This is not deposed to by Mackenzie; it probably passed only between the parties themselves; and in contradiction to it, or at least its probability, are produced Dr. Barlow, the accoucheur, the nurse, and one of the servants (the cook) at Clonyn. They can only speak negatively "that nothing of the sort passed to their knowledge;" but they also say affirmatively "that Lord Westmeath was a most attentive, tender husband, and that they seemed the happiest couple that could be imagined." At such a time, if ever, at the birth of a first child, there would be a mutual kindness and the fondest affection. But what in reality did take place during even this very period? The very conduct imputed. Direct evidence could not be expected, but it is proved by the subsequent admission of Lord Westmeath, confirmed by his own letters. In 1815 Lady Westmeath distinctly accused her husband of these facts, and he as distinctly admitted them.

Mr. Wood, to the twelfth article, deposes: "He remembers, in particular, she gave an account that about a fortnight after she was brought to bed he had threatened to disinherit her child, and to settle his fortune upon his brother by the half-blood; his discontent and anger at her not suckling her child, and his unkindness, violence, and cruelty to her." "During this time Lord Westmeath was walking up [85] and down the room, apparently a good deal annoyed by the recital, striking his head occasionally, but he acknowledged distinctly the truth of all she said."

But that Lord Westmeath made such an admission does not depend upon either the credit or the recollection of Mr. Wood; it results from his own letters. In letter No. 30 Lady Westmeath thus writes to Lord Westmeath, in September, 1817: "When my child was twelve hours in the world, you told me 'you would be damned if you gave twenty-five guineas a year to a bitch of a nurse. Why the devil could I not nurse her myself?' though the doctor told you I was unable. Three weeks after the child was to be disinherited, and settle every thing upon Thomas; you took possession of my pin-money; would turn me out of doors if I dared to insist upon having it."

Lord Westmeath's letter, No. 5, is in answer: "Then was the folly of my saying I would disinherit Rosa. You can call it by any other name, though I was a brute to say it. Then there was my saying, in passion, I would turn you out of doors. If I was to qualify the brutality of such expressions, I should not be sensible of the light in which I cannot deny they deserve to be seen."

To what does this answer amount? He admits the fact; he does not deny the time at which it took place; he himself denominates it an act of brutality. The ignorance of this event by Dr. Barlow, by the nurse, and still more by Mackenzie, only shews Lady Westmeath's forbearance, and her wish to bear her wrongs secretly and in silence. But here, again, how ungovernable must have been [86] the temper of that husband, who, at such a time, would resort to such heart-breaking menaces.

During the subsequent part of the year 1814 acts of violence, deposed to by Mackenzie, are necessary to be stated. She thus deposes on the ninth and tenth articles. After relating that the parties went to Dublin after the confinement; that they staid at Leinster House, his grace being absent; that they went out one day to dine at the house of the late Lord Westmeath in the same street; that she was present when Lord Westmeath returned, and ordered his wife's clothes to be packed up, saying that horses would be at the door early the next morning to quit Dublin; that when they came home in the evening she saw that there had been something amiss; she proceeds: "At an early hour in the morning Lord Westmeath came to her and called her up," in the meantime Lady Westmeath had fastened her own door, "Lord Westmeath stood at it for as much as an hour and a half: he called to Lady Westmeath to let him in, and promised he would not beat her any more. At last she did open the door, and he went into his own room. In a little time deponent heard Lady Westmeath scream out 'Murder,' upon which deponent went into their room; they were both out of bed, and just as deponent went in he was about to strike her ladyship. Deponent stepped in, and saved her for that time. Deponent said 'words were bad enough without blows;' but he was swearing at and abusing Lady Westmeath, and talking so fast deponent could not well know what he said. Lady Westmeath then said 'he had been beating her again;' he did not deny it; she mentioned where he had struck her; deponent succeeded [87] at length in quieting him; prevailed on them to go to bed, and left them."

To the tenth article she deposes: "On the following morning Lord Westmeath

went to get some lotion, and for several days it was applied, two or three times a day, by deponent, to a severe bruise, where Lady Westmeath said before that he had struck her on the breast. It was a very serious bruise, at first black, after a time all kind of colours. She remembers making a thick handkerchief to hide it, when they were going to the Duke of Leinster's country house. Lady Westmeath was for some time in great alarm, fearing it would end in a cancer; and the blow was enough to excite such an apprehension." These facts require no comment, and can receive no exaggeration nor aggravation. Here is beating, and beating a second time, in breach of a recent promise; and here is personal "violence," of that sort as not merely to hurt and injure the person, but to endanger health, and even life. Lord Westmeath's answers to some of these articles are not immaterial. The Court would willingly suppose that in respect to some of his answers his mind was so obscured by fury and rage that he did not accurately remember all the circumstances; he admits, in the seventh article, "that on one occasion he had slightly slapped his wife's face:" that article is confined to a transaction before her confinement, and he may understand the answer to be limited to facts prior to that period; but how does he answer to the substantive acts of violence, particularly to those laid in the ninth and tenth articles, when Lady Westmeath screamed out "Murder," and brought back Mackenzie a second [88] time to her assistance, and when the severe blow on the breast had been given? The ninth article pleads the first beating; and then goes on, "that shortly after Lord Delvin again quarrelled with his wife, used most violent language to her, and attempted to smother her with the pillows; that she screamed out for help, and her cries brought Sarah Mackenzie again to her assistance." Mackenzie, as already shewn, speaks to hearing the cry of "Murder," to going to Lady Westmeath's assistance, and to the other circumstances, stated above from her deposition, but she can say nothing respecting the use of the pillows. How, then, does Lord Westmeath palliate this in his own answers? "That Lady Westmeath having used insulting conduct and behaviour towards him immediately on retiring to bed, he admits that in his anger, on the impulse of his wounded feelings, and not with an intention of injuring her, he did for a moment, but without violence, place a pillow over the face of his said wife, but instantly took it away."

To the tenth article he says "that Lady Westmeath, having complained that he had hurt her neck, he did apply to Mr. Crampton, a surgeon; and admits that in order to conceal from Mr. Crampton the manner in which she had received the imagined injury, he did, at the suggestion of his wife, tell Mr. Crampton she had fallen against an imperial, or table. He admits that Mr. Crampton prescribed a lotion to be used."

Here then is a confession of personal violence in return for words; of personal violence of an extraordinary sort; "in his anger" putting a pillow over her face—the effects are such as to require medical aid—the blow is so severe as to bear the appear- [89]-ance of a fall against an imperial. If the false representation of the source of the injury was the suggestion of the wife, it only serves to evince the great forgivingness of her disposition, her long forbearance, and her desire not to expose her husband.

These answers go far to corroborate and give credit to the evidence of Mackenzie. That witness, on the eleventh article, states that they went for a few nights to the Duke of Leinster's country house at Carton; and then goes on, "In the course of the night, or early in the morning, deponent was awoke by Lady Westmeath's running into her room, followed by Lord Westmeath; she was flying from him, and he was coming after her to take her back to her own bed; she said she would not return; she told deponent 'that he had been beating her;' he desired her to come back; she said 'she was afraid;' he continued, first ordering, and then begging her to return; and saying 'that the servants would hear them, and that he would not touch her again if she would come back.' Lady Westmeath was apparently very much frightened at first. At length she consented to return; they went back, and deponent with them. The water jug had plainly been emptied in the fire, which had been so put out; the bed was in confusion; the clothes all pulled off and lying on the floor: deponent put that to rights for them, and then left them." These repeated acts of furious violence prove the character of his temper, on the point already noticed.

This concludes the transactions of 1814, and the confirmation of this witness will appear in the sequel. Lady Westmeath's letters in the remaining [90] part of this

year 1814 are not very material: only two are exhibited, couched in the ordinary style of a wife to a husband, though, even here, the letter of the 14th of August shews there had been disagreements; for she says, "You know very well when we are friends I never neglect writing to you:" agreeing, therefore, with Mackenzie and Wood that at all times they had not been friends.

Under these injuries, personal and mental, that Lady Westmeath's health should have suffered, is not extraordinary; it is difficult to shew the cause of ill health; it certainly does not follow that because post hæc, therefore propter hæc; but here is the fact that her health was affected, and that she went to Dublin, in 1815, for medical advice, and was there under the care of three medical gentlemen. It is not probable, with her desire for secrecy, that she should communicate the cause of her illness, even to her medical attendants, and in writing to her husband whilst she was upon terms with him, and when both were cool and apart, it would have been ungenerous, as well as imprudent, to have referred her indisposition to his treatment. Making light of her illness, and saying "there was not much the matter with her," will bear an interpretation creditable to her judgment and forbearance; but the evidence of Lord Westmeath's friend, Mr. Wood, unless all credence is denied to it, gives a different account of her state of health.

During 1815 the same species of differences seem to have continued, and she began at length to entertain serious thoughts of a separation. In her letters of April, 1815, there are these passages: **[91]** No. 21 is dated April 3, 1815; and it appears from it that they had not been friends, and that some discussion respecting the woman and her children had taken place: it however begins kindly—"I do not know, my dear friend," and afterwards proceeds: "So much the better if you have not received my last, it would not have given you pleasure. I hope to hear from you to-morrow that you are in good health, and that the detestable subject will be at an end between us until your return. It will depend entirely upon yourself whether we are for the future to live peaceably and happy together; and, indeed, if you do not entirely get rid of the whole of that infamous gang, your good sense must tell you that it is impossible for us to live together without making ourselves miserable. If I were indifferent, or if I desired that you should have your objects and engagements separately from mine, I should, indeed, be more of a Madame Commode: but as you know well that I have no other object in the world than you, I cannot endure such a want of sincerity towards me. I must have all or nothing. You know my opinion in regard to your conduct before marriage; and God knows that that discovery was sufficiently afflicting to me, without having further to discover all that has since passed in that respect; but let us make an end of it: you have been the dupe of two wretches, the very dregs of mankind" [it appears that the woman had a husband], "and you and I have very nearly become the victims of our enemies, high and low, and this ought to be a lesson for us never to disguise any thing." She then goes on with affectionate cordiality, giving an account of herself **[92]** and her daughter, expressing anxiety about his health and safety, and adding, "If any thing should happen to you, recollect that Rosa and myself are beggars." Lord Westmeath's father was now dead.

In the letter dated April 8, 1815, there is the same disposition to kindness; but the same marks of her strong sense of injustice that are not discreditable to her. An intermediate letter had passed, to which this seems to be the answer.

"My dear friend,—Much obliged by the letter I received yesterday. I am very glad that you received mine, and that you wish to live peaceably together. I assure you, my dear friend, that it is only when you break my heart, and mortify me to the quick, that I have any intention of abandoning you; and put yourself in my place, is it not enough to have had the mortification of discovering that you are, by no means, what I believed you to have been before marriage, without having to blame you for your conduct after it?" The remainder of the letter is civil.

There is nothing in these letters inconsistent with Lady Westmeath's case, or to her disadvantage, either as regards her temper, understanding, or right feeling. Her resentment is expressed as an honourable and injured wife would express it; she indulges in no terms of violence or reproach, and is ready to forgive if the injuries cease and are not renewed. She does not, it is true, advert to acts of personal violence; but to a woman of such a mind and character, personal violence, inflicted in a moment of passion and irritation, would be easily overlooked, forgiven, and

almost forgotten as soon as suffered: but mental injuries, such to use her [93] own expression, "as broke her heart, and mortified her to the quick," would sink deepest in her mind. Notwithstanding these sentiments, in other parts of this very letter she expresses herself in terms of kindness, conciliation, and friendship, and appears regardful of his health and safety; so that her writing kindly is no disproof of her feeling injuries keenly.

In September in that year, 1815, the parties were coming over to England, intending to proceed to France, accompanied by Miss Wood, the daughter of their neighbour and friend at Rossmead. Before they left Dublin a discussion respecting their differences took place at the Waterford Hotel; and Mr. Wood, as he had done on former occasions, acted as mediator between them, and gives the following account of that interview:—"In September, 1815, deponent went to Dublin, a visit to the Continent being contemplated by the parties, accompanied by deponent's daughter. Lord and Lady Westmeath were at the Waterford Hotel. There was at that time a serious misunderstanding between them, and Lady Westmeath was threatening that she would proceed against him, and apply for a legal separation. Lady Westmeath enumerated various instances of grievous ill-treatment and cruelty; the principal features were some particular acts of violence. He remembers, in particular, she gave an account that, about a fortnight after she was brought to bed, he had threatened to disinherit her child, and to settle his fortune upon his brother by the half blood; his discontent and anger at her not suckling her child; and his unkindness, violence, and cruelty to her. She mentioned his having beaten her several times; in [94] particular, she gave an account of a violent beating he had given her at Leinster House: she described it as of a nature that she was severely bruised, and that she carried the marks for a long time, and that he himself had gone the next morning to Surgeon Crampton, and had procured a lotion, under pretence that she had fallen against an imperial; that the marks continued so that she was obliged to wear something to cover them." This is a complete corroboration of Mackenzie. "She also upbraided him with not having made the promised settlement on the children, as he had pledged himself to do on the death of his father. During this time Lord Westmeath was walking up and down the room, apparently a good deal annoyed by the recital, striking his head occasionally, but acknowledged distinctly the truth of all she said. He did express regret and contrition for his conduct, and his wish to make her amends: and he, in a very serious manner, promised that he would fulfil his engagements in regard to the settlements, and that he would never repeat his ill-treatment of his wife. Upon this a reconciliation took place, and he left them reconciled." If, then, the witness is to be believed, and I have already said I see no reason for disbelieving him, his evidence is in unison with Mackenzie's account; and, what is more decisive, it is confirmed and admitted, not only by Lord Westmeath's whole conduct, but by his own letters. Here had been acts of cruelty committed sufficient to entitle her to a separation, if then demanded; but through the kind offices of Mr. Wood, from affection for her child, and, probably, affection for her husband not extinguished, she, with laudable forbearance, agreed to be reconciled.

Before the visit to France, Lord Westmeath [95] went back from England to Ireland; and during his absence Lady Westmeath constantly wrote to him. There are six or seven letters written during that short period, which are exhibited: they are such as a reconciled wife would prudently and properly write to an irritable and violent husband: they are kind: no expression of reproach occurs in them; no reference to what had passed in Ireland; but they furnish, in my judgment, no disproof whatever (for that was the purpose for which they were used) of injuries which it is alleged she had before suffered.

In December, 1815, the parties proceeded to France, accompanied by Miss Wood and Lady Westmeath's own maid, Janet Service, a Scotch girl, hired in Ireland in the early part of 1815. Mackenzie, who had married in 1814 and become housekeeper at Clonyn, remained there; Lady Rosa, the child, being entrusted to her care. The parties had a bad passage of seventeen hours from Dover to Calais, during which Lady Westmeath suffered much from sea-sickness, and Lord Westmeath was kind and attentive to her. It is not the result of the evidence that at that period, at least when he was in good humour, he was not kind, nay, that he was not extremely attached to her: but that fact only serves to prove more strongly the ungovernable force of his temper and passion, and the dangers consequent thereon. An instance

occurred almost immediately. On their journey to Paris they stopped at a place called Granvilliers, and went to the post-house: whether there was a better inn, at which Lord Westmeath would not stop because too much was asked for the apartments, is not material; the accommo-[96]-dation at the post-house was not very good; Lord Westmeath went down himself to procure some wood for the fire; on his return, the door being fastened (the room was also probably a bed-room), he was detained a short time. Whether any thing before had passed to put him out of humour, or whether the detention at the door, or something said upon his entrance, provoked him, need not be inquired, but he struck his wife a violent blow, which not only hurt her, but seriously endangered her person; for, if not caught by Miss Wood, she would have fallen upon the fire-place, in a manner that might even have produced fatal consequences. The fact is proved by the concurrent testimony of Miss Wood and the maid-servant, Janet Service, who is since married, and has been long out of the employ of either party.

Miss Wood thus deposes: "She was standing by the fire, but was not looking that way at the moment when Lord Westmeath came into the room; her attention was suddenly roused by hearing a blow given, which, though she did not actually see struck, was most certainly given by Lord Westmeath, and at the moment when he struck her he said, 'Go to hell; I wish I had never seen you.' Lady Westmeath staggered, and was in the act of falling backwards, when deponent caught her; and, she being a very little woman, deponent was enabled to break the fall. In all probability she would have fallen with her head upon the dogs on the fire-place; the dogs being iron frames on which the logs of wood are laid: Lord Westmeath made no kind of effort to save her."

Janet Service thus details the same occurrence: [97] "Deponent went with, or just following, Lord Westmeath into the room. Lady Westmeath said, as soon as Lord Westmeath entered, 'My God! Lord Westmeath, what a place is this you have brought us to!' Whether he was angered by that, or what other cause, deponent knows not; but, going up to her ladyship, he struck her a violent blow, which would have knocked her down, had it not been for Miss Wood, who caught her falling, and said, 'Oh! Lord Westmeath, what a brute you are.' As Lord Westmeath struck her, he said, 'Go to hell: I wish to God I had never seen your face.' The blow for a time seemed to take away her ladyship's breath; his manner was very violent and outrageous."

This, then, is an act of personal injury amounting to cruelty, according to the strictest demands of matrimonial law, and proved by two unimpeached witnesses. This transaction is the more important because the Court sees the cause and the commencement of it. A wife, fatigued, coming in the evening to a French post-house, for so excuseable an observation on the badness of the accommodation, and with no other provocation, is immediately treated in the manner just related from the evidence of the two witnesses. It serves to illustrate what was the sort of provocation he might have received, which produced those nocturnal violences in Ireland, when unrestrained by the presence of third persons, and when his only excuse is, "You provoked me to do it." It evinces a temper that inflames by the slightest spark, or rather that, by a mere jar, explodes with these dangerous effects. It is the duty of the Court, when it considers other acts, [98] to bear in mind the species of temper which rules the person, who now demands to have his wife again placed under his marital authority.

The parties proceeded to Paris. Lady Westmeath was at first unwell; she afterwards became better, and was able to partake of the society and amusement of the place; but the same witnesses prove that there was the same general treatment: Lord Westmeath was frequently speaking in a loud angry tone, generally in French, so that Janet Service could not understand what he said, and Lady Westmeath was frequently in tears. Service says, "Though she could not understand his language, she could not mistake his manner; for that was violent and passionate, and frequently very unbecoming."

Miss Wood thus describes his conduct during their residence abroad: "She does not know that he sought occasions of quarrelling with his wife; but the slightest occasion excited his temper, which appeared to be ungovernable. She did not observe that Lady Westmeath provoked him, either intentionally or incautiously;

she conducted herself prudently towards him; deponent has seen her angry, but then it was not unprovoked, and she uniformly endeavoured to hide their quarrels."

What their common acquaintance, and persons meeting them in society (Lord Arthur Hill and Lady Glengall) might observe is of little weight. It is much to be feared that husband and wife, particularly among the higher ranks, who, from education and habit, have more command over their external behaviour, often appear to the world to be mutually civil and kind, when at home by their own fire-side, they are but ill at ease [99] with each other; and that many a wife is often obliged to wear a countenance cheerful, and clad in smiles, who carries with her under it but an aching heart.

In the autumn of 1816 the parties came back to England; went over to Ireland for a short time; and then returned again to England. At the Pigeon-house, when they intended to embark on their return, there occurred a scene of unseemly conduct and opprobrious language, in the presence of the servants, which though not attended with personal injury, was degrading, and strongly marked violence of temper.

Soon after their arrival in England in the beginning of 1817 an application was made to Lord Salisbury to advance Lord Westmeath part of a sum of money which would fall to Lady Westmeath at her father's death; Lady Westmeath joined in this request, and it is stated that she urged the compliance with it on the ground of Lord Westmeath's uniform kindness. This has been relied on as falsifying the charge of ill-treatment; it does not weigh much with me against the body of proof adduced in support of the imputed misconduct: if she in kindness towards her husband, or in some degree for her own convenience, comfort, and peace, joined in the application, and with earnestness—it is not to her discredit: if she alleged his uniform kindness in order to induce Lord Salisbury to consent to the advance of this money, the evidence satisfies me that she misrepresented the matter. At this period the parties resided in Saville Row, where their differences and unhappiness still attended them. Wetherly, the housekeeper, heard [100] "Lord Westmeath violently storming at her ladyship, who, as it seemed to her, was crying very much." Lady Westmeath at length applied to Mr. Sheldon, saying, "She could no longer bear it," and a deed of separation was in preparation, and agreed to; Lord Westmeath in the meantime going to Ireland.

Mr. Sheldon states: "Deponent had repeated conferences with Lord Westmeath on the subject. It was agreed that a deed of separation should be executed, and deponent requested and urged his lordship to employ some professional gentleman as his own legal adviser; but Lord Westmeath refused to do so, stating his entire confidence in deponent, and his disinclination that the matter should become known to other persons. Lord Westmeath left England for Ireland in the autumn, promising to execute the deed on his return. His lordship previously expressed great reluctance to execute such a deed, but at length consented; it being the only condition on which Lady Westmeath then declined to persist in her resolution to seek a legal separation by divorce. Lord Westmeath distinctly and unequivocally admitted his violent misconduct to, and ill-treatment of, Lady Westmeath; and so matters stood when his lordship went to Ireland in the autumn of 1817." It was at this time that the correspondence, to which I am now going to advert, took place.

It appears that Lord Westmeath, even before he left England, wrote to Lady Westmeath, endeavouring still to dissuade her from the separation, and that she answered his letters in terms of civility, but justifying the measure she had re-[101]-solved upon, by reference to the treatment she had experienced. Her letter, No. 30, was written in the latter end of September, 1817, and addressed to Lord Westmeath, at Leamington; it is produced by him, and is an important document in illustration of this cause. It contains an enumeration of the injuries of which she then complained, and was written, not for the purpose of reproaching and worrying him, but of justifying herself, in insisting at that time on a separation, to which he had agreed, but from which he was now endeavouring to persuade her to depart. It is not a letter written for the purpose of being shewn to third parties, in order to make her own story good; but it is addressed to him alone, and it is he who has produced it in the present suit, after his letter in reply to it had been exhibited on the part of Lady Westmeath. Her letter, and his answers, are keys to each other. It is difficult to suppose that this letter would contain a misrepresentation of facts, it being addressed to the very person who must be fully aware of any falsehoods inserted in it; but it is still more

difficult to suppose, if it did contain falsehoods, that having received this letter, and written an answer in justification of himself, in extenuation of his misconduct, and with a wish still to dissuade her from a separation, he would not have pointed out any circumstances which she had either misapprehended or misrepresented; he would naturally deny, in excuse of himself, any accusations that were totally unfounded. In this view, it is extremely important to see the charges she makes against him in this letter to him; and the answer which he gives in defence of himself, against these charges. Her letter contains the following passage:—"Many thanks for your letter which I [102] received this morning. I hope, dear Lord W., you will not torment yourself, or me, any more with discussions upon the painful subject of the causes of our unfortunate disagreement: there is nothing more to be said upon the subject, and all the fine words, 'refinement, delicacy, &c.' ne changent rien à la chose. When I say you neglected me, I ought to say insulted me personally; and now you are trying to insult my understanding also. You still attempt to prove that 'you had not even persons in your imagination, and that you only thought of me.' I will just put down a few instances of your attachment to me and forgetfulness of others. You first took me away from all my friends; as good as shut me up in an obscure corner of the world, without horses, or servants to stir out. In the bitter winter of 13 and 14, I was in a room not papered, sashes rotten; with child, and very ill; not allowed any thing but green wood for firing, because turf was two shillings a kish instead of one. When my child was twelve hours in the world, you told me you would be damned if you gave twenty-five guineas a year to a b——— of a nurse; why the devil could not I nurse her myself, though the doctor told you I was unable. Three weeks after the child was to be disinherited, and settle every thing upon Thomas. You took possession of my pin-money; would turn me out of doors if I dared to insist upon having it. You beat me; you endeavoured to place (I will call things by their proper names) a pimp's daughter as my own maid, her nephew, a post-master; and all this time, when I was undergoing all the privations I mentioned for want of money, you could find money for a [103] prostitute; you could believe her word when she saddled herself and her children upon you, and did you the honour to tell you they were yours. You dared to tell me that you had injured her. You lived three years with me in constant deceit; at last, when your nurse's impertinence made it impossible to conceal the whole any longer, you made an agreement with me, and bound yourself by all that was sacred that there should be an end of the business upon conditions, God knows to that woman's advantage enough. Last year, when you returned from Spa, you began again and broke your most solemn word of honour; and you now dare to tell me that you never thought of any one but me. Lord Westmeath, I assure you I do not wish to speak harshly; but if you will persevere in asserting things that you know cannot be true, I must state facts to you. As to your anxiety to make up with me, the removal of the causes of disagreement was always in your power, but you never thought of that. In short, you thought (if I may apply the example to such a subject) that you could serve two masters; and you thought, that as long as you condescended to tell me I was your object, it was enough; I was to be satisfied with whatever you thought fit to do. You have been mistaken; and now, according to your disposition in every thing, you regret what you have yourself, with your eyes wide open, thrown from you.

"As to me, I freely confess that when Sheldon got me to agree to coming together again I never was deceived with a hope of its ever coming right again; I made the condition of those people being out of your reach, not because I [104] did not well know that there were other Frank Erwins in the world; but because I owed it to myself, not with my positive knowledge, to allow the slightest link of communication. The thing has failed, owing to the impertinence you have yourself taught the woman. To speak openly, nothing offends me more now than your persevering in saying you all along only thought of me. I wish Mr. Stephens to understand that the woman's being married"———

"What was owing to myself was, that, as far as possible, the thing should be as if it had not existed; if your word had been to be trusted there would have been no necessity of going out of the country; but remember your oath to me and them, and then ask yourself if you are to be trusted. Frankly speaking, I never will live with a man as his wife who thought any other woman and her children had the slightest claim upon him. You and I are not intended for each other, and cannot understand

each other. Rosa is very well, and sends her love. I hope Leamington will agree with you.—Yours, in haste, EMILY."

This letter is certainly written in a tone of strong resentment; but with her view of the injuries she had suffered, and her repeated forgiveness of those injuries, it does not, perhaps, exceed what a wife so circumstanced, and adhering to her determination of a separation, was justified in stating in support of that determination. Her complaints are here then distinctly enumerated to him, not before third parties, but in the privacy of a letter. How does he answer? By denying any of the facts? No! he points out an unfortunate **[105]** coincidence in one or two circumstances, which he says were accidental and unconnected: but as to the rest of the charges there is no contradiction; all is acknowledgment, self-abasement, and contrition.

The first letter is dated Dublin, October 5th, and contains the following passages: —"My dearest Emily,—Although I would give up willingly the mention of the unfortunate unhappy state, as it is disagreeable to you, and indeed had intended it, yet your cold—worse than cold—your freezing letters go the length of incapacitating me, even for any part of the business I came about; I cannot raise myself from the paroxysms of anguish into which the hell of the style of your letters too surely acquaint me with, that I only live in your recollection to be detested. . . . I confess to you, Emily, that when I look back on the principal part of my conduct—that it was that of a person totally unworthy of such a friend . . . my only hope now, in this life, is to have some of your regard, and to shew you that I am full of remorse; but under your contempt and disregard I cannot live; I have, miserable and lost man that I am, too late, the belief that the money those devils have been supplied with, was only fuel wherewith to torment me and mine hereafter; but that is, thank Heaven, at an end: I trust you will know and believe it." Towards the conclusion he says, "Poor little Rosa! her mother deserved to have had a husband of whom she could have spoken to her, as I fear you never can of me; but it is bad for her, poor little thing, that the best she can know of her unhappy father is not to have known him at all. May God bless you, and comfort you, for the blast I have made **[106]** of your happiness." In this letter, then, he expresses contrition and deep remorse, but makes no attempt to gainsay the truth of the imputations made against him by his wife.

The letter, dated October 8th, has passages of the same tenor: "If existence has charms for others, there is nothing for me but dreariness. Kiss Rosa for her unhappy father."

The letter, dated October 13th, comes next. "My dearest dear Emily,—I am distracted, I am too miserable a wretch to live long; but, before I die, I hope to obtain your entire forgiveness." He then enters into an explanation about his property, and afterwards proceeds: "As to my oath, broken as you say it is, I acknowledge actually it is: and, as I tell you, I feel too bitterly having compelled you, my dearest and best friend—you angel, who devoted yourself for me—to think so ill of me as you do, to loathe me as you do, to live long. My state is absolutely intolerable, and, indeed, I do from my heart acquit you, for you deserved every thing the very reverse from me; I do however cling still to the hope, that when I am gone you will try to forget your wrongs from me, and endeavour to forgive them here. I have not now an object on earth, and I only wish and pray to die." The rest of this long letter is very much in the same strain, and of the same character—all humiliation, sorrow, and self-reproach; but he ventures upon no denial of his misconduct, and concludes; "Oh, pardon and forgive me, Emily; what a comfort it would be to my very great wretchedness, to think that I was dear to you in any degree." Letter No. 5 has no date; but by the answer seems to have been written the following day. Some extracts **[107]** from it have already been quoted, acknowledging specifically his unkindness and threats during her lying-in of her daughter. There are also these passages: "At one time I fully determined to go with the child, and never see you again: at another, to leave every thing with you, but go; at a third, to destroy myself; but it is evident I can do nothing." Further on he says, "Let pity for my misfortunes induce you to relent, Emily: if I was not a worthy object for your compassion and pardon for much brutality I have shewn you, in individual instances, I probably should not have the grace to ask it." He then, after a solemn protestation, says, "That, however disinheriting Rosa, and turning you out of the house, as it was threatened, coupled, as I truly see, in your mind, with appearances of improper consideration for other persons than you, I say, believe me, on that great oath, when I say, they were coincidences of chance, and produced by misfortune to undo me."

This is the only part of Lady Westmeath's charges which he endeavours to explain, viz.: that he did not employ those threats for the sake of, and with reference to, the woman and children who gave his wife so much anxiety. He says, again, in disavowal of that reference: "As I loathe the unworthiness which would make the principal and foundation of all your charges against me, so I never could be at ease in my mind to have it fixed upon me." This, then, is the only part which he attempts to extenuate; but the individual instances of much brutality, as he terms them, and which Lady Westmeath had enumerated in her letter, he does not deny, which goes far towards a full admission of them.

[108] Much in the same tone and feeling are the two following letters; but they were not received by Lady Westmeath till after the former letters had had their effect upon her heart, and she had consented to be reconciled. No. 6, dated October 19th, concludes thus: "For God's sake, believe me, my dearest Emily, my heart is worthy of your forgiveness, though I have wounded yours in its disinterestedness deeply; pray forgive me, and let me know how you do." Letter No. 7 is dated Dublin, Tuesday morning, and in it he says: "Thank God, Emily, I did not commit a last act of brutality and madness, by taking her (Lady Rosa) from you, who suffered twice what most mothers suffer, all through your time—mind as well as body. Oh, Emily, will you—will you forgive me!" By sufferings of mind must be meant his treatment of her at that time; it concludes, referring to a provision for the child. "I am anxious to comfort your true heart, as far as I can, on a point that evidently afflicts you, and leaves a sting, even in poor Rosa's existence, towards you." Previous, however, as has been already stated, to the receipt of the two last letters, she relented. She was not inveterate and obstinate; she had strong inducements to keep up, if possible, matrimonial society; her daughter was still unprovided for; her friends were, and possibly she herself was, averse to make her separation known to the world. She might also be alarmed lest he should commit an act of violence on himself; she therefore consented once more to try him, and, accordingly, on the 18th of October, 1817, writes the following letter:—"I have received your two letters, of the 13th and 14th of October, and their enclosure. Let us say no more about it, mon cher ami. I shall be happy **[109]** and willing to consider you in future, and if you can but permanently profit by all the misery we have gone through, I hope we may yet pass many years of comfort, and as if nothing had happened." This surely is no want of generosity. "On my part, I assure you I forgive you, and will sincerely try to forget; and on yours I hope you will excuse any violence of words on my part; for, after all, in any case, it is as useless as it is unnecessary, for it proves nothing one way or the other; I will say no more on this subject at present." She then proceeds to matters of business, respecting his property, and requests he will not return till he has settled all his concerns in Ireland.

In his answer, No. 8, he makes the most faithful promises: "I am sure, my dearest Emily, my dear little soul, you will not expect me to describe my feelings at your last letter. After your feelings had been so much wounded, I confess I did not expect so great a blessing; I cannot be too thankful." He then promises what his future conduct shall be; and in answer to that part of her letter where she apologises for any intemperate words, he says: "But, indeed, indeed I do, on my part, entirely forgive any thing I ever had to complain of; I well know I brought every thing upon myself, by a bad outset; I changed you, and therefore you cannot be justly chargeable. I must not neglect to say that I shall be anxious to make arrangements, such as you must naturally desire, to secure you in case of any unfortunate recurrence. I do not like to mention that, but it is necessary for you that it should be mentioned, and that your mind should be quite at ease on so important a point." This **[110]** was a right feeling of generosity and of self knowledge, to guard against a recurrence of ill-treatment. And in answer to her expressed hope "that he would permanently profit," he says, "You will be rewarded, I am sure, at the hands of providence for what you have done."

In consequence of this forgiveness, a deed of reconciliation is substituted for the articles of separation, by which Lord Westmeath contracts to make a settlement upon Lady Westmeath and her issue; but engages expressly, that if he renews his ill-treatment, she shall be at liberty to live apart from him; and this is said, and perhaps not improperly said, to be a prospective deed of separation, and of no legal validity;(*a*)

(*a*) See *Durant* v. *Titley*, 7 Price, 577, and Roper on Husband and Wife, 2nd edit., p. 269 et seq.

but it is, on the part of Lord Westmeath, a solemn act, fully acknowledging, in general terms, his past misconduct and ill-treatment of his wife; and in that view, as evidence of the deliberate admission of the conduct imputed, it is not unimportant.

It has been said "that Lord Westmeath was inops consilii; that Mr. Sheldon was Lady Westmeath's legal adviser and attached friend;" but Mr. Sheldon states that, in each of these arrangements, he earnestly pressed Lord Westmeath to call in professional assistance; that Lord Westmeath refused, being anxious that the transactions should be known to as few persons as possible; but that he took great pains repeatedly to examine the deed himself, so that whatever it contains was carefully considered, and advisedly agreed to. This deed bears date on the 17th of December, 1817; and recites that the parties "were on the **[111]** point of separating; but by the intervention of mutual friends the said countess had agreed to cohabit with Lord Westmeath, after he shall have executed these presents, and thereby made such provision for their issue, and also such provisional maintenance for the said countess, as is hereinafter mentioned." After settling the property, then comes this proviso: "Provided always, and it is hereby admitted by the said earl, that the said countess hath agreed to live and cohabit with him on this express condition; that in case it shall unfortunately happen that by a renewal of such differences as had nearly caused such separation the countess shall find herself compelled to cease to cohabit, and to live separate and apart from him." Then, after settling her provision, it goes on: "But such separation is only to take place in case of ill-usage or gross abuse from the said earl to the said countess." Such, then, are the terms on which the reconciliation is effected. She consents to return to cohabitation, protected by this deed.

Pausing here, at the end of 1817, am I to consider the charge of cruelty established against Lord Westmeath? General violence of temper and several acts of personal injury are deposed to by three witnesses—Mackenzie, Miss Wood, and Service. The first speaks to what occurred in Ireland, the two latter to behaviour in France. These witnesses are corroborated by distinct parol admissions, proved also by three witnesses —Wood, Sheldon, and Stephens; still more fully corroborated by the correspondence, and by Lord Westmeath's own letters; and, finally, by this **[112]** very deed. On this body of evidence, I fully concur in opinion with the Chancellor of London, "that there is proof of cruelty sufficient to have entitled the wife to a separation, if such a sentence had not been barred by this subsequent reconciliation." But Lady Westmeath consented to be reconciled; the parties again cohabited, and she became pregnant. This return to cohabitation does certainly amount to a condonation, which forms a legal bar to a separation, on account of preceding cruelty.

The case then resolves itself into the question whether any subsequent acts took place, furnishing fresh grounds of legal complaint, or at least reviving former wrongs; and, in connection with those former wrongs, creating reasonable and just apprehension of a renewal of ill-treatment. This condonation has been termed conditional; but all condonations are impliedly conditional, though it seldom happens that the conditions are so expressly declared as in the present instance. Lord Stowell, in the case of *Ferrers* v. *Ferrers*, thus describes condonation and its effects: "Condonation is a conditional forgiveness, that does not take away the right of complaint in case of continuation of adultery, which operates as a reviver of former acts." (*a*) In the present case the condonation creates a bar; but it is a bar accompanied by circumstances rendering it an impediment as slight and as easily removed by "a reviver of former acts," as can well be described.

[113] The force of condonation varies according to circumstances; the condonation by a husband of a wife's adultery, still more, repeated reconciliations after repeated adulteries, create a bar of far greater effect than does the condonation by a wife of repeated acts of cruelty committed by the husband. In the former case the husband shews himself not sufficiently sensible to his own dishonour, and to his wife's contamination; and such reconciliations, often repeated, amount almost to a licence to her future adultery, so as to form nearly an insuperable and immoveable bar; but the forbearance of the wife, and her repeated forgiveness of personal injury, in hopes of softening the heart and temper of her husband, and under the feelings of a mother anxious to continue in the care and nurture of her children, are even praiseworthy, and

(*a*) *Ferrers* v. *Ferrers*, 1 Hagg. Con. 130. And, further upon the same case, see vol. i. 781*, notis.

create but a slight bar, removed by the reasonable apprehension of further violence. Forbearance in bringing a suit even, on a charge of adultery against the husband, is thus noticed by Lord Stowell in that same case of *Ferrers* v. *Ferrers*. "It may not only be excusable but meritorious, in hopes of reconciliation; and there is a great difference between the husband and wife on this point."

Cruelty, in almost every instance, must consist of successive acts of ill-treatment at least, if not of personal injury, so that something of a condonation of the earlier ill-treatment must in all such cases necessarily take place. But, on the present occasion, the wife bears long in silence; she endures injuries personal and mental. In 1815 they become so far intolerable to her feelings that she talks of separating, but forgives, and is reconciled. In 1817 she again insists on a separation, but **[114]** after his letters—contrite—entreating—solemnly promising future kindness; on the execution of a deed, protecting her, as she vainly hopes, against a renewal of ill-treatment; at the earnest solicitation of her husband; and with the anxious desire of her friends not to make their disagreements known, she consents to make another trial. Under such circumstances the former injuries would be revived by subsequent misconduct of a slighter nature than that which would constitute original cruelty; and for this plain reason, that the apprehension of danger would be more easily and more justly excited. A bar the reconciliation undoubtedly would be, in case no further ill-treatment of any sort took place; if, from that time, the husband fulfilled his promises; if he discharged his marital obligations in the manner which the law requires, and, as it expresses it, "by treating his wife with conjugal kindness," the law would not allow the wife, from mere fancy and caprice, again to separate herself. It could, as the deed correctly expressed it, "only take place in case of subsequent ill-usage by the husband."

But what takes place? In the month of May the wife, notwithstanding her pregnancy, demands a separation; she will on no other terms abstain from a suit in the Ecclesiastical Court. The husband most unwillingly, but on her insisting, and in order to avoid meeting her complaint in a Court of Justice, agrees to a deed of separation, thereby confessing—and the parol evidence fully confirms this admission—that she was entitled to a separation, which was only "to take place in case of his ill-usage or gross abuse." This deed of separation, bearing date May 30, 1818, **[115]** recites, "Whereas Lord Westmeath, at the particular instance, and at the sole desire of Lady Westmeath, agreed to live separate and apart from her, and to allow such separate maintenance and yearly provision for her and her child, or children, as is hereinafter mentioned." Then follow the provision and the usual covenants, that she shall live apart unmolested, and that he shall bring no suit or process to compel her to cohabit.

As a deed of separation upon mutual agreement, on account of unhappy differences, though containing a covenant not to bring a suit for restitution of conjugal rights, these articles would offer no impediment to the husband's present suit, but as evidence against him, necessarily implying a confession of ill-usage subsequent to the condonation, they appear unanswerable, and are a strong acknowledgment that the casus fœderis had occurred. On that confession alone, coupled with the character of his temper and former acts, if the case had even rested here—if the parties had never met after the execution of that deed—I should have entertained considerable doubt whether the husband was entitled to the aid of the Court to compel his wife to return; whether the Court would not, at least, dismiss the wife. It would be a new case, and at present I give no opinion upon it, as it may be unnecessary to solve that doubt; and, if unnecessary to solve it, the full discussion of the point would be inconvenient among the mass of matter which composes the present suit; at all events, it is proper first to examine the remainder of this painful history.

The deed before the Court, dated in May, but executed in August, is not the only evidence of the subsequent ill-usage; there is other proof both **[116]** of his admissions and of his acts. In May, 1818, Mr. Stephens came to England to furnish an account of Lord Westmeath's property, and to assist in arranging the separate maintenance. He, Mr. Sheldon, and Mr. Wood had several meetings with Lord Westmeath on the subject, and they all speak to Lord Westmeath's admissions.

Mr. Stephens, on the twenty-third article, states, "Lord Westmeath wished to be permitted to cohabit with Lady Westmeath; she would not consent to this. Lord Westmeath admitted that he had given her cause to require and insist on a separation if she were resolved so to do; and that, as she would not yield the point, his lordship

consented, though reluctantly, to the measure, and ultimately executed the deed aforesaid." To the twenty-fifth article he deposes: "Lord Westmeath, after the execution of the deed, asked and entreated, and he did certainly urge strongly the request, that he might have a bed-room in Stratford Place, though quite distinct from her ladyship's. Lady Westmeath objected to this; but Mr. Wood, Mr. Sheldon, and the deponent having all recommended it, in order to conceal their separation from the world, Lady Westmeath yielded the point, and consented that his lordship should be permitted to sleep in the house for a short time, till he should remove either to Ireland or to some foreign settlement, his lordship having asked such indulgence only for a short time, and being in expectation of getting some appointment abroad."

Here, then, were full admissions that his conduct had been such as to entitle his wife to a separation; he submits to it most unwillingly, and **[117]** these were the means used, and the terms granted, in respect to his having a bed-room in the house.

Mr. Sheldon, on the twenty-third article, fully confirms this account. "After the deed of December, 1817, had been executed, and Lord and Lady Westmeath had cohabited for a few months, her complaints of his ill-treatment were renewed, and her determination to be separated from him was again expressed. Various interviews and discussions took place between his lordship, Mr. Wood, the Rev. Mr. Stephens, and deponent. Mr. Stephens was his lordship's agent, Mr. Wood was present as the mutual friend of both; deponent renewed his earnest solicitation that his lordship would employ some professional adviser on his own part; but he would not. Lord Westmeath was very reluctant to sign any deed, but Lady Westmeath was resolute; and Lord Westmeath, admitting, as he did, the justice of her accusation against him, yielded consent, though he appeared to be seeking delay by various contrivances." And on the twenty-fifth article he says, "Lord Westmeath laboured hard for permission to have a room in any house which Lady Westmeath might take, in order, as he said, to save appearances, as he was very desirous the world might not know he was separated from his wife. To this Lady Westmeath strongly objected, and made the most determined resistance to it. Lady Salisbury, who was very anxious to save appearances, and Mr. Wood, who acted the part of a friend to Lord Westmeath, united their influence with Lady Westmeath, and, after a considerable time, she reluctantly yielded her **[118]** consent to his having a room in the house, provided the house was entirely under her controul, and the servants also, excepting his lordship's valet. The deed was delayed some time in consequence of this struggle. Nothing could be more explicit than Lord Westmeath's declarations that he would be considered merely a lodger, having no right to cohabitation, and no controul or authority in the house, or over the servants, being merely under the roof by sufferance."

After the month of May, then, there was no matrimonial cohabitation. The permission respecting a bed-room, thus obtained and thus accepted, forms no continued condonation; it only shews that Lady Westmeath was at length induced to give way to the wishes and advice of her friends, though highly repugnant to her own feelings, and contrary, in my opinion, to her own better judgment; for, as matters have turned out, it was very imprudent advice.

It was argued that Lady Westmeath, by consenting to this arrangement, has shewn that she had no apprehension of personal injury from the residence of Lord Westmeath in the same house with her, and that, therefore, she may safely return to him now; but surely she was then in a very different state of protection from what she was, or would be, while cohabiting with him as his wife. She was in her own house, surrounded by her own servants, having very little communication with Lord Westmeath, and, what is highly important, sleeping apart from him; for his more frequent acts of intemperate violence broke out in the night, when no person was present. Under such an arrangement she was exposed to much less danger than if they were living on the ordinary **[119]** terms of husband and wife. If this was a degraded and galling situation on his part, he had reduced himself to it by his own temper and passions, and he had solemnly bound himself, both by verbal promises and by a formal deed, to submit to it.

What, then, was his conduct after the separation in May? Did it shew that reason and reflection had taught him to subdue the turbulence of his temper? Had he acquired more self-command? Had he become convinced that the best mode of preserving his character in society, and of regaining possibly even the forgiveness and affections of his wife, was by patiently disciplining his mind into coolness and self-

controul, and by strictly fulfilling the conditions which he had deliberately undertaken to observe? Or did his subsequent conduct rather shew that his passions had become, if possible, more domineering and despotic; that no engagements could bind him so as to controul them; and that, to place his wife again under his marital authority would, in all probability, expose her to a repetition of acts of ungovernable fury, and subject her to the risk of personal injury?

The instrument, originally signed in May, was a short deed of covenant, by which he engaged that, on a future occasion, regular articles should be executed; for there was then no time to prepare the latter, Mr. Sheldon being obliged to go into Yorkshire, and Lord Westmeath intending to visit Ireland. Before his departure Lord Westmeath took a most extraordinary step: he had desired a copy of the deed of covenant to be made for him; he went to Mr. Sheldon's chambers in his absence, and finding the deed had been sent to a stationer's to be copied, he proceeded to the stationer's shop, accompanied by Mr. Sheldon's **[120]** clerk, who left him there. Learning, on inquiry, that the copy was not completed, he went away, and returned in half an hour. The copy being still unfinished, he again went away, returned a third time, and then, under pretence of assisting the stationer, a woman, in comparing the copy with the original, he got possession of the executed instrument, tore it, put it into his pocket, and left the shop. It would not become the Court to designate and animadvert upon this act in terms which it deserves. Lord Westmeath soon became aware of the impropriety of this outrage; he wrote twice to Mr. Sheldon, on his way to Ireland. When there, he communicated what he had done to his agent, Mr. Stephens, and became anxious to hasten back to England, in order to make the best reparation he could by executing a new instrument. The Court reluctantly notices this act; but it so strongly marks the ungovernable state of his mind that it would be unfit to pass it over without remark, as it forms another trait in what appears to me to be the principal feature in the case. A new deed is prepared; not a mere deed of covenant, but full articles of separation, and is executed in August, but is ante-dated the preceding May.

During his residence in Stratford Place—allowed only in the manner already stated by the witnesses—Lord Westmeath, according to the account given by the two female servants, Johnson and Wetherly, was frequently quarrelling with Lady Westmeath, speaking in the French language, and appearing in violent passions. Such is the manner in which he used the indulgence he had obtained of having a residence in the house, in order to save appearances.

[121] In the month of November of that year Lady Westmeath was delivered of a son, of whom she became pregnant before the separation. Even that situation could not protect her from his temper; for, as Johnson deposes, "Lord Westmeath quarrelled violently with her ladyship and was in a great passion, which she, the witness, on account of her time, thought particularly cruel and brutal." That is just before or just after the confinement, which is an aggravation. Johnson also states that, during her confinement, "Lady Westmeath was greatly in want of money, even for the clothing of her infant;" and Mr. Stephens mentions that about that time he received a letter from Lord Westmeath directing him to pay no more money to Lady Westmeath. It is true that Stephens adds, "Very speedily after, if not the very next post, it was followed by another letter, desiring the deponent to pay no attention to the former letter." But such a step at such a time, in direct breach and contravention of the deed he had entered into, shews the intemperate passion of Lord Westmeath.

In the beginning of 1819 Lady Westmeath removed to Bolton Street; and painful as must have been the treatment she experienced from her husband, she did not violate the agreement she had been prevailed upon to make—of allowing him a bed-room in the house. For some time she admitted him to take his meals with her, and in order to keep up appearances in the world she occasionally went with him into public and to parties; but, in April, she thought it necessary to her peace to decline dining at the same table.

It is manifest from the history that Lord Westmeath had about this time worked himself **[122]** up into a determination of using all the means in his power to put an end to the deed of separation, and to resume the management and controul of the house and servants. On Good Friday, 1819, as it comes out in an interrogatory addressed to Mr. Wood by Lord Westmeath, he rushed into the house of Mr. Wood,

one of the trustees, and, as he states it, "in a violent rage, holding up both his fists at respondent, demanded, in a lofty tone, whether respondent had not received things which had been taken out of his house? Respondent replied that Lady Westmeath had asked respondent's leave, the night before she left town, to send some things to his house, to which respondent had consented, and they were accordingly sent. Upon which Lord Westmeath said, I am answered; and immediately left the room with the same rapidity and violence he had entered it." He afterwards sent a friend and relation to require an explanation respecting some expressions that had passed. Upon this transaction again it is only necessary to observe that though no act of personal ill-treatment to his wife, yet it marks his extreme violence, and how entirely he was under the dominion of passion.

About this time Johnson, Lady Westmeath's maid, speaks of his general conduct. She also relates an occurrence which took place soon after, and was apparently the sequel of this strange interview with Mr. Wood. "Violent disagreements took place in Bolton Steet; that is, violent on the part of Lord Westmeath, sometimes in her ladyship's room, sometimes in the passage. She has heard his lordship storming at her ladyship's door when he could not get in. His **[123]** lordship usually began in French; but when he had worked himself up into a rage, which he did not unfrequently, he would change to English; and deponent has heard him, on such occasions, use terms which convinced her that the deed of separation was the cause. He used to threaten that he would assume his rights again, and be master, and that he would bring down her little ladyship to her proper level, and shew her to the world in her true character; frequently, when speaking in French, his lordship's hurried, angry, loud tone of speaking, all over trembling with rage, and his whole manner, shewed how violent he was: and his passion was excessive at times. Lady Westmeath was commonly calm; though deponent does not depose that her ladyship never was provoked to anger—for she was sometimes, his conduct being more than could be borne—yet he was the aggressor whenever deponent had the means of witnessing the commencement of the quarrel. On one occasion his lordship found his way into her ladyship's bed-room when she was dressing for an evening party: deponent was dressing her. He began in French. Her ladyship said but little, and in a calm unirritating manner: he became more and more angry; he could not govern himself at all; he was quite in a frightful rage, and stormed and raved like one that was mad: he proceeded after some time in English; it was against Mr. Wood: called him all sorts of names—a scoundrel, villain, blackguard, bogtrotter; said he would challenge him, and make him fight here or in France: that one of them should bite the dust: and, throwing himself on the floor, he swore (for **[124]** he used quantities of oaths all the time) that if he had not a leg to stand upon, he would shoot at him as he lay. Deponent did not leave the room, as it was a general order to her, from Lady Westmeath, never to leave her when Lord Westmeath came into her bed-room. It ended by Lord Westmeath bouncing out of the bed-room. Lady Westmeath was, as deponent believes, very much terrified; she had all the appearance of being so: and indeed it could not be otherwise, his passion was so violent. This was, as deponent believes, about May, 1819."

Here, again, it is only necessary to observe that this conduct created just ground of terror, though the menaces are not directed against his wife; yet the rage is so extreme as to expose her to danger. An unguarded expression, or misapprehended word, might have changed the direction of his vengeance, and brought it upon herself; more especially if the servant's presence had not restrained him. Looking back to the whole history—for the Court is not at liberty to disconnect the transactions, if it wishes to do justice between the parties—I cannot think that the law imposes on the wife the obligation of continuing, or that she could safely continue, in matrimonial society with a husband who, up to this period, had so conducted himself.

The only remaining transaction necessary to be examined is that which took place in June, and induced Lady Westmeath to withdraw from her house, leaving him in possession of it, and thus finally breaking off all intercourse with him.

In furtherance of his plan for the resumption of the domestic government, he, on this day, demanded of the housekeeper what wages were due to **[125]** her, and required her to deliver up to him her books and papers. This she refused, on the ground that Lady Westmeath, whose servant she considered herself to be, was absent at Mr. Wood's, in a neighbouring street. On this refusal, Lord Westmeath broke open

the housekeeper's presses, and took forcible possession of all her papers, and whatever he found therein. The conduct of each of the parties will be more correctly described in the words of the witnesses; or, at least, by abstracting the most material parts of their evidence. Johnson speaks to the earlier part, and afterwards to the conclusion of the scene. She mentions that while they were at dinner in the housekeeper's room, Lord Westmeath looked in, and desired Wetherly to come to him after dinner: "From his manner she judged something was the matter; she went to her own room, Lord Westmeath came there, and asked where the housekeeper kept her accounts and keys? she said she did not know; he was apparently very angry and disturbed. In a little while deponent heard a great noise below, as of bursting open locks and bolts violently—a crash; she was alarmed and staid where she was, till called down stairs by Lady Westmeath's voice." Wetherly then gives the following statement:—"After she had dined she went to Lord Westmeath, as he had desired; his lordship spoke to her in the dining room; asked her what wages were due to her; she told him how many months; he said he was going to pay and discharge her; desired to have the books, keys, and accounts: deponent told his lordship she was Lady Westmeath's servant, and could not give them up unless she was present and ordered her. His lordship was in a great passion, [126] flew out at the deponent, called a man servant, and sent him for a constable; said he would take them; he turned from her: she was just by the door, and as he had used personal violence to her once before, she did not know but he might do it again, so she made her escape, and got out of the house; she went to Clarges Street, to Mr. Wood's, where Lady Westmeath was, and did not return to Bolton Street for about eleven days, when she went to fetch her own things, when his lordship returned some letters and papers which were her own property, and some money which belonged to her."

The next witness, who speaks to the same affair, is Miss Weldon, who had been governess in Mr. Wood's family, and who returned to Bolton Street with Lady Westmeath on this occasion: "Deponent accompanied Lady Westmeath to Bolton Street; when they got there Lady Westmeath went immediately into the housekeeper's room, followed by the deponent. Immediately afterwards Lord Westmeath entered. It was plain the presses and drawers had been forcibly opened. Lord Westmeath was in a most violent and extraordinary passion, amounting to almost fury, though apparently in a degree exhausted; he was as pale as a sheet of writing paper, his lip quivered, his whole frame shook with rage, his shirt collar unbuttoned, and his whole appearance that of a man greatly agitated and irritated. Lady Westmeath asked him, with greater coolness than she could have expected, what he had been about; Lord Westmeath replied, his voice tremulous with passion, I have been breaking open your presses, and I will do it again. I will shew you that I will be master [127] in this house. Lady Westmeath said that, if she was to be exposed to such horrors, she must send to her trustees for protection. Lord Westmeath said he should like to see the trustees that would dare to interfere with him. Upon this, Lady Westmeath left the room; she was followed by Lord Westmeath: deponent remained in the housekeeper's room. In about ten minutes Lord Westmeath came back, and said as he supposed she was there as a spy, he must desire her to quit the house. She expressed her readiness, if Lady Westmeath consented, but otherwise she could not go. Lord Westmeath left the room. Lady Westmeath came there, entreated deponent not to leave her, saying she would come back to deponent in a few minutes; after being absent about a quarter of an hour she returned." They waited in the drawing room till her solicitor, Mr. Talbot, came; and having consulted with him, they went to Mr. Wood's house in Clarges Street. "Lady Westmeath was certainly under alarm, and terrified, as it appeared to the deponent, but preserved her presence of mind. She was cool, and spoke calmly; but it appeared to the deponent evident that she did not consider herself safe in the house in Bolton Street; or under the same roof with Lord Westmeath; and deponent saith that, as far as she could judge, her alarm was well founded."

A short passage in Johnson's evidence concludes the narrative. "On being called by Lady Westmeath, she went to her in her bed-room. Lord Westmeath was with her ladyship; he said, on deponent's coming in, what do you want your maid for—as a witness against me? Lady [128] Westmeath said whenever she had occasion for her, and wanted her, she should call her; and she added, I desire, Lord Westmeath, you will leave my room. Upon which he said he would not; that he would come

into her room when he pleased, and stay as long as he pleased; that he would have no more of these separate doings; that he would be master of his own house; that he would go down stairs and turn Miss Weldon out of the house, and would have no more interference from that family in his concerns, and then left the room, apparently to execute his purpose on Miss Weldon. Deponent then assisted her mistress in moving her boxes, which had papers in them, and other things, to deponent's room, where Lady Westmeath filled her pockets, gave deponent as many as she could dispose of about her person, dispatched deponent to seek the children, who were out walking, and send them to Lady Salisbury's, for whom deponent received a note, and she then left the house. That on the occasion deposed of Lady Westmeath was undoubtedly very much alarmed at his lordship; the whole scene was very alarming. Lady Westmeath is a woman of wonderful self-possession, but she could not conceal that she was alarmed on the occasion."

Here, then, the scene closes; and the Court is to decide whether, under all the circumstances of the whole case, Lady Westmeath was justified in quitting cohabitation. Without recapitulating the facts of this painful history, which the Court has gone through with much detail, in order to mark distinctly the grounds upon which its conclusion must rest; but looking to the ungovernable vio-**[129]**-lence of this husband's temper on these several occasions—looking to the former acts into which that temper had betrayed him—looking to his conduct at the separation of beds in May, 1818—looking to these final transactions in the face of all his engagements—his resumption of his marital authority by forcible means—his refusal to quit her bed-room—his declaration "that he would come into her room when he pleased, and stay in it as long as he pleased, that he would have no more of these separate doings," I do think that she had a reasonable foundation for an apprehension of renewed personal violence. I so far join in that apprehension as to think, and be morally convinced by the evidence, that if she had submitted to a continuance of domestic society under those terms, and had allowed of further matrimonial cohabitation, there was great risk, and a strong probability, that she would have been exposed to a repetition of acts of personal injury. I am of opinion that the case fully comes up to the requisites of the law, as laid down in the several adjudged cases to which I have referred, and more especially, to use the words of Lord Stowell, "that the passions of the husband are so much out of his own controul that it is inconsistent with the personal safety of the wife to continue in his society."

If such was her danger at that time, has the Court any reason to conclude that she would be in a state of greater security if compelled now to return to his house and home? Has he shewn that he is become sensible of his past misconduct? Is he emendatus? Are his mind and disposition softened down into conjugal kindness? Where are the proofs of it?

[130] After the separation he carries his infant son to Clonyn, where the child dies just before he becomes a year old. Lady Westmeath, on hearing of the illness, with the natural feelings of a mother, sets off, accompanied by Lord Cranborne, her brother, and her maid, but arrives the day after the child died; she stays a few hours, and returns to England.

Till 1821 Lady Rosa, then about six or seven years of age, had been living with her mother, and in charge of a governess. In that year Lord Westmeath was residing at Mrs. Winsor's, in Bolton Street. The child is brought frequently by the governess to visit him; and one day the child is detained by Lord Westmeath, the governess dismissed without her, and in about ten days the child sent out of town, to a friend's house in Hampshire. This seems to have been done without the least notice, or previous preparation of the mother for the infliction of such a stroke. She applied to a Court of Justice to regain the possession; but the rights of a father are too strong to enable that Court to afford her any relief. His lordship not only still persists in the same course, but will not allow Lady Westmeath even to see the child, or at least would not as late as the year 1824; for his own witness, Lady Salisbury, who was examined in March, 1824, and who was most likely to be correctly informed as to the fact, states, on the twenty-first interrogatory, "that respondent believes that the producent, Lord Westmeath, has prohibited the ministrant, Lady Westmeath, from seeing her child, Lady Rosa Nugent, and has prevented her from so doing." Of the reason for this **[131]** course of conduct respecting the little girl the Court may not be fully apprised; but, judging from what appears in the suit, the smallest speck

is not attempted to be pointed out in the moral character of Lady Westmeath. Indeed, the very prayer, made in this suit for restitution of conjugal rights, to compel her to return to cohabitation, implies necessarily that he has no imputation to make against her, either as a wife, or a mother. The Court does not venture to blame Lord Westmeath in this respect, because all the facts are not before it; but as far as does appear, his conduct, in this particular, furnishes no affirmative evidence that he is disposed to shew greater kindness and forbearance towards this lady. The Court carries the inference no further.

Again, the parties have been engaged in litigation with each other from the moment of separation to the present time; not in one court only, but in all courts—in equity, common law, and ecclesiastical courts; and in those several jurisdictions Lord Westmeath has been the party commencing the proceedings. These circumstances are not likely to engender more good-will and cordiality. They do not operate as sweeteners to prepare the parties for the performance of matrimonial duties with affection and consideration.

Looking, therefore, to the present time, as well as to the time of their actual separation, I see no prospect of their practically living together in any degree of conjugal happiness, and in the proper discharge of the obligations of the marriage state; but looking at the case not practically, but strictly in a legal view, I am of opinion that to compel the wife to return to cohabitation would but ex-**[132]**-pose her to the risk and danger of renewed violence and personal injury.

In arriving at this conclusion, I trust that I have proceeded with due caution, weighing and considering again and again every transaction, with its accompanying circumstances, and every branch of the evidence in proof of them, and endeavouring to draw impartial inferences from the whole. I have formed my opinion, not only with the usual care and attention which the ordinary justice due to the parties would require, but with considerable hesitation and unaffected diffidence, on account of my respect for the learned Judge, who, in this case, has come to a different decision; but after mature deliberation, finding myself compelled to dissent, on this latter part of the case, from the judgment already given, I must not shrink from the duty which is cast upon me of reversing the sentence; for to shrink from the discharge of that official duty would be to defeat the very remedy by appeal which is afforded by the law.

I must, therefore, reverse the sentence; pronounce that Lady Westmeath has sufficiently proved her first allegation, charging her husband with cruelty, and is, on that account, entitled to a sentence of separation.

On a prayer from Lady Westmeath's proctor for costs generally, the Court, after a few observations from counsel on that question, and on the form of the sentence, further pronounced that Lady Westmeath had failed in proof of the adultery; and condemned Lord Westmeath in the costs of both Courts, excepting those occasioned by the charges of adultery in Ireland.

[133] From this sentence Lord Westmeath appealed to

The High Court of Delegates, Trinity Term, 2nd Session, 1827.—Costs in the Courts below not allowed to be taxed in the Court of Appeal, as between husband and wife; or (before sentence) as between party and party.—Costs taxed de die in diem, between husband and wife, though she had a separate income.

After a negative issue had been given to the libel of appeal, and the process transmitted, Lady Westmeath's proctor, on the second session of Trinity Term, 1827, brought in three bills of costs, and prayed to be heard on taxation. It was objected that if the application rested on the principle of costs as between husband and wife, Lady Westmeath having neglected to procure the taxation, de die in diem, in the Courts below, it could not now be enforced in the Court of Appeal; and if as between party and party, the condemnation in costs formed part of the sentence, the subject of appeal from the Court of Arches.

The Con-Delegates rejected the prayer as far as the taxation of the bills in the inferior Courts; but directed an act on petition to be entered into as to the costs in the High Court of Delegates.

On the 23d of June, 1828, this act on petition was debated before the whole commission, consisting of Mr. Justice Bayley, Mr. Justice Park, Mr. Baron Garrow, Dr. Arnold, Dr. Burnaby, Dr. Daubeny, Dr. Dodson, Dr. Pickard.

It was contended for Lord Westmeath that costs ought not to be taxed against him de die in diem, as Lady Westmeath was possessed of a sufficient separate income:

for Lady Westmeath, that there was nothing to take the case out of the ordinary rule, entitling the wife to have her costs **[134]** taxed de die in diem. A long statement as to the comparative income of the parties was made on both sides, and the Court finally granted the prayer of Lady Westmeath's petition as to the costs in the High Court of Delegates.

After the usual proceedings before the Con-Delegates the principal cause came on before the whole commission at Serjeants' Inn, and the Court,(*a*) after hearing, on the 13th, 14th, 15th, 16th and 18th of April, Sir Charles Wetherell, Mr. Adam, Drs. Lushington and Addams, as counsel for the Marchioness of Westmeath; and the King's advocate, Mr. Denman, Dr. Phillimore, and Mr. Broderick for the Marquess of Westmeath, affirmed the sentence of separation pronounced by the Court of Arches, and remitted the cause. (See infra, 148.)

MIDDLETON *v.* MIDDLETON.(*b*) Consistory, Feb. 21, 1795.—In a suit for separation by reason of the wife's adultery (publication having passed), the Court, on an affidavit that material facts are newly discovered, may, in its discretion, allow the cause to be opened for the purpose of pleading further adultery.—The renouncing all further allegations, unless exceptive, is the virtual conclusion of the principal cause as to the rights of parties: leave for further pleading is in the discretion of the Court.—In suits for adultery the party is not limited to the contents of the libel, but may plead fresh charges and obtain a sentence on facts not existing at the commencement of the suit; but publication is a bar to further pleading as of right.

This was a suit, brought by the husband against the wife, for adultery.

In Trinity Term, 1793, the libel; on the third session of Hilary Term, 1794, an allegation on the part of the wife; and on the 5th of June in that year a responsive allegation on behalf of the husband, were admitted. On the third session of Trinity Term, 9th of July, 1794, publication was decreed; and, on the fourth session, both proctors declared they gave no allegation, unless exceptive, to witnesses; and on the by-day after Michaelmas Term, viz. the 5th of December, an **[135]** exceptive allegation, given in by the wife, was admitted. On this exceptive plea publication of the depositions had not been prayed, nor had the cause been concluded, when on the second session of Hilary Term, 1795, the proctor for the husband brought in an affidavit of Mr. Middleton and himself, stating, "that since the publication of the depositions, evidence of certain facts of adultery had come to their knowledge," and they prayed the cause to be opened for the purpose of giving an allegation in the principal cause. This was objected to on behalf of the wife; and the Judge assigned to hear, on act on petition, on the next court-day. On the third session this assignation was continued; and the allegation being brought in, the Court further assigned to hear on the admission thereof on the fourth session, if the petition did not obstruct.

On that day, after hearing counsel on both sides, the Court thus delivered its opinion.

Judgment—Sir William Scott (*Lord Stowell*). I see no foundation for any imputations of delay on either party: the citation was taken out in Easter Term, 1793; a libel, containing a large mass of matter, was given in on the first session of Trinity Term, and it is said that seventy witnesses have been examined: the production of so many, and these too on commissions in the country, did not exceed the usual allowance of time. The wife gave in her allegation early, and proceeded with great dispatch in the examination of her witnesses, and a responsive allegation was brought in on the 5th of June, 1794. The parties subsequently renounced all further allegations, **[136]** unless exceptive, which, undoubtedly, is the virtual conclusion of the principal cause, as far as the rights of parties extend. They cannot retract without the leave of the Court; and the question is whether the Court, in its discretion, shall, under the circumstances, listen to the application and allow the party to plead.

The allegation I have not seen; but the affidavit, sworn to by Mr. Middleton and by his proctor, states, "That since the responsive plea has been given in, Mrs. Middleton, while residing at Lowestoff, has been observed to carry on a secret intercourse with a stranger of low condition, who had no acquaintance but her servants; that they had reason to suspect that this was the person mentioned in the proceedings as the adulterer, but they could not obtain the proofs till January; that they had

(*a*) Dr. Arnold was not present.

(*b*) Vid. sup. *Hamerton* v. *Hamerton* (Arches, Mich. T.), p. 24.

since ascertained that the stranger was the alleged adulterer, and they had now collected facts which they believe are relevant and proper to be introduced, and that they are confident they shall be able to prove the same."

No doubt these matters are relevant, and that the party had a right to plead them before publication on the strictest principles of law and justice. It is every day's practice to introduce charges of adultery committed since the institution of the suit. It cannot be contended that a party is bound down to the contents of his original libel. In *Newton* v. *Newton*,(*a*)[1] and many other cases, it has been constantly held that fresh acts of adultery may be pleaded supplementarily; and that a sentence may be obtained on facts not existing at the commencement of the suit. The bar, in this case, would be publication, and it [137] operates to prevent the right of further pleading; which would be a dangerous proceeding, if assumed as a matter of absolute right. But the question is whether it be not proper for the Court, in its sound and legal discretion, under the circumstances of the case, to grant the permission prayed for; and, acting not from favour but from justice, to open the cause. It cannot be denied that the facts are material to the investigation of the question. If the wife has carried on a clandestine intercourse since the commencement of the suit, it would be explanatory of much obscurity which appears to hang over the cause on the face of the libel. What danger or injury can there be to the wife?

It is asked, where is the matter to stop? At that period where the proper and sound discretion of the Court will limit it. Does it follow that I am bound in like manner to admit twenty other allegations? I am to look at the circumstances and stage of the cause, and to form my judgment upon all. Two pleas only have hitherto been given by Mr. Middleton; one of them being responsive: and the facts now pleaded are such as, if publication did not withstand, the Court could not hesitate to admit. Now, the grounds on which in point of law publication is a bar are, first, the fear of subornation; secondly, the danger of the prolongation of the suit. Here are fresh facts to be proved; and, I presume, fresh witnesses to be examined: it is not proposed to supply the defect of the proof of the former pleas; but to establish facts having no existence at the time the libel was given in; and, therefore, there is no fear of subornation. The other ground of objection is the prolongation of the suit. I am told, however, these facts might be pleaded in the Court [138] of appeal, or that the husband might proceed on a new citation, dropping this. Where would be the advantage or convenience in driving the husband to an appeal, or to a fresh suit? How would the wife be taken out of peril and discomfort? I think I shall perform an act of justice favorable to the wife in suffering the cause to proceed in its present course to a complete termination. If these facts cannot be proved, her character will be vindicated; if proved, the Court will have the satisfaction of administering justice with full information, which satisfaction it would be difficult to feel under the confusion with which the suit set out. It, besides, is an allegation on the part of the husband, from whom there is less reason to fear protraction, as he is in a great measure to sustain the expences; and I therefore have all the assurance from the situation of the parties that he is sincere in the purpose for which he offers the allegation. As to myself, when I recollect the extreme obscurity which appeared in the original case, and the quantity of evidence produced, the introduction of this new matter will be a great relief. I owe it to my own conscience to give the case every instruction I can; and I think this allegation, and the evidence produced upon it, will contribute to throw great light on the real state of the facts, and I am convinced it will materially serve the interests of truth. I, therefore, am clearly of opinion that I ought to receive the allegation.(*a*)[2]

(*a*)[1] Consistory, 1781. See *Webb* v. *Webb*, vol. i. 349.

(*a*)[2] March 3.—The objections in the petition being thus overruled, the assignation "to hear on the admission of the allegation was continued." On the by-day the proctor for the wife alleged the cause to be appealed: and, at the same time, the Court was moved to admit the allegation.

Dr. Nicholl and Dr. Laurence for the husband. The hand of the Judge is tied effectually only by an inhibition: here none has yet been served. There are instances where, notwithstanding an appeal apud acta, the Judge has gone on, admitted an allegation, and decreed a requisition for the examination of witnesses. In *Annesley* v. *Aylmer*, Prerogative, 1790 (S. C. Delegates, 1791). The cause stood on act on petition.

[139] Arches, July 6.—From this decree, and from a further decree admitting the allegation, an appeal was prosecuted to the Court of Arches; when, after argument, the Court gave sentence, as follows:—

[140] Arches, July 6th, 1795.—Material facts, newly come to the knowledge of the party, may be pleaded after publication.—Before a party can plead after publication, he must shew (generally by affidavit) that the facts came to his knowledge since his former plea: the Court then ought to admit a plea of such facts.

Judgment—Sir William Wynne. The libel was, in this case, admitted in 1793. Many witnesses were examined: an allegation of the wife and a further allegation of the husband were given; the depositions on all these pleas were published: an exceptive allegation of the wife was also admitted; and another by the husband was asserted. The cause was in this state when an affidavit of the husband and his proctor averred that facts had lately come to their knowledge; and a prayer was made that an allegation might be admitted, it having been before **[141]** declared that neither party would tender any such plea; the Judge of the Consistory Court was of opinion that they might give such a plea. From this decree the wife appealed; and the question for my decision is whether the Court below exercised a proper discretion.

[142] Most certainly the Court is exceedingly cautious in admitting any plea after

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Stevens prayed further time to give in an affidavit: this application was rejected, and the Court, Sir William Wynne, directed the cause to proceed. Stevens appealed apud acta. But the Court heard the petition and decreed administration. Oughton, tit. 306.

In *Barwell* v. *Barwell*, Prerogative, Hil. T. 1792. Willis propounded a will, exhibited an affidavit of scripts, and brought in an allegation (of which he had offered a copy to Stevens) and prayed it to be admitted. Stevens objected, and appealed apud acta; but the Court, Sir William Wynne, ordered the allegation to be read, admitted it, and decreed a requisition for the examination of witnesses. This is a case in point.

Per Curiam. What was the gravamen there?

Argument resumed. The Court ordering the allegation to be read.

No distinction arises from this being a case in which the Court exercises a discretion in respect to the admission of a plea, it being after publication. If the Court sees that delay is intended by the adverse party, it will now, in its discretion, admit this allegation. The step taken in overruling the petition was only preparatory; the allegation might have been admitted on the last session.

Per Curiam. Why was it not then brought on?

Argument resumed. Merely for the convenience of the counsel on the other side, that they might look over the allegation, and see if it were opposable. It was therefore, in fact, admitted nisi on that day; and we are now entitled to that which was then virtually the decree of the Court: the plea was allowed, if admissible, to be admitted. What can be the injury to Mrs. Middleton? The expence will fall upon the husband, and the wife will have an opportunity, in the Superior Court, of considering whether the allegation be objectionable; while, on the other side, a great injury might arise: the wife might appeal further on the same grievance, and might thus hang up the cause for a very long time.

Per Curiam. As I understand, this allegation was brought in on the Court-day before last; a copy tendered to Mrs. Middleton's proctor, and the assignation stood "upon admission next Court, if the petition did not obstruct," and that petition was overruled; therefore, regularly, the allegation ought then to have been debated. Why that was not done I do not know. If the opposite party would not accept a copy of the allegation, Mr. Middleton's proctor might then have read the plea, subject to the observations of the Court. The wife's proctor alleges that the cause is now appealed.

Dr. Swabey. This is not an appeal apud acta, as in the cases that have been cited. Here the proctor alleges the cause in due time and place to be appealed, which is different. By the canon law every act is appealable. On the last Court-day the petition was rejected, since which an appeal has been entered from what was then done. In other cases the appeals have been apud acta, interrupting the Court in what it was then doing, and in those cases the Judge has gone on, and sent the whole cause

publication: there are strong objections which it is absolutely necessary for the party to get over; it would lead to subornation—witnesses might supply defects, might avoid contradictions, might make artificial evidence: these are evils which the Court will strive in every possible way to prevent, and it therefore always requires strict and legal proof that these evils cannot happen; it must be shewn that facts have come to the knowledge of the party since his former plea: this is always demanded, and is usually done by affidavit. The Court has the power, on such affidavit, and always does and ought, for the purposes of justice, to exert its authority in admitting a plea of facts, which, for want of being known, could not be pleaded before. Where such facts and such former want of information are shewn, the Court, I take it, will never shut its ears; for otherwise it might give sentence, when it knows that the party could possibly give a good reason against it. Where this danger is removed, there is only one other reason against admitting such a plea, namely, **[143]** delay, or want of proper diligence: but here there is an affidavit of the party and his proctor (which is always held sufficient), by which it appears from the date of the facts that they could not be within their knowledge. Only one fact is pleaded in 1793, and without here stating that fact, it is clear that the rest occurred in August, 1794, that is, since publication, which passed in July; therefore it is most evident that they must have come to the knowledge of the party after publication.

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together to the Court of appeal. Where an appeal from a separate act has been entered out of Court, the Judge has usually deferred. In *Raybold* v. *Raybold*, Arches, Mich. Term, 1789, the Court made such a distinction.

Per Curiam. What is the disadvantage to Mrs. Middleton?

Dr. Swabey, as amicus curiæ, I know of none. The petition stated the substance of his allegation: the admission of the latter can therefore scarcely be said to make the charge public.

Per Curiam. This case comes within the principle of the cases cited. The Court is not, I think, legally obliged to defer to an appeal till an inhibition is served, nor, in my opinion, is there any sound distinction whether all the acts be done on the day on which the appeal is asserted, or some on a subsequent day. Generally the Court will be inclined to defer, unless circumstances afford a reason against it. It is, then, for the Court to consider whether, in order to do justice between the parties, it shall, in its discretion, defer to the appeal or not. The husband had a right to have his allegation debated on the last session: this forms a fair equity on which the Court may proceed. The party, offering the allegation, will bear the expences: he tries the experiment suo periculo; and I do not see in what way the interest of the other party is concerned to prevent it.

Another consideration weighs with me—the great and incurable grievance in these Courts that parties may appeal from every step, and that causes, by the occupation of the Court of Delegates, may be hung up long before an interlocutory decree can be pronounced. The Court will, in practice, consolidate the steps as much as it can, and will not drive a party to two appeals. Shall the Court, in this case, send up the party on an appeal against overruling the objections to the petition, and then, a second time, against the admission of the allegation? I hold it to be my duty to facilitate and expedite causes as much as I can, and to go as far as I can without breaking in upon the authority of the Superior Court. I therefore think I am at liberty to hear this allegation read, and to admit it if it appears admissible.

The allegation was then opened and read in pœnam.

Per Curiam. The act on petition stated that facts of an adulterous intercourse had newly come to the knowledge of Mr. Middleton, who prayed leave to give an allegation; and the Court thought itself bound in justice to all parties to grant permission. I should have done Mrs. Middleton a great injury if I had not given her an opportunity to clear her character from every imputation, so that I might proceed to the final hearing, or even to dismiss her without any drawback on her character. The allegation, now read, agrees with the statement of the petition; but, as I understand that Mrs. Middleton has appealed, I admit the allegation only in order to send it up to the Court of appeal: and I therefore make no observations, except that I think a responsive allegation would have been a more advisable step on the part of Mrs. Middleton than an appeal.

Allegation admitted.

The question, then, is whether the Court below did right in admitting this plea of facts undoubtedly material, and strictly applicable to the cause. Shall the Court, then, be barred from receiving such, when the party lays them before it as early as possible? One part of the circumstances is in January, 1795. It is said that the cause should not have been commenced if the husband had not evidence enough, and that he ought to go to sentence on the facts alleged in the former part of the case. I apprehend that is not so. If material circumstances come to the knowledge of the party after the commencement of the suit, or happen pendente lite, it would be very absurd for the Court, in a cause where the issue is, whether adultery has been committed at some time or other, not whether it has been committed at any particular time, to proceed to sentence without hearing facts stated to have occurred during the pendency of the suit. It is an unreasonable conception.

Again it is said, you may take out a new citation: but would the Court decide a cause when it sees there are facts which might induce a different opinion? I do not recollect the name of a similar case during my own practice, though I [144] think there has been such; but I have a note of Dr. Simpson and Dr. Paul, of *Kell* v. *Kell* in 1746, to this effect: "In a case of adultery facts allowed to be pleaded, after publication, which not laid in the libel." It is not said whether the facts happened after publication, and therefore this is a stronger case. On that authority, and on general reason, it strikes me that the Court below did perfectly right in suffering the allegation to be given in, and I, therefore, affirm the decree.

The Court pronounced against the appeal, retained the cause, and on the 6th of May, 1796, signed the sentence of separation as prayed by the husband.

DONELLAN *v.* DONELLAN. Consistory, 12th May, 1795.—In a suit for separation by reason of the wife's adultery the conclusion of the cause may be rescinded generally if the Court is of opinion, after the argument, that adultery is not sufficiently proved.

This was a cause of separation brought by the husband against the wife. The libel, after pleading the marriage, alleged that while the husband was absent in May, and the beginning of June, 1794, a person frequently visited and corresponded with the wife: it exhibited an original letter, alleged to be from the wife to the paramour; and another letter from the paramour to the wife, both fictitiously addressed; it pleaded her elopement, and cohabitation with him.

The evidence of this cohabitation was, that the first witness, a stranger to the wife, saw a woman in bed with the paramour; the second saw the wife in the same lodgings, and heard her called by his name; and the third deposed "that the [145] paramour confessed to him she was living in criminal connexion with him."

It was objected by Dr. Arnold, on the part of the wife, that the chief reliance, for proof of adultery, must be placed on what happened after the elopement; that the rule of the canon law required two witnesses before the Court could pronounce a fact fully proved: that though one witness to a fact, supported by circumstances, was sufficient, the rule had not been further relaxed: that being found in bed was sufficient evidence of adultery, but of that there must be legal proof: that identity was perhaps proved if the fact had been supported by other witnesses, or by other acts; that the confession of the paramour, not in the presence of the wife, was no evidence: that as to the letters, though of the handwriting of the parties, they were not dated; there was no proof of sending; nor in whose possession they were found, nor to whom addressed. The whole cause, therefore, rested on the testimony of one witness, and the law required more.

Per Curiam. I should wish to give the counsel for the husband time to consider the proofs in this case; for I think it would be relaxing the rules of evidence too much to pronounce for the divorce on the present proofs. It is strange that neither the second nor third witness should depose to any conversation. I shall therefore permit the conclusion to be rescinded generally; for I see enough to incline me to think it is a fair case; but there is not sufficient proof to warrant a sentence.

Conclusion rescinded.

[146] CARGILL *v.* SPENCE. Prerogative, Easter Term, 1st Session, 1796.—In a testamentary cause the Court—after hearing the arguments and delivering its opinion of the insufficiency of the evidence—may rescind the conclusion, in order that the identity of the alleged testator may be pleaded and proved.

The Court (Sir William Wynne), after the argument in this case, which respected the validity of a seaman's will, stated its opinion, that though the execution of the will was sufficiently proved, the identity of the testator was not established; and then proceeded:—

It is impossible on this evidence to pronounce for the will, yet if, by practice, the Court can have an opportunity of establishing the fact, by allowing the party to supply the defect, it is bound to do so. It is not for me to inquire whether the paper be officious or not, but whether it be the will of the asserted testator or not.

In the case of Lady Amelia Butler's will, which was executed in the presence of persons not acquainted with her, there was a defect of proof of identity; and the Court rescinded the conclusion in order to allow the link in the chain of proof to be supplied. I shall, therefore, rescind the conclusion in this case, and give the parties an opportunity of proving the identity.

There is also a paper which is insisted upon as material; but which is not proved on the interrogatories, though annexed to them. I shall also allow the opposers to plead and prove, if they think fit, that that letter is of the handwriting of Thomas Cargill, the executor: though my only object in rescinding the conclusion is to obtain proof of the identity.

[147] The following minute was taken down:—"The Judge having heard the proofs read and counsel on both sides, rescinded the conclusion of the cause for the purpose of permitting John Cargill to plead and prove the identity of the party deceased, and for permitting the adverse party to plead and prove the handwriting of an exhibit annexed to his interrogatories."

On the 4th Session of Easter Term an allegation, pleading identity, was admitted without opposition; three witnesses were examined upon it; and Cargill having admitted the handwriting of the exhibit, the Court, on the third session of Trinity Term, pronounced for the will, the identity being fully established.

HENLEY AND DUDDERIDGE *v.* MORRISON. Delegates, 3rd Feb., 1829.—In a suit for seaman's wages the Judge may properly rescind the conclusion of the cause for the admission of further evidence.

This was a suit for seaman's wages, wherein Lord Stowell, as Judge of the High Court of Admiralty, had, after the cause had been opened at the hearing, rescinded the conclusion in order to allow a second witness to be produced in support of the mariner's summary petition: and, on two subsequent occasions, the Judge, on affidavits, also rescinded the conclusion for the same purpose.

From this third rescinding of the cause an ap-**[148]**-peal was prosecuted, on the part of the owners, to the High Court of Delegates, wherein the Judges, viz. Mr. Justice Bayley, Mr. Justice Park, Dr. Daubeny, Dr. Phillimore, Dr. Gostling, Dr. Blake, Dr. Haggard, pronounced against the appeal, and declared "that the Judge of the Court below had proceeded rightly, justly and lawfully, and they condemned the appellants in costs, and remitted the cause."

WESTMEATH *v.* WESTMEATH.

An application in this cause (vide supra, 134) for a Commission of Review was rejected on the 24th of June, 1829.

Broderick in support of the application.

Lushington contrà.

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[149] APPENDIX.

[See SKEFFINGTON *v.* WHITE, p. 631.]

The principles and object of the statutes of administration (31 Edw. 3, c. 11; 21 Hen. 8, c. 5) may be gathered from the construction put upon them by repeated decisions, and by long-established practice recognized by the Judges of different courts—common law, equity, and ecclesiastical—to have been to vest the right to administration in the person who is possessed of the beneficial interest in the personal estate. Thus, in the case of a feme covert, it has been determined that the husband has a right to the administration, not strictly as next of kin, but either under the

equity of the statute of 21 Hen. 8, c. 5,(*b*) or under the earlier statute of 31 Edw. 3, c. 11, "as the next and most lawful friend," (*c*) or mero jure; (*d*) which right, as well as the right to the property, the statute of 29 Car. 2, c. 3, s. 25, declares the husband shall have, notwithstanding the statute of distributions (22 & 23 Car. 2, c. 10): yet still, "if the husband has departed with all his interest in his wife's fortune, he shall not have administration."(*e*) So also, in the case of an administration cum testamento annexo, the residuary legatee and his representatives ad infinitum are held entitled to the grant in preference to the next of kin.(*f*)

[150] On the same principle of interest, and in affirmance of a practice which had long prevailed, the following adjudged cases have determined that, under the statutes, the ordinary is bound only to grant the administration to such person as is next of kin at the intestate's death, and not to one who is not entitled to the beneficial interest in the effects, though, by the death of intermediate persons, he may have become next of kin at the time the grant is required.

SAVAGE *v.* BLYTHE. Prerogative, Hilary Term, 4th Session, 1796.—The stat. 21 Hen. 8, c. 5, applies only to such as are next of kin at the time of the death. Therefore the Court made the de bonis non grant to the executor of the administrator (the sole next of kin at the death) in preference to persons entitled in distribution, who had received their shares and signed releases.

Abraham Cocker died intestate, leaving a brother and several nephews and nieces. Administration was granted to the brother; and at the end of the year he distributed, taking the deceased's securities upon himself. The administrator died, leaving the securities due to the original deceased outstanding: he made a will and appointed an executor.

A decree was taken out against the nephews to shew cause why the administration de bonis non should not be granted to the executor of the brother administrator. The nephews appeared and prayed administration.

Sir William Scott and Dr. Nicholl for the executor. The question is whether the executor of the administrator or the next of kin is entitled to the administration de bonis non. It was necessary to cite the next of kin, though they have received their shares, executed releases, and thus discharged their interest. The Court is inclined in such grants to follow the interest, and give the handle to the person who has the interest. It would not, unless compelled by law, give the grant to persons without any interest. The 21 Hen. 8, c. 5, enacting that, on the death of an intestate, the administration is to be decreed to the next of kin, does not apply: it has been complied with: the administration was so granted in the first instance. The Court is not to go on in infinitum. Where a party has parted with all his interest in the effects, he has no right to the administration, *Young* v. *Pierce* (Freeman, 496). Great danger and inconvenience would ensue if persons were permitted to come into the management of the estate who have no interest, and who would have only to pay over to those entitled. This is the principle of the ordinary practice of granting administration with will annexed to the residuary legatee, though against the words of the statute, *Isted* v. *Stanley* (Dyer, 372).

[151] Dr. Swabey contrà. Though the parties have released their interest they have not renounced their right to the administration. In *Young* v. *Pierce* there was an agreement that the other party should take administration. In *Isted* v. *Stanley* the point decided was, that an executor of an executor, dying before probate, was not executor to the original testator, though entitled to administration if the residue was bequeathed to his testator; it is true it was stated that though there were next of kin it was the course of office to grant administration to the residuary legatee, which was (the reporter says) allowed to be law. The question is whether the 31 Edw. 3,

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(*b*) Per Nichols and Warburton in *Stevens* v. *Gibbons*, Moor, 871.

(*c*) 4 Burn. Ecc. Law (p. 278, s. 5, 8th edit.), citing 1 Roll's Abr. 910. *Wilson* v. *Drake*, 2 Mod. 20, notis. *Fawtry* v. *Fawtry*, 1 Salk. 36; 1 Show. 327; Holt, 42.

(*d*) *Ognel's case*, 4 Co. 51. *Johns* v. *Rowe*, Cro. Car. 106, Com. Dig. Administrator, B. 6.

(*e*) Com. Dig. Administrator, B. 6 (notis), citing *Rex* v. *Dr. Bettesworth*, Str. 1111.

(*f*) *Isted* v. *Stanley*, Dyer, 372; *Day* v. *Chapfield*, 1 Vern. 200; *Thomas* v. *Butler*, 1 Ventris, 217, 2 Lev. 55. Com. Dig. Administrator, B. 6, vol. i. p. 487, 5th edit.

and 21 Hen. 8, are obligatory on the Court. The Court is only ministerial: the statutes leave it no discretionary power. The practice of the Court inclines to the person having the beneficial interest, as in the case of a residuary legatee, and where the option is left to the Court; but it has only such a discretionary power when the parties are in equal degree, or between a widow and next of kin who are equally entitled. It has no further discretion. The statute is as obligatory on the second grant as on the first. In *Prior* v. *Moss* (Prerogative, 1772, April 10) "Moss died intestate. The mother of the intestate died without taking administration, and made Prior executor. The uncle of the deceased took out administration. Prior, the executor, called it in as having all the interest under the will. The Court (Dr. Bettesworth) held it well granted to the next of kin to the intestate." In *Elliot* v. *Collier* (3 Atk. 526, 1 Ves. sen. 17, 1 Wils. 168) Lord Hardwicke held the husband entitled to the interest without the administration.

Per Curiam (Sir William Wynne). I understand the rule of the office to be to grant administration to those who are next of kin at the time of the death: but where a representation has been taken out and another is wanted, the course of the office is to make the grant to the interest and not to persons who were not next of kin at the time of the death, but who have since become so. Such is laid down by Sir Edward Simpson to be the rule of office (infra, 154). In the case of *Young* v. *Pierce* an administration was granted by the prerogative and Delegates to the interest, viz. to the executor of one next of kin, in exclusion even of another who was also next of kin at the intestate's death, but who had released her interest. Here the parties were not next of kin at the death, for they are nephews and nieces, and there was a brother. I conceive that, such being the case, they are not entitled to this administration: for the **[152]** statute looks to the next of kin at the time of the death, not to the next of kin when a second grant is wanted, and the Court will grant the administration to the representative of the original administrator in preference to a person who, by the death of intermediate persons, becomes the next of kin when the second administration is wanted. *Lovegrove* v. *Lewis*, before the Delegates, was a case of this kind.(*a*) The question is not whether the same rule applies to administrations de bonis non as to original administrations; but whether the statute does not apply only to such as were next of kin at the death. But in order to look more fully into the cases let the matter stand over.

On the by-day the cause came on again.

Dr. Swabey cited *Hole* v. *Dolman* (infra, 165), *Kinleside* v. *Cleaver* (infra, 169), *Walton* v. *Jacobson* (vol. i. 346), and *Whitehill* v. *Phelps* (Prerogative, 1711, E. T. 2 Sess.). "Whitehill died intestate, leaving a widow and no children. The widow took administration and made her son executor. He prayed administration de bonis non to the husband. This was opposed by the mother of the husband. Administration de bonis non was granted to her, though, according to the custom of London, the widow had the right of distribution." The case cited from Freeman the reporter thinks contrary to law. Unless *Lovegrove* v. *Lewis* (of which case I was not aware on the former day) had occurred, the cases to which I have referred would have been decisive. That case has established a distinct principle; the only distinction from

(*a*) *Lovegrove* v. *Lewis and Lewis* (Prerog. 1772, Trin. Term, 2nd Session). John Bidleston died in November, 1761, a widower, intestate, leaving two sons—the only persons entitled in distribution. John Bidleston, one of the sons, took out administration to his father in 1761. Thomas, the other son, died in 1762 intestate, leaving his brother John his only next of kin. John, the administrator, by his will dated 13 September, 1763, appointed Lovegrove his sole executor. The validity of that will being contested, it was pronounced for by the Prerogative Court and by the Delegates. Lovegrove was sworn administrator of Bidleston, the father. John and Richard Lewis opposed the grant on the ground that they were the cousins-german, and then next of kin of John Bidleston, the father, and, as such, asserted their right to the administration de bonis non. It was alleged that they had no interest in the effects. Sir George Hay decreed letters of administration de bonis non of John Bidleston, the father, to be granted to Lovegrove, the executor and residuary legatee of John Bidleston, the son and administrator. And this sentence was, on the 29th of April, 1773, affirmed with costs by the Court of Delegates. The Judges present were: Aston, J., Blackstone, J., Macham, and Loveday, LL.D.

the present case is that here the parties were originally in distribution, but they have released their interest.

[153] Sir William Scott and Dr. Nicholl contrà. The question is whether the other party has a statutable right, and whether the Court is consequently bound. It turns on the construction of the statute—on the words "next of kin." We apprehend they mean the next of kin at the time of the death. Great inconvenience would result if the Court did not attend to this limitation, but extended the term to all the branches to whom it may be derived. To say that any one can acquire the relation of "next of kin" to a person, after that person is actually dead, would be absurd. The term must only mean those who are so at the time of the death. No person, therefore, having a statutable right, the Court will grant it, in its discretion, to the interest.

Per Curiam. Abraham Cocker, the deceased, died intestate, a bachelor without parent, leaving a brother and seven nephews and nieces; the brother took administration; he died, leaving goods unadministered, and having appointed Savage his executor; the representative of the brother and administrator applies for administration de bonis non; this is opposed by the nephews and nieces, who claim it under the statute. The brother, at the death of the intestate, was the sole next of kin and solely entitled to the administration. The nephews and nieces were then entitled in distribution, but not to the administration. The only question is whether the nephew, who had no right to the administration at the death, is now entitled by devolution on the death of the brother.

It is argued that it has been held that it ought to be granted to the next of kin at the time of the grant. This is founded on several cases, deciding that the administration to the wife is not grantable to the representative of the husband but to the next of kin of the wife. By the ancient practice, on the death of the husband administrator, the Court granted the administration prius petenti—to the kin of the husband or of the wife. *Hole* v. *Dolman* (infra, 165) determined that it was grantable in preference to the wife's kin and not to the representative of the husband: after which two other cases were decided, viz. *Kinleside* v. *Cleaver* (infra, 169), and *Walton* v. *Jacobson* (vol. i. 346). But this case does not fall within the principle there decided; for in those cases the kin were next at the death, the husband not being considered as kin but having a claim in a distinct character; and therefore the Court held that the wife's next of kin in those cases had an absolute statutable right, **[154]** on which they granted it. Such also is the case where the administration is granted to the widow; she does not take it as next of kin.

The question then is, whether the grant is to be made to the representative of the person who took as next of kin, or to those who have become next of kin at the time of asking for the grant. By the practice of the office the statutable right is confined only to the kin at the time of the death; afterwards to grant it to their representatives. So in a note of Sir Edward Simpson, in which, adverting to the case of *Hole* v. *Dolman*, that learned Judge says: "The rule there seems to mean only to the next of kin at the death of the deceased, not to whom may happen afterwards to be next of kin at the time a question arises upon the grant of administration; for a dead man can have no next of kin; he is not in a capacity to have next of kin at the time he becomes so. Therefore, by the course of office, it is granted to the interest when the next of kin at the time of the death is not living at the grant of administration de bonis non; except in the case of next of kin of wife and representative of the husband—then granted to the next of kin. Undoubtedly by the statute the grant of administration to next of kin is good; but when the next of kin, who were so at death of deceased, are dead, then it is in the heart of the Court to grant it to the next of kin or the interest, and the grant does not depend on the statute but the rules of the Court—may grant it to next of kin, may grant it to interest, without regard to greater or less interest, according to the circumstances." In exact affirmance of that principle was the judgment of Sir George Hay in *Lovegrove* v. *Lewis* (supra, 152, notis), which was affirmed by the Delegates with costs. There it could not be denied that the cousins were the next of kin at the time of the grant, yet Sir George Hay and the Delegates decreed it to the interest. In this case the nephews were not next of kin at the death, though in distribution; but the greater interest at the death was in the brother, and therefore his representatives have the greater interest. Not only so; it is stated that payment was made to the nephews and nieces in full satisfaction of their dis-

tributive shares, and that they gave releases; so that they have now no interest as appears on the face of the releases. But it is said that they protest against the effect of their releases, and against any use to be made of them; and it is argued that they may apply to some Court to determine on their validity: it is not, however, suggested that they were improperly **[155]** obtained, nor that any proceedings are going on to invalidate them. Though the Court has no right to try the validity of these releases, yet it must take notice of them, as it does of marriage-articles allowing a wife to make a will, which, being upon the face valid and their validity not appearing to be contested, the Court grants probate. By the same plea that the effect of these releases is sought to be avoided, a husband might always avoid his wife's will. I am of opinion that the nephews have no statutable right, as they were not next of kin at the time of the death. The course of office in that case is to grant the administration to the superior interest, viz. in this case to the representative of the administrator, who would take half; and the interest of the others is released. Under the circumstances the interest is so clearly in the executor of the deceased administrator that I shall grant the administration de bonis non to him.

ALMES *v.* ALMES. Prerogative, Mich. Term, 4th Session, 1796.—Where the Court is not bound by the statute of 21 Hen. 8, c. 5, it always grants the administration to those who have the interest. Administration de bonis non granted to a person entitled under a deed of gift from the first administratrix to the whole beneficial interest, in preference to one who was not next of kin at the time of the death, and who consequently had no statutable right.

Sir William Scott and Dr. Nicholl for Elizabeth Almes relied on the recent decision in *Savage* v. *Blythe*.(*a*) It was contended contrà, that by taking out a decree calling on the son to accept or refuse the administration, the other party had waived their own right; at least that the son should be indemnified for his costs.

Per Curiam (Sir William Wynne). Administration is prayed of the goods of William Davis left unadministered by his sister, who in her lifetime conveyed all her interest in the effects of William Davis by a deed of gift to her daughter-in-law, Elizabeth Almes, one of the parties. And the question is whether Elizabeth Almes or William Almes, the son of the administratrix and the nephew and next of kin of William Davis (but who was not so at the time of the death), is entitled to administration de bonis non.

It is not denied that the entire interest is in her; nor that the other party is fully aware of that fact; for he was a party to the deed. Has, then, William Almes a statutable right by which the Court is bound?

Where there is a statutable right the Court always grants it, except in a few instances —that of a residuary legatee for example. William Almes was not next of kin at the time of the death, and had no right nor interest then, nor has he any interest in the **[156]** effects now. He has, then, no statutable right. I so decided in *Savage* v. *Blythe*, where the question was between the executor of the brother (administrator of the deceased) and nephews and nieces, who, though they were not entitled to the administration, would have been entitled in distribution if they had not signed releases. That case I determined on the authority of Sir George Hay's decision in *Lovegrove* v. *Lewis*, affirmed by the Delegates. There those who were not next of kin at the time of the death were held not to be entitled under the statute to the administration de bonis non, which was granted to the executors of the administrator. The present case is rather stronger than *Savage* v. *Blythe*. Where the Court is not bound by the statute, it will always grant the administration to those who have the interest. Then there is no doubt that Elizabeth Almes is entitled.

There must have been some mistake in taking out the decree calling upon the other parties to accept or refuse administration, instead of to shew cause why it should not be granted to Elizabeth Almes. There is a kind of inconsistency in this decree with the application for the grant of administration to her. It cannot be the course of office that such should issue: but, as that might have been explained without entering into this petition, it was not necessary to bring the question before the Court; and on this ground I shall not decree the costs to be paid by the person taking out the decree. Let administration pass to Elizabeth Almes.

(*a*) See preceding case.

The preceding are cases of de bonis non grants; but different Ecclesiastical Judges have on several occasions declared that, in all that regards the obligation of the statutes of 31 Edw. 3, c. 11, and 21 Hen. 8, c. 5, on the Court, in the grant of administration, no distinction exists between an original and a de bonis non administration; (*a*)[1] or, in other words, that where a party would have had a statutable right to an original administration, he would have the same right to the de bonis non administration; and the converse of that proposition must also necessarily be true that where he would have had no statutable right to a de bonis non grant, he can have no such right to an original grant. Nor does it seem possible either in principle or in reason to distinguish in this respect between the first and any subsequent grant. The ground of making the de bonis non grant to the represent-**[157]**-atives of the next of kin at the time of the death, in preference to the next of kin at the time of the grant, is, that the former are possessed of the beneficial interest in the intestate's effects: but that interest under the 22 & 23 Car. 2, c. 10, vests in the distributees immediately on the intestate's death, and is consequently transmitted to their representatives, although no administration had been taken out in the lifetime of such distributees. Accordingly, while on the one hand it is always held in practice that a person who was next of kin at the time of the death is, under the statute of Hen. 8, entitled to the de bonis non grant in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death, it is, on the other hand, the established practice and course of office that if all who were next of kin at the death are dead, then the representative of such next of kin being entitled to the beneficial interest, is also entitled to the administration, whether original or de bonis non; with this limitation however in both cases, that a person originally in distribution is preferred to the representative of the next of kin.

The foregoing cases, the established practice, and the inferences deducible from both, sufficiently shew that the Ecclesiastical Courts strongly hold that the right to the administration is transmissible, and almost universally accompanies the right to the property: but, since the cases of *Hole* v. *Dolman* and *Kinleside* v. *Cleaver*, a different rule has prevailed with respect to the administration of feme covert's estates after the death of the husband—the sole person entitled to the administration at the time of the wife's death, viz. that, whether the husband has taken administration to his wife or not, the representation to her must be granted after his death to those who, at the time of the wife's death, were her next of kin, even though they have no interest in her effects, in preference to the husband's representative in whom the whole interest is vested.(*a*)[2]

Since the publication of the former volume, more extended notes of the cases of *Hole* v. *Dolman*, and *Kinleside* v. *Cleaver* (vol. i. 344-5), together with some notes of the earlier cases relating to this point, have come into the editor's possession, and are now published in the hope that the materials and information thus col-**[158]**-lected may be useful, if this important point of practice should hereafter be re-considered.

KINASTON *v.* MILLS. Prerogative, February 25th, 1700-1.—Chose in action to wife. Husband, administrator, dies without altering property, and makes a will: his administrator with will annexed takes administration de bonis to the wife; that administration called in by her next of kin and revoked, the property not being altered by the husband.

Margaret Burnett (otherwise Kinaston), the wife of Major William Burnett, died entitled to the sum of 1400l., the property whereof the said William had not altered. He took administration to her and made his will; and died, being killed in a duel. Francis Mills takes out administration to him with the will annexed (no executor being named in the will), and afterwards takes administration de bonis non of Margaret Burnett. John Kinaston, brother of Margaret and next of kin, cites him to shew cause why the administration de bonis should not be revoked and granted to him. Sir Richard Raines, the Judge of the Prerogative Court, revoked the administration accordingly. What belonged to Margaret, being a chose in action, and the property

(*a*)[1] Dr. Bettesworth and the Court of Delegates in *Kinleside* v. *Cleaver* (vol. i. 345, and infra, 169). Dr. Hay in *Walton* v. *Jacobson* (vol. i. 346).

(*a*)[2] Is it not a strange anomaly to grant the administration to the representative of the residuary legatee ad infinitum, and to refuse it to the representative of the husband—the universal legatee by operation of law?

not altered goes to her next of kin, and not to the executor or administrator of the husband.(*a*)[1]

AMHURST *v.* AMHURST AND BAWDES. Prerogative, Hilary Term, 1713.—Estate not vested by law or equity, administration de bonis non to the next of kin.

Charles Amhurst makes his will, and Dorothy Amhurst and Lady Selby, his executors, who prove it. 1000l. legacy is charged on the estate for them. Dorothy dies intestate, and her husband takes administration to her and makes his son executor, who prays administration de bonis non of Dorothy. Charles Selby, a sister's son of Dorothy, prays administration as her next of kin.

Ex parte Selby. Applying for administration shews the estate not vested; it must be granted to the next of kin, 21 Hen. 8, c. 5. If the estate had been vested in the husband, his executor would have had it without administration. If the husband had been her executor, if the husband and wife had assigned the legacy, or if **[159]** the husband in his life had taken security, he might have released the legacy; but, not having done it, it no ways vests in him. Though a sentence be given for a legacy, yet if not paid it will go to the administrator de bonis non.(*a*)[2] The husband is not to have execution for a debt of the wife's recovered by them. Orphanage money in London, if not recovered, shall be considered as a chose in action, and the husband cannot dispose of it (*Pheasant's case*, 2 Vent. 341). Administration is to follow the interest where there is a residuary legatee. Distributees have an interest vested in them. Before the 31 Edw. 3, c. 11, the ordinary had nothing to do with choses in action.(*c*) It is held in B. R. that an estate pour auter vie is not distributable.

[Contrà. In Chancery the opinion is that an estate pour auter vie is distributable. Though the estate be not vested in the husband, yet the interest is which he transfers to his representatives, and the administrator will be trustee for them.(*d*)]

In continuation. The same law is in an administration de bonis non as in a common administration. It is not discretionary with the ordinary to grant it where the interest is. *Whitehill* v. *Phelps* (cited ante, p. 152). In *Harcourt* v. *Lady Smith*, Delegates, 1709, "Sir Samuel Astrey made his wife executrix: she married Mr. Harcourt, and died leaving goods unadministered; she not being residuary legatee, the administration de bonis non cum testamento annexo was granted to the sister and next of kin." And in this case the interest was not considered, but only the statute 21 Hen. 8, c. 5. The interest is not considered by the 21 Hen. 8, c. 5, but a proper person to represent the deceased. If the executor does not prove the will, the next of kin shall represent him. If Amhurst were administrator he would only be trustee for the next of kin.

E contrà. The question in the principal case is whether the interest is vested in the husband: for this case does not depend upon the 21 Hen. 8, c. 5, but rather on the Statute of Distributions, where administration is to follow the interest; as in *Astrey's case* the residue not being disposed of belonged to the next of kin. This was the opinion of the Prerogative Court and of the Delegates. The ordinary was administrator before the 31 Edw. 3, c. 5. That statute **[160]** directed administration to be granted to the next of kin. A dispute arose thereupon whether the wife was not next of kin, and administration to be granted to her, which occasioned the statute 21 Hen. 8, c. 5. Upon that, inquiry was made whether the husband was next of kin to the wife, and determined in *Ognel's case*, 4 Co. 51. *Johns* v. *Rowe*, Cro. Car. 106, that administration did belong to the husband mero jure. *Hughes' case* was the cause

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(*a*)[1] In the case of *Burnett* v. *Kinaston* (Prec. in Ch. 118, S. C. 2 Freeman, 239; Trin. Term, 1700, which related to the effects of the same party deceased) Sir Nathaniel Wright, Lord Keeper, held that the money there in question, a chose in action, belonged to the administrator de bonis non, and was not distributable among the surviving husband's next of kin; but "the point is now settled that if the husband survive his wife, then he, as her administrator, will be entitled to all her personal estate which continued in action or unrecovered at her death; and although he die before all such property be recovered, yet his next of kin will be entitled to it in equity." 1 Roper, Husband and Wife, 205, and cases there cited.

(*a*)[2] See, however, *Heygate* v. *Annesley*, 3 Bro. Chan. Rep. 362.

(*c*) See *Hensloe's case*, 9 Co. 39.

(*d*) By 14 Geo. 2, c. 20, estates pur auter vie, in case there be no special occupant thereof, are made distributable.

of the Statute of Distributions,(*a*)[1] and the law therein makes the intestate's will; and if the party having a right to distribution die before all is collected, his next of kin shall have administration, and not the next of kin of the first intestate (*Brown* v. *Shore*, Carth. 52; 1 Show. 25. *Palmer* v. *Allicock*, 3 Mod. 58). The husband is the next of kin, and has a right to the whole, for the law has made the wife's will, and vested all her right in him. The universal legatee and not the next of kin shall have the administration where there is no executor. Even a residuary legatee is preferred to the next of kin. *Isted* v. *Stanley*, Dyer, 372. *Thomas* v. *Butler*, 1 Ventris, 217. In the case of *Culpepper* v. *Porter*, 1681, "Porter married Culpepper, who had a legacy of 1000l. left her by her father. After her death the husband takes administration to her, and dying makes his son executor, who takes administration de bonis non to Mrs. Porter, formerly Culpepper, and is called upon by the next of kin of Porter to shew cause why it should not be revoked. The administration is confirmed to the executor against the next of kin." Every legatee has an immediate interest. The husband had a right to the legacy left to his wife, which he transmitted to his executors. In *Early* v. *Cole*, "Early made his will and gave a legacy of 50l. to his daughter: she married: 20l. of the legacy was left unpaid at the death of her and her husband, who survived. The husband's brother and wife's mother apply for administration; it was granted to the husband's brother." Arrears of rent due to the wife shall go to the executors of the husband, 32 Hen. 8, c. 37.

Per Curiam (Sir Charles Hedges). This estate not being vested either by law or statute,(*c*) by [161] the 21 Hen. 8, c. 5, the administration must be granted to the next of kin. Administration of part of the estate must go as the administration of the whole would do. As it is an intestate's estate of a chose in action not recovered, it must go to the next of kin.

REES *v.* CART.(*a*)[2] Prerogative, Hilary Term, 3rd Session, 1718-9.—Administration of the wife's goods to the executor of the husband, who died without taking administration to her.

Ann Church made her will dated 2d February, 1709, and made John Church Metcalfe, sen., one of her executors and her residuary legatee. Elizabeth Metcalfe made her will and likewise Metcalfe, sen., her executor and residuary legatee. He took probate of both wills; made his own will, and his wife, Jane, his executrix and residuary legatee—leaving goods of Ann Church and Elizabeth Metcalfe unadministered. Jane Metcalfe proved his will and afterwards married John Rees. She died on 10th June, 1717. No administration was taken to her. John Rees died in August, 1717, having made his will, and his brother, Richard Rees, executor. Richard proved the will in the Archdeacon's Court of Middlesex. In October, 1717, Jane Cart (mother of Jane Rees, alias Metcalfe) applies for administration to her. A caveat is entered by Barbara Jordan and John Church Metcalfe, a minor. Jordan—as surviving daughter of Ann Church—prays administration de bonis non to her. John, as grandson to Elizabeth Metcalfe, and great grandson of Ann Church, and nephew to John Church Metcalfe sen., prays administration de bonis non to them to be granted for his use, before the grant of Jane Cart's (alias Metcalfe's, alias Rees') administration to her mother. (Richard Rees was not cited, and no ways a party to the caveat.) No interest appearing to bar Jane Cart from having the administration to her daughter, the Court granted it to her; and by virtue thereof she obtained letters of administration de bonis non to John Church Metcalfe, sen., Elizabeth Metcalfe and Ann Church. Afterwards Richard Rees calls her by process to shew cause why the administration should not be revoked and granted to him, being executor of his brother who was husband to Jane Rees, alias Metcalfe.

(*a*)[1] *Hughes* v. *Hughes*, 1 Lev. 233. On prohibition the Court of King's Bench resolved "that the Ecclesiastical Court could not oblige an administrator to a distribution, and that their bonds taken to that intent were void." The arguments are reported in Carter, 125, and at the conclusion is the passage that follows:—"Et puis per act del Parliament pur melieux settlement des intestates estates fuit contrived."

(*c*) Lord Chancellor Cowper and Lord Chancellor Parker, however, held that the wife's choses in action did vest in the husband by the statute of distributions. See *Squib* v. *Wyn*, 1 P. Wms. 381. So did Lord Hardwicke in *Humphrey* v. *Bullen*, 1 Atk. 458, and in *Elliot* v. *Collier*, 1 Ves. 15; 3 Atk. 527; 1 Wilson, 169.

(*a*)[2] Cited in *Squib* v. *Wyn*, 1 P. Wms. 381. Viner, Executors (K.), 22.

Ex parte Rees.(*b*) **[162]** It is still res integra as to Richard Rees, he never having been cited or any way precluded. Where the whole interest is vested, administration must go with the interest, and not according to the statute. *Isted* v. *Stanley*, Dyer, 372. *Thomas* v. *Butler*, 1 Ventris, 217. *Ognel's case*, 4 Co. 51. *Johns* v. *Rowe*, Cro. Car. 106. *Wilson* v. *Drake*, 2 Mod. 20. The husband is not obliged to distribute. It makes no alteration that the husband did not take administration; for the administration continues no privity: but the interest being once vested is transmissible, the right not depending on the 21 Hen. 8, c. 5, but on the Statute of Distributions; and the executor has the same right as the husband had. Hæres succedit in universum jus quod defunctus habuit. *Earl of Winchelsea* v. *Norcloff*, 2 Reports in Chancery, 165. *Brown* v. *Shore*, 1 Show. 25. *Palmer* v. *Allicock*, 3 Mod. 58. That the administration must go with the interest and not with the blood was determined in this very case, when the administration de bonis non was granted to Jane Cart, and Jordan and John Church Metcalfe were refused by the Court. The same has been determined in other cases, *Culpepper* v. *Porter* (cited in *Amhurst* v. *Amhurst*, ante, 160). *Early* v. *Cole* (ibid.).

E contrà. The mother is in possession of a simple administration to Jane Rees alias Metcalfe. The administrations with the will annexed depend upon that. Simple administrations are always governed by the statute. The interest is not considered. A man dies intestate leaving two children; one dies leaving a child; that child cannot have the administration, though equal in interest. John Metcalfe, the minor, was not the next of kin to Jane Rees, and therefore was refused. Upon her death the privity was discontinued. The husband, not being administrator to her, could have no right after her death. *Astrey's case*. *Amhurst's case* (supra, 158-9).

In reply. In the cases of *Astrey* and *Amhurst* there was no residuary legatee.

Per Curiam (Dr. Bettesworth). The only question is whether administration ought to follow the interest or the blood. If the husband had taken administration, there is no doubt that the whole property had vested in him. Whether, then, his not having done it shall bar his executor. The interest being in him, the executor may at any time take the administration the husband was entitled to. The administration **[163]** to Jane Rees and the de bonis non administrations to Church and Metcalfe ought to be revoked and granted to the executor.

Note.—The case of *Powell* v. *Trigges*, 1727, 2d October, was inserted among the list of cases, in support of the husband's representatives, by Dr. Simpson in his report of *Rees* v. *Cart*. It appears from the assignation-book that Powell, the sister of the deceased, called in the administration granted to Trigges; but the Court directed it to be re-delivered to Trigges. No other particulars can be discovered.

ST. AUBYN *v.* PAGE. Prerogative, Mich. Term, 1st Session, 1719.—Administration of a feme covert, granted to the daughter of the third husband, revoked and granted to the grand-children by her first husband; it being shewn that an estate would come to them.

Lady St. Aubyn, relict of Sir John, married afterwards to Spencer, and had a third husband, Page: she dying intestate, Page takes administration and dies intestate. Elizabeth Fursden, a creditor by mortgage, calls Sir John St. Aubyn, the grandson and next of kin, to shew cause why administration de bonis non should not be granted to some third person to substantiate proceedings in Chancery, and upon his not appearing it was granted to Ann Page, daughter of Richard Page by another wife, as next of kin to him. Sir Richard Vyvyan (testamentary guardian of Sir John, Peter James, Mary and Martha St. Aubyn, minors and grandchildren) calls upon Ann Page to shew cause why the said administration de bonis non should not be revoked and granted to him for their use.

Ex parte St. Aubyn. The estate of the wife does not vest in the husband by marriage otherwise than as in possession. Hale's Analysis of the Law, ss. 14, 27, pp. 47, 78. 1 Inst. p. 351 b. If the husband does not recover the wife's choses in action as administrator, and die intestate, no property can be transmitted to him. The husband is not included in the Statute of Distributions, but by the last section of the Statute of Frauds and Perjuries his case is provided for. By the former statute

(*b*) In the arguments in this case, and in *St. Aubyn* v. *Page*, and in *Plaidel* v. *Howe* (infra, pp. 163, 4), the passages that seemed to be a mere repetition of the arguments in *Amhurst* v. *Amhurst*, supra, 158, have been omitted.

the distributable share vests immediately, but until that statute it was not so. The husband, therefore, not being entitled to the whole by virtue of that statute must remain in the same case as other common administrators were, and what is left unadministered must go to the next of kin.(*a*)

[164] E contrà. We admit it to be law that choses in action do not vest in the husband by marriage, but the estate which is in the wife's possession does. Fact is wanting in order to found the law. Page, being in possession of an administration, ought to be continued therein, unless it shall be made appear that there are choses in action still remaining which were not collected by the husband.

Per Curiam (Dr. Bettesworth). The administration not to be revoked without shewing that there is some estate remaining which will come to the grandchildren. To give an allegation on the next court-day.

Note.—It was afterwards alleged that several debts owing by Spencer (the second husband) were discharged out of her separate estate. He having mortgaged the most part of his estate for his debts, the mortgage was transferred over in trust for her to the Marquis Worcester and Mr. Justice Fortescue. The allegation was confessed; and the Court revoked the administration de bonis non, and granted it to the guardian for the use of the minors.

PLAIDEL *v.* HOWE. Prerogative, 26th July, 1723.—A legacy to a wife not received by her or her husband, nor administration taken to the wife by the husband: his executor, and not the next of kin, to have administration to the wife.

James Howe, by a codicil to his will, 13th November, 1714, makes Ann Gilman, wife of George Gilman, executrix and residuary legatee. She proved the will and died. Her husband survived, but died without taking administration. He made his will on 25th April, 1722, and Christopher Plaidel, his executor, who is called, at the instance of a creditor, to accept or refuse administration de bonis non of James Howe. He is opposed by Sarah Howe, daughter of Howe and sister of Ann Gilman.

Ex parte Plaidel. Every legatee has an immediate interest. Ann Gilman, being residuary legatee, the whole personal estate, after debts and legacies paid, vested in her, and consequently in her husband. *Early* v. *Cole* (cited in *Amhurst* v. *Amhurst*, ante, 160). *Thomas* v. *Butler*, 1 Ventris, 217. *Earl of Winchelsea* v. *Norcloff*, 2 Reports in Ch. 165. *Cary* v. *Taylor*, 2 Vern. 302. *Rees* v. *Cart* (ante, 161).

E contrà. The residue did not vest in him as husband. It was a chose in action, and the husband never had the administration. It remains the property of the first deceased, Howe, not altered.

[165] Per Curiam (Dr. Bettesworth). Administration granted to the executor of the husband.

DARLEY *v.* WHADDON. Prerogative, July 3rd, 1734.—Administration de bonis non to a feme covert granted to the representative of the husband, administrator, in exclusion of the wife's kin.

Elizabeth Hoile, alias Auckland, died in 1715; her husband took administration to her, and died in 1728. Administration was granted to Mrs. Whaddon, his sister, in 1729; and in 1732 she took administration de bonis non to Elizabeth Hoile. This was held to be according to the course of the office. If the estate of Elizabeth had only been an estate not in possession, Mrs. Whaddon would not have been entitled. *St. Aubyn* v. *Page* (ante, 163), *Kinaston* v. *Mills* (ante, 158). But the property consisted of South-Sea stock, in the names of Elizabeth Auckland, the mother, Elizabeth, the daughter, and Mr. Hoile. The Court dismissed the next of kin without costs.

HOLE, OTHERWISE WELLINGTON *v.* DOLMAN. Arches, July 21st, 1736.—An original administration to a feme covert decreed to her next of kin in preference to the representative of the husband who survived her.

Peter Wellington made his will, and appointed Margaret, his sister, executrix and residuary legatee, and died. The executrix took probate and married Jeffery Follett, and died. Follett, the husband, made Dolman his executor, and died before he took

(*a*) In *Cart* v. *Rees* (cited in *Squib* v. *Wyn*, 1 P. Wms. 382) Lord Chancellor Parker said, "That the husband was within the statute of distributions so as to take the wife's choses in action; and that this was not a new point."

administration to his wife. Dolman proved his will, and then took administration to Follett's wife in common form in the Court of the Archdeacon of Barnstaple. Rebecca Hole, alias Wellington, the sister of Peter Wellington and of Margaret Follett, called Dolman, in the Archdeacon's Court, to shew cause why the said administration should not be revoked; and it was then revoked. Then Dolman appealed to the Consistory of Exeter, where the decree in the Archdeacon's Court was reversed, and then the sister appealed from that reversal to the Arches.

The Court (Dr. Bettesworth) inclined that the administration should be granted to the sister Rebecca Hole, but, upon motion to hear common lawyers, the Court assigned an information in law by common lawyers upon this question—Whether administration to a feme covert, which had not been taken by the husband in his lifetime, should be granted to the representative of the husband or to the wife's next of kin?

Mr. Serjeant Wynne for Dolman. **[166]** Whatever belongs to the wife is the husband's. Co. Litt. 354. Whatever chattel interest or otherwise the wife has belongs to the husband; and for a chattel right, which reverts to the wife after the husband's death, she is not obliged to take administration. The wife's estate is vested in the husband, and consequently in his representative; the husband's right arises from the act of law and not from the letters of administration. The stat. 21 H. 8, c. 5, directs administration to go to certain persons, but leaves a discretion in the ordinary whether he will grant it to the widow or next of kin. *Sand's case*, Ray. 93. An administration in this case is not necessary for the husband unless in order to sue: 29 Car. 2, c. 3, s. 25, declares that nothing in the Statute of Distributions should extend to the estate of femes coverts. The wife's estate in this case being fully vested in the husband, his representative only is entitled to administration.

Mr. Crewe on the same side. The husband by law and equity has a right to the wife's estate, and the administration is only to recover what is not in his possession. The ordinary shall depute the next and most lawful friend of the intestate to take administration. *Fotherby's case*, Cro. Car. 62, 63. Before the statute of 31 Edw. 3, c. 11, the ordinary might grant the administration to whom he pleased. Since the stat. 21 Hen. 8, c. 5, no doubt but the ordinary has discretion to grant administration to "the widow or next of kin." By mere right the husband has a title to the administration, and has the interest and is "the next and most lawful friend." Mich. 2 G. 2, *Butler* v. *Story*, before Lord Chancellor King. "Samuel Story, deceased, a freeman of London—his daughter married Wolley, who became bankrupt. The assignees prayed an account of Story's estate, as the third part belonged to Wolley's wife, though she was dead, and no administration taken to her." *Bacon* v. *Bryant* (Viner, Executors, K. 24), before the Master of the Rolls, held that the representative of the husband had the interest, and therefore ought to have the administration. *Isted* v. *Stanley*, Dyer, 372. *Denn's case*, Cro. Car. 115. *Sparke* v. *Denne*, 1 Sir W. Jones, 225. Administration shall be granted to the interest. *Davies* v. *Cutts*, 1 Mod. 231. 3 Salk. tit. Administration, p. 23. An administration granted to a sister when there was a husband: he sued to have it revoked: prohibition moved for but denied. *Johns* v. *Rowe*, Cro. Car. 106. Administration of mere right is to be granted to the husband. It can be of no use in this case to grant it to the deceased's next of kin; for they will be only trustees for the husband's representative.

[167] Mr. Serjeant Hussey contrà. This Court will not consider what will be the effect in another Court; but who has a right, and whether the ordinary must not grant the administration to the next of kin. By 31 Edw. 3, c. 11, the ordinary shall grant the administration to the next friend. The word shall in a statute must be taken to be compulsive. 9 Coke, 39, *Henloe's case*. Upon the statute Edw. 3, held in case of an absolute intestacy that the ordinary must give administration to the next of kin: 1 Levinz, 187. The King's Bench constantly grant mandamus to give administration to next of kin. *Amhurst's case*, 1 Vent. 188. The first instance of a mandamus to this purpose; and mandamus are only to be granted where the ordinary ought by law to do the thing. *The King* v. *Dr. Bettesworth* (*Smith's case*), 1 Str. 891, held in the King's Bench that a mandamus should not go upon grant of administration durante minore ætate, because that was not directed by any statute. *The King* v. *Sir R. Raines*, 1 Salk. 299; Carthew, 457, S. C. Mandamus to prove a will, though the executor was insolvent; because the Court must grant a probate to the person appointed; and it is stronger where the law has appointed, as in a case

of administration. The husband cannot come under the name of next of kin; for he is the same person as his wife; and 29 Car. 2, c. 3, s. 25, shews it by the proviso in favour of the husband. There may be a separate estate in the wife, and then the husband has nothing to do with it: and administrations must be uniform, and cannot depend merely upon a supposed interest. The granting a mandamus is a full proof of the opinion of the common law that an administration under an intestacy, as in this case, is of right to be granted to the next of kin. In *Cullum's case* (*Rex* v. *Dr. Bettesworth*, 1 Str. 891) the mandamus to the Prerogative Court was to grant administration to the husband, not to his representative.

Mr. Murry (*a*) on the same side. The single question is, to whom by law the administration is in this case to be granted; and we apprehend it is to be granted to the wife's next of kin. 31 Edw. 3, c. 11, gives the administration to the husband, but that is merely personal: the husband is merely entitled as the next and most lawful friend, Cro. Car. 108. Resolved by three judges that by stat. 31 Edw. 3 the administration must be granted to the husband, 1 Salk. 36. That the husband's right depends merely on 31 Edw. 3, *Wilson* v. *Drake*, 2 Mod. 22. If the husband had been alive he must have **[168]** had the administration, but that right is merely personal and not transmissible. It is like a case of guardian in socage. If administrator died it does not go to his executors. *Brudnell's case*, 5 Coke. *Thorn's case*, Golds. 2 b. 182. The husband had a right, but he did not exercise it; that right was as the most lawful friend, but that cannot be said of his executor. The case of a residuary legatee is out of the statute, but if there is any part of the residue undevised, administration of that must be granted to the next of kin; and this appears from *Sparke* v. *Denne*, 1 W. Jones, 225; Co. Litt. 351. *Palmer* v. *Allicock*, 3 Mod. 58, shews that before the Statute of Distributions (which does not relate to this case) the administration was always to go to the next friend of the intestate. This right of a husband is not transmissible within the words of the statute 31 Edw. 3.

Wynne in reply. Different statutes are to be considered to explain each other. It is said that the right of the husband is only a personal trust; but no authority is cited to prove it. Guardian in socage is merely a trustee. In the case of a presentation to a void living, be the infant never so young, he may present: so held by Lord King in *Hitch's case*, when the patron was but six years old. The administration in this case follows the property; that vested in the husband, and therefore the interest is transmitted to his representative.

Mr. Crewe in reply. An administration is not merely a personal trust, but is an interest, and is so considered by all the statutes. *Fawtry* v. *Fawtry*, 1 Salk. 36, where wife dies, administration must be granted to the husband.

Dr. Bettesworth took time to consider of this case; and on 18th of December gave judgment on it:

He said the only question is whether administration to a wife shall be granted to her next of kin, or to the representative of her husband when he had died without taking it himself; so that it was an original simple administration. On behalf of the husband's representative, the interest was the point solely relied on. It may happen that the interest is in one, and the right to the administration in another. If a man dies intestate, leaving only a mother and brother, they are equal in interest; but the mother is preferable in administration. In this case it is to be presumed there is a separate estate of the wife's that never came to the husband. In the case of *Culpepper* v. *Porter*, E. T. 1681 (cited supra, p. 160), **[169]** before Sir Richard Lloyd (surrogate of Sir Leoline Jenkins), an administration de bonis was granted to the husband's representative; but then the husband had taken administration first. In *Kinaston* v. *Mills*, 1701 (supra, p. 158), the husband took administration and died, and the administration de bonis was granted to the husband's representatives; but it was afterwards revoked, and granted to the next of kin of the wife. In *Amhurst* v. *Bawdes*, Hil. 1713 (supra, p. 158), Sir Charles Hedges decreed administration de bonis to the wife's next of kin preferable to the representative of the husband. The course of the office has been to grant it primo petenti, indifferently, to the one or the other. But it is a matter of weight, and it is fit the practice should be settled, and become a standing rule for the office to proceed by; and therefore the Court desired the opinions of the advocates unconcerned, and they all unanimously agreed, viz. Doctors Paul, Henchman, Audley,

(*a*) Afterwards Lord Mansfield, C. J., of the King's Bench.

Kinaston, Isham, Cottrell, Lee, that this being an original administration, ought to be granted to the next of kin of the wife. And the Court entirely agreed with them, and decreed the administration in this case to be granted to Rebecca Hole, alias Wellington, the sister and next of kin to Margaret Follett, deceased; and reversed the sentence of the Chancellor of Exeter; but, it having been an unsettled point before, gave no costs.

KINLESIDE *v.* CLEAVER. Prerogative, November 22nd, 1745.—After the death of the husband, administrator of his wife, administration de bonis non granted to her next of kin in preference to the husband's representative.

Per Curiam (Dr. Bettesworth). In this case the husband took administration and left some effects of his wife unadministered. Before the case of *Hole* v. *Dolman* (ante, p. 165) the administration of a wife was granted primo petenti, either to the wife's next of kin or to the representative of the husband. In that case an original administration was in question, but here it is an administration de bonis non. Ever since that case, notwithstanding the diversity, it has been always the rule of the office to grant the administration as well de bonis non, as of a simple administration, to the wife's next of kin. Peere Williams says (*Squib* v. *Wyn*, 1 P. Wms. 382) interest and administration go together; but I do not know where that rule has been established. If I grant it to the next of kin, the husband's representative may have relief in Chancery. I see no difference in reason between an administration de bonis non and a simple administration; for what the husband, as administrator, did not alter the property of, remains **[170]** still the wife's estate. I think it safest to follow the direction of the statute, and therefore decree the administration de bonis non to Mary Cleaver, next of kin of the wife.

[After stating that the Delegates unanimously affirmed the decree, and gave 5l. nomine expensarum] the report continued. The Common Law Judges were clearly of opinion that this case was within the stat. 31 Edw. 3, c. 11, and that the administration de bonis non must be granted to the next of kin of the wife; and that there was no difference between a simple administration and an administration de bonis non.(*a*)

The above, together with *Walton* v. *Jacobson* and *Reece* v. *Strafford* (vol. i. 346-7), are the only cases within the editor's knowledge wherein the right of administration to the wife's estate after the husband's decease has been contested: and it would seem from the decisions that, prior to the case of *Hole* v. *Dolman* (ante, 165), the Judges selected, as administrator, that party (whether the representative of the husband or the wife's next of kin) in whom they conceived the beneficial interest to be. Whether in all the three cases in which the grant was made to the wife's kin the beneficial interest really did vest in them from the property being her separate estate and settled on her next of kin in case of intestacy, or whether there prevailed in any of those cases the same misconception of law that produced the decision in *Burnett* v. *Kinaston*,(*d*) is immaterial: the fact appears to be that the Judges **[171]** believed the

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(*a*) The opinion of the Common Law Judges may be presumed to be correctly stated, because the above note is in the handwriting of Dr. (afterwards Sir Edward) Simpson, who sat under the commission.

(*d*) Vide supra, p. 158, 9, and note (*a*). It will be observed that the decision in *Burnett* v. *Kinaston* (Trinity Term, 1700) preceded by a few weeks the decision of the Prerogative Court in *Kinaston* v *Mills* (Hilary Term, 1700-1), and therefore it may fairly be supposed to have been the ground-work of the latter sentence. It must also be remembered that the judgment in *Kinaston* v. *Mills* (1700-1) and in *Amhurst* v. *Amhurst* (1713) were both anterior to the case of *Squib* v. *Wyn* (1717), the first decision (it is believed) in which the choses in action of a feme covert, not recovered by the surviving husband, were held to belong to the representatives of the husband. And in *St. Aubyn* v. *Page*, supra, 163, it will be observed that the Judge refused to revoke the administration to the husband's daughter till it was shewn that the interest was in the wife's kin. Of the three cases then adjudged in favour of the wife's kin, one was expressly decided on the ground of interest and of interest alone: the other two were almost entirely determined under a misconception of the law as to the person in whom the beneficial interest vested; and from the language of the Judges in both these cases it may be inferred that their decision would have been different if such misconception had not prevailed. That this misconception did exist is confirmed by

interest to be in the wife's kin, and on that principle granted them the administration. Thus, then, in every case they decided that the administration ought to follow the interest, and were clearly of opinion that grants of this nature were not within the statute of 21 Hen. 8, c. 5, but that the Court had a discretion to decree administration either to the next of kin of the wife or to the representative of the husband, which discretion it exercised in contested cases by making the grant to that party in whom it supposed the beneficial interest to vest; while, as to uncontested cases, Dr. Bettesworth, in *Hole* v. *Dolman*, declared that up to that time the course of office had been to grant the administration "primo petenti indifferently to the one or the other." This course of office clearly establishes that the previous decisions in favour of the wife's kin were at the time considered to have been the result of the Court's discretion, exercised on the facts of each particular case, and not a mere ministerial compliance with the exigencies of the statute. At length came the case of *Hole* v. *Dolman*, deciding that if the husband had not taken administration, the next of kin of the wife was entitled. This case was followed by *Kinleside* v. *Cleaver*, in which it was held that the fact—that the husband had or had not taken administration—made no difference in the question; that, in short, there was no distinction between an original administration and a de bonis non administration: but in both these cases the next of kin of the wife, at the time of the grant, were next of kin at the time of the death, the husband not being next of kin, but eadem persona. **[172]** Though, however, in this respect, they are not, in literal strictness, inconsistent with the judgment in *Lovegrove* v. *Lewis*, *Savage* v. *Blythe*, and *Almes* v. *Almes* (supra, 150-2-5), it may be much doubted whether they are reconcileable with the principles and spirit of the decisions in the three last-mentioned cases.

It will be seen moreover that, in the case of *Mary Alicia Gill* (vol. i. 336), the present learned Judge, who has presided in the Prerogative Court above twenty years, expressed very strong doubts of the propriety of the rule now followed, by which the next of kin of the wife at the time of her death exclude the representative of the husband; a rule which is certainly at variance with former practice in this class of cases, and with the present invariable practice in every other class of cases, of making the administration accompany the interest in the effects; and which is undoubtedly a departure from the spirit of the statutes, only to be justified on the ground that the words of the statute 21 Hen. 8, c. 5, so clearly apply to this class of cases, and are so imperative on the Court, as to render its functions purely ministerial. Under these circumstances, an inquiry into the authority for, and foundation of, the present practice may be attended with advantage.

That practice dates its origin, as has been already stated, from the judgment in *Hole* v. *Dolman*, a case certainly decided upon mature deliberation by a very learned Judge, after arguments by very able men, and in conformity with the unanimous opinion of the advocates who were present in Court, but unconcerned in the cause; and its authority has been very much strengthened by the subsequent decision in *Kinleside* v. *Cleaver*: but it may be a little doubted whether more weight than is due has not been accorded to the latter decision. The distinction as to an original and de bonis grant was the principal point under discussion: the previous question—

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the argument of Selby's counsel, that if Amhurst, the representative of the husband, were administrator, he would only be trustee for the next of kin.

It may be presumed that there were no earlier decisions in favour of the wife's kin, because none are referred to in any of the arguments; and both the cases cited, *Whitehill* v. *Phelps*, supra, 152, and *Harcourt* v. *Lady Smith*, supra, 159, and 2 P. Wms. 161, as affording countenance to the doctrine, were on questions between persons entitled in their own right as next of kin at the time of the death and in distribution, and persons claiming as the representatives of the widow.

It is also worthy of notice that the reporter of *Squib* v. *Wyn* (1 P. Wms. 381) had stated that, on the 27th November, 1718, Lord Chancellor Parker held in the case of *Cart* v. *Rees* that the administrator to the wife was but a trustee for the executor of the husband. May it not then be fairly inferred that it was in consequence of this decree of the Court of Chancery ascertaining the interest to be in the husband's representative that in the following Hilary Term, 1718-19, the Prerogative Court repealed that administration to the wife's kin, and granted it to the executor of the husband?

whether the next of kin of the wife were, in either case, entitled as a matter of right, under the statute 21 Hen. 8, c. 5—seems, in the Prerogative Court, to have passed nearly sub silentio on the authority of the case of *Hole* v. *Dolman;* and Dr. Bettesworth, holding that there was no distinction between the one grant and the other, possibly made his decree without fully and deliberately considering the propriety of his former decision. The note at the end of the report of *Kinleside* v. *Cleaver* seems, however, to imply that in the Court of Delegates the Common Law Judges did not, without investigation, assume the correctness of the sentence in *Hole* v. *Dolman* as to the original grant; but that, having themselves **[173]** examined and considered the statute, they expressed their opinion that the wife's next of kin had a statutable right, and thus sanctioned by their deliberate judgment the propriety of the earlier decision. But the note may also be construed to mean that, assuming that earlier decision to be correct, and an original grant to be within the statute, they were clearly of opinion that a de bonis grant was also within the statute, for "that there was no difference between a simple administration and an administration de bonis non." Thus, in this latter construction, the last sentence must be considered rather as the reason assigned for the opinion they expressed than as an independent and separate proposition; but it may be much doubted whether the words of the note will fairly bear this interpretation.

The rule then rests for authority nearly, if not entirely, on the judgment in *Hole* v. *Dolman*, supported by the opinion of the Common Law Judges in *Kinleside* v. *Cleaver:* for, in subsequent cases, the judges, without any minute inquiry, have followed in the same track.

The sanction, however, of Lord Hardwicke's great name has been frequently invoked in support of the correctness of the rule now acted upon: and it would seem from the report of *Elliot* v. *Collier*, contained in 3 Atkins, 526, that his Lordship had expressed his opinion to that effect. At all events, however, even supposing that report to be perfectly accurate, and that the exact words attributed to the Court really proceeded from it, it was a mere dictum—it was not the point which Lord Hardwicke decided. But, on reference to the report of the same case in 1 Vesey, sen. 15, the expression, there attributed to Lord Hardwicke, would imply a doubt of the propriety rather than an approval and sanction of the practice now followed.

The judgment, as given in 1 Wilson, 168, has not a passage exactly parallel to either of those contained in the two other reports.

A comparison of the three reports rather shews that the substance instead of the exact words of Lord Hardwicke's judgment has been given: and, from that comparison, the fair deduction seems to be that Lord Hardwicke admitted (on the authority of *Hole* v. *Dolman*, cited by the Solicitor General) that such was the practice at Doctors' Commons, but did not proceed to express any deliberate opinion on that practice. The authority, then, of Lord Hardwicke's opinion can hardly be vouched in support of the existing rule.

In the opposite scale, to balance the judgment of *Hole* v. *Dolman*, and the cases dependent on it, there are a long course of **[174]** precedents and of practice (no bad expounder of statutes), asserting the discretion of the Judge, and numerous decisions to the same effect by very learned Judges of the Ecclesiastical Courts, recognized in several instances by great authorities in other Courts; (*a*) and also the uniform interpretation and construction put upon the statutes in cases similar in principle and in spirit; as in the case of a residuary legatee; (*b*) and the limitation of the grant to the next of kin at the time of the death.(*c*)

Such, then, being the state of the question, as far as regards the authority of decided cases of practice and of analogy, it may not be improper to say a few words respecting the statutes of the 31 Edw. 3, c. 11, and 21 Hen. 8, c. 5. The husband has been held to be clearly entitled under the expression "the next and most lawful

(*a*) Hargrave's Law Tracts, p. 475, and cases there cited (see vol. i. p. 342, notis). The editor takes this opportunity of correcting a misstatement in page 342 of his former volume: it was a decision of Lord Chancellor Bathurst, and not Northington, in the case of *Bouchier* v. *Taylor*, that was reversed in the House of Lords. See *Bouchier* v. *Taylor*, 4 Brown's Cases in Parliament, 715.

(*b*) *Isted* v. *Stanley*, Dyer, 372. *Thomas* v. *Butler*, 1 Ventris, 217.

(*c*) *Lovegrove* v. *Lewis*, 152, n. *Savage* v. *Blythe*, supra, 150. *Almes* v. *Almes*, 155.

friend" in the 31 Edw. 3, c. 11 (see p. 149, note (*c*)). And judging from analogous decisions, there seems to be but little doubt that, if the statute of 21 Hen. 8, c. 5, had not been passed, the Ecclesiastical Court would, after the husband's death, grant the administration of a feme covert's estate to that person in whom the beneficial interest in the property vested, that is, under ordinary circumstances, the representative of the husband. For the principles of the decision in *Lewis* v. *Lovegrove*—that the 21 Hen. 8, c. 5, applies only to the next of kin at the time of the death—would necessarily lead the Courts to limit the expression in the statute of 31 Edw. 3, c. 11, to mean "the next and most lawful friend" at the time of the death; and then, as the husband alone would be included under that designation, the grant on his decease would be in the discretion of the Court.

However, in the 21 Hen. 8, c. 5, the expression "to the widow or his next of kin" was substituted for the words "most lawful friend" in the earlier statute: but it was still held that the husband was entitled to the representation mero jure—that his case was out of the latter statute. It would then seem that none of his rights were intended, or can be interpreted, to be curtailed by that statute. The right to administration is itself a bene-**[175]**-ficial right; if so, the power of transmitting it must be a beneficial right. Why is it to be held that the statute of 21 Hen. 8, c. 5, is to operate as a deprivation of a part of the husband's rights, and not of the whole? Mr. Murray, indeed, in his argument as counsel in *Hole* v. *Dolman*, contended that the husband's right was a merely personal right; but this position, as was noticed at the time by the opposing counsel, seems to have rested on his assertion alone: no case nor authority was quoted in support of it. What is there in the words or spirit of the statute, or in the cases decided upon it, to warrant the distinction between his personal rights and those rights which he would otherwise have the power to transmit? It must be remembered, likewise, that there are no repealing words in the latter statute; that the two statutes run together; and it has been subsequently held that the husband still takes the administration under the earlier statute.(*a*)[1] Surely, then, his representatives, or whoever have the beneficial interest, may fairly be considered as not excluded from the benefits they would have enjoyed under the provisions of that statute by the enactments of the latter statute. It seems, indeed, that it is taking up too narrow a ground to say that the reservation of the husband's rights merely was forgotten in the statute of 21 Hen. 8, c. 5; and that it would be more correct to say that the case of a feme covert dying intestate, and possessed of choses in action or separate property, was not contemplated at the passing of that statute. It appears most probable that the circumstance of the wife having any property independent of the husband, or any chattels in action, being of comparatively rare occurrence, the Legislature never provided for any such contingency: that, not distinguishing on this occasion between chattels in possession and in action, the Legislature treated all the wife's property as vested in the husband by the marriage, and therefore deemed it unnecessary to declare who should have administration to a feme covert; that, in short, the representation to a feme covert, whether during the lifetime of the husband or after his decease, is a casus omissus.

There is no doubt, however, that, previous to the Statute of Distributions, the husband was held entitled personally to the administration to his wife. That statute directs the proportions in which intestate's effects shall be distributed, but it says nothing of the person to whom the grant of the administration shall be made; nor did it specially reserve the husband's right to the wife's **[176]** estate in exclusion of the parties who would be entitled in distribution if she had not died a feme covert.(*a*)[2] To supply that omission, the Statute of Frauds (29 Car. 2, c. 3, s. 25) provides: "That neither the said act (22 and 23 Car. 2, c. 10) nor any thing therein contained shall be construed to extend to the estates of femes coverts that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act." From this it may be inferred that the Legislature conceived that were the beneficial interest in the wife's estate taken away from the husband, the right to administration would also be by implication taken away; and consequently this statute not only declares that he may recover and enjoy the personal

(*a*)[1] *Fawtry* v. *Fawtry*, 1 Salk. 36. S. C. 1 Show. 351. *Wilson* v. *Drake*, 2 Mod. 22.
(*a*)[2] See *Wilson* v. *Drake*, 2 Mod. 22.

estate (which, if the Statute of Distributions were held to extend to the estates of femes coverts, would have been directed by the positive words of that statute to go in a different course of distribution), but that he may demand and have the administration as he might have done before the making of the 22 and 23 Car. 2, c. 10, of which administration he could only have been held to be deprived on the principle that the party entitled to the beneficial interest was entitled to the administration; and that the husband being deprived of the beneficial interest in the property, he was, ipso facto and as a necessary consequence, deprived of the right to the administration. This, therefore, is an implied declaration of the Legislature itself that the law was, that the administration should, in all cases, follow the interest; and, consequently, that the statute of 21 H. 8, c. 5, did not apply when the next of kin were not the persons beneficially entitled to the estate: and, further, it is an implied declaration that that interpretation of the law and that limitation of the statute were generally received and acknowledged.

In *Hole* v. *Dolman* it was urged by counsel as an objection to considering this class of cases as not included in the 21 H. 8, c. 5, and, consequently, as within the discretion of the Court, that inconvenience would be produced by the uncertainty of practice thus introduced: for it was said the wife may have separate property, and then if the rule of interest were to be followed, the Court, contrary to what would be its usual practice, but in the exercise of its discretion, must grant the administration to the wife's next of kin in exclusion of the husband's repre-[177]-sentatives. But, in the first place, separate property in the wife is an anomaly, and being of comparatively rare occurrence, the difficulty would but seldom occur; and, secondly, this objection would equally apply to the discretion left, by the stat. 21 H. 8, c. 5, in the ordinary to choose between the widow and next of kin; which discretion the Court is always by practice bound to exercise in favour of the widow, unless cause be shewn for her exclusion, such as misconduct, or that she is barred by settlement from any interest in the effects, or the like; and, in the same manner, if the representation to a feme covert, after the husband's decease, were held to be in the Court's discretion, the general rule would be to grant it to the representatives of the husband: but, on its being shewn that they had no interest, they would properly be excluded in favour of the next of kin of the wife, in whom the beneficial interest would vest. The uncertainty, indeed, appears rather to be the result of the practice for which the counsel were then contending, and which is now followed in this class of cases. In all other cases there is a clear and well-defined rule universally applicable, viz. that the interest shall direct the Court to the person entitled to the grant; and, as has been before said, the practice of preferring the next of kin of the wife, at the time of the death, to the representatives of the husband is the solitary exception which makes the practice uncertain; and which, whatever may be the law on the subject, is undoubtedly found by daily experience to be attended with far greater inconveniences than any that have hitherto been pointed out, from leaving such grants to what is called the discretion of the Court, thereby meaning not an arbitrary but a judicial discretion—a discretion regulated by sound principle, and controuled and restricted by precedents and practice, to the single object of carefully providing that the interest and the representation shall not be separated.

Note.—The abstracts in *Kinaston* v. *Mills*, *Amhurst* v. *Bawdes*, *Rees* v. *Cart*, and *Plaidel* v. *Howe*, are copied verbatim from the MS. reports.

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOHN HAGGARD, LL.D., Vol. III. Containing Cases from Michaelmas Term, 1829, to Hilary Term, 1832, inclusive; and some Cases of an earlier Date. London, 1832.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

HAMERTON *v.* HAMERTON.(*a*) Arches Court, Michaelmas Term, 3rd Session, 1829.—Where the evidence did not amount to judicial proof of the wife's adultery, but her conduct had been so culpable as to raise strong suspicions of criminality and induce the Court to rescind the conclusion to admit fresh evidence, proof that during the progress of the suit the alleged particeps criminis had frequently visited her alone and remained late at night will, coupled with the former evidence, found a sentence of separation.

The decree of the Arches Court, rescinding the conclusion of the cause for the admission of further evidence, having been affirmed by the High Court of Delegates, and the cause remitted; an additional allegation on the part of Major Hamerton was, on the by-day after Trinity Term, admitted to proof; pleading in substance that "in the spring, and up to the month of June, 1828, Mrs. Hamerton was residing in lodgings at Paris, attended only [2] by one female servant; that Bushe was in the constant habit of visiting her, frequently dining and remaining alone with her till a late hour of the evening; that there was a sofa in the room, and that Mrs. Hamerton's bedroom adjoined; that in the latter end of May Mrs. Romer came to Paris and resided with her daughter, during which time Bushe did not visit her; that in June Mrs. Hamerton went to Switzerland, where she was joined by Bushe, and that they returned to Paris in October; that she and Bushe still reside there, but that their place of residence has not been discovered; that both before Mrs. Hamerton went to Switzerland and since her return she has frequently walked out arm in arm with Bushe, and visited the theatres and other public places in his company, and that they still continue to carry on their adulterous intercourse together."

Upon the effect of the evidence the Court, after argument, now pronounced its final decision.

Judgment—Sir John Nicholl. The question for my present consideration is whether the facts pleaded in this allegation are proved; for, if proved, they would, coupled with the former history at Cheltenham, leave no doubt on my mind that the adultery is established. Two witnesses have been examined; one—Gyde, the clerk of Major Hamerton's attorney—who merely assists in proving the identity, but who had before deposed to seeing Mrs. Hamerton and Mr. Bushe in company [3] together at Paris; the other, Madame Rouquiet, the portress at No. 51 Rue Neuve, St. Augustins, the house where Mrs. Hamerton lodged. This witness fully proves the allegation, if she is credited; and there is nothing to affect her credit. She proves that Mrs. Hamerton lodged there; that she was constantly visited by Bushe, who frequently dined there,

(*a*) See *Hamerton* v. *Hamerton*, 2 Hagg. Ecc. 8, 618.

and was alone with her till eleven at night. She proves also that for two or three weeks in the latter part of the time, not only was Mrs. Romer, the mother, there, but also an aunt, Mrs. Robinson; and that during such time Bushe visited Mrs. Hamerton less frequently, and staid not so late; and that Mrs. Hamerton and her maid left Paris in June for Switzerland.

In the following winter this witness and Gyde had an opportunity of identifying Bushe; she is also corroborated by the former evidence of Gyde, who saw Mrs. Hamerton and a female come out of No. 51 Rue Neuve, St. Augustins, and get into a coach in which Bushe was waiting for her, some bundles and a bandbox having been previously put into the carriage. This was on the 10th of April, 1828, at the same time that Rouquiet deposes that Mrs. Hamerton lodged at this house and was visited by Bushe. True it is that the Court has not before it the evidence of Julie, Mrs. Hamerton's maid; she was, however, long detained for the purpose of being made a witness on this plea, and that object was partly defeated by the time taken up in the appeal of the wife; but under the requisition for the examination of witnesses at Paris, every attempt was made to compel her attendance, as is stated in the return, and in an **[4]** affidavit annexed. Nor is Madame Mallard, the mistress of the house, produced; but she might not be able to speak at all to the fact of Bushe's visits to Mrs. Hamerton, her lodger on the ground floor. On the other hand, here is not only Mrs. Romer, the mother, but Mrs. Robinson, the aunt, who, if Mrs. Hamerton was not at Paris, nor there visited by Bushe in the manner deposed of, might have been examined on behalf of the wife to contradict that part of the case; yet no contradiction has been attempted.

Without, then, imputing either perjury to the witnesses produced, and subornation on the part of the husband and his agents, or collusion between the parties, or rather both perjury and collusion—neither of which can be presumed—the case is now, taking the whole together, sufficiently proved. The Court, therefore, pronounces for the separation.

JAY *v.* WEBBER. Arches Court, Hilary Term, 3rd Session, 1830.—A clause providing against any future expence falling on the parish need not be inserted in a faculty confirming the erection of an organ by voluntary contributions, and with the consent of the vestry, in a parish church. The sentence of court below affirmed with costs.—A faculty directing the performance upon and repairs of an organ in a parish church to be paid out of the parish rates would be legally objectionable; for the ordinary can only bind the parish to expence for articles absolutely necessary.—Even if the vestry is unanimous, a clause binding the parish to defray, out of the rates, future expences for an article not necessary, ought not to be inserted.—In collegiate churches organs may be necessary, but not in a parish church.—The ordinary is to judge whether the circumstances of the parish offer an objection to the erection of an organ: the parish alone is to decide on any expences to be incurred.—A faculty confirming the erection of an organ binds the parish to nothing prospectively.

[Referred to, *London County Council* v. *Dundas*, [1904] P. 30.]

On appeal.

This was, in the first instance, a business of shewing cause in the Episcopal Consistorial Court of Sarum why a faculty should not be granted for confirming the erection of an organ, seventeen feet six inches in height, and, in width, nine feet, in the parish church of Tisbury, in the county of Wilts, and was promoted by the Rev. Simon Webber, the vicar, and by **[5]** one of the churchwardens, and others, parishioners and inhabitants of Tisbury, against James Jay, one of the churchwardens, and others, parishioners and inhabitants of the said parish. The organ had been erected, in pursuance of a resolution of vestry on the 16th of August, 1826, at an expence of 244l., which sum had been defrayed by voluntary contributions. The organ was erected in May, 1827, and upon a petition to the bishop of the diocese for a faculty confirming the erection of this organ the grant was opposed on the ground "that it was inexpedient that a faculty should be decreed, at least without the usual clause in such faculties inserted that the said organs should not be burthensome to the parishioners for keeping the same in order, or for an organist."

The cause was heard upon act on petition and affidavits, and on the 29th of July, 1829, the chancellor of the diocese decreed the faculty; but reserved the considera-

tion of the question of costs. From this decree an appeal was prosecuted to this Court.

Phillimore and Addams for the appellants.

The King's advocate and Dodson for the respondents.

Judgment—Sir John Nicholl. This is an appeal from the Consistory Court of Salisbury, where it was originally a proceeding to obtain a faculty confirming the erection of an organ in the parish church of Tisbury, Wiltshire, the application being made by the [6] minister and one of the churchwardens, and opposed by the other, and by several parishioners.

The usual proceedings were had: affidavits were exhibited on both sides, and the faculty was finally decreed; and from that decree the parishioners have appealed. The præsertim of the appeal is, that the Judge of the court below "did order or decree that, an organ having been erected by voluntary contributions, and being now standing in the parish church of Tisbury (which organ was erected without any expence to the parish in consequence of a vote of a vestry regularly called and assembled), a licence and faculty should be granted under the seal of his office, confirming the erection of the said organ, and, by so ordering or decreeing, did virtually reject the prayer of James Jay (one of the churchwardens), John Bennett and others, parishioners and inhabitants of the parish aforesaid, that is to say, that the said faculty might not issue without the insertion of a clause therein that the expence of playing and keeping in repair the said organ should not be defrayed at any time by any rate, tax, or assessment to be levied on the inhabitants of the parish." So that no objection is offered to what has been already done—the erection of the organ by voluntary subscriptions, nor to the playing upon it—provided the expence also is defrayed by voluntary subscriptions. But the appellants complain that a clause has not been inserted in the faculty protecting the parish against any future expence by rate, either for playing on or repairing this organ.

The only question then is whether the fa-[7]-culty is invalid in law, or whether at least the discretion of the ordinary has been improperly exercised in granting a faculty without such a clause. Cases of this sort do not often come before the Court in a contested form; they generally pass sub silentio and without opposition. This may account for a clause being often inserted exonerating the parish from all expences. Here the expences of erection formed no burthen on the parish, and the faculty decreed does nothing more than confirm that erection. I have heard no authority cited to the effect that such an approbation of the erection of an organ by voluntary contributions will have the effect of necessarily burthening the parish with the costs of repairs, or the expence of an organist. I have heard no authority quoted shewing that the faculty is not legal, because there is no clause prospectively binding the parish against paying an organist by rate, if the parish, acting by its vestry, should think fit hereafter so to do.

If the faculty had directed that the performance upon, and repairs of, this organ should in future be paid for out of the parish rates, that might be a legal objection; for the ordinary has no power to bind the parish to an expence for an article which is not absolutely necessary. A notion, indeed, formerly existed, that by an unanimous vote of the parish a clause might be inserted that the expence should be paid out of the rates; and, accordingly, there are instances where such clauses have been inserted: but that is wrong in principle, for such unanimity may exist only at the actual time: the opinion and wishes of the parish may be wholly different [8] after the lapse of a few years; and neither the ordinary nor the existing inhabitants have a right to bind their successors to an expence not legally necessary. In a collegiate church organs may be necessary on account of the manner in which the service is there performed; but in a parish church it is not an article of legal necessity. It may be very edifying and beneficial, as it tends to excite attendance and to aid and elevate devotion. The assistance of church music is beautifully described by Hooker in a passage which it is unnecessary to quote; (*a*) and the propriety of the introduction of organs as a part of religious worship has been so generally acknowledged that they have been admitted into all reformed churches, with the exception of the Scotch church and of some few others. The erection of organs, therefore, in parish churches, is not to be discouraged if the circumstances of the parish, regard being had to its opulence and population,

(*a*) Hooker's Eccl. Polity, b. 5, s. 38.

and to the size of its church, offer no objections. Of these circumstances the ordinary is to judge: on any expence to be incurred the parish alone is to decide.

In the present case no objection has been offered arising out of the circumstances of the parish. It contains a population of between four and five thousand souls. The rateable property is 10,000l. a year;(*b*) and a rate for the salary of an organist would be, perhaps, one penny in the pound. The erection of the organ is not sug-**[9]**-gested to have produced inconvenience to the parishioners in attending divine worship: it was erected by voluntary contributions, without any expence to the parish; and the erection was founded upon a previous order in vestry. The faculty, then, merely confirming the erection, appears perfectly proper, unless it could be shewn that, in point of law, by so doing it binds the parish out of the rates to find an organist, and to keep the organ in repair. No authority has been quoted to shew that such would be the effect. The parish is left quite at liberty. It may apply even to have the organ removed altogether, if such a measure could be shewn to be necessary, or even strongly beneficial for the more important object of enabling the parishioners to attend public worship in the parish church. This faculty binds the parish to nothing. The ordinary merely approves and confirms the erection of this organ by voluntary contributions. This is the doctrine I find laid down in these Courts.

Two cases have occurred within my own recollection—first, the *Margate case* (1 Hagg. Con. 204). There a person offered to present the parish with an organ. The parish, by a resolution of vestry, applied for a faculty to erect it. This was objected to by a few individuals upon the ground that the expence of erecting it would fall upon the parish, and that there was no provision for an organist. But the Court overruled the objection. In that case the question was whether the ordinary should allow an organ to be erected; here the question is whether the faculty **[10]** confirming the erection is erroneous, because a clause of exoneration from future expences is not inserted. The other was the *Clapham case*. In that case the Commissary of Surrey had refused to allow a decree with intimation to issue, because there was no permanent provision for an organist. The Court of Arches, on appeal, reversed the decision, and decreed the faculty without such a clause.(*a*)

I must, then, pronounce against the appeal, because the faculty does nothing to bind the parish. It leaves the matter quite open. It neither lays the burthen on the parish, nor prevents the parish undertaking it hereafter, if the vestry should chuse to support such a burthen in case of the failure of voluntary contributions. I therefore remit the cause with the costs of appeal.

PEARCE AND HUGHES, Churchwardens of Clapham *v.* THE RECTOR, PARISHIONERS, AND INHABITANTS THEREOF. Arches Court, Hilary Term, February 26th, 1830.—It is no sufficient objection to the issuing of a decree with intimation to lead a faculty for erecting an organ in a parish church, that there is no provision for the future repairs, nor for the permanent salary of an organist.—In a parish church an organ cannot legally be erected without a faculty, nor will a faculty be granted without a decree with intimation in order that any of the parishioners may object; on which objection the court, considering all the circumstances of the case, is to decide.

[Referred to, *Burial Board of St. Margaret, Rochester* v. *Thompson*, 1871, L. R. 6 C. P. 456. Followed, *Keet* v. *Smith*, 1875, L. R. 4 Adm. & Ec. 404.]

This was an appeal from the Commissary Court of Surrey, upon the rejection of a motion, made on the 15th of December, 1794, for a decree with intimation to lead a faculty for erecting an organ in the west gallery of the parish church of Clapham.

The application had been made by counsel, stating, first, the act of Parliament (14 Geo. 3, c. 12) under which certain trustees were empowered to make a rate for building a church at **[11]** Clapham, for providing proper ornaments, and, by letting the pews, to pay off whatever debt might be incurred. The act further directed that the surplus fund should be at the discretion of the parish, in vestry assembled, for any parochial purposes. The parish bought an organ and applied for this decree, considering that the further expences of erecting and maintaining the organ might

(*b*) The rental of the parishioners and inhabitants who voted for the erection of the organ amounted to 3145l.

(*a*) See the next case.

properly be defrayed out of this fund; and the trustees consented to such an appropriation; but the Judge of the Commissary Court thought that the act did not empower the trustees to dispose of the fund raised under its provisions in such a manner; and therefore that a decree with such intimation could not go. The application was afterwards renewed and put on a different ground; it was prayed that the parish might be permitted to erect an organ; the salary of the organist and the contingent expences to be provided for by voluntary contributions; but the Judge of the Commissary Court rejected this application, "by reason that no provision had been made or proposed to be made by voluntary subscription for the future repairs of the organ and a permanent salary for the organist, so as to prevent the organ or the organist from becoming a burden to the parish."

Judgment—Sir William Wynne. This was originally an application to the Commissary of Surrey, on behalf of the churchwardens of Clapham, for a decree with intimation against the vicar and inhabitants to shew cause why a faculty should not be granted for **[12]** erecting an organ in the west gallery of Clapham church. The ordinary practice is said to be for a decree of this nature to issue, as other citations and decrees, without motion of counsel; and on the return of the decree the Court has formed its opinion, considering the issuing of the decree as not binding on the Court, even if no one appeared to oppose, but that the Court might look at all the circumstances, and if it thought the application improper, would refuse it. In the present case a different method has been pursued, and I think one that is more regular; because in these decrees an intimation is inserted that if no one appear to shew cause the faculty shall go, which looks like an engagement to grant it, unless an objection be taken. I therefore think it is more proper for the Court to take the objection in the first instance.

Most certainly an organ is not necessary in a parish church for the decent performance of divine worship; therefore the parishioners are not bound to provide an organ: but though it is not necessary, it is extremely decent, proper, and even customary in a parish, such as this, of extent and opulence. Music has always been used in divine worship; therefore the ordinary never would think of discouraging, and never did discourage, an organ, where a parish offered to provide all expences, unless there appeared to the contrary some reason of more consideration than the benefit thence to be derived to their devotion. As, however, such a reason may exist, an organ cannot by the law of this country be erected in a parish church without a faculty; and a faculty is not granted by the or-**[13]**-dinary without a decree and intimation to the parishioners in order that any one may object. But the consent or desire of the parishioners does not bind the ordinary: for the consent may be imprudently given and contrary to the interests of religion. Where a church is too small, as in the case of St. Luke's, Chelsea, which I shall presently notice, there the ordinary never would grant, for the inconvenience is greater than the advantage. These circumstances the ordinary is to take into his consideration when a case is before the Court, either on objection on the part of parishioners, or on application for a decree.

The question is whether there is any ground for refusing a decree in this case. It was at first alleged that a subscription had been made in the parish with which an organ had been bought, and a vestry had been held where it was resolved that the trustees, under the act of parliament for building the church at Clapham, should be applied to for their concurrence to an arrangement by which the further expences, if any, and the salary of an organist, should be defrayed out of the surplus funds raised under that act. An addition to the decree was made stating the matter differently; that at a subsequent vestry it was resolved that the salary of the organist should be paid by voluntary subscription, and that the offer of Mr. Hague, to play the organ for what could be raised, should be accepted.(*a*)

[14] Supposing the question had been raised whether, under the circumstances of

(*a*) The minute of vestry was as follows:—"Mr. Hague having offered to play the organ for whatever sum he should be able to raise by voluntary subscriptions, and also out of the said sum to pay the bellows blower, keep the organ in tune, and defray all the other expences relating to the organ; it was resolved that Mr. Hague's offer be accepted, and that the salary of an organist and the contingent expences relating to the organ be defrayed, not out of the church-rate, but by voluntary subscriptions."

this parish, the expences could be defrayed out of the parochial rates, I think there would be ground for objection. The church-rates in Clapham are, under the act of Parliament, made by trustees in aid of the rent of pews, and other minor funds. They are, therefore, different from a church-rate made by the parishioners, which is for general parish purposes; while this fund is not thus generally applicable. The parishioners seem to have been aware of this; for on the second vestry meeting they agreed to defray the expences of the organ by voluntary contributions, and a person offered to undertake the playing and the keeping of the organ in repair.

Then it appears that such a provision was made that no expence could arise to the parish at present. But the Judge of the Commissary Court refused the decree by reason that no provision was made, or proposed to be made, for the future repairs of the organ, or the permanent salary of an organist, so that no expences might ever come upon the parish. And it is said that he rested on the case of *Randall and Hodson* v. *Collins and Ludlow*, before Sir George Lee in the Arches; known as the *St. Luke's Chelsea case* (Arches, 30th June, 1755). I have ordered the process to be looked up. The case was much litigated. The parties opposing the faculty appeared on behalf of themselves and others, parishioners of **[15]** Chelsea. There was a great opposition in the parish: there were three allegations; a petition, signed by thirty or forty parishioners, alleged that the church was too small for an organ, and that the expence would fall on the parishioners. It appeared that the houses had increased fourfold; that there was not room in the church for one-tenth of the parishioners; and that the church-room would be diminished, not very considerably, but at least nine sittings: they then proceeded to the other ground—that there was no permanent provision; and that, of the subscribers, some were dead and others had left the parish. The Chancellor of London, Dr. Simpson, granted the faculty; but the Dean of the Arches, Sir George Lee, reversed his decree. I have a note in Dr. Simpson's own handwriting:

"The Court thought an organ unnecessary in all churches; and in this it would be inconvenient; for it clearly appeared that the church was too small for the number of inhabitants, and would be made less by taking away several seats to make way for an organ. As to the annual subscriptions, the Court thought them merely nominal; that several of the subscribers were already dead, or removed; and perhaps their successors would not subscribe; but after the organ was set up, by virtue of a faculty, it must be supported, and consequently would become a burthen to the parish: and it appeared to the Court that Dr. Andrew, in 1747, thought an organ prejudicial; for otherwise, though it was set up illegally, he might have granted a faculty to confirm it. Randall and Hodson are parishioners; **[16]** they have a right to oppose; and the Judge thought a faculty ought not to be granted, and therefore reversed the Chancellor of London's decree; but without costs."

There is one part of this decree to which I cannot accede; viz. that after an organ has been set up by faculty that organ must be supported, and consequently would be a burthen. For I do not think that if a faculty has been obtained for an organ, and if, there being no permanent provision for its support, succeeding parishioners should not chuse to take upon themselves the expence, there is any authority to oblige them to have it played upon, especially if a clause be added to the faculty, as is often done, that the expences shall be defrayed by voluntary contributions. What consequence would ensue? that the organ would not be played upon. It might remain in its place unperformed on, and, not being essential to divine service, I think there is no duty or authority in the ordinary to compel the parishioners to contribute. A ring of bells cannot be provided for without expence—as for ropes, tuning, &c. Suppose at one time the parishioners are willing to take upon themselves such expences, and at another time refuse, the ordinary could not compel the parishioners to keep the bells in order, because they are in the steeple. There must be a bell to ring to church, and to toll at funerals: but that is all.

Then the ground that a provision for a permanent salary for an organist is necessary is not founded. Inconvenience would not follow necessarily. But what probability is there, when I consider the circumstances of this case, that the subscriptions should fail? The parishioners **[17]** have subscribed for the purchase of an organ: they have unanimously petitioned for the faculty, meaning at first to put the burthen on themselves by rate, then by voluntary subscription; and a person has offered to take upon himself the playing and the repairs. The probability of a deficiency is

extremely slight: but there is a strong probability or certainty that there will be a sum actually provided by which the expences may be paid. By act of Parliament a certain sum has been borrowed; and the surplus may be applied for the benefit of the parish, as in vestry resolved.

Under these circumstances, with the greatest deference and respect for the Judge of the Commissary Court, and with due attention to the usual practice, I think there is not sufficient ground to refuse the decree.

THE OFFICE OF THE JUDGE PROMOTED BY BENNETT *v.* BONAKER, A.M. Arches Court, Trinity Term, 1st Session, 1829.—In a criminal suit a defensive plea tending to shew the promoter's motives to be malicious or vindictive is admissible, as bearing on the credit of his witnesses and on costs; but it must be specific, and confined to his conduct with reference to the defendant.—A defensive plea in a criminal suit having imputed to the promoter malicious motives, the Court is bound to admit a plea repelling such imputations: and presentments, by the churchwarden and vestry, of the clergyman's misconduct are admissible for such purpose, though not as matters of charge or proof in the original articles.—In a criminal suit against a clergyman of unimpeached moral character—remote charges of omission or irregularity in performing divine service, being shewn generally not to be "without just cause:" more recent charges, being completely rebutted: no neglect of duty being imputed for the two years next before the institution of the suit: the clergyman, as to one charge of misconduct, having erred from mistake; and as to two of the remaining charges (one of which totally misrepresented the fact) having acted properly—the Court pronounced the articles not proved: and, as no fair ground for a suit existed at the time of its institution, dismissed the defendant with his costs.—Length of time, though it may not amount to a bar to a criminal suit, will induce the Court to admit general explanation, instead of requiring a direct contradiction or explanation of each specific fact.—If, in a criminal suit, the charges are clearly proved, unaccompanied by circumstances of reasonable excuse or explanation, the Court, presuming the promoter acts from a sense of duty, will not inquire into his motives: aliter, if the misconduct be not proved; or, even if proved, be sufficiently accounted for.—To constitute in a clergyman criminal neglect of duty requiring censure and correction, there must be neglect without just cause: but unless such cause be shewn, the law will infer its absence.

[Referred to, *Sheppard* v. *Bennett*, 1870, 39 L. J. Ecc. 9.]

The articles in this case being admitted on the 4th Session of Michaelmas Term, 1828 (vol. ii. p. 25), an allegation on the part of the defendant was, on the 1st Session of Trinity Term, 1829, debated. The allegation, in the first instance, consisted of seventeen articles, besides the exhibit of a licence for non-residence; and the purport of the first article was to shew that the population of the parish did not exceed one **[18]** hundred and forty souls, and that the churchwarden, promoting the suit, had proceeded vexatiously and maliciously. It then went on to allege that the defendant had, "at all times from and after his incumbency, comported himself soberly and religiously, and had attentively and correctly discharged his clerical duties as vicar of the parish, save in the instances objected in the articles" (of which the allegation set forth a justification and explanation, as detailed in the judgment), and "that by such his conduct and demeanour he had given general satisfaction to the greater and more respectable part of his parishioners, and procured their esteem and respect, as well as of others, his neighbours." The concluding part of the third and the whole of the fourth article were objected to by the counsel for the promoter. The third article concluded in these terms: "And that the said William Bennett [the promoter] and others of the said persons [farmers and parishioners of Churchhoneybourne] have taken all opportunities to thwart and insult the said Reverend W. B. Bonaker, and to misrepresent his conduct and his motives."

The fourth, after alleging "that the said W. Bennett, the voluntary promoter of the office of the Judge in this cause, was and is in his general character a person of a litigious, quarrelsome, and revengeful disposition and temper, and is so accounted and reported to be by and amongst his neighbours, acquaintance, and others," went on, in substance, to plead "that in January, 1826, having quarrelled with a neighbouring clergyman **[19]** and his curate, he raised and circulated a false and malicious

report in respect to them, and caused the same to be inserted in the *Worcester Journal;* that the statement was utterly unfounded, and that Bennett having made and subscribed an acknowledgment to that effect, the same was published, with his consent, in the newspaper aforesaid."

The Court sustained these objections; and, in respect to the fourth article, observed, that though where a clergyman was proceeded against criminally the Court was bound to give him every latitude of defence, and must allow him to shew that the charges proceeded from vindictive or malicious motives (for this may have a double effect, it may shake the credit otherwise due to the promoter's witnesses and bear materially on the question of costs), yet it was desirable to keep the true issue in view, and that the Court could not enter into the conduct of the promoter in regard to another transaction, and to a different party. The allegation thus reformed was admitted to proof.

Michaelmas Term, 4th Session.—On the 4th Session of Michaelmas Term a responsive allegation, of seven articles, with three exhibits annexed, was offered on the part of the promoter. It counterpleaded the first article of the defendant's allegation, and set forth "that ever since his induction, the misconduct of Mr Bonaker having become the subject of great complaint, several vestry meetings were held for the purpose of taking such misconduct into consideration, and of adopting measures necessary for remedying the same; that on the 30th of May, 1825, a presentment drawn up by Henry Grove, the **[20]** then churchwarden, was signed by ten of the principal parishioners, stating the irregularity in, and neglect of, the performance of divine service, and other misconduct of Mr. Bonaker; that this presentment was given in at the episcopal visitation; that a second presentment (signed by the said Henry Grove), re-stating the misconduct contained in the first presentment and some additional charges, was given in at the visitation held on the 5th of June, 1826; and that further presentments, of the same tenor, were exhibited at visitations on the 30th of October, 1826, 17th of May, 1827, and 9th of June, 1828: that in consequence of an intimation from, and recommendation of, the Bishop of Worcester, it was resolved, at a vestry held in April, 1827, that William Bennett, the then churchwarden, should be authorized to commence the present suit."

The 2d article pleaded the exhibits A and B to be "the presentments of the 5th of June and 30th of October, 1826; and that they had been delivered up by the direction of the bishop, to be produced in this cause; and further, that the other presentments had been lost, or so mislaid that the same could not be produced."

The 3d concluded by pleading "that Mr. Bonaker had not, by reason of any proceedings in respect to tithes, or by reason of having caused a rate to be made for the repairs of the church, become obnoxious to W. Bennett, or to others of the parishioners."

4th. "That the inhabitants of Cowhoneybourne, a village within the parish of Church-**[21]**-honeybourne, were not at any time, during the incumbency of Mr. Bonaker, prevented by floods from attending divine service, as by him falsely pleaded; for that there then was and is a bridle road from the village to the church, which path was and is constantly used, and not at any time rendered impassable."

5th. "That notwithstanding Mr. Bonaker well knew that he had not published the banns of matrimony between William Stanley and Martha Sammons on the 31st of October, 1824, nor performed any divine service in the parish church of Churchhoneybourne on that day, yet he did, with his own hand, make entries in the banns book, kept in and for the said parish, of such banns having been published three times, and therein by mistake inserted the 16th, 23d, and 30th of October as the days on which such banns were published: that, in making such entries, he represented that the banns had been so published on three successive Sundays by himself, notwithstanding in the 15th article of the allegation on his behalf it is pleaded 'that he had engaged Mr. Bloxham to officiate for him on the 31st of October, and that he was prevented from getting to Churchhoneybourne on that day in consequence of the road thereto being rendered impassable by a flood:' that the three entries are in Mr. Bonaker's handwriting; and that the banns book was seen by Joseph Price and others with such entries appearing therein: and that some time afterwards, and whilst the banns book was in Mr. Bonaker's possession, the **[22]** aforesaid days of October were altered by erasure, and the 17th, 24th and 31st substituted, as by a reference to the book, now in Mr. Bonaker's possession, will appear."

6th. Exhibited a (corrected) copy of such entries, certified, by Mr. Bonaker, to be a true copy.

Phillimore and Addams in objection to the allegation. Nearly thirty witnesses have been examined. Several presentments are now pleaded; they should have been the foundation of the charge. In a criminal suit the whole charge ought always to be adduced in the first instance; but here is an attempt, on the part of the promoter, not only to plead the same matter in a different form, but also to introduce new matter. The 22d of the original articles alleged that Mr. Bonaker had given a false certificate in respect to the publication of certain banns; in reply to that charge we pleaded that at the time the certificate was given the defendant had reason to believe that the banns had been duly published. Now a false entry of the banns is set up. We admit that the insertion in the banns book was irregular, but it was done to save time and trouble, and Mr. Bonaker fully expected to be at church on the Sunday after; he was, however, unfortunately prevented by illness.

Per Curiam. There is no reason to suppose that the insertion was made with any fraudulent intent.

The King's advocate and Lushington in support of the allegation.

[23] Per Curiam. The Court, after noticing that this was a criminal suit, and adverting to the general character and dates of the charges, the nature of the defence, and the number of witnesses examined, said it should have been glad to have concluded the cause; but as there had been a species of recrimination against the churchwarden, charging him with proceeding vexatiously and maliciously, and averring that the duties had been performed, it could not with propriety refuse to receive this allegation, nor suspend it, which was only done under extraordinary circumstances. That the Court was bound to allow the promoter to repel the charges of malice, and if the defendant had taken up a more extensive line of defence than necessary, he must abide the consequences that follow. That the first article shewed that the suit was not brought in contravention of the general wishes of the parish, the first presentment being signed by ten principal rate payers, a considerable proportion out of a population of one hundred and forty inhabitants.

It was objected that these presentments should have formed part of the original articles: but the Court was of opinion that, not being admissible as a matter of charge or proof, they were properly not introduced as a part of the original articles: that the Court, in that stage of the proceedings, would, under ordinary circumstances, have presumed that the churchwarden was acting in discharge of his public duties. The defence had alleged that the promoter was acting vexatiously and maliciously; and these [24] presentments the Court was now bound, in justice to the churchwarden, to admit, as repelling the imputations against him, and as possibly bearing materially upon the question of costs. The first and second articles were therefore admissible. The third and fourth articles were also admissible, as directly contradictory and explanatory. To the fifth article, and the exhibit explaining the entry of the banns, the Court had already adverted; the fact charged was undoubtedly an irregularity, and the rejoining plea gave to it a character different from that ascribed to it in the defensive allegation; and was admissible as tending to rebut the imputation of malicious motives in the original charge. On the whole, the Court could not anticipate whether the charges generally were malicious; and though reluctant to allow the case to extend itself, it was bound to admit the allegation.

In Easter Term the cause was argued upon the effect of the evidence and proofs in support of the several pleas.

Judgment—Sir John Nicholl. This suit is brought, under letters of request from the Chancellor of Worcester, by William Bennett, described as a parishioner and churchwarden of Churchhoneybourne, against the [25] Reverend William Baldwin Bonaker, the vicar of that parish, for neglect of duty and other irregularities, and was commenced in 1828, the articles being brought in on the second session of Michaelmas Term in that year.

The heading of the articles sets forth the nature of the offences imputed, and the præsertim is in these terms:—"For neglect of, and irregularity in, the performance of divine offices as vicar of the said parish, and for indecently and irreverently digging the soil or ground of the churchyard and the said parish, and thereby disturbing the bodies of the dead buried therein, and for other irregularities and excesses." The præsertim is always construed as setting forth the nature of the principal charges; the general words as only including subordinate charges ejusdem generis.

This, then, being a criminal suit, must be proceeded in strictly: the charges must

be laid in such a detailed and specific form that the party accused shall have an opportunity of contradicting or explaining them. Innocence is presumed till criminality be proved.

In this case the articles, in their whole number, consisted of twenty-seven; but six or seven of them may be considered rather as articles of form than of charge. The charges may be classed under four heads:—1st. Neglect of performing divine service, either by omission or by irregularity in time; 2d. Refusing to administer private baptism; 3d. Giving a false certificate of the publication of banns; 4th. Digging up graves and disturbing the bodies of the dead.

[26] The four first articles plead the institution of Mr. Bonaker in May, 1817, and the duties which attach to the incumbent. Sixteen articles, from the fifth to the twentieth inclusive, apply to the charges of omission or irregularity in the performance of divine service—the fifth article stating the time at which service was performed before Mr. Bonaker became the vicar; the other fifteen, which immediately succeed, specifying the instances of neglect; and twelve of those fifteen articles contain instances occurring in the winter of 1824-5, that is to say, between the middle of September, 1824, and the middle of April, 1825. The eighteenth article pleads one instance on Good Friday, 1826; the nineteenth, that in one instance, happening in January, 1827, there was no service; the twentieth, that in February, 1827, on two occasions, there was evening instead of morning service: so that the great bulk of the offences of neglect of duty charged are stated to have occurred in the winter of 1824-5. The refusal of private baptism is charged to have been made in February, 1826; the offence respecting the certificate of banns in November, 1824, and the digging up the churchyard in December, 1826, and January, 1827.

When the articles were brought in, it was strongly complained on the part of the defendant, by his counsel, that he was called to answer these charges four years after most of them were alleged to have happened. The Court felt in a considerable degree the justice of that complaint, but was of opinion that it formed no legal bar to the prosecution. All the Court could do was, first, to expect clear proof of the **[27]** charges, it being a criminal suit; and secondly, on the part of the defendant, to allow of general explanation; for, after such a lapse of time, it was hardly possible to produce direct contradiction or distinct explanation of each specific charge of neglect of duty.

The promoter having, in support of these charges, examined thirteen witnesses, the defendant, in the regular course, brought in a defensive allegation. It is not necessary to detail its averments minutely, but it stated generally that Churchhoneybourne was a parish of small population; that the vicarage-house had been dilapidated, and that, till the year 1825, Mr. Bonaker resided at Evesham, with the permission of the bishop, and that he performed the duty faithfully; that he raised his tithes from 30l. or 40l. to 120l., and had suits for their recovery with the farmers; that he caused the church to be repaired, and rates to be made for the purpose; that in consequence of these circumstances the present suit was vindictively instituted. It then went on to account for some irregularities—partly from the difference of clocks, partly from the roads being occasionally inundated, and partly from his own ill health, he being subject to sudden attacks of sore throat and disorders of the trachea. It alleged that, when unable to attend, he always endeavoured to procure the assistance of some other clergyman; and, when time allowed, sent notice to the parishioners. It also, in some instances, offered contradictions or explanations of specific offences charged; not only of these omissions or alterations of the service, but of the other matters alleged against him re-**[28]**-specting the baptism, the certificate of banns, and the digging up of the churchyard.

In support of this defence, fifteen witnesses were examined.

From the nature of this defence it was evident that the character and motives of the prosecution would be involved; namely, whether the promoter was proceeding in discharge of his official duty, or whether the suit was brought vindictively on account of these disputes about tithes and the repairs of the church. This consideration might bear in two ways upon the cause: first, it might assist the Court in forming a more correct estimate of the credit of the witnesses; and, in the next, it might be important in deciding the question of costs—which question, in cases of this sort, forms no immaterial part of the justice of the case. If the misconduct be clearly proved, unaccompanied with circumstances which might afford any probable

excuse or reasonable explanation of the facts, the Court will not inquire into the motives of the promoter, but will give him credit for acting from a sense of official duty. It might, however, turn out otherwise: either that the misconduct was not proved; or, being proved, was sufficiently accounted for; and therefore a responsive allegation was given in by the promoter alleging that the parish had made several presentments at the visitations, setting forth the neglect of duty and other charges, and that these presentments were founded upon resolutions of vestry; that, in consequence of such presentments, the bishop had signified that it was the duty of the parish to proceed against the minister if the charges were true; that no [29] floods had occurred to prevent Mr. Bonaker's attendance, that the certificate of banns was not given through error, and that the banns book had been altered.

On this allegation seven more witnesses were examined, making in the whole thirty-five witnesses. Numerous interrogatories were administered on both sides: the evidence is become very voluminous, and consequently the suit very expensive.

In this state of the subject it is proper to examine, first, whether the criminal charges are proved; and, secondly, how the question of costs is to be disposed of.

On the part of the defendant it has been contended, not only that the charges are not proved to any criminal extent, but that, upon the whole, the defendant has been a meritorious incumbent. It may therefore be necessary to look shortly at the state of the parish before and at the commencement of Mr. Bonaker's incumbency.

Churchhoneybourne is a very small parish on the extreme verge of Worcestershire, about six miles east of Evesham. Cowhoneybourne is a chapelry and a separate parish adjoining, but in a different county and diocese—viz. Gloucester. The constitution of these two parishes is not very clear. Cowhoneybourne pays no tithes to the incumbent of Churchhoneybourne, raises its own separate rates, and seems formerly to have belonged to the monastery of Evesham. The chapel is now in ruins; or, as described in Bacon's Liber Regis, "it is as desecrated and converted into a private dwelling, and now the inhabitants contribute to the re-[30]-pairs of the church at Churchhoneybourne." Whether this is done under some composition, as cheaper than supporting its own chapel, is not in evidence; but the institution does not mention that the chapelry is annexed to Churchhoneybourne; and whether, as it pays no tithes, the cure of souls is strictly and legally in the vicar does not clearly appear: by usage, however, the inhabitants of the chapelry attend public worship at Churchhoneybourne.

The former incumbent, the Reverend Thomas Williams, was also the patron, and is described of Bere Regis, Dorsetshire. His curates in succession were two gentlemen of the name of Mould, father and son, who held the curacy about forty years. Mr. Mould, the son, now sixty-three years of age, has been examined, and states "that during the forty years he and his father served the church he never saw nor heard of the vicar, Mr. Williams, being within the parish." A resident incumbent was therefore an advantage the parish had not possessed for at least forty years before Mr. Bonaker's time. Mr. Mould was offered the living, but he declined to accept it, and Mr. Bonaker, who succeeded Mr. Mould as curate for two or three years, at length, in 1817, accepted the living and became incumbent.

What was the state of the living at that time? First, the church itself was so much out of repair that it required a rate of 11s. in the pound in Churchhoneybourne, and 9s. in the pound in Cowhoneybourne, to repair it, to build a new buttress for the support of the tower, and to make other repairs to the fabric and different parts of the church. Secondly, the vicarage-[31]-house had never, as far as appears, been inhabited even by a curate, and is described as reduced to a dilapidated cottage, let at a rent of about 3l. a year: and the witnesses state, and among others, Mr. Mould, that it was at one time used as a Methodist meeting-house; and, as I understand the evidence, at the time when he was curate: so that there were Methodist meetings even before Mr. Bonaker's incumbency. Mr. Mould, on the first article, thus deposes: "When Mr. Bonaker became vicar, the vicarage-house was a mere dilapidated cottage, and wholly unfit for any clergyman to dwell in: deponent, who was curate to Mr. Williams, the late incumbent and patron, remembers when the vicarage-house was used as a dissenting meeting-house by a very low order of people, and itinerant preachers used to preach at it."

It is laid in the fifth article "that for many years before Mr. Bonaker was instituted the service was performed every Sunday during the winter months at

eleven in the morning, and during the summer months alternately at eleven in the morning and three in the afternoon." No arrangement could be more proper. Eleven was as early an hour perhaps as in this dairy district the families and servants of the farmers could get ready for church; and in the long days of summer alternate evening service was proper as giving a better opportunity to some to attend. But is the article true or false? Was this proper arrangement existing previously as laid in the article, or was it made by Mr. Bonaker? Mr. Mould thus deposes on the fifth article: "He was curate at Churchhoney-**[32]**-bourne twice: the latter time was for about four or five years previous to Mr. Bonaker undertaking the curacy. When deponent undertook the curacy on the latter occasion he was curate of Aston Subedge and Childswickham, and was therefore compelled to make the best arrangement he could for the regular performances of the church service at each of the three churches. With this view deponent on one Sunday began the service at ten at Childswickham, then went to Aston, and afterwards to Churchhoneybourne, and performed the duty there at about half-past two: on the following Sunday he commenced the service at Churchhoneybourne at ten; then went to Aston, and then to Childswickham. Thus he went on through the year. Deponent did not reside in either of the three parishes."

And on the thirty-third interrogatory: "When first he became curate of Churchhoneybourne he continued his father's habit by doing duty constantly in the afternoon, a little after twelve on one Sunday, and at one on the following, and so alternately the year round. He has found the waters out at Churchhoneybourne, so that he could not get over; but he several times persevered, not being a timid rider, and sometimes got through: at other times he got to the church by a circuitous route; but he was then on the Churchhoneybourne side, and could do so, while those at Cowhoneybourne could not get over."

Fletcher, a witness in support of the articles, confirms, in answer to the fifth interrogatory, this part of Mr. Mould's evidence; and says "that Mr. Bonaker fixed the hours and times of **[33]** performing divine service now in use at Churchhoneybourne."

So that up to Mr. Bonaker's incumbency the duty was performed either at ten or at half-past two by a curate serving two other churches and not residing in either of the three parishes: and for many years the evening service, "because it was shorter," was, according to the evidence of Fletcher, alone used by the elder Mr. Mould, and was performed by him about twelve or one o'clock: so that neither the Litany nor the Communion service, nor the Commandments, nor the epistle and gospel of the day were ever read to these parishioners.

Here, then, was a church extremely out of repair requiring the tower to be buttressed up: here was a vicarage-house dilapidated, used as a meeting-house or a cottage: and here was the duty performed in the manner just referred to: and yet there were no complaints: how is that to be accounted for considering the present proceedings?

The parish is in an agricultural district, and consists principally of dairy farms. It seems at one time to have been occupied by four farmers and there may now be five or six. None of them were very rigid religionists—none of them, except one, ever went to the Sacrament—none of them prevented their servants from following their ordinary occupations throughout Good Friday. The fabric of their church or the residence of their minister did not occupy their attention; but there was another circumstance which accompanied this acquiescence. The incumbent resident in Dorsetshire not only did not trouble them with his presence, but he did not trouble **[34]** them about his tithes—he was content to accept about one-third of what was legally his due.

When Mr. Bonaker becomes incumbent, he it is that arranges the time of duty in the proper manner stated in the fifth article: he did not at first reside, but he did the duty himself; nor does it appear that he served any other church; his vicarage-house was dilapidated; his father, an old gentleman who had been in the medical profession, and was in very advanced age, lived at Evesham five or six miles off: Mr. Bonaker, his only child, resided there with him and did the duty from thence. The Bishop of Worcester, in 1818, granted him his licence for non-residence for three years, which was for as long a period in one licence as the statute allows. It does not appear that the bishop made it a condition that Mr. Bonaker should in the mean-

time repair the vicarage-house, and then reside. That licence expired on the 31st of December, 1821; and it should seem, from the bishop's letter in 1822, that Mr. Bonaker applied for a renewal of this licence. The bishop's letter, dated on the 27th of January, 1822, requires the state of the glebe house to be particularized: "The Bishop of Worcester wishes to have the circumstances of the unfitness of the glebe house at Churchhoneybourne specified."

Though no new licence appears to have been granted, the bishop's sufferance is necessarily to be inferred. The bishop, and the bishop alone, had a right to issue a monition, and to call him into residence. Whether he was now required to repair the vicarage, or when the **[35]** vicarage was repaired, does not exactly appear: but it was repaired and made "quite a different place:" and in 1825 the bishop requires him to reside, and he does reside. On the 1st of June, 1825, the bishop writes to Mr. Bonaker: "If you are not resident by the end of this month, I shall proceed for the purpose of enforcing your residence." And again on the 9th of July in the same year: "In answer to two letters from you, I have to state that, in case you are not resident in your house at Churchhoneybourne before the expiration of the week after next, I shall immediately send to you a monition which I have directed to be made out if requisite."

Here, then, the bishop will no longer extend his indulgence. Before this time, however, it is pretty evident John Grove's complaint, sent to Mr. Clifton, the secretary, to be laid before the bishop, had reached his lordship: but I must infer that until that time Mr. Bonaker was residing at Evesham at his father's house, and was doing the duty from thence, by the bishop's sufferance.

It is necessary to see what had happened in the meantime. Mr. Bonaker had not only got the church repaired, but he had raised his tithes, and had been in a state of law and warfare with his parishioners on that subject. The tithes, which before did not produce 40*l.* a year, were now raised to 120*l.* This the vicar had a perfect right to do: the tenth part, or its equivalent, was as much his property as the other nine parts were the property of these farmers, and if they had been allowed to pocket above one half of what legally belonged to the former incum-**[36]**-bent, they had no just grounds nor honest right to resist the future payment of what was legally due to Mr. Bonaker. The Court does not mean to applaud the exacting the utmost penny—far from it: reasonable compromise and fair composition may be much more expedient and proper, but these tithes were not obtained by mutual accommodation. In order to enforce payment, recourse to the law was repeatedly necessary, and great animosity was unfortunately produced. Besides this, it happened one Sunday that Mr. Henry Grove being at church (it should seem that he was churchwarden at the time), and laughing during the sermon, Mr. Bonaker stopped and said "that those who could not conduct themselves properly had better leave the church," upon this Mr. Grove took up his hat and walked out. The circumstance is admitted on the cross-examination of more than one of the promoter's witnesses. Sollis, for instance, on the fifteenth interrogatory, says: "He was present at Churchhoneybourne church about four or five years ago, as he best recollects the time, and Henry Grove was also present. Respondent remembers that Mr. Bonaker, during sermon, as he believes, said 'that those who could not behave themselves decently might leave the church:' he did not name any one, but respondent well recollects that Henry Grove took his hat and immediately walked out of church."

Without entering into further particulars, it is quite manifest from the evidence that the farmers in this parish felt a strong animosity against Mr. Bonaker. They began by making verbal **[37]** complaints at the visitation against Mr. Bonaker for neglect of duty. A cousin of Henry Grove (John Grove), who had been a farmer, who had failed in 1816, left the parish, and returned to keep a school at Cowhoney-bourne in 1823, began a journal in September, 1824, and noting down whenever no service was performed, or whenever it was too early or too late, or whenever there was evening instead of morning service: and he sent an account of this to Mr. Clifton, a proctor at Worcester, who is also, as I have observed, the bishop's secretary, and desired him to lay it before the bishop. In 1825 there were meetings of the farmers; and a presentment was agreed upon, sent round, and signed. This course does not seem to me such as would have been pursued if the real object had been to get the service more regularly performed. No remonstrance appears to have been made to Mr. Bonaker: no notice given him, if he did not attend regularly, or assign some

satisfactory reason in explanation, that John Grove, who as schoolmaster regularly with his boys attended church, would lay the journal, which he kept, before the bishop. The farmers did not call a regular vestry and give Mr. Bonaker notice to attend in order to afford him an opportunity of explaining the cause of his absence or delay: but they held these meetings among themselves, and Mr. Bonaker having once come in, they adjourned the place of meeting to a neighbouring meadow. These parishioners, having been compelled to pay their full tithes, had an undoubted right to expect in return a careful and punctual performance of the service of the church, unless the minister [38] was prevented by reasonable cause: but the course of proceeding seems more calculated to entrap and to punish than really to enforce the performance of clerical duties—more to avenge the past than to correct the future.

At length, in June, 1826, Henry Grove, being then churchwarden, gave in a presentment containing an enumeration of all the charges recorded in John Grove's journal from the 19th of September, 1824, and whatever else could be collected in the way of accusation. That presentment was laid before the bishop of the diocese; and the bishop very properly directed his secretary to inquire into the truth of these charges.

In July, 1826, the secretary went to Churchhoneybourne, and had he been satisfied of the truth of these charges, and that they could be proved, that was the time to have instituted the suit, if that were deemed necessary to enforce more punctuality—more especially as almost all the instances of neglect of duty were suggested to have taken place nearly two years before this investigation. Mr. Bonaker was then, in June, 1826, become a resident incumbent; and if proceedings were not immediately commenced they could only be justly delayed in order to see whether this interference of the diocesan would correct the conduct complained of, or whether the neglect would be persisted in. It will become necessary then for the Court to consider what are the proofs and explanations of those transactions before July, 1826, and what there was subsequently to justify the commencement of the suit two years afterwards. As to the specific facts charged from September, 1824, to [39] March or April, 1825, detailed in articles six to seventeen inclusive, the only witness who pretends to be able to prove them as laid is John Grove, with the assistance of his journal.

Now John Grove, the cousin of Henry Grove, has been so active in collecting this evidence—in applying to the witnesses for a year or two—in attending the commission and being joint agent with Mr. Clifton—that it is hardly possible to designate a more hostile and prejudiced witness; and upon again carefully perusing his evidence I find several circumstances in that evidence which induce me to listen to it with great doubt and caution.

The sixth and eighth articles lay the charges to have been neglect of duty "without just cause:" and to be criminal neglect requiring censure and correction, it must be "without just cause:" but, on the other hand, it is true that if the fact of omission or irregularity be proved, the law will from the fact infer the absence of "just cause" until such a cause be shewn. All that is correct: but then it comes to the question whether the promoter's own witnesses do not upon cross-examination furnish evidence of probable cause. It is difficult to say that, upon reading their evidence alone, there are grounds to pronounce the articles proved, or to pronounce that they do not sufficiently negative that the omissions and irregularities were not "without just cause." If there be a doubt, the defendant in a criminal suit is entitled to the benefit of it, and the Court is never to lose sight of the circumstance that the defendant is called to answer these charges four years after the facts are alleged to have taken place. The witnesses of [40] the promoter admit that Mr. Bonaker is liable to attacks of cold and hoarseness, that the clerk has sometimes been obliged to read the lessons for him, that he could sometimes hardly be heard, that whenever he was wholly prevented, or some other person attended for him, he sent over notice to the clerk or to the churchwarden in order that the fact might be communicated to the parishioners. Even on Good Friday, 1825 (when it is charged in the articles that there was no divine service at Churchhoneybourne), though the farmers made their men work, and only a very few persons probably would, according to the evidence of John Yeamans, have attended the church, Mr. Bonaker was anxious to get the duty done. Thomas Yeamans upon the sixteenth article, on the part of the promoter, says: "He well recollects that on the morning of Good Friday, 1825 (for in that year deponent looked after Mr. Bonaker's nag), he assisted in ringing the bells for morning service at Churchhoneybourne; bells were rung at eight and at nine; and it was expected that service would

begin at eleven. After ringing the bells deponent went to work in the vicarage garden, and while there Mr. Bonaker's servant, in the hearing of deponent, told the parish clerk that there was not to be any service on that day, for that his master could not come from Evesham. The servant also said 'that he had been to the Rev. Mr. Bloxham; but that he (Mr. Bloxham) was not able to come.' Deponent does not recollect that any congregation assembled in church on that day: he believes that the clerk gave notice, by calling at houses, that service would not be perform-[41]-ed." And Mrs. Roper, a witness for the defendant, deposes on the 13th article of his plea "that Mr. Bonaker, the father of the Rev. Mr. Bonaker, was so ill on the Good Friday of 1825 that the Rev. Mr. Bonaker could not and did not leave him; that the old gentleman was 75 years of age, and the Reverend Mr. Bonaker, his only child, remained with his father at his particular desire; but deponent is certain that some one was spoken to to do duty for him, though it might have happened no one could attend. On Good Friday, 1826, he was prevented by his own illness; but, from his regularity and punctuality in all his clerical duties, deponent is quite positive that he had engaged some friend to do his duty for him if any person could be found to do it; and if Mr. Bonaker knew that no person could attend for him, she is certain that he sent word to the clerk or churchwarden to let the parishioners know."

That other clergymen often attended and did the duty for Mr. Bonaker, and that the brooks were liable to be flooded is, I think, clearly proved. Sollis, for example, one of the promoter's own witnesses, in his deposition upon the ninth article, "remembers two Sundays on which there was no service in the morning. One was a very rainy day, and on the other there was a flood," and this evidence he confirms by his answer to the eighth interrogatory.

Robins also, the parish clerk, another of the promoter's witnesses, says, upon the same interrogatory, "that the road is baddish in winter, and sometimes flooded in parts as high as the saddle flaps: the people from Cowhoney-[42]-bourne are sometimes prevented by the floods in the winter from coming to church, but not very often." Yet it is pleaded that the road to the church was never rendered impassable by floods; and John Grove says he was never prevented by floods from taking his boys to church. They also admit that the clocks at Churchhoneybourne were irregularly kept; that there was no parish clock; and that the farmers generally kept their own clocks in advance in order to get their men earlier to work.

Under such circumstances where a clergyman is in ill health, where there are so few clergy that it is necessary to allow the same clergyman to serve two or three churches, is it possible to prevent occasional alterations of the time of service, or occasionally even total omission of duty? All that a minister so circumstanced can do is to send notice, as soon as he can, to his parishioners to obviate disappointment and waiting; and, if possible, to get another clerical friend to do the duty, though it may often happen that he can only obtain that assistance at a different time of the day. Any omission or irregularity should, if possible, be avoided: the service ought to be performed constantly and punctually: but irregularities, arising from reasonable causes and accidents, however to be regretted, are widely different from those which require to be criminally prosecuted, and to be visited with ecclesiastical censures and an expensive suit.

Upon the explanations therefore afforded by the promoter's own witnesses, the wilful negligence seems in a great degree to be negatived: but, upon the evidence of the defendant's wit-[43]-nesses, the charges are still more satisfactorily repelled; not indeed in all instances by direct disproof of each charge—for the charges are too remote to expect a specific contradiction—but by shewing that this clergyman, instead of wilfully, or capriciously, or carelessly omitting his duty, was most anxious for the due performance of it. When he was prevented by illness from going to do his own duty he was most desirous and spared no pains to provide a substitute, and, as I have remarked, to send previously to the clerk to give the parishioners notice of the change of time.

It is no immaterial fact that no imputation is attempted to be made against Mr. Bonaker's moral and religious character. On the contrary his character in those respects is spoken to in high terms by witnesses in no degree mixed up with the feuds of this parish; by Mr. Rudge, the sheriff of the county; Mr. Murrel, a banker at Evesham; by the Reverend Mr. Mould and by others; and by the very fact that so many of his reverend brethren assist him in doing his duty. Upon this part of

the case, without entering into a statement of each particular charge, the promovent appears to me to have failed in establishing omission or irregularity in performing the service "without just cause."

But how stand the charges after July, 1826, when Mr. Clifton had been there by the bishop's desire, and after Mr. Bonaker had become a resident incumbent? Since that time only three circumstances are specified. One is that no service was performed on the 28th January, 1827; the others, that there was service in the evening, instead of morning, on the 4th and 11th of **[44]** February—three successive Sundays in the very severest season of the whole year, and Mr. Bonaker was then resident: this alone renders it probable that Mr. Bonaker was prevented by illness. What, then, is John Grove's own entry? And there is no reason for thinking he would make it more favourable than was the fact: on the 19th article that entry is thus stated: "No service, Mr. Bonaker is ill"—not entering in his journal the illness as a report—as a doubtful fact—but as the fact. He goes on upon the 20th article, "Referring to his journal: '4th February, 1827. Service at two. Reverend Mr. Keysall. On the 11th of the same month. At one o'clock. Reverend Mr. Fowle. Notice from the clerk for one.' Deponent knows that on Saturday evening, the 3d of February, the clerk gave him notice that service would not begin on the following day until two." The performance then of the two services in the afternoon instead of the morning, on the 4th and 11th of February, by two different clergymen, and with due notice given—evidence of itself that there was no wilful neglect nor omission—is a complete acquittal of these later charges. And all the promoter's witnesses admit that for the last two years or more there is no ground of complaint; and the congregations are improved.

Robins, on the 24th article, deposes "that for the last two or three years Mr. Bonaker has been very regular in the performance of service on Sunday at the church: that is to say, after Mr. Clifton enquired about it."

Several others speak to the same effect. Even John Grove admits that Mr. Bonaker **[45]** was more regular: and the absence of entries in his journal, except those already noticed, is conclusive.

That during the former period the congregation was diminished is true: but the farmers had quarrelled and were at war with the incumbent, and they staid away: and their example and influence induced the cottagers to do so. It unfortunately happens that in this little remote parish no person of liberal education is resident—five or six farmers are the heads of the parish; they are unable to avoid mixing up these paltry disputes, about their pecuniary and temporal concerns, with their religious duties; because the clergyman enforces his just dues they absent themselves from church, and the cottagers (and all the cottages in Churchhoneybourne belong to the promoter William Bennett) are employed by the farmers, and they unite. Mr. Hale, one of farmers, did in the earlier stages join in the complaints of neglect of duty: but, upon further enquiry and explanation, and upon Mr. Bonaker having become resident and performing his duty thus regularly, he withdrew from the prosecution, and has given notice that he will oppose the making of any rate for paying the expences. The notice which is produced is dated before the articles were given in.

There does not appear any great inconsistency or want of candour in this course: it is only to be regretted that in 1828, after Mr. Bonaker had, as resident incumbent, been doing his duty properly, these other persons did not give up all thoughts of the present prosecution. **[46]** But, before proceeding to that consideration, it may be proper just to notice the other charges.

In regard to the next subject of charge, the refusal to baptize an infant brought to his house, it seems to me that the conduct of Mr. Bonaker was quite proper. The rubric expressly enjoins "that without great cause and necessity they procure not their children to be baptized at home in their houses." Such is the rubric, which is sanctioned by Act of Parliament; and the canon is to the same effect (see canons 68, 69).

It seems a little extraordinary that this solemn rite which has been retained in the Reformed Church of England, and pronounced to be one of "two only" sacraments, "generally necessary to salvation," should by many serious and well-disposed persons be so lightly treated, that it has become with them a sort of fashion to have their children christened in their houses instead of at church, and that too many of the clergy comply with the practice in the face of the canon and of the rubric. In one or

two populous parishes of this metropolis the ministers have resisted and do resist it. In this parish of Churchhoneybourne a practice had prevailed of having their children half-baptized, and of then bringing three or four together to church to be christened. Robins, on the 12th interrogatory, "recollects that William Grove (not either of the Groves already mentioned, but the brother of John Grove) brought four children of different ages to be baptized at the church: he believes it happened about two years ago."

Mr. Bonaker very properly thought this was a practice to which a stop ought to be put, and **[47]** he gave public notice that it must be discontinued. In February, 1826, Mrs. Caldicott, a farmer's wife, was confined on the 13th; and, on Sunday the 26th (so that there was an intermediate Sunday), thinking the child ill, she sent the nurse with the child to Mr. Bonaker about half an hour before church time requesting he would baptize the child, and desiring the nurse to say that "if Mr. Bonaker wished it, the child should be brought to him at the church." Mr. and Mrs. Caldicott might therefore have provided sponsors, though Mrs. Caldicott might not be sufficiently recovered to have their "merry-making," of which Mr. Mould speaks. The nurse carried the child and delivered the former part of the message. Mr. Bonaker answered "that he could make no distinction of persons, and that unless he could be assured the child was dangerously ill he could not do it: but if they would bring the child to church to be christened he would wait there and do it." This seems to have been quite the correct course. From two circumstances this appears not to have been a case of "great necessity," such as the rubric contemplates: in the first place, it is hardly to be credited that the mother would have sent the child, in the month of February, from Cowhoneybourne to Churchhoneybourne, and have offered that the child should be carried into the cold church if it were dangerously ill: in the next place, here is the fact that the child does live, and is regularly christened some time after by Mr. Mould. Mr. Bonaker appears therefore to have been justified in the refusal, and it ought not to have been made a matter of charge.

[48] The next charge regards the circumstance of banns. The banns between one Stanley of Churchhoneybourne and a female of Long Compton were published on the 17th and 24th of October, 1824. On the 31st of October Mr. Bloxham was to have performed the duty for Mr. Bonaker, who was ill, but he was prevented by a flood: on the 7th of November, however, the banns were published the third time by Mr. Roberts, Mr. Bonaker continuing ill. The 22nd article, after stating that the banns were published on the 17th and 24th of October, goes on thus: "That such banns were not published in the church of Churchhoneybourne on Sunday the 31st of October by you or by any other person, no divine service having been performed in the said church on that day, but that notwithstanding such omission you did write or give and sign a certificate that such banns of matrimony had been duly published in the parish church of Churchhoneybourne as well on the 31st of October as on the two preceding Sundays, and that in consequence of such certificate the said William Stanley and Martha Sammons were married in the parish church of Long Compton on the sixth of November, 1824. And we further article and object that on the next day, being Sunday, the seventh of November, you published the banns of such marriage in the parish church of Churchhoneybourne."

The fact charged, then, is giving this certificate notwithstanding the omission on the 31st of October, and before the third publication of the banns; and himself afterwards publishing the banns a third time. The latter part of the **[49]** charge is directly proved to be false by the promoter's own witness, John Grove. On the 22nd article "deponent perfectly recollects that the Rev. Mr. Roberts, in the course of divine service, which he performed in the church of Churchhoneybourne, in the afternoon of Sunday the seventh of November, 1824, published the banns of marriage for the third time of asking between William Stanley and Martha Sammons."

At all events, then, Mr. Bonaker himself did not publish the banns the third time after giving the certificate. But what are the facts in evidence? On the 4th or 5th of November Stanley called upon a woman of the name of Wells, who frequented Evesham, and begged she would call on Mr. Bonaker and ask for a certificate. This woman could not read nor write. She called on Mr. Bonaker and asked for Stanley's certificate. Mr. Bonaker, who was then ill, supposing the banns had been published a third time on the 31st of October, gave a certificate that the banns had been thrice published. Mr. Clarke, who solemnized the marriage, says, on the 22nd article, that

the document did not purport to be a regular extract from the banns book, but was only a certificate that the banns had been published on three successive Sundays. "The certificate set forth that banns of matrimony between William Stanley and Martha Sammons had, on three successive Sundays, been duly published in the parish church of Churchhoneybourne: he well recollects that such certificate was not, as in strictness it ought to have been, an extract from the banns book, but the same contained a full certificate **[50]** of the publication of the banns, and purported to have been signed by the officiating minister of the parish."

The fact seems plain enough. Mr. Bonaker, not having the banns book at Evesham, but concluding of course that these persons wished to be married in that week (which among this class of persons is the usual time after banns), and being unwilling to delay the marriage, gave the certificate in this general form, really supposing the banns had been published a third time on the preceding Sunday. I can discover no possible reason or inducement on the part of Mr. Bonaker to have given this certificate, knowing or suspecting it to be false. As to the manner in which the publication of the banns is entered or was corrected in the banns book, that is not the offence charged; and, in a criminal suit, the Court cannot go beyond the offence charged; and, in this case, the party has had no opportunity of answering or explaining that circumstance.

The remaining charge, as expressed in the articles, appears of a more serious cast: it is included in the præsertim of the citation and is thus laid in the 23rd article: "That you, W. B. Bonaker, in or about October, November, and December, 1826, and in January, 1827, or in some or one of the said months, did indecently and irreverently, and without any legal licence or faculty for so doing, dig up or cause to be dug up a part of the ground or soil of the churchyard of Churchhoneybourne, and did dig up and level or cause to be dug up and levelled the graves of several persons who had been interred, and in particular the graves **[51]** of [certain specified names], and did take and carry away or cause to be taken and carried away a great quantity of the earth or soil of the churchyard, together with the bones of human bodies buried there, and carried or caused such earth or soil and bones to be taken into your own garden."

If all this were true—not only disturbing the ashes of the dead, but applying them for the use of his own garden—it is a most indecent act. How does the fact turn out? There was a heap of earth lying near one of the gates of the churchyard; and from the circumstance that there were bones among it, this earth was probably dug up and wheeled there when the foundation for the new buttress against the tower was made. There was also in the churchyard a heap of rubbish of lime and stone left after the same operation. The churchwarden, who conducted the repairs, did not so far regard the decent appearance of the churchyard as to remove even the rubbish. A part of the lime and stone was removed by Hale and spread upon the road near the gate. The heap of earth near the gate was close to the path, and, besides being very unsightly, rendered it very inconvenient to bring a hearse or a cart into the churchyard. Now for both these reasons Mr. Bonaker had the whole removed. Then, as to the charge of digging up graves: instead of digging up the graves and disturbing the bodies, he merely levelled the little mounds on the top of the graves, which, though they were almost level with the surface in consequence of the coffins having mouldered, were still inconvenient for **[52]** hearses, and after levelling these he laid down again the same turf. This operation could not possibly disturb any of the bodies buried in these graves.

Again, as to the charge of having removed any bones, even with the heap of earth near the gate: Mr. Bonaker, it seems, was not privy to any such removal: the bones —part at least of them—were collected, as stated by Charles Ashevin, one of the promoter's own witnesses, and were deposited in the churchyard.

Finally, as to the earth being carried into his garden, as it would be inferred, for his own use and benefit. It happens that the public church-path passes through his garden; and the earth was carried there to fill up some holes and pools, and to improve the access to the church for the convenience of the parishioners and inhabitants of Cowhoneybourne who came that way. All the promoter's own witnesses again admit that the churchyard is very much improved in its appearance; and yet out of these facts it is that this serious accusation of "irreverence and indecency" has been framed, charging Mr. Bonaker with digging up graves and carrying away the bones and earth into his own garden: and to support this very charge, Bennett, and John Grove, and

Mr. Clifton, have been hunting up evidence for two years past, as stated by Sollis in his answer to the third interrogatory.

This finishes the examination of the proofs respecting the several criminal charges made against the defendant. It remains to be considered how the important question of costs is to be disposed of.

[53] The Court does not rely upon the opinion of the defendant's witnesses, that the suit is brought vindictively on account of the disputes about tithes. The Court looks to the facts. In July, 1826, when the bishop sent Mr. Clifton to enquire into the truth of the complaints, either the suit should have been brought then, or it should not have been brought at all. Subsequent to that time no circumstances occurred which could justify the institution of a suit in 1828. On the 9th of June in that year the charge is kept up by a new presentment to the bishop of the diocese, suggesting a fresh instance of neglect in January, 1828. This presentment is annexed to the interrogatories addressed to the Bishop of Worcester, and is signed "William Bennett, churchwarden." The presentment begins in the following terms:—"The Rev. Wm. Bonaker has discontinued to reside at Honeybourne for the last seven or eight months, except a day by chance: he neglected to perform divine service at the church on Sunday the 13th of January last, and the congregation were under the mortification of retiring from the church without seeing a minister." Now either this charge was not true, or it could have been satisfactorily answered; for it is not included in the articles of charge, though it is suggested to be a recent act, and the presentment to the bishop himself is just before the commencement of the suit. Mr. Bonaker, accompanied by the churchwarden, waits upon the bishop, offering to explain his conduct and exculpate himself; but the bishop, under the advice of Mr. Clifton, who was then **[54]** with him, declines hearing Mr. Bonaker's exculpation, as a suit was begun.

However, upon such representations, or rather misrepresentations, to the bishop, they endeavour to bring in his lordship's authority to sanction these proceedings. That right reverend and highly respectable prelate gave no sanction, except what was quite correct—if the facts are true and can be established it will be proper to proceed: "provided," says his lordship, "the complaints can be proved." It is also attempted to call in the sanction of vestry: but there was no vestry, or any thing to bind the parish or justify a rate: there was a combination and subscription, as stated by one of the promoter's own witnesses. Fletcher, on the 22nd interrogatory, thus deposes: "He believes that Mr. Corbett, Thomas and William Bennett, three Caldicotts, Mr. Hall, Henry Grove, and respondent's son have all signed a paper which, he believes, was a petition to the bishop against Mr. Bonaker: and among them (every one paying a part) he believes that 30l. was collected to be sent to Mr. Clifton to begin the suit: he supposes as they have begun, they must go on to meet the expence."

Thus it is that the preparation for the suit commences.

What then was the state of the parish in 1828, when the proceedings were begun, if compared with its condition, as already mentioned, in 1817, when the incumbency of Mr. Bonaker takes place? The fabric of the church had been repaired: the churchyard had been rendered **[55]** decent in appearance and convenient for use: the church-path had been restored and the holes filled up: the vicarage-house, from a dilapidated cottage, had been made a fit residence for the incumbent: for the preceding two years the parish had had the advantage of a resident minister, who, at least during that period, had performed the duty at the most convenient hours and without affording any just grounds of complaint: in these respects the state of the parish formed an advantageous contrast to its condition for the preceding forty years. One of the leading parishioners, Mr. Hale, who had joined at first with the other farmers (whose tithes had been raised) in thinking Mr. Bonaker had neglected his duty, had now become so far satisfied, either of his own misapprehension, or of the propriety of forgetting past disputes, as to return to his attendance at the public service, and to accept the office of vicar's churchwarden, and had given a notice protesting against the suit and against a rate to support it: the congregation at church was also improving by a better attendance among the lower classes. If in 1828 the other farmers had followed the example of Mr. Hale, had laid aside animosities, had been content to pay the minister his just dues, they having succeeded on their part in getting a resident incumbent, and the duty regularly performed; if they, and those who could be influenced by their example, had returned to their attendance at the public service, the moral and

religious character of the parish, and the harmony and mutual charities and kindly feelings of the inhabitants and their pastor might [56] have been all that could rationally be expected. Instead of that the present mischievous suit was undertaken, and has been conducted with considerable acrimony and at a heavy, and in some respects unnecessary, expence. The Court is compelled to take all these matters into its consideration. The question of costs forms an important branch of the case. Even if any omissions and irregularities had taken place in 1824 and 1825, and previous to July, 1826, which required explanation (but which explanation, I think, candid enquiry might have obtained without any suit), yet in 1828 it is difficult to discover any fair ground for instituting the present proceedings. Mr. Bennett is the promoter, and he is the party responsible to the defendant: it is to be feared that even the taxed costs may not indemnify the latter for the expences in which he has been involved; still less can any compensation be afforded him for the harassment and anxiety to which he has been exposed by this proceeding.

It really, therefore, does appear to me, upon the most careful and dispassionate consideration I have been able to give the whole evidence, that it would be far short of justice if, in pronouncing the articles not proved and dismissing the defendant, the Court did not accompany that sentence by condemning the promoter in costs.

[57] ROGERS *v.* ROGERS. Arches Court, Trinity Term, 1st Session, 1830.—An allegation, pleading facts to infer connivance as a bar to the husband's prayer for a sentence of separation, by reason of his wife's adultery, rejected, because, as no single fact pleaded necessarily inferred a knowledge of the wife's guilt, nor a suspicion that an adulterous intercourse had been, or was about to be formed; and as the whole, taken together, did not warrant an imputation on the husband of consenting to, or intending, his wife's adultery, his conduct laid in the allegation, even if proved, would not amount to connivance; to constitute which there must be intentional concurrence.—A plea of connivance does not necessarily admit adultery.—Connivance is a bar to a suit for separation, by reason of adultery, on the principle that "volenti non fit injuria."—To constitute connivance, active corruption is not necessary; passive acquiescence, with the intention, and in the expectation that guilt will follow, is sufficient: but, on the other hand, there must be consent, not mere negligence, inattention, confidence, or dullness of apprehension.

This was a suit instituted in the Consistory Court of London, and brought by John Rogers against Mary Ann Rogers, his wife, by reason of her adultery. The libel was admitted without opposition; but an allegation on behalf of the wife, pleading the connivance of the husband, having been rejected, an appeal was prosecuted to this Court. On a former session the admissibility of the allegation was debated by the King's advocate and Phillimore on the part of the husband, and by Addams and Haggard for the wife, and the Court, on this day, proceeded to give its judgment.

Judgment—Sir John Nicholl. This is an appeal from the rejection of an allegation given on behalf of the wife in the Consistory Court of London. The suit was originally brought by the husband for separation on account of the wife's alleged adultery, and the outline of the case, as stated in the libel, is that the parties, being both of age, were married in 1810, cohabited at Ranby in Nottinghamshire till June, 1829, and had several children, but none of whom are living. The adultery is charged to have been committed with Joseph Whitaker, a young man living at Morton Grange in the same neighbourhood. It is stated that the separation took place in consequence of a quarrel, but no adultery nor any indecent familiarities are charged before the separation. On the separation the wife went to [58] Leamington, then to Scarthing Moor in Nottinghamshire, where she met Whitaker; and it is alleged that they afterwards arrived together in London, and, at the service of the citation, were cohabiting together in a state of adultery. That is the sort of case set up by the husband.

On the part of the wife an allegation is offered, not defensive in respect to the adultery after separation, but charging the husband with previous connivance—a defence which does not necessarily admit the charge of any adultery. Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has allowed to take place. Volenti non fit

injuria (*a*)[1] is the principle on which the rule has been founded. Several cases have occurred within my recollection when the wife has been dismissed on that ground, though the adultery has been fully proved against her. *Timmings* v. *Timmings* (infra, p. 76); *Lovering* v. *Lovering* (infra, p. 85). In both these cases the Court held the adultery fully proved, but it held the corrupt connivance of the husband to be likewise clearly established. Allegations pleading connivance have also been admitted in other cases. In *Moorsom* v. *Moorsom* (infra, p. 87) such an allegation was admitted, though the proof of it failed. In *Gilpin* v. *Gilpin* (infra) a similar allegation was also ad-[59]-mitted, as well probably also as in several other cases. In these cases it was held not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife; to induce and encourage her to commit the criminal act. Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the crime; but on the other hand it has always been held that there must be a consent. The injury must be volenti, it must be something more than mere negligence; than mere inattention; than over-confidence; than dullness of apprehension; than mere indifference: it must be intentional concurrence in order to amount to a bar. Thus in *Walker* v. *Walker*, Lord Stowell, after stating that the adultery was fully proved; that the intercourse was for a long time carried on with considerable secrecy, proceeded: "The defence is not a denial of the fact, but that which, if established, is said to be equivalent in law. It is said that the husband connived; but they do not impute active means, but a passive consent. I take the position laid down by Dr. Arnold to be the true doctrine, that passive consent is sufficient; but there must be a consent, an acquiescence of his will; not mere negligence; not too high a confidence, or a misplaced confidence: there must be evidence that he was passively concurrent; that he saw the train laid for the corruption of his wife; that he saw it with pleasure, and gave a degree of passive concurrence to it." (*a*)[2]

[60] So in *Moorsom* v. *Moorsom*, to which I shall presently have occasion to refer more fully, the same learned Judge laid it down: "The first general and simple rule is, if a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit, he must be supposed to see and mean the consequences; but this is not to be too rigorously applied, without making allowance for defective capacity. Dullness of perception, or the like, which exclude intention, is not connivance."

Again, "Though, to bar the husband, there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy."

The evidence to establish connivance can hardly in any case be other than circumstantial: it can seldom happen that the connivance can be proved by one or two broad facts; that two cases of circumstances can exactly coincide in all their features. In the case of *Gilpin* v. *Gilpin*, which was so much pressed in argument, several strong circumstances occurred which are not to be found in the present case, as there are circumstances in the present case which did not occur in that case. There, the husband himself introduced the asserted paramour to his young wife, did every thing in his **[61]** power to promote the intimacy, invited him to visit his wife when he, Gilpin, was from home, requested him to attend her to the rooms at Bath, and, among other circumstances, the fact (strongly relied upon by the Judge in admitting the allegation) of the husband, his wife, and this man walking, one evening, out of Bath

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(*a*)[1] In *Forster* v. *Forster*, 1 Hagg. Con. 146, Sir William Scott says: "A fourth defence is, that he has connived at, encouraged, and promoted his own dishonor; for in that case the general rule of law comes in—'Volenti non fit injuria'—no injury has been done, and therefore there is nothing to redress."

(*a*)[2] Consistory, M. T. 1796.—The Court finally pronounced for the separation, concluding its judgment as follows:—"Walker had no intimation or suspicion of criminality till the discovery in October, though he might suspect that she was not sufficiently guarded: he receives the news with the affliction and distress of an affectionate husband: his conduct was inconsistent with that of a consentient husband; though from humanity he did not discharge her till after her delivery. There is nothing in the evidence which in the least tends to shew that he is not entitled to relief."

to the lodgings of the husband, who remained and slept there, allowing the wife and her gallant to return together to Bath for the night. Even that might have been explained away, but that, and the other circumstances coupled together, amounted, on the whole, to such a case of consent and intention as required the Court to admit the allegation to proof.

It will be proper, then, to examine this allegation in order to see whether, if all the facts detailed in it were proved, the Court must impute to the husband this base conduct of consenting to the wife's criminality. If the facts are equivocal, the presumption is in favour of the absence of intention: it cannot readily be presumed that any husband would act so contrary to the general feelings of mankind as to be a consentient party to his own dishonor: the effect of which would be to leave him legally bound for life to a corrupt and adulterous wife. It is necessary, therefore, to see what are the facts laid, and also to compare them with some cases which have turned upon the same point.

The allegation pleads, in the 1st article, "that the husband treated his wife with great neglect and severity—was morose and penurious and debarred her of suitable society, though she brought him a fortune of 30,000l." These traits of character and conduct do not tend to conni-**[62]**-vance, and indulging her in criminality; they rather point to cruelty. The Court will, however, for the present, take this to be the true character of the husband.

The 2d article pleads "that, in August, 1818, he carried his wife and her sister to Scarborough, left them there with a female servant only, without taking them lodgings." This may shew either that, eight years after marriage, he reposed confidence in or was indulgent to her, or it may shew indifference and neglect: but it could not be with a view to Whitaker, for their acquaintance had not then commenced; "that she there became acquainted with Whitaker, then of the age of eighteen, that she remained there several months, and that the husband only came to visit her once, and then only for two days." This acquaintance then was of her own making. Whitaker was not introduced by her husband—he was a mere youth, while Mrs. Rogers was nearly forty. Whitaker also was a neighbour, and came from the same parish. This latter part of the article develops only traits in the husband of the same character as those in the earlier part, viz. indifference, indulgence, or confidence, but no marks of guilty connivance.

The 3rd article pleads "that after Mrs. Rogers' return home Whitaker visited her; that she was often at her aunt's (till her death in 1827) at Retford, four miles from Ranby, and that Whitaker frequently drove her there in a chaise drawn by his own pony; that Rogers never accompanied her, and refused to buy her a pony."

The 4th article states "that in 1820 she at-**[63]**-tended for three days a sale at Garnston: that Whitaker drove her there in the chaise and remained with her during each day's sale; that they afterwards called at his father's, and drove home late in the evening." In these I can see nothing more than the ordinary civilities which pass between country neighbours. Here was an idle young man, living with his parents, glad to employ his time in escorting a lady about; here was a morose, penurious, indifferent husband glad to save himself trouble and expence, but there was nothing from which to infer bad intentions on the part of Whitaker, nor any ground to suspect, on the part of the husband, that he was consentient to his wife's falling the victim to the attentions of this young man.

The fifth article pleads "that Mrs. Rogers frequently went to the house of Whitaker's father, a mile distant from Ranby: that once, in 1822, Rogers went with his wife when Whitaker's father and mother were from home: that this was his only visit, and that on this occasion Whitaker kissed Mrs. Rogers: that Rogers either was, or pretended to be, out of humour with his wife; but shortly afterwards he became in good spirits, and remained till late in the evening."

Rogers might have many good reasons for not forming an intimacy with Mr. and Mrs. Whitaker, the parents of this young man, especially as Rogers was not willing to allow his wife suitable society, being himself morose and penurious; nor does it appear that the father or mother warned Rogers of the danger of permitting the intercourse between their son and his wife, nor were themselves alarmed at it. As to the kiss, there is no explanation given of what led to it, **[64]** nor the manner of it it might be from some innocent cause and be innocently given, and from the bare manner in which this familiarity is pleaded, it may not perhaps be too much to infer

that such was the case. But, at all events, what did the husband do? This happened in 1821, seven years before the separation; he thought it an unbecoming freedom; he appeared out of humour at it; and the fact is that no other kiss nor any other undue familiarity is alleged to have taken place before the separation.

The 6th and 7th articles plead "that Rogers and his wife took to separate beds in 1822; and, about a year after, to separate apartments, and so continued to live till Mrs. Rogers left the house." "That her first pregnancy occurred in 1823; that the child was currently reported in the neighbourhood of Ranby to be Whitaker's; that after her confinement Whitaker shewed her great attention; adjusted her person and clothes on the sofa, administered her medicines to her in the presence of her husband, and that these attentions were noticed by the servants."

There might be good reasons for this separation: it does not infer crime, nor is it suggested that Whitaker ever slept in the house. If however it is intended to aver that all matrimonial intercourse ceased, and that the child subsequently born was not, and was known by Rogers not to be—what the law presumes it—the child of the husband, the averment should have been direct and pointed, not thus obscure and equivocal; if indeed any such averment could effectually be made, considering the circum-[65]-stances under which the parties were living at, previous and subsequent to the birth of the child, and the apparent treatment of it as legitimate. As to the reports in the neighbourhood, servants are apt enough to set such stories on foot, but it is not alleged that the reports reached the husband so as to require him to put an end to the intimacy; there is nothing to shew that he was aware that her character was suffering. Again, as to adjusting her clothes on the sofa, servants in a family of this kind are pretty much alive to suspicions of this description. These too are attentions which a dull man, a man of obtuse understanding, a morose, indolent, and inattentive man might allow without thinking any harm would ensue: he would only consider them as officious attentions and civilities from this young man—attentions which undoubtedly would not be allowed by a man of refinement, who would not suffer any one to render what he would be so desirous to pay himself: but, from Mr. Rogers' character, he would not be alive to these feelings.

The 8th article alleges "that during the succeeding years Whitaker was much at Ranby; remained there whole days; Rogers encouraged his visits, went out, leaving Whitaker with his wife; that she frequently visited the theatre at Retford accompanied by Whitaker, and returned late at night; of summer evenings walked out together arm in arm; that on some occasions Rogers would accompany them a short distance and then leave them, and that on others, when he saw them approach-[66]-ing, he would turn another way." Now all this might go on without a dull morose husband even suspecting it would lead to mischief: considering their disparity of years, he might not surmise that this lad had any such views—he might regard it as mere innocent society, or might have that confidence in his wife that he could not fancy it would lead to mischief.

The 9th article pleads "that at Worksop market ordinary Whitaker and Rogers dined every week at the same table; that Whitaker went away before Rogers, and was at Rogers' house when the latter returned home." The same observations here apply. Rogers might well suppose that Whitaker had no taste for the enjoyments of Worksop market ordinary, and might prefer going to Mrs. Rogers' house and having his tea there.

The 10th article pleads "that once in 1827, at Rogers' house, Mrs. Rogers and Whitaker had words; that Whitaker left the house in anger—that Rogers urged his wife to follow him to his father's and apologize." If Rogers thought that his wife was rude, what impropriety was there in his urging her to make up the quarrel? This young man was convenient in attending and escorting her; but it does not follow that the husband had suspicions of improper conduct. All this then might be done with perfect propriety; it might, it is true, be part of a plan to seduce his wife; but the facts do not necessarily lead to that conclusion nor amount to what the law calls "intentional consent."

The eleventh article pleads "that several times in the last six years of their cohabitation Mrs. Rogers visited Mr. and Mrs. Volans [67] at York, for months together; that Rogers did not accompany her nor go to see her while there; that Whitaker on one or more occasions visited Mrs. Rogers with the knowledge of Rogers, and accompanied her to the coach: that Whitaker did not visit at Rogers' house during

Mrs. Rogers' absence, but immediately on her return resumed his visits." This shews inattention to his wife on Rogers' part, but it is not surprising that Whitaker did not visit him, for there were no terms of great cordiality between Rogers and Whitaker: and the latter was the friend and acquaintance of Mrs. Rogers, and did not pretend to cultivate Rogers' intimacy on his own account. Besides, it must be remembered that this article details facts spread over six years: she was visiting her friends, and this Rogers might allow without any intention to forward her guilt. Once or oftener in six years Whitaker called upon her there; this is no more than mere common civility. Mr. and Mrs. Volans were not suspicious of any impropriety, otherwise they would have given some hint to the husband. The facts pleaded shew indeed that he was not a very affectionate husband; they may also shew that he had great confidence in his wife; but this is very different from establishing that he intended by such neglect to lead on his wife to a guilty attachment, or that he was corruptly conniving at actual criminality.

The 12th pleads "that upwards of a year before the separation the attentions of Whitaker were the talk of the neighbours and servants." And so they might be, and they might be censorious without any just cause; **[68]** but it is not stated that the husband was informed of their suspicions.

The 13th and 14th articles merely give a different version from that stated in the libel of the immediate cause of the separation. The 13th article recites the fourth article of this libel,(*a*) and in contradiction pleads "that the separation did not take place on account of Rogers' remonstrating because Whitaker had driven Mrs. Rogers from Retford; that Rogers expressed no displeasure thereat; that on the evening of that day Whitaker drank tea and supped with Rogers and his wife, and continued to visit them until Mrs. Rogers left the house."

The 14th pleads "that Mrs. Rogers, before the 30th May, proposed going to Cheltenham with Whitaker's mother: that Rogers had thereupon fixed that his two sisters should visit him during his wife's absence: that after her return from Retford, on the 30th of May, Mrs. Rogers said she was not then going to Cheltenham; that a quarrel ensued, and he **[69]** said 'she might go to Hell if she chose:' that on this she proposed a deed of separation, to which he agreed; that instructions were given to his solicitors at Retford, and were communicated to Rogers; that they came to no final arrangement of terms, but settled that Mrs. Rogers should go to Leamington; that on the sixth of June, 1829, Rogers himself ordered the chaise, and that whilst it was waiting he wrote a letter by her to his seedsman to be left on the road." The arrangement to go with Whitaker's mother, and the visiting at his father's and mother's are pretty strong evidence that no suspicion existed in either quarter that there was anything wrong in the connexion. The grounds of the quarrel are not material. The husband and wife disagree: he uses a very coarse expression: a separation is to take place: and Mrs. Rogers to go to Leamington; but, so far from suspecting her guilt, the husband sends for a chaise and gives her a letter to convey for him.

In the whole of this allegation I do not see any one fact from which the Court can necessarily infer a knowledge of the wife's misconduct, nor even a suspicion that an adulterous intercourse was formed or was about to be formed; nor is the whole taken together sufficient to warrant the Court in imputing to the husband a consent to the wife's dishonour, nor an intention that she should form an illicit connexion, nor even in concluding that adultery had been committed before separation; for none is charged nor admitted, though something of an insinuation of that sort may be intended in **[70]** the articles respecting the separate beds and rooms, and the subsequent birth of a child.

(*a*) The 4th article of the libel pleaded: "That on the 30th of May, 1829, Rogers remonstrated with his wife for suffering herself to be driven home by Whitaker from Retford, and intimated that he (Whitaker) should not come to his house again; whereupon Mrs. Rogers became very angry, and, flying into a passion with her husband, declared that she would no longer live or cohabit with him, and insisted upon a separation. That various differences and altercations having previously taken place between Rogers and his wife, he at length agreed thereto; and instructions were given to a solicitor to prepare a deed of separation; but whilst the same was in preparation, to wit, on the 6th of June last, Mrs. Rogers quitted the house and society of her husband."

Rogers is described as morose, penurious, and unkind; not as an affectionate, attentive husband—warmly attached to his wife. A husband of the former description is not likely to perceive little attentions which would excite the alarm and rouse the jealousy of the latter. The warmer the affection, the more jealous and vigilant and the more likely to take alarm is the person who entertains such affection. Rogers had also been married nearly ten years before the acquaintance began; and he might feel, and must naturally be presumed to feel, full confidence in his wife's chastity, though she might take advantage of the attentions and civilities of this young man, and find it convenient that he should accompany her to different places and give her the amusement of his society, as the husband and wife were not very fond of each other's company. The acquaintance continues for nearly ten years more: yet, as far as appears, no indecent familiarity ever passed either in the presence of the husband or at all. On one occasion there was a kiss: what accidental circumstance might lead to it is not explained; but the husband resented it; he shewed that he thought it too great a freedom; he appeared displeased; and no such freedom, nor any other, is ever again repeated. It is said that their intimacy was the talk among the neighbours and servants; and such scandal often exists without any just foundation—often, at all events, without the husband hearing or suspecting his own dishonour; but it is not suggested that any servant or friend hinted to the **[71]** husband that such reports existed; still less that any facts had taken place which should require his vigilance.

I have already noticed that, to amount to connivance so as to bar the husband, there must be circumstances fixing upon him "intentional concurrence." To shew the degree of proof required by these Courts before such baseness can be imputed to a husband, and before such a heavy grievance can be inflicted upon him as that of remaining fixed with an adulterous wife, I will state the judgments given in two or three cases in which the point has arisen. In *Moorsom* v. *Moorsom*, as already mentioned, the connivance was pleaded and an allegation admitted. The following is the sentence, at the final hearing upon the evidence.

[The Court here read a note of that judgment. Vide infra, p. 105.]

In my opinion the circumstances in that case were infinitely stronger than those imputed to Mr. Rogers: yet the Court would not venture to refuse a separation by pronouncing that there was intentional consent. I may add that no Judge was more alive to any misconduct on the part of the husband than the eminent individual who then presided in the Consistory Court, but he was also cautious in administering justice according to law. In *Crewe* v. *Crewe* adultery was charged: the connivance was not pleaded: the wife did not give any defensive plea, nor even cross-examine the witnesses; there was much the appearance of collusion: and that as well as connivance were suggested in argument. The Judge made several difficulties and post-**[72]**-poned the decision before he finally pronounced sentence.

[The Court read a note of the judgment in *Crewe* v. *Crewe*, vide infra.]

In this case, again, the circumstances are infinitely stronger than those laid in the present allegation: in the latter, the adultery was notoriously going on for four years together; and, in both, during cohabitation. In the present case no adultery is charged nor admitted till after the separation. To support such a case as the present, where no adultery is charged nor admitted during cohabitation, it would require the clearest possible evidence of intention and consent. There is some doubt whether connivance at adultery during cohabitation would be even a bar, in point of law, against a suit for adultery with a different person, long subsequent to separation. I say that there is a doubt, on the authority of my predecessor in the case of *Hodges* v. *Hodges* (p. 118, post).

In this present case during cohabitation there was no adultery; no—not even any indecent familiarity. I do not say that if, during cohabitation, connivance at actual adultery, proximate acts, or even at such gross familiarity as necessarily inferred consent and intention to prostitute his wife, were clearly established, that the husband could not obtain relief because the wife continued, or even commenced, an adulterous intercourse with the same person after separation; that would be a case different from that of *Hodges* v. *Hodges:* but, in the present case, **[73]** my opinion is that the facts are not sufficient to fix any connivance. No defence is offered to the charge of adultery: it is not admitted in her plea, unless, as I have said, it is intended to be admitted by insinuation in the articles respecting the separate beds, and the subsequent pregnancy and birth of a child: but this is so ambiguous that the Court cannot

rely on it. The adultery must be proved. If the husband fails in the proof the wife will be entitled to her dismissal; but if the adultery be proved, then all the circumstances laid in this allegation would not, if they also were proved, establish connivance, and therefore would be no legal bar to a sentence of separation. Whether such a husband, morose, severe, inattentive, negligent, should be entitled to a special legislative interference, dissolving the marriage and enabling him to marry again, is quite a different question, and rests upon very different principles; but his conduct does not amount to a legal bar to a sentence à mensâ et thoro: and therefore, on the grounds stated, thinking the Chancellor of London did right to reject the allegation, I pronounce against the appeal, and remit the cause.

On the 17th of July, 1830, the cause came on in the Consistory Court upon the proofs in support of the libel: when, after adverting briefly to the evidence, the Court signed the sentence of separation.

[74] Note.—As there are no cases in print in which the doctrine of connivance has been the subject of much consideration and discussion, and as the Court of Arches, in the judgment of *Rogers* v. *Rogers*, particularly referred to several manuscript judgments, some cases, illustrative of the principle, are here appended.

RIX *v.* RIX. Arches, 1777.—On proof, either directly or presumptively, of the wife's adultery, great inattention on the part of the husband will not bar him. To establish such a defence he must have been privy to her guilt, or have led her into the crime.

On appeal.

This was a suit brought by the husband against the wife by reason of her adultery, and on the 4th Session of Michaelmas Term, 1776, Dr. John Bettesworth, the Judge of the Consistory Court of London, pronounced that the husband had failed in proof of his libel. There had been no action at common law, and the wife had not given in an allegation. From this sentence the husband appealed.

Judgment—Sir George Hay. It is clear that there has been a criminal conversation between the parties. If the fact is proved, either directly or presumptively, which is the general case, the Court is bound to grant its sentence. Ocular proof is seldom expected; but the proof should be strict, satisfactory, and conclusive. Keeping company with a stranger privately as Mrs. Rix did, there arises from such clandestinity the strongest presumption: and where there are to that clandestinity addi-**[75]**-tional circumstances in proof, the Court can have no doubt. A single witness with circumstances is sufficient in cases of this kind. The man was frequently alone in the lady's bed-chamber; this is a very strong circumstance of criminality: he was more than once seen on her bed: and the witness heard them there conversing after the family were gone to bed. The law presumes what passed, though the witness has declined to mention it. There is evidence of those indicia which in law are proofs—marks of two persons in the bed. The witness says "she has no doubt of the criminal conversation." I cannot find a doubt with respect to the circumstances at Newport. This being the case, superfluous proof is unnecessary.

The difficulty is with respect to the supposed connivance, approbation, and privity of Mr. Rix. If there is a connivance on the part of the man, there is no right to a compensation from the adulterer; nor could the husband obtain a sentence here, though the adultery should be fully proved. This was the case of *Mrs. Cibber.*(*a*) Nottage swears that Rix was a stranger to the journey to Newport. The servant boy gives ground of suspicion by saying "that he believes Mr. Rix knew of it;" and assigns as a reason, "his lying there the night before." Rix and this man were acquainted. The boy swears the husband sometimes knew of this man lying in the house: but is it an inference from thence that he was acquainted with his views? The evidence is directly the contrary. There has been, I think, a great inat-**[76]**-tention in the husband to his family: but is a Court of Justice, on a suspicion of the husband's inattention, to suppose him accessary to the turpitude of his wife?

It would have been better if a suit had been brought against the adulterer at common law: but it would be going too far for me to pronounce, upon a supposition of connivance, without any evidence of the husband's knowledge. The clandestinity as well shews that Rix was not privy, as it shews what were the views of this paramour.

(*a*) See a notice of this case in *Hodges* v. *Hodges*, p. 118, post.

But, whether privy or not, there is no proof that he was. Inattention is not sufficient. I cannot presume privity without proof. If a wife is led into the crime by the husband there is no pretence for a sentence on his side. There is full proof of the wife's criminality; and not the least ground to suspect the husband's connivance. I am of opinion that the sentence below is not justified by the proof.

TIMMINGS *v.* TIMMINGS. Consistory, Hilary Term, 4th Session, 1792.—Great facility in condonation of adultery with A., taking no notice of adultery with B. (of which he could not be ignorant), conduct amounting to an invitation to adultery with C. —not merely to giving free scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt; matrimonial cohabitation, after being in possession of full legal proof of such adultery, are criminal connivance and collusion, barring the husband of relief for his wife's adultery, all happening within two years after marriage.—In a suit for separation by reason of the wife's adultery the husband must prove his case so that his own evidence shall not create a bar, by reason of connivance or compensatio criminum—for of such evidence the wife is entitled to the full benefit.—A facility of condonation of adultery on the part of the husband leads to the inference that he does not duly estimate the injury, and will induce the Court to look with jealousy at his subsequent conduct.—Conduct amounting to an invitation to adultery, and not merely to giving scope to the wife's licentiousness, in order to obtain conclusive evidence of guilt, is legal prostitution.—The wife having committed adultery on the first of three successive nights, and the husband, aware, and having full proof of this, sleeping with her on the second, condones thereby the previous adultery, and cannot take advantage of further adultery on the third night.—Semble, that the husband, by pleading that the wife slept at his house on the night after the last act of adultery charged (of which adultery he was at the time informed), takes on himself the onus of shewing that they did not sleep together on that night—though, generally speaking, the party relying on condonation, as a bar, should plead it.

[Discussed, *Dillon* v. *Dillon*, 1841, 3 Curt. 86. Dissented from, *Gipps* v. *Gipps & Hume*, 1864, 11 H. L. Cas. 1.]

This was a prosecution instituted by the husband against his wife for a separation by reason of adultery. The marriage in 1789 was confessed and proved.

Dr. Nicholl and Dr. Swabey for the husband.

Dr. Laurence and Dr. Crespigny contrà.

[77] *Judgment—Sir William Scott* (*Lord Stowell*). In cases of this nature it is incumbent on the husband to make such strict proof of the fact charged as shall not involve himself or create a legal bar; for if, by evidence which he brings to establish adultery, he at the same time involves and implicates himself, the wife has the full benefit of this evidence, nor can he avail himself of a case in which he does not appear with clean hands.

The parties married in February, 1789. The two earliest acts of adultery are stated in the libel to have happened within the first year; the first at a house of ill fame; the other at the warehouse of the paramour. The only evidence of these are the confessions of the delinquent wife in the presence of her family and of the paramour. In what way the husband discovered or became possessed of this information there is no evidence: it is a desideratum in this cause throughout.

It has been said truly that on confession alone the Court will not build a sentence of separation,(*a*) but although by the rules of law a confession does not satisfy the mind of the Judge, it must satisfy the mind of the husband, particularly when direct and unequivocal, as in the present instance. And what is his behaviour upon it? His mother, in an interrogatory, says "he wished his wife to go from him—but on the intercession of friends he consented to live with her." This then is a direct condo-**[78]**-nation; and on these facts, even if supported by evidence, no sentence could be built.

But the facility manifested in this condonation will make the Court attentive to his conduct. A husband, if the matter is not divulged, may, from tenderness to his family, to himself, or to his wife, be induced not to complain to a Court of Justice—

(*a*) See *Williams* v. *Williams*, 1 Hagg. Con. 304; *Mortimer* v. *Mortimer*, 2 ibid. 315. *Crewe* v. *Crewe*, infra.

upon strong reasons to believe the repentance of his wife. But here were no strong inducements; the affair is passed over slightly. This part of the case is extremely barren of all information, except that he did consent to live with her again. This fact will lead me to watch his conduct, because to me he appears not to estimate the injury as he ought.

The next act is with a second person; and it is pleaded that she renewed her acquaintance with him, whom, as well as the other paramour, she had known before marriage, that they several times committed adultery, and one day in November went together to a house of ill fame. Another act is laid at the husband's house, on 16th December, 1790, in his absence. The account of the maid servant Gibbs shews a strong habit of criminal intimacy between these persons. She was the carrier of notes and messages between them. She says he very frequently came to her house; and, excepting twice, in the husband's absence. The wife told Gibbs that he would take care of her if her husband and she should part, and that he had been her sweetheart before marriage. Gibbs also speaks to familiarities and other circumstances which leave no doubt of a criminal intercourse between those parties at the husband's house.

[79] But a fact deposed to by another witness is decisive; she plainly saw, from the street, an act of adultery between these parties, the window shutter being scarcely closed. The Court cannot abstain from remarking how slight the caution, and how little the reserve, observed upon this occasion, in order to keep her conduct from the knowledge of her husband. Usually, indeed, a husband is the last man acquainted with his own dishonor, as, in general, caution and secrecy are observed. But where a criminal correspondence is carried on in this open and shameless manner, when the fact is absolutely done "in triviis," it cannot be supposed to have been altogether unknown to him. The only evidence, however, is that he had acquired a knowledge of it by the end of January, 1791. His mother, indeed, knew it on the 12th of January; and it is most highly improbable to have travelled to the knowledge of the mother (whom he appears to have consulted on other occasions) without arriving also to the knowledge of the son. I cannot force my mind to the belief that he was the only person unacquainted with this matter: but it is the defect of this cause throughout that it does not appear when or how he first received information of the different facts.

However, the most material charges are with Smith. And how is this affair stated in the libel, and how does it come out in the evidence? In the libel it is stated "that Smith was received as an acquaintance in Timmings' house; but in the latter end of 1790, Timmings, becoming dissatisfied with his conduct, remonstrated with him and forbad him the [80] house, and his wife to receive him; notwithstanding which she frequently received his visits unknown to the husband: and in the evenings of the 10th and 12th January she did so and committed adultery with him."

Now the very contrary appears in evidence. He spoke to Gibbs about these visits six weeks before the 10th January, but there is no proof that he took any steps to prevent them.

Two facts of adultery are pleaded—one in the 12th, the other in the 13th article. I shall take the 13th first, which is, that in the afternoon of the 12th January, 1791, Timmings went to Greenwich, and his wife, having given Smith intelligence of his absence, invited him to supper. The first witness, Gillett, does prove an act of adultery on this evening as laid in the libel. I cannot help observing that this witness, by the manner he states his evidence, leads me to suspect that something has been intentionally kept from the Court: he says, by communication from Gibbs, he suspected all was not going on right, and he determined to watch their conduct; and for this purpose bored holes: he states no previous knowledge of his own; only suspicions; and he is not produced to speak to the 12th article. Now when I look into the depositions of the other witness, Montford, I see Gillett was on the spot, and had the same opportunity of ascertaining by positive proof the whole business on the night of the 10th of January.

Montford says that on the 10th, Gillett came to him, as he understood by his master's order, and desired him to go with him to watch the conduct of Mrs. Timmings and Smith; and that [81] they arrived together at the house between eight and nine o'clock. Gillett then, having been also sent to observe the criminal facts that passed on that occasion, why was he not produced to speak to them? I can see no good reason: and the Court cannot help feeling for the circumstance of having evidence

denied it which the case properly afforded. Montford says that on the 10th, whether Mr. Timmings was apprised or not he does not know, but when he went he saw him in the warehouse. Can I possibly suppose him to have been a total stranger to the scene which was going on? but from the evidence of Gibbs I find he not only knew of it, but was active and, as I think, illegally active in it.

It must be remembered that the husband has pleaded in the libel that he had forbidden Smith his house; yet Gibbs says there was scarce an evening in which Smith did not come to the house. But what happened on the evening of the 10th of January? Smith, in the wife's absence, drinks tea with Timmings, and on her return sups with them. The husband then goes out and leaves them together for some time, during which they commit adultery: he returns, and they continue all together some time after. Is this proper conduct towards a man of whom he entertained strong suspicions, and whom he had forbidden his house?

True it is that a husband is not barred by a mere permission of opportunity for adultery; nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of **[82]** the wife take its full scope: but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution. The analogy, as to theft, in the passage cited from Sanchez, shews this doctrine: (*a*) and it was solidly established in a case determined in the Arches, on the last session,(*b*) and in all cases of this kind.

[83] But the matter does not stand there. The doctrine laid down might apply if the husband had broken in on their criminal pleasures and had said, I only availed myself of that opportunity to obtain full and complete evidence. But how did he comport himself the day after, on the spot, in the neighbourhood, and when apprized of her guilt? This does not rest on presumption; it is proved by the evidence of Montford—that he had full information of what passed between them. At this time, supposing it perfectly lawful to have used means to obtain the discovery, what use did he make of it? For if he is once in possession of a fact of adultery, and still continues his cohabitation, it proves connivance, collusion and facility. Did he apply to the law?

(*a*) "Viro suspicanti adulterium uxoris licitum est illam observare, cum testibus idoneis, ut eam possit de adulterio convincere. Quoniam id non est ejus peccato connivere, sed uti ejus malitiâ ad proprium commodum. Secundo, quia aliud est rogare, consulere, vel jubere malum, quod nunquam licet, et aliud permittere seu non auferre mali occasionem, quod aliquando licet ob aliquod majus bonum. Nimirum non peccare parentes vel heros qui filiis vel famulis non auferunt aliquam furandi occasionem cum eos ad furandum propensos norunt, ut sic in furto deprehensi resipiscant"—Sanchez de Matrimonio, lib. 10, Disp. 12, No. 52.

(*b*) Arches, Hilary Term, 4th Session, 1792.—The case referred to was a suit for separation by reason of the wife's adultery with a servant. In February, 1791, the man was discharged by the husband; for what reason did not appear. There was nothing to shew that the husband suspected any thing till the 10th of April, when a servant told his master of his suspicions: the husband set three witnesses to watch the man's lodgings in the neighbourhood. On the 18th, 22d, and 25th April two of these witnesses there saw what left in their minds no doubt of adultery. On the 25th it was agreed she should be exposed, and the room was immediately entered.

The Court—Sir W. Wynne—said that "the only remark that arose on the man's dismissal was, that the husband could not be charged with laying a trap for his wife; if he had wished to do that he would have continued him: that up to that time the facts proved no act of adultery, but a criminal inclination in the strongest degree: that in its apprehension the case came strictly within the authority of *Eliot and Eliot* (Arches, 1776. See 1 Hagg. Con. 302), where the parties went to a house of ill fame together. Here was a bed-room let to a man who had been her menial servant, and with whom she had before been shewn to have been too familiar; and the lady went backwards and forwards to it, and was locked up there with him, and permitted him to take gross liberties with her person, and other familiarities. That on the whole there was a complete and legal proof of criminality, and that the husband was entitled to a separation."

Note.—The above summary is taken from a long manuscript note, which does not notice the point referred to in the text as established by the facts of the case.

On the 12th another fact happened, to which a great deal of evidence applies, shewing, I think, that he was well apprized of the intended interview; and that he was posted there at nine o'clock. But, if the husband here stood clear, his conduct on the 11th would have defeated him of his remedy. He cohabited with his wife that night it is agreed; and he is not to avail himself of this subsequent discovery, having re-[84]-mitted the other. It has been said there is no condonation of this fact in proof, nor any thing to shew that he slept with her on the night of the 12th; and that if condonation is relied upon it should be put in plea, for that it is not incumbent upon the complaining party to prove there was no condonation (see *Durant* v. *Durant*, vol. i. p. 733, 751).

To this as a general doctrine I assent; but I think in this case, where it is alleged in the libel that she did not leave his house till the 13th, it is necessary the complainant should shew that they did not cohabit on the 12th by sleeping together: he has taken an onus upon him, which, in ordinary cases, does not lie on the complaining party.

There is another circumstance strong to the disadvantage of Timmings. Gibbs, the profligate instrument of the wife—the active go-between—in all her criminal transactions, still lives in his service, and, as appears by an interrogatory, in full as great a state of familiarity as is necessary between a servant and her master.

On the whole, the husband is criminally implicated in these facts. Corrupt as she has been, he is equally corrupt; he encouraged her guilt by criminal connivance and collusion. Such a man is not the object of the attention of the law. I dismiss her, not because the husband has not proved her guilt, but because he has proved himself utterly unworthy of legal relief.

[85] LOVERING *v.* LOVERING. Consistory, 16th July, 1792.—Where the wife made no defence to a suit for divorce by reason of her adultery, the Court dismissed the suit, on the ground that the husband, having connived at his wife's adultery with A., could not complain of an adultery, nearly cotemporary, with B.

This was a suit of adultery brought by the husband against the wife, and was heard ex-parte.

Judgment—Sir William Scott (*Lord Stowell*). No appearance, no plea, no interrogatory has been given on the part of the wife. Very few witnesses have been examined. The Court is left with as bare information as possible. However, there is absolute proof of adultery, and a course of shameless profligacy. The wife had a strong attachment to the apprentice, which she took no pains to conceal; it was known and talked of in the family: her bell used to ring for him ten times a day: it was a common joke in the workshop where the brother of the plaintiff was present: he did not imagine her guilty, though other witnesses speak of their behaviour as leading to a different conclusion. It is by no means probable that this partiality should remain an entire secret from the husband: there was a forwardness, as if this woman wished to obtrude it on notice; but the case does not rest on probabilities; for in the libel the husband states that in May, 1790, he had himself observed great and indecent familiarities between his wife and this apprentice.

It is said that the husband might forgive; and yet has a right to avail himself of further misconduct. The husband may be induced to remit on many grounds, from motives of com-[86]-passion—remains of tenderness—remembrance of past endearments—regard for common offspring: he may, on such grounds, on promise of amendment and reasonable prospect of it—forgive. But there was no such promise here; he says "he did not forgive; but withdrew himself from her bed."

Condonation and connivance are very different: and I must look a little at his conduct to see whether it can be set down to legal connivance. There is one circumstance here which distinguishes this husband's conduct from proper condonation, and marks an improper consent. If he were induced to forgive his wife, yet when he sees an indecent familiarity with his own apprentice, would he suffer the man to remain one moment in his house? This is impossible to reconcile with a due care of his own honor. If he had pardoned his wife after 1790, and discharged his servant, there would have been nothing in the condonation. The act of his permitting him to continue in his house, after he knew of great and indecent familiarities, and till she is guilty with another, amounts almost to consent; and is a degree of delinquency which renders him unworthy of a remedy as far as that man is concerned. The husband pleads that he left the bed of his wife: his own witnesses prove the contrary: they prove that

he slept with his wife a few days before the separation, after knowing of all these indecencies. I have a right to presume that the husband was not ignorant or averse to the sort of intercourse that was going on. There is however proved criminality with another man, nearly cotemporary.

[87] The case then comes almost to this. Can a man, consenting to adultery with A., but not consenting to adultery with B., take advantage of that adultery, and say to the Ecclesiastical Court, "Non omnibus dormio." This is language not to be endured. The Ecclesiastical Court requires two things—that a man shall come with pure hands himself, and shall have exacted a due purity on the part of his wife: and if he has relaxed with one man he has no right to complain of another. I think, in this case, the husband is not entitled to relief, having consented to the turpitude of his wife. I dismiss the suit.

MOORSOM *v.* MOORSOM. Consistory, Trinity Term, 4th Session, 1792.—The notoriously debauched character of the paramour, his exclusion from all respectable female society, the introduction of him by the husband to his wife, the encouragement of their intimacy, the allowing her to accept a supply of money from him, expostulations from her family at such intimacy, the refusal of the husband to attend to them, and improper familiarities and liberties in his presence, and without his remonstrance, are material facts in a plea of connivance.—In a suit for separation by reason of the wife's adultery, connivance on the part of the husband may be pleaded by the wife, consistently with a denial of her guilt.—Indifference, ill behaviour, or cruelty is not pleadable in answer to a charge of adultery, nor relevant to a plea of connivance.—As a plea of connivance must generally be circumstantial and consist of many facts, trifling when taken separately, but altogether convincing, the Court must allow a latitude in such a defence.—It is not necessary to shew connivance at actual adultery. The Court, from connivance at improper familiarity, will infer corrupt intent as to the result.—Much delay having occurred in the wife's defence, a plea of minute facts to establish connivance having been admitted, and the cause now standing "to propound all facts," an allegation of the wife, not responsive, but pleading more minutely, but to the same effect as in the former plea, rejected in toto; the facts not being noviter perventa.—The whole substantive case of a party should be at once brought before the Court; but where it is clearly shewn that the facts could not have been sooner pleaded, additional articles may be given in.—To establish connivance as a bar, it is not sufficient that the man did not act as a wise or prudent or attentive man, nor that he in fact contributed to his wife's guilt: he must be shewn, intentionally, to contribute thereto: there must be intentional permission or corrupt facility.—Passive connivance is as much a bar as active conspiracy, but there must be an intention that guilt should ensue.

[Referred to, *Symons* v. *Symons*, [1897] P. 174.]

A libel, pleading adultery in the wife, having been admitted to proof, a defensive allegation was given in, which, after reciting that part of the libel which alleged that the wife left her husband's house without his knowledge, and went off with C., pleaded, 1st, *coolness and cruelty on the husband's part; that she late in the evening and when it was dark quitted the house with her husband's knowledge, and with the intent to go to her father's; that though the husband saw her going, he did not prevent nor accompany her, nor send a servant with her; and that since she quitted she has been living with her father.*

[88] 2d. *That Moorsom had become less attentive since his marriage; and did not attend his wife to parties; but allowed C. to accompany her.*

3d. That C. was gay, lewd, and debauched, and his general character so notorious that no married man in his neighbourhood would permit him to visit or associate with the females of his family; that his character was well known to M. long before and since his marriage; that M. introduced him to his wife, to whom he was a perfect stranger; that at his house he would make excuse for absenting himself and leaving them alone together for a long period; that finding them together on his return, he would express no displeasure; that he encouraged him to continue his visits, and permitted his wife to accompany him to assemblies, and to dance with him there, and to go out in his carriage with him, *and that she received from him presents of fruit and game directed to her.*

4th. That M. paid no attention to the remonstrances of his friends, who forewarned

him of the probable consequences of this intimacy; that he continued to connive at it; that his wife's parents repeatedly told him "they feared their daughter's reputation would suffer in the eyes of the world from his countenancing the visits of C., who was known to be a man of gallantry and intrigue, and of very loose and abandoned character, and that his neighbours were very much astonished thereat, and made many remarks upon his suffering the same;" that he generally replied, very much out of temper, "that he would not affront his best customer by desiring him to make his visits less [89] frequent, or putting any restraint upon the conduct of his wife towards him." That notwithstanding such remonstrances he still continued to countenance and permit C. to visit and keep company with his wife, though M. seldom or never returned the visits or appeared on habits of intimacy with him.

5th. That C. would sit close with his arms round the waist of Mrs. M. while at the harpsicord, and put himself into amorous attitudes with, and kiss and toy with, her, and use other modes of dalliance, and take very great and unbecoming liberties with her; that M., though present, or at other times surprizing them in such situations, did not remonstrate with C. or rebuke his wife.

6th. *That from the insufficiency of her allowance for her private expences she was necessarily and continually incurring bills, and under the necessity of applying to various persons for money to discharge them, and* from time to time did accept of, and was liberally supplied with, money and other presents from C., which was well known to and permitted by her husband.(*a*)

Dr. Nicholl in objection. The Court, in a suit of this nature, looks with jealousy on the pleas of the wife, because it is her interest to keep the cause open: for alimony is received by her while the cause lasts, and she is in no danger of expence. Of the various sorts of defence, as recrimination, malicious desertion, condonation, and the like, connivance is the least favourable, because it is a tacit acknowledgment of guilt, and therefore [90] cannot be set up together with an exculpatory plea. The libel pleads a verdict with damages 3500l.: this is no proof of the wife's guilt, but a defence of connivance is most commonly used in an action against the adulterer. If the fact be so, it is not to be supposed but it would have been set up as a defence to the action: I do not argue that this is a proof that there has not been connivance, or that because it was not set up by the adulterer the wife is barred from such a plea, but the Court will be induced to observe it narrowly, and not to admit any thing not so strictly laid as to bar a sentence. [The objections taken to the 1st, 2nd, and 6th articles were to the same effect as appear in the Court's sentence.] C.'s character was its own antidote, and every woman of virtue, as Moorsom at the time supposed his wife, would have been put on her guard by it. His answer to her mother's remonstrances amounted to no more than an expression of confidence in his wife, or might be made to prevent a plan for his discovery being interrupted by premature interference. Of the facts pleaded in the fifth article there is no specification of time; no person is alleged to be present—how are they to be proved? No remonstrance from her to her husband, or to her own friends, respecting his inattention is pleaded. The whole of the facts are too slight to operate as a defence. If a husband is suspicious of his wife, the conduct which he follows, in order to detect her guilt, wears necessarily the appearance of connivance.

Dr. Battine and Dr. Laurence contrà.

[91] Per Curiam. This is a defensive allegation brought in by the wife in a prosecution for her adultery. This defence comes in a late period. The circumstances, however, explain the reason; but if I admit it, I shall expect diligence in the proof. A negative issue was at first given to the libel, pleading an elopement from the residence of the husband, to London and different places, at each of which it laid facts of adultery.

This allegation in part pleads connivance; and it has been said that such a plea is not consistent with a denial of facts; but I think it possible that a denial may be given, and yet connivance be pleaded at the same time. Undoubtedly, if the wife admit in one part of the defence a fact, or even a proximate act of adultery, it is not open to her to say in another part that she is not guilty; but it is competent to her to say there may have been suspicious appearances, though I deny criminality, and those appearances into which I have been betrayed have occurred by the contrivance

(*a*) The parts of the plea printed in italics were not admitted.

of my husband, or have been produced by an insidious project on his part; but I have not completed his intention: as, in a case of recrimination, the party may deny her own guilt, but at the same time say that even if she had been guilty, yet the conduct of her husband was a bar to his prayer.

It is said that a verdict having been given with such large damages, the Court will regard the plea of connivance with jealousy, as this defence was not set up at common law, or at least not established. The eternal answer is, a verdict is "res **[92]** inter alios acta." (*a*) Whatever defence the adulterer set up, or declined, is nothing to the wife. It will not conclude her. On what facts the jury determined, whether the circumstances of connivance were brought forward, is out of the view of this Court. The wife's defence must be independent of that, though the fact may a little awaken the jealousy of the Court: but it will do no more. She avers the facts of the allegation to be true, and so at present they must be taken to be.

This allegation is of two parts—the one pleading connivance; the other, miscellaneous matter. This latter part is open to the objections made by counsel. The first article negatives none of the material facts in the libel. That she quitted him from his coolness is no justification. Indifference, ill behaviour, or cruelty is not pleadable in a suit for adultery. It will not justify her criminal misconduct. The only fact negatived is that she quitted him without his knowledge: and it is now pleaded that she quitted him with the intention of going to her father's, and that he did not oppose it nor accompany her. This will not affect his claim for relief. If he did not attend her, it may be incivility or not, according to his circumstances. It pleads she has since lived with her father; but it does not say that she went there directly, nor has continued there ever since; nor does it appear how soon her intention was diverted; on this there is an entire silence. The fact negatived is immaterial, and **[93]** I shall not put the husband to the expence of a contradiction by plea.

The second article is also immaterial; it pleads that he was a more attentive and polite lover than husband; that he did not attend her to places of amusement. That a tradesman should so attend his wife is not perhaps much to be expected. The fact of his allowing her to go with C. appears sufficiently in another article. I therefore reject the two first articles.

The sixth article is also liable to objections. The parsimony of the husband depends on his discretion and circumstances, and the Court cannot take on itself to judge in such matters. That she accepted money and presents from C. is of importance, but it may be added to the third article. It would be a striking circumstance if he knew she was in the habit of receiving money from this man. As to his allowance to her for pocket-money, I cannot inquire into it; and but little advantage could be drawn from it if I knew it. It is sufficient that with his consent she was supplied with money by C. I therefore direct this fact to be added to the third, and reject the remainder of the sixth article.

A plea of connivance must for the most part, in its own nature, be circumstantial, and consist of many facts, trifling perhaps when taken separately, but altogether making a case calculated to affect the judgment of the Court. That the husband entertains such a design must be a matter of inference, for it can hardly be supposed that a man who frames a project of the kind against the honor of his wife will avow it, or betray his purpose by any single **[94]** broad unequivocal act. The Court then must admit a latitude in such a defence.

The third article pleads very material facts. If the husband is so very imprudent as to recommend to the society of his wife a man excluded by others, it goes further than carelessness, and lays a foundation for the belief of the design imputed. If the husband had such a design he would not introduce a virtuous man as his accomplice, but just such an one as C. It has been said that C.'s character was the antidote; in the same way it might be said that if he carried her to a brothel and told her the character of the house, it was a sufficient caution. He should remember the dangers of seduction and the infirmities of human nature; and it is his duty to give to his wife the benefit of his prudence and protection: his practice of leaving her alone with a man of such a character is not to be explained upon the ground of a virtuous and proper confidence; nor his permitting him to conduct her to, or dance with her at, assemblies, without expressing displeasure; this and the other behaviour is not justifi-

(*a*) Vide infra, 107, and *Hoar* v. *Hoar*, infra. Also, upon this subject, see *Elwes* v. *Elwes*, 1 Hagg. Con. 289, in notis. *Loveden* v. *Loveden*, 2 ibid. 51.

able on the part of the husband; it may lead to that interpretation on which the wife relies. The conclusion of this article is slight—"that she received from him presents of fruit and game." This stands on a different ground from the supply of money. Presents of fruit and game are not of the same import; they pass as common acts of civility.

The fourth is extremely stringent. Her family taking alarm at the intimacy, and his refusal to attend to their remonstrances on the impropriety of her conduct, go a great way to impress a sus-[95]-picion of his criminal design; and to shew connivance. It is argued that his refusal may be no more than an expression of confidence in the virtue of his wife, or that he might wish for an opportunity of discovery. If he had shewn alarm and said, "I will avail myself of your communications and watch her conduct," this might be a sufficient answer; but if, on the contrary, he said—what is here laid—"that he would not affront his best customer by laying a restriction on his wife's conduct," this is most important.

The fifth, it is said, will be difficult of proof: but there is undoubtedly a possibility of proof: and if it can be shewn that improper familiarities from a very debauched man passed in his actual sight without his interference, it would give reason to believe that the husband was not averse to greater familiarity: but I shall defer delivering judgment on their effect till I see how they turn out in proof.

It is not necessary to prove connivance to actual adultery, any more than it is necessary on the other side to prove an actual and specific fact of adultery. If a system of connivance at the improper familiarity, almost amounting to proximate acts, be established, I shall infer a corrupt intention as to the result, and shall not call for more direct proof.

Hilary Term, 1st Session, 1793.—A responsive allegation on the part of the husband, admitted without opposition, in substance pleaded: 1st. That C. was visited by all respectable people; was married and had four children; that he was looked upon as a man of honor; was a man of pleasing manners [96] and conversation; had parties at his house which were attended by ladies of good character, and that other ladies, besides Mrs. M., accompanied him in his carriage; that M. was very domestic, seldom from his wife, except on business; was a tender and indulgent husband, that her brother was a great friend of C.; and another brother, a great friend of C.'s son; that C. was forty and a good customer to M.; that M. sometimes went to the assemblies with his wife, and at all other times sat up till her return; that she always went in a chair and had a servant to attend her; that C. presided at the assemblies, walked out and danced with other ladies.

2d. That C. and Moorsom were on terms of great intimacy and friendship, and Moorsom constantly returned his visits.

Easter Term, 1st Session.—On the first session of Easter Term, 1793, a further defensive allegation on the part of the wife was given, consisting of two articles; and pleading, more minutely and circumstantially, acts of undue familiarity and improper assiduity on the part of C., in the presence, or to the knowledge, of Moorsom: and also that the conduct of the three parties was matter of general notoriety, observation, and conversation.

The admission of this allegation was opposed.

Per Curiam. In this case the libel was admitted on the 3d Session of Trinity Term, 1791. No answer was [97] given till the second session of Michaelmas Term: on the first session of Easter Term, 1792, publication was prayed, and to propound all facts: and on the second session an allegation was asserted for the wife; it was not debated till the third session of Trinity Term, and was admitted on the fourth. That allegation pleaded many circumstances composing the defence of the wife—to the effect that her conduct was occasioned by the corrupt encouragement of her husband. She did not thereby admit the fact of adultery, for she gave a negative issue; she only asserted that, if the fact had been true, the husband, under such circumstances, was not entitled to a divorce. That allegation was very minute and particular, and on that ground parts of it were rejected. The rejoining allegation by the husband was not debated. A commission for the examination of witnesses has been returned. The cause stands "to propound all facts," and now another allegation of the wife is brought in, not responsive to the husband's allegation, but pleading circumstances, some almost the same as those in her former plea, others of the same nature. It is the duty of the Court to compel parties to bring the whole of their substantive case before the Court

at once, where it is possible, which is not always the case; for the knowledge of facts, or the proof by which the facts are to be supported, may not always be in the power of the party, and then additional articles may be given in; but it must clearly appear to the Court that they could not have been given in before: a contrary practice would be extremely oppres-[98]-sive, especially where one party pays all the expences on both sides.

It is said that the facts pleaded generally in the former plea are more specifically and circumstantially stated here. This is of itself an objection. If the party is to plead facts, then to split and make them minute, where will the matter end? When a party states facts, he ought to be required to state the circumstances, and is not to be allowed to state them separately. The wife had a year to consider of and prepare her defence. The facts, which almost every one happened to herself and in her own presence, must have been known to her; and she had abundant opportunities for making all necessary inquiries as to—and, from the nature of the facts pleaded, she must have known—the means of proving them. If, being in possession of the facts, she did not prepare her defence, the husband is not to bear the inconvenience.

They pleaded in the first allegation that C. often went out in the chaise with Mrs. Moorsom: here they plead that when Moorsom was with them in the chaise familiarities passed; and that Moorsom used to get out, leaving them in the chaise alone together. Now of this fact the wife must have been in possession: and as to the excuse, that inquiries were not made with success for the evidence necessary to establish it, this, considering the great stake at issue, was great negligence, from the effect of which the Court cannot relieve her. They might have stated this in the former articles. The same observation applies to the other familiarities, those at the assembly for instance: they had before pleaded that C. accompanied her to, and [99] danced with her at, assemblies; and now they plead Moorsom's conduct after: that after C. had danced with her they would all three retire into a private room, where Moorsom left them together. This was not secret; it might have been proved by many persons: the party must have known the fact, and that she could prove it.

Some of the circumstances are such as would come out under the articles of the former allegation, and in that allegation more general words might have been added. The objection to the former was that it was too particular. The second article pleads that Moorsom's conduct was matter of notoriety in the town: she must have known of the existence of this, and of the means of proof at the time of giving in the former allegation; for that a matter of such universal publicity should be a secret to the party before is incredible. Then as to the remonstrance from Moorsom's mother to C.'s mother on this intimacy, it is not pleaded that the husband was privy to it; if it could affect him, they might have pleaded it before, when they alleged that the familiarities were observed by the friends, and that remonstrances were made; but the fact is insignificant: considering that the effect of this allegation is to increase the stringency of her own facts, it would be very improper to admit it at this late period, for the party should bring forward the whole of her substantive defence at first, or shew that she could not. The contrary is manifestly the case here. The party might before have pleaded the whole in general words. If facts are now excluded, it arises by her own negligence. On the important considerations of the injury that [100] the admission of this allegation, by increasing delay and expences, will inflict on the husband's character and fortune, I reject it in toto.

1st July, 1793.—The case now came on for the final hearing.

Dr. Nicholl and Dr. Swabey for the husband. The libel pleads the marriage on 22d June, 1785, Moorsom being then twenty-six years of age, and Mrs. Moorsom seventeen. On the 10th January, 1791, she left her husband's house without his knowledge and eloped with C.; went to North Allerton; arrived there at four in the morning; she desired the chambermaid to make only one bed, which was prepared in a single-bedded room; she went to bed; he went up; door was locked; parties slept together. Next day went to Grantham; slept together: on 15th January arrived in London, stayed a week there, passing for and cohabiting as man and wife. Verdict, damages 3500l. Ten witnesses; marriage confessed; exhibit proved.

1st witness—a friend of C. who borrowed from him clothes and a trunk—saw Mrs. M. in chaise; came to prevail on C. to leave her and return to his wife; placed Mrs. M. under care of a brother-in-law. 2nd. Driver of chaise knew both parties; drove them to North Allerton. 3rd. The chambermaid at North Allerton proves

arrival, sleeping together; did not know them; told by post-boy not husband and wife. 4th. The chambermaid at Grantham proves their sleeping together; positive as to identity; gives **[101]** no reason, but explained by the attorney of Moorsom, who shewed C. and Mrs. M. to the last witness, who recognized them. Three others prove their sleeping together in London, and her going by name of C.: these were examined on the trial at common law: no doubt of identity.

On responsive allegation fifteen witnesses were examined, and on the rejoining allegation five. 1st. Mrs. M.'s mother—That C. was addicted to gallantry; believes M. must have known it; has twice seen her daughter in C.'s phaeton; daughter received a toothpick-case and knife; nothing clandestine; no evidence that he supplied her with money. Witness often expressed her surprise that C. should be so much at the house; once said "feared daughter's character would be injured." M. said, "Would you have me affront my best customer." It appears her objection to M.'s acquaintance with C. was because the latter was expensive and of superior fortune. Mrs. M.'s custom was to spend Saturday evening with her father and mother; once was late; her excuse, that she was detained by a visit from C., and under these circumstances the objection was made. 2nd. Mrs. M.'s father proves the long acquaintance of M. with C. 3rd. A maid-servant to M.—C. often came; stayed there; M. would go out; C. drove mistress out in phaeton; made her presents of fruit, &c.; sat close to her; squeezed and kissed her hand; scraped her nails; and kissed her hand in presence of M. 3rd. A man servant to C.—Danced with her; arm round her waist at harpsichord; M. sometimes reading; one evening, at parting, C. kissed her in **[102]** presence of deponent and M.; gave her meat off his own plate with his fork when dining by waterside. 4th. Another maid-servant to M.—M. left them together; and went into counting-house. 5th. A third maid-servant to M.—M. left them together; went out in phaeton together; M.'s child sometimes with them. 6th. This witness, of the age of sixty-seven, would not have trusted his wife for an hour with C.; M. might not have known his general character. 7th and 8th. Two other witnesses—Went together in phaeton; walked arm in arm. 9th. A clergyman—From notoriety of C.'s character thinks it impossible but M. must have known it. 10th. Another witness—Was sent with a present of peas. 11th. M.'s father—Met C. coming out two days before elopement; said "too often there; was an expensive man." 12th. M.'s nursery-maid—C. came two or three times a day on business; asked first for M.; when there, M. would retire into counting-house only on business; walked out together; went together to assemblies; believes M. had no bad opinion of C., or would not have permitted this.

The ground-work of the charge on the husband is the notoriously bad character of C., that no one with a wife or daughter would admit him into their house: but, on the rejoining plea, five witnesses of respectable character prove the facts as pleaded, that C. was held a man of honor, that there was no report of C. being forbid any house, and that M. was a tender and indulgent husband; one witness says he had no reason to suppose that M. thought C. a man of debauched character; and all depose that they think M. was incapa-**[103]**-ble of conniving at improper conduct in his wife. The only fact referred to appears on interrogatory, that C. had, eighteen years before, had connexion with some woman. One gentleman deposes that he would not have hesitated to trust his wife with C.; does not believe M. had the least suspicion of the elopement; that when M. was first told he was so much affected that witness did not expect he would have lived; he scarcely ate or drank for two days.

This is the substance of evidence. Adultery is fully proved. The defence, containing serious accusations on the husband, is unfounded. Character of C. not such as to excite fear of any husband; his bad repute unknown to M.; an old and intimate acquaintance of M. Nothing happened which should induce him to interfere in his wife's acquaintance with a man whom he considered as a most intimate friend. What is connivance? Perhaps, from the expression in Sanchez, "vir qui uxorem prostituit," (*a*) one might be led to think it necessary that the husband should be active: but we admit that if he is passive it is sufficient; he must however be conusant and guilty. The Court will consider likewise the habits and manners of life of the parties and of the place where they live: there is less reserve in the country and among people in a middling situation than in town, and in the superior ranks. It must be shewn that

(*a*) Sanchez de Matrimonio, lib. 10, Disp. 5, No. 3, 4.

he knew and wilfully lay by and permitted the crime. The intention of the husband may be proved by facts: but they must be unequivocal facts; there must be shewn such [104] familiarities and approximations as could leave no doubt, or at least must raise a suspicion in the husband.

The question is whether such facts were known to M., as, considering the relative situation, &c. of the parties, might and did excite alarm in the husband. The charge here depends on C.'s being a man of so notorious character as to be excluded from decent houses; all that is suggested on the interrogatories is a connexion with some young woman, eighteen years before, prior to his marriage; no similar charge since. The familiarities were of a nature that would not alarm in the country, and in the situation of these parties. There was nothing clandestine; all was done openly before the servants: they were not surprized by them. There is nothing in the character of the husband leading to this suspicion: he was a domestic, tender, and indulgent husband. What inducement could there be to such a man? he was almost distracted at hearing of the elopement.

Dr. Battine and Dr. Laurence contrà. One clergyman had a bad opinion of C.; had heard was excluded from one house in the neighbourhood: deponent would not have admitted him if he had a wife; M. must have known his character from notoriety. Mrs. M.'s father and mother—that C. always considered as addicted to gallantry; M. must have known it as always residing in the same place. The witness of the age of sixty-seven—that C. had a general bad character as to women. Several witnesses—that [105] no doubt M. must have known C.'s character. Another witness—that few ladies kept company with him without losing their character. Two servants—C. visited often in same day; M. retired and played on a flute; that M. finding C. staid several hours, shewed no displeasure. One witness says they walked together hand in hand; M. present. Presents are proved, and remonstrances are pleaded. Many parts of rejoining allegation not proved. M. was told of the elopement at an early hour, yet did not pursue. On the whole, M., when he introduced C. to his wife, knew his general character, admitted his frequent visits; familiarities and indecencies passed in his presence; he allowed her to receive presents from him; her conduct excited attention and remonstrances; he refused to interfere. Husband has no right to sentence.

The Court took time to deliberate.

9th November.—*Judgment—Sir William Scott* (*Lord Stowell*). This suit is brought by Richard Moorsom against his wife for a separation by reason of her adultery. The marriage is confessed and proved. The adultery is proved and almost confessed. A negative issue has been given, but the allegation, on behalf of the wife, is not an assertion of innocence: it rests her defence on that which indirectly admits the truth of the husband's plea, the defensive allegation charging connivance on the part of the husband.

It is not necessary to state the evidence of the adultery further than that C., the party charged to have eloped in 1791 with Mrs. Moorsom, is proved to have so done. The chaise-[106]-driver, who knows both C. and Mrs. Moorsom, says the same. The chambermaid at the inn proves that the persons brought by him slept together in the same room: she did not know them, but is told by the post-boy that they were not husband and wife. The chambermaid at another inn proves that they slept together: she is positive as to their identity: and it appears, from the evidence of the attorney, that this witness has since seen both C. and this lady, and recognized them. Three other witnesses also speak to these parties sleeping together and going by the name of C. There is also a verdict giving 3500l. damages. On this evidence there is no doubt of the guilt nor of the identity.

The defence which, in law and reason, is as available to the party as the fullest contradiction of fact is—that the husband himself was the author and accomplice of the crime; that he has practised a train of conduct which led to her guilt, and which he foresaw and intended should lead to it; that he is therefore not the object of relief which the law gives to the innocent only. The conduct then upon which the wife relies for her defence is of a passive and permissive kind, to be proved therefore by circumstances. Active conspiracy appears in overt acts, but unless there are declarations to establish it, connivance must in general depend on circumstances, and is to be gathered from a train of conduct which the Court is to interpret as well as it can.

The first general and simple rule is, if a man sees what a reasonable man could not see without alarm; if he sees what a reasonable man could not permit, he must be supposed to see [107] and mean the consequences; but this is not to be too rigorously applied without making allowance for defective capacity: dulness of perception, or the like, which exclude intention, is not connivance; there must be intention. The presumption of law is against connivance; and if the facts can be accounted for without supposition of intention, the Court will incline to that construction. Undoubtedly there have been some persons who have conspired against the virtue of their wives to gain a separation, and (experience has proved) have even connived without such an object: but either of them is contrary to the usual conduct and disposition of mankind; and the Court is to presume according to general rules of conduct. However, though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy; he would be particeps criminis.

The expression of the books, of a man prostituting his wife, is too strong, but the rule is "volenti non fit injuria;" that is the true principle: active or passive, the husband is not the object of legal relief.

The verdict giving such large damages, it is forcibly contended, rebuts the argument of connivance; for it shews either that no such defence was attempted, or that it was not proved. It has been often observed that a verdict to the disadvantage of the husband is strong, because he is a party to both proceedings, and therefore such a verdict will operate in other courts: but a verdict against the adulterer is slight evidence against the wife, who is no party to the action, and who has no control in the conduct of it. At [108] the time of the trial she is often at variance with the adulterer: he may have good reasons not to set up a defence which she may sustain. The defence of connivance is hazardous where the action is for damages, for it is to be proved by circumstances, and if it should fail, it will inflame the damages. Here part of the wife's defence is that C. is a man of debauched life; but he could not set up the turpitude of his own character. Possibly, or probably, he was not in possession of a material part of the evidence, which has been much relied on—a conversation between the mother of Mrs. Moorsom and the husband. It was natural that she would step forward to the aid of her daughter's character, which she would not do to protect C. from high damages. On all these considerations, I am satisfied that it was impossible this defence could be submitted to the King's Bench; it was impossible that such damages could have been given on the evidence now before this Court. I shall not suffer my mind to be influenced by the damages.

The marriage of these parties was in 1785. As far as appears, there was no disparity of condition or age, no seeds of dissatisfaction; they had one child, and lived, as far as appears, on terms of general amity. The contrary is not pleaded. An interrogatory has been put whether he was an affectionate husband; but the witnesses are such as do not know much of the parties. This interrogatory is not put to the witnesses upon the second allegation, who might know. Mercer says that, as far as he saw, Moorsom was an affectionate husband. He pleads that he was affectionate, and the [109] witnesses support it as far as they speak. I may therefore set off with this—that there was nothing in the general state of Moorsom's affections towards his wife that would lay a ground of suspicion that his conduct was such as to tempt her to part with her honor, or that he would consent to her pollution with a view of getting rid of her.

The defensive allegation pleads that C. is notoriously a man of very debauched life, and of such a character that no man of credit would suffer him to visit the females of his family; that his character, both before and after his marriage, was known to Moorsom; and that he first introduced him to his wife. As to the private morals of C., I have no curiosity nor right to inquire; but I have a right to inquire into his character, because it involves the intentions of others; and I am compelled to say that before this he did labour under the ill opinion of many of his neighbours as a man of unrestrained life. I do not advert to the blind account of a fact which happened before his marriage, and so long ago that, even if it were better proved, the man might be considered as emendatus moribus; but I advert to the depositions given by many witnesses as to his conduct and reputation at a late period. It is by no means true that the witnesses do not speak to conduct after marriage. One in particular says, C. was reported to have been connected with a variety of women

since his marriage: others confirm this account, and the contrary is not pleaded: the responsive allegation only pleading that he was a man of pleasant manners, but these are frequently associated with very free morals. I may there-**[110]**-fore consider it as a fact proved that C. was regarded in his own neighbourhood as a man of free conduct; but that he was so notoriously profligate as to be shunned by all decent people, and to be the terror of fathers and husbands, is not only not proved, but is contradicted. Some speak to reports which others never heard: some say that they would not admit him into their houses; others, as respectable, speak to the contrary; and that some persons in the neighbourhood cultivated his acquaintance, and lived on the same social terms of intimacy with him as Moorsom did. He was certainly, therefore, not a person of that marked character that a husband could not introduce him to his wife without putting her virtue to the proof. More cautious persons might exclude him, but the general reception of him in many families acquits any one individual of a criminal design in admitting him to their domestic circle. No doubt his character was known to Moorsom. In a capital a man may hide such a character, but in a provincial town that is next to impossible. Here both were brought up in the same town and street. C. was a magistrate, a married man; Moorsom must have known the general opinion that C. was a man of free conduct; but that his conduct was so flagitious as for him not to be received, he did not see, for it was not the fact; he saw he was well received. Then I cannot impute an ill design to him in admitting him into his house. C.'s first introduction to Moorsom's house happened thus: Moorsom had dined in company with C., and brought him to tea. This shews no evil design in the original introduction. Is there any thing in the history **[111]** which follows inferring that such a design was taken up afterwards? I must always carry with me that Moorsom started without suspicion, for he was without ill design: if he had originally entertained a suspicion, there must have been an ill design: and whether his suspicion was afterwards excited is a material inquiry. A violent intimacy was struck up, which lasted two years and more—great attentions and assiduity, marked by particular circumstances of gallantry, as appears, passing from C. to Mrs. Moorsom. C. was in the habit of buying his timber of Moorsom. I cannot help thinking that Moorsom had reason enough to consider that the intimacy and constant visits were not all on account of the timber, nor all on account of himself. They were very different men in their characters and tempers. Moorsom was reserved and attentive to business; C. was gay and a lively companion; he was not likely to be attracted by Moorsom's society; and, judging from the frequency and length of his visits, he must have spent such time with Mrs. Moorsom, and paid such such attentions to her that I cannot admire the quickness of Moorsom's apprehension.

It was said that Moorsom had confidence in his friend. I do not mean to say that a man is to disturb the common intercourse of social life by jealousy; but manly confidence is consistent with caution, and does not exclude the use of reasonable discretion: the wife was free enough in her manners generally, the man was gay: the appearance of the thing was ungraceful, and the intercourse was likely to produce one great harm —the discredit of his wife's reputation. It has been said that it was strange **[112]** he should be alarmed when no one else was alarmed: but the contrary is proved: her mother was alarmed, other persons were alarmed. A lady, one of his own witnesses, heard it spoken of in different companies with surprize. It is proved out of C.'s own mouth: for he told his friend he supposed he had heard the reports about him and Mrs. Moorson. It was said that the husband was the last to hear; and so he is in ordinary cases; because in ordinary cases he is the last who sees; for caution is observed before him; but here all passed before him; he had the same data and materials for judgment as others. Then he did not see what others saw, or, if he did, he approved and tolerated; and was content that the effects should follow. That he did see appears not only from a variety of facts in his presence; and in his responsive allegation there is a contradiction to two of the articles, but none to the third, stating acts of amorous dalliance passing in his presence.

I decline entering into a particular discussion of the acts of freedom, chiefly because the effect produced on my judgment is not produced by them as detached facts, but as being in connection. When detached, some are improprieties or indelicacies; others not much so; others not at all. Put the question on each distinct fact, and it may not amount to much; but that is not the way of considering the case. I take the whole together; I consider them as a train of assiduities and marked attention—as

conduct distinguishing the gallantries of one man to one woman—as making a system of behaviour from him to this one woman which differs from his **[113]** conduct to others. Other facts are to be connected with these which, if put in a detached way, do not consist with perfect propriety, as a habit of squeezing her hands, kissing them, and holding them in his before her husband—not walking out arm in arm only, but her hand in his, and sitting with his arm round her waist. It is not too much to say that a husband who sees this is sufficiently indulgent of the person of his wife to another. It was said that manners are different in the country; there persons are not so particular: but these parties are not in the lower rank of life, they are not villagers who can set up the simplicity of rustic manners. The manners of the town in which these parties resided seem to correspond with those of any other town. The opinion of the place appears from the evidence of a respectable gentleman, who had considerable confidence in C.; but who, on an interrogatory put to him whether if he had seen certain specified liberties he would have suffered them, answers, if he had seen such, and such are proved to have been taken with Mrs. Moorsom before her husband, he would not have permitted them. I presume that the same would have been the answer of every other person of character in the place.

Another class of facts is Moorsom's frequent retirement, leaving his wife in the sole company of this man, and giving them an opportunity of private conversation. It has been said, is there any harm in this? but it is to be taken in connection with the other facts. The fact which alarms me most is the conversation between Moorsom and his mother-in-law; for though if **[114]** it were once established that there was blind, unsuspecting confidence in Moorsom, and not corrupt facility, the law would not refuse him relief; yet it is strange confidence to hold out against admonitions coming from so grave a quarter; moreover, he returned an answer, very improper, and as near as can be, shewing an extreme indifference to the consequences. It is pleaded that the mother remonstrated frequently; and I think it is so proved: but the counsel say it was merely a remark of surprise from the mother at C.'s associating on such familiar terms with persons of inferior fortune and station, not a remonstrance with her daughter on the too great intimacy she kept up with him; but it appears that the remark was made in consequence of his paying much attention to her daughter. The terms used are not mentioned; they must, however, have borne relation to the too great attention. The mother once used this expression, "If no other harm happened, her daughter's reputation would suffer:" and Moorsom's answer was, "His best customer must not be affronted."

It is said, why were these remonstrances not followed up? How could they? I must confess Moorsom's answer gave no great encouragement to a repetition of them. Every thing substantial was said. No special pleader could have drawn up a fitter remonstrance, which, coming from the mother of his wife, could not fail to awaken the sensibility of any husband. It does lay open his conduct to this interpretation, that he put the timber in one scale and his wife in another, and was willing that the timber should preponderate. But the most fa-**[115]**-vorable interpretation is, "I have such confidence in my wife and in my friend that I fear no real mischief, and for the mere opinion of the world I will not lose my best customer." In this interpretation of the reply I do not commend either the discretion or delicacy of it; it at best shews that he was not attentive to the character of his wife, but it does not go the length of shewing that there was intentional permission or corrupt facility.

It is said the elopement is in favour of Moorsom; since, if the parties could gratify their passion at home, there would be no necessity for their elopement. But the answer is, if the parties had formed a criminal attachment they would be uneasy; the one, at living with her husband; the other, with his wife: they would elope to emancipate themselves from this restraint, and not to indulge a criminal passion hitherto ungratified; and I say this the rather, because it is proved to me that opportunities of criminal gratification were not wanting; this is not to be controverted. I cannot therefore admit the conclusion that no criminal intercourse had taken place before the elopement. Another circumstance is Moorsom's extreme grief and concern at his wife's elopement, which could not be affected, and is proved to have been vehement: he was much shocked at her infidelity. But it does not appear to me that this inference follows. The sort of criminality which would attach on Moorsom, if the evidence be taken unfavourably, is not that he had a design to get rid of his wife, but that he was willing to make advantage of C. as a lucrative customer, and to purchase this at any

rate; he did not wish for [116] a separation as long as he had his wife and customer; and therefore though he was easy whilst this intercourse continued, yet the elopement made him feel different: the sweets of the connexion were gone, and nothing but the disgrace remained. These feelings would be aggravated by the reflection that his own conduct had contributed to this result; and the opinion that the world would form upon it might much shock him: the expression of the witness who states the extreme concern is, "that Moorsom was very much surprized at the elopement," which, in the point of view that I have taken, is consistent with a knowledge of their previous guilt. On the other hand I must not omit the presumptions in favor of Moorsom: the familiarities were not clandestine: the freedoms were not taken by stealth; they were the conduct of a man of bold and familiar manners, whose actions would not bear the same interpretation as those of other men. Another presumption in his favor is that the connivance of Moorsom was too much public and unguarded to be insidious; for nothing was more likely to provoke the defence which has been set up.

These are the facts and presumptions upon which the Court is called to decide. I have considered them more at large, because I must confess I have at different times felt some fluctuation of opinion. On the one side, here is an unhappy woman who has not met with that care and protection from her husband which she had a right to expect. On the other hand, there were facts that passed in his presence which ought to have alarmed a reasonable man: and Moorsom is not proved to have been deficient [117] in that degree of capacity. But considering, as I am willing to consider, his conduct as the result of unsuspecting confidence, yet he shuts his eyes after they were opened by other persons—after the remonstrance of his mother-in-law with an answer which must ever recur to my mind, "I must not affront my best customer."

In pronouncing for a separation I feel that I shall tolerate a negligent inattention to marital duty; and that I shall pronounce a decree which will not lead to the peace and honor of families, nor to the purity of private life, to which this Court always attends. On the other side, there are facts of adultery which are grossly and palpably proved, combated by presumptions which the Court is to found by inference, on particular facts, and which very possibly the Court, not knowing the husband's feelings, may misinterpret to his disadvantage; and, attributing to intention what is merely the result of dulness of apprehension, injure him by a refusal of relief. But the Court must decide. If the question were whether Moorsom acted as a prudent, a wise, or an attentive man, the result would be unfavorable: if it were a question whether in fact he contributed to the disgrace of his family, the answer would again be unfavorable; but the question is whether he contributed with a corrupt intention: and, on a consideration of the evidence, I do not think myself judicially warranted to pronounce that he did so; I am bound to pronounce judicially, and I accordingly do pronounce that he is entitled to his separation.

[118] HODGES *v.* HODGES. Arches, 26th February, 1795.—The husband having proved the wife's adulterous connexion with one individual, five years after separation, of which connexion two children were born, the Court held that the husband's knowledge of, and consent to, gross indelicacies, or even adultery, with three other persons, during cohabitation, would not bar him.

This was a suit for separation, by reason of the adultery of the wife with one individual during the years 1789, 1790, and 1791. On the part of the wife an allegation, pleading connivance, was to this effect: that A., a person of high rank, introduced himself to the wife; that the husband was pleased, knew she accepted presents from A., removed to lodgings near the residence of A., who visited her every day; that the husband left the room, often the house; that A. visited her in her bedchamber when she was without her stays; that in January, 1784, the husband and wife being in bed together at two in the morning, A. came to the door, told the husband there was a great debate in the House of Commons, wished him to learn the event—he went, leaving A. in the bedchamber with his wife; that A. went away without waiting to hear the result of the debate; that her brother remonstrated, ordered her to return the presents; that the husband reluctantly consented. At Spa another person, B., was attentive; went into her bedchamber; the husband saw and was pleased; B. took lodgings near them and was often in her bedchamber. At Brussels they lived in the same house with C; that the husband used frequently to go to bed, leaving his

wife and C. together. An action was brought against the party with whom she [119] was charged in the libel, and a verdict for the defendant was given with costs.(*a*)[1]

The cause was argued by

Sir William Scott and Dr. Swabey for the husband.

Dr. Nicholl and Dr. Laurence contrà.

Judgment—Sir William Wynne. The evidence is such that the counsel for the wife have not aimed at a denial of her guilt; but, as a defence, recrimination and connivance are set up. The first is not proved; the second defence is singular—the wife does not allege that she had been guilty, but that there had been during their cohabitation previous to 1785, when a separation took place, a freer correspondence than there should have been between her and other persons, with which her husband was acquainted, whence it is to be inferred that she committed adultery with them; but this adultery is not pleaded by her nor by the husband. I take the law to be, as laid down in the books, that if it appears that the wife committed adultery, that the husband connived at her adultery, that he knew that she was living in that improper manner, that he was aware of what was going on, such conduct deprives him of a right of applying to the Court, [120] and obtaining a remedy for the injury done him—if it can be considered as an injury. But when I say that this is the law, I admit at the same time that I do not remember any one instance, nor am I acquainted with the circumstances of any case, in which a sentence has been refused on this ground,(*a*)[2] except the case of *Cibber* v. *Cibber*, where it was said that connivance was clearly proved.(*b*)

[121] It is strange that there should be no precedents, for I should have expected that such a defence must frequently have been set up. But, however, I do not doubt

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(*a*)[1] *Hodges* v. *Windham*, 1 Camp. N. P. 54, Lord Kenyon, in summing up, said that, "the husband having suffered such connexion with other men, was equally a bar to the action, as if he had permitted the present defendant to be connected with her."

(*a*)[2] The cases of *Timmings* v. *Timmings*, p. 76; *Lovering* v. *Lovering*, p. 85, had, however, been recently decided in the Consistory Court.

(*b*) The editor has considerable doubts whether sentence was ever given in *Cibber* v. *Cibber:* he can discover no trace of a judgment in any note to which he has access, and all that he can find in the assignation book of the Consistory, respecting the proceedings of that case, is as follows:—*Cibber* v. *Cibber* was a suit for restitution of conjugal rights brought by the wife. The citation was returned on the first session of Michaelmas Term, 1738. A libel was admitted and the marriage confessed. An allegation of faculties was given in; alimony allotted; costs were twice taxed, and twice excommunication was pronounced, and a significavit issued against the husband. An allegation on the part of the husband was asserted, but not brought in: publication passed of the evidence; the cause was concluded; and on the by-day after Michaelmas Term, 1739, the proctor for the wife porrected, in pœnam, a sentence, and prayed the husband to be condemned in alimony and costs; when the Judge, having heard counsel in support of the prayer, took time to deliberate. On the by-day after Trinity Term, 1740, the sentence was again porrected and the prayer repeated. This assignation was continued at different intervals till the second session of Michaelmas Term, 1742, when the cause stood to be sentenced, as before. The assignation was then further continued till the third session of the next term; but there is no further trace of the cause.

For the circumstances at common law of this case, see *Cibber* v. *Sloper*, 1 Selwyn, N. P. p. 10 (n. 4).

The action was tried before Lee, C. J., Middlesex Sittings after Michaelmas Term, 1738. The plaintiff and defendant lived in the same house; their bedrooms communicated. Mrs. Cibber used to undress in her husband's room and retire to Sloper's room, with a pillow taken from the bed of her husband, who shut the door after her and wished her good night. He sometimes called Sloper and Mrs. Cibber up to breakfast. Verdict for plaintiff, damages 10l.

However, "The law on this subject is now clearly settled to be that, if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even of loose or improper conduct, not amounting to a consent, it only goes in reduction of damages." Per Buller, J., *Duberley* v. *Gunning*, 4 T. R. 657.

the law to be so, provided that, on a suit brought by the husband, the wife could shew that the fact complained of was done with his connivance. In such a case the Court would not pronounce a sentence; but that the wife having committed adultery with one or two persons, on account of which the husband quits her society and lives apart from her for many years, during which she, without his knowledge, contracts an acquaintance, and commences an adulterous intercourse with another person and cohabits and has children by that person, the husband, because he once knew of the adultery of his wife with another and did not complain, should be bound to retain his wife and take her children—the fruit of this adulterous intercourse—as his own, is a very different case; I cannot think the law goes so far; I know of no case, except *Cibber* v. *Cibber*, where the sentence was refused on the ground that the husband knew of and consented to his wife's guilt without complaining; and the great **[122]** distinction between the two cases is that here the adultery was committed with another person, and at a great distance of time. For this reason it is not necessary to examine minutely into the evidence as to the connivance, but taking it to be as criminatory and as complete as possible, supposing that the husband was cognizant of and conniving at her adultery with the three persons mentioned, yet the parties having separated by articles in 1785, and there being no account of any adulterous connexion of the lady till 1789, when this new connexion is mentioned, of which children have been the fruit, I cannot think that the law is so severe as to bar the husband of relief. One child was born just after this suit was brought; she had another child afterwards, this may go on for ever. There is, then, a strong ground why the husband should complain when he finds children are born; each child was baptized by the name of the husband; this may be a severe grievance, an irreparable injury: for the presumption of the law is that these are the legitimate children of the husband.(*a*) I think this is such an increased injury that, under the circumstances,(*b*) the party is justified in ap-**[123]**-plying for relief. The adultery is proved: the recrimination is not proved: the connivance at her criminal or indelicate conduct proved is not sufficient in law to operate as a bar. I pronounce for the separation. As to the verdict, the Court does not know upon what grounds it was given. All that appears is that on the whole case the husband was not thought to have established his claim to damages.

CREWE *v.* CREWE. Consistory, Trinity Term, 1800.—On a suggestion that a charge of collusion and connivance, raised in argument on his own evidence, was a surprise on the husband, there being no counter-plea or interrogatories, the Court refused to rescind the conclusion in order that letters might be pleaded, holding that the husband was bound to guard himself originally against such suggestions.—A constant intercourse, continued for four years, between a wife and her paramour, not clandestine, but the common subject of conversation among servants and friends, raises a grave suspicion of the husband's knowledge and acquiescence.—On proof of the wife's adultery, continued for four years, under circumstances which raised a strong suspicion that the husband could not

(*a*) It was pleaded in a responsive allegation by the husband "that though he had not cohabited since 1785, that his wife was delivered of a child in 1791, at the house of the adulterer; that she declared 'it was a pity it was a girl, and that such an estate (meaning her husband's) should be lost.' That a son was born in October, 1792; that the husband went abroad in 1791; that he came to Paris; that he heard his wife had left that city on the day before; that he was advised to go away, lest she should return and assert him to be the father of the child."

(*b*) This consideration seems to have had much influence in the decision of the learned Judge; but it may perhaps be doubted whether any such weight would be attributed to it, since the case of *The Banbury Peerage* has more exactly ascertained the strength of this presumption. See the answers of the twelve Judges to a question proposed to them by a Committee of the House of Lords at the conclusion of the arguments in *The Banbury Peerage case.* The answers will be found at p. 433 of Mr. Le Marchant's Report of *The Gardner Peerage case*, to which is appended a collection of cases illustrative of the law of legitimacy, and a valuable report of the claim to the earldom of Banbury. See also 2 Selwyn, N. P. p. 745, et seq.; 1 Phillipps on Evidence, 158.

have been ignorant, the Court, after much hesitation and difficulty, granted the sentence of separation, as it could not affect the husband with a direct knowledge of the adultery, and as three witnesses had positively sworn they believed the husband was ignorant.—Witnesses should be required to answer to their belief or impression as to whether adultery has been committed or not, though the Court cannot rely on such opinion.—On proof of adultery, sentence may be barred—1, by compensatio criminis; 2, by condonation; 3, by active procurement or passive toleration; and, possibly, by other conduct.—Collusion is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, so as to suffer the other to obtain a remedy at law as for a real injury. The law permits no co-operation for such purpose, and refuses a remedy for adultery committed with such intent; but it is not proof of collusion that, after the crime is committed, both parties are desirous of a separation.—The 105th canon requiring that divorce should not go on confession alone, the Court is almost bound to reject an affirmative issue in a suit for separation for adultery. —Passive connivance, or toleration, arising from the husband's insensibility to his own honor, or unwillingness to seek redress, is a bar to relief; if there be proved a long course of criminal conduct, of which he was, or of which he must be presumed to be, cognizant: he may wait for adequate proof, but no longer. —The long duration of a criminal intercourse, and delay in applying to the Court, and the indirectness and want of stringency in the evidence, are strong presumptions against a preconcerted scheme to obtain a sentence by contrivance. —A judgment by default against the paramour, and no defence on the part of the wife, are not proof of collusion.—Passive sufferance of adultery for a length of time enures to a waiver of legal remedy, but is difficult of proof.

[Referred to, *Churchward* v. *Churchward*, [1895] P. 17.]

The argument in this case took place on the 3rd of May, 1800: Dr. Arnold was counsel for the husband. Sir John Nicholl and Dr. Fisher, who were counsel for the wife, rested their case on collusion, connivance, and insufficient proof of adultery.

The Court took time to deliberate.

On the 11th of May the husband's counsel made an application to the Court to rescind the **[124]** conclusion,(*a*) as connivance was suggested by surprise at the hearing, there being no plea nor interrogatories on the subject—that as the charge of collusion could not be foreseen by the husband he had omitted to bring evidence to repel it: the husband now offered an affidavit with certain letters, and prayed the conclusion to be rescinded, to meet the suggestion of surprise by introducing proof consisting chiefly of exhibits (the least suspicious evidence), and to introduce in this Court before sentence that which he might, it was apprehended, introduce in the Court of Appeal.

Contrà. There is no surprise; the charge arises on his own evidence: that they are noviter perventa cannot be averred of these letters.

Per Curiam. I apprehend this application is not made as a matter of right, but of indulgence and discretion—that is, of such indulgence as can legally and justly be given, and as is governed by a regard to the genuine and fair administration of justice. I should be unwilling to deprive the party of a remedy on any thing which appears to have been suggested as a surprise: and, if that suggestion were founded on facts appearing in the case, I would, in a matter of such importance to the husband's comfort, allow this evidence to be introduced, though the inconvenience of doing so generally is evident: **[125]** but I am of opinion that the suggestion of surprise is not founded. The objection of collusion and connivance arises on evidence produced by the husband himself, not on matters extrinsic; and he is bound to guard against all suggestions, not merely in the plea of the other party, but which may arise on his own evidence: if the original facts pleaded furnish such objection, he is bound to repel that by the original proof; and if he slumbers over his own remedy for such a length of time, he is not to be allowed any extraordinary indulgence in order to escape from the effect of it. How far the present evidence may affect the husband it is not for me at present to pronounce; but I am by no means inclined to allow that this is matter of surprise, for it does not grow out of any thing external. I shall therefore admit no further pleadings in this stage. There is, however, a letter referred to in the original evidence, which communicated the transaction that had

(*a*) See *Hamerton* v. *Hamerton*, vol. ii. p. 24, and note. See *Jones* v. *Jones*, vol. i. 254.

passed, and the misconduct of Mr. Crewe: this letter I have some curiosity to see, and, if the party think proper, I would allow this to be introduced: but I cannot consistently with practice and general convenience admit the others.

2d July.—The letter having been brought in, the Court said: I have great difficulty upon the point of toleration. If the wife does not take the objection, the Court will. The husband must lay his case before the Court in such a manner as not to give occasion for such an inference. In this case there has been a course and system of habitual intercourse for four years, which could not exist without the husband's knowledge: if **[126]** he had a conversation with his own servants he must have learnt it. I have no reason to suppose that all the servants in the house were leagued in a corrupt faction. Even this letter, which leads to the discovery, startles me; it is rather stimulatory on the part of the paramour's friends than a letter of information. I think it points strongly to previous knowledge. The case must stand over.

11th July.—*Judgment—Sir William Scott* (*Lord Stowell*). The parties were married at Jamaica in 1780, and have had five children. A lady, who resided with them from 1793 to 1797, says "the gentleman visited in the family; till 1795 she observed nothing particular; when she was at Brighton this gentleman was much with them: he called in London, and when Mr. Crewe was at home only left his card."

Witnesses also prove "that he constantly visited Mrs. Crewe and remained alone with her when the husband was absent: but that when he was at home the visiting was in the usual form." The footman, who went to live with Mr. Crewe in August, 1797, mentions likewise "their coming from card-parties in hackney coaches together, till they were near the husband's house, and that then the gentleman got out." The same witness deposes "that he was frequently dispatched with letters from her to him, and, on one occasion, about the time when Crewe was going out; that the gentleman came late in the evening, and that on the husband's returning home he was let out clandestinely by Hawkins, the lady's-maid." Another, a maid-**[127]**-servant, says, "At Richmond he visited as a common acquaintance, but afterwards at Brighton was on a different footing:" she speaks to "his opening the door himself —to his knocking by a single rap—to his paying great attention to Mrs. Crewe;" and both say "that the impropriety of these visits became the subject of conversation among the servants." Hawkins also is examined. Such witnesses force the Court to observe that when servants degrade themselves by living with a woman corrupted they partake in the corruption of the house; they can neither see nor hear any thing. All that can be obtained is an ounce of truth mixed up with pounds of equivocation and the various artifices by which corrupt minds endeavour to palliate vice: but I must take the evidence as I find it.

Hawkins says she saw nothing but what was pure and proper; yet I apprehend, even from her account, that the gentleman did visit Mrs. Crewe in a way that was not consistent either with purity or propriety of conduct. Another witness, a friend of Mr. Crewe, called at Mr. Crewe's house, and found Mrs. Crewe alone: she gave a little hem, or said, "You may come in." The paramour came out of an adjoining room: she said, "He withdrew because he thought it might be some one whom he would not wish to see." Crewe was then absent. The witness called on another occasion: she said something—the servant replied that the witness was on the stairs —he found her and the lover in the room. This is the only witness who speaks to any thing respecting the anonymous letter: but there is no account in the evi-**[128]**-dence of what measures were taken after the receipt of it, though there is in plea.

It appears from that time the husband and wife lived apart, and the conduct of the wife and the paramour became more clearly improper. The footman says the lover was there the first day he came; was always there afterwards, and at all places, and every day; boarded in the house; stayed till one o'clock in the morning. Witness saw Mrs. Crewe in his bedchamber, and saw him twice in hers, early in the morning; it was evident there was great fondness; has found them with the doors locked. Sarah Pulteney says he visited her in the morning, and again in the evening; at the Isle of Wight he was constantly with her, and also in town; dining, supping, and staying late; slept two or three times with her mistress at Haverstock. At Southampton she waited upon her instead of her maid, and put her to bed; the paramour sat an hour by her bed-side. One night she was sent by Mrs. Crewe to tell him she was in bed. On passing through the room afterwards she saw his clothes, and the curtains close drawn. This is another fact which leaves no doubt

that the parties were in bed, and were living on a criminal footing together; it gives a colour likewise to all the antecedent conduct—it shews what the connexion was originally.

I must here notice that the depositions have not been taken exactly as the Court could wish; nor as is usual in these cases. That part of the allegation which directly pleads that adultery did take place has not been examined to. The Court, though it cannot rely on the opinion of the witnesses, has a right to know their im-**[129]**-pression and belief whether the crime was committed or not; and it is material that the examiner should understand that it is necessary the witnesses should be required to give this information.

On the action at law there has been a judgment by default; and, on inquiry before the sheriff, damages were assessed at 3000l. What evidence was there produced does not appear to this Court, and part of the evidence here, viz. that which relates to the conduct subsequent to separation, is posterior to the action. Notwithstanding then the exceptionable mode in which the evidence has been taken, I think, attending to the later depositions, the matter of adultery is on the whole sufficiently proved; and if there are no objections to the conduct of the husband, he is entitled to his sentence of separation.

There may be, however, such objections, and of various kinds: 1st. Recrimination—for that is a bar by the law of the country: (*a*)[1] 2d. Condonation—unless there be a renewal of criminal conduct (*Durant* v. *Durant*, 1 Hagg. Ecc. 733): 3d. Active procurement or passive toleration of his own dishonor: and there may be others. Of these, not one has been put in plea by the wife, nor suggested in interrogatories; for she has not even cross-examined the witnesses. But, in argument, two defences are set up—collusion and connivance. These are different in their nature. Collusion may exist without connivance, but connivance is (generally) **[130]** collusion for a particular purpose.(*a*)[2] Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, a fact of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorize parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law therefore requires that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause who alone may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that, after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released because the offending wife equally wishes it; she may have honest or dishonest reasons, innocent or profligate; an aversion to live with the man she has injured, a desire to live uncon-**[131]**-trolled, or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it.

It has been often said, and with peculiar injustice, that although the original adultery was not collusive, yet the proceedings in these Courts lead ultimately to collusion in the conduct of the cause; because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision of law: the canon directs that a divorce shall not go upon the mere confession of the party: (*a*)[3] the wife therefore must give a negative issue (indeed

(*a*)[1] *Forster* v. *Forster*, 1 Hagg. Con. 144. *Proctor* v. *Proctor*, 2 Hagg. Con. 292. *Astley* v. *Astley*, 1 Hagg. Ecc. 714.

(*a*)[2] It is presumed the learned Judge did not mean that connivance cannot exist in any case without collusion; for it seems that the husband may, by winking at (connivere) and pretending not to observe attentions paid to the wife by, or her attachment for, another man, lure her on to adultery, for the purpose of a separation, and obtaining damages from the paramour; and this may be done without the wife's or paramour's suspicion that the husband saw what was going on: whereas collusion must be an act in which two or more parties join to deceive the Court, or entrap another party.

(*a*)[3] See *Timmings* v. *Timmings*, supra, 77.

the Court is almost bound to reject an affirmative issue, since it is necessary, by the canon, that evidence should be produced): she must deny her guilt, and her prayer must be according to her denial; but this is mere style and form. If the Court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is whether the husband has received a real injury, and bonâ fide seeks relief.

Another ground of objection is the connivance or toleration of the husband: he may have an insensibility to his own honor, and, from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy, or **[132]** may not think it worth pursuing; and if such a person, after a long continuance of toleration, of himself awakes, or is compelled by the clamour and outcry of the world to awake, he awakes too late. If the adultery has gone on for a length of time, he does not stand before the Court in the favorable light of a person acting on the spur of honest feeling, whom the law delights to succour; he has made up his mind to some other satisfaction. I do not mean by this to say that the husband is immediately to rush into Court upon suspicion; he must wait for adequate proof, but he is to shew his vigilance; he is not to lay by longer than to obtain proof: if he does, his lethargy will be fatal to any application that he may make: whatever his motives may be for coming afterwards, if it be proved that there has been a long course of criminal conduct of which he was cognizant, or which, by law and by presumption, he must be supposed to have been cognizant, he cannot receive relief.

What are the circumstances here as to collusion and to connivance? The long duration of the criminal intercourse is a strong presumption against collusion, for if there had been a preconcerted scheme, an original design to separate, I think it impossible but that the application should have been sooner made, and that the purpose would have been more speedily effected. This applies to all the evidence before the separation; and as to the later evidence after the separation, there is much force in the observation that if the parties had intended to have obtained a sentence by contrivance, the proofs would have been more direct and conclusive; **[133]** though at present they are sufficiently so to warrant the Court in saying that the adultery is established.

It is true that the adulterer suffered judgment by default; that may in some cases arise from collusion, but it also may arise from other motives—from prudence and discretion—from a hope of mitigation of damages—from a desire of not further vexatiously annoying the party whom he has injured. The wife too has given in no plea, nor administered any interrogatories; this may arise from collusion; but it may also arise from other circumstances; at any rate the husband cannot compel the wife to do either. Looking, then, at the general circumstances of the case, I am not entitled to say that there is collusion.

I come then to the next head of objection, viz. connivance or toleration for other purposes: and this is the part of the case which presses with most force. By toleration, I mean that passive sufferance of adultery for a length of time which, in law, enures to a waiver of legal remedy. The proof of this is difficult enough; for it must arise in general, not from a positive act, but from negative conduct—inactivity. If information were proved to have been conveyed to him, that would be decisive; and if there be nothing of that kind, still the circumstances may be so strong as to raise an almost certain presumption that he has seen; and, if seeing, has tolerated. There are circumstances in this case which set in an uniform current in that way: the general mode in which these parties lived together is extraordinary and not unimportant: there was no formal separation, yet **[134]** as much estrangement as can well consist with the marriage state: she is allowed to go to Bath, to Brighton, and to other public places, without the husband being there for more than a night or two: the Court cannot compel the husband, even if he has no office nor profession that prevents him, to be constantly with his wife; but every man must observe that this husband did not give his wife the benefit of his care. I do not say that the husband is to dog his wife at every step with sullen and gloomy suspicion, but the protection and comfort of his society is to be afforded to a person so closely connected with him, and in whose conduct his happiness as well as her own is involved. What was the state in which these parties were living? As soon as the husband went out the lover came: the visits attracted the notice of all but the husband; it was the common conversation among the servants; and this sort of intercourse continued for four years and more:

and yet it is to be presumed that the husband was ignorant of the fact, or, if not, he was perfectly unconscious of the nature of these visits. According to the modes of life with which I am acquainted, it is not very reconcileable with credibility that a man can be so much a stranger to his own house as that a person, not particularly connected with him, shall enter his house almost constantly as the master quits it, and that the other facts proved in this case should happen. I know well that it is not uncommon that the husband is the last acquainted with the dishonor of his family; that may happen where the facts occur at a third place, where there is great intimacy with the husband, and **[135]** advantage taken of it; but that is not the case here: there was no particular acquaintance with the husband, yet these continual visitings going on day after day, for months and years, are noticed by every one, and still it is pressed upon the Court that the husband remained ignorant till he received the anonymous letter.

There may be modes of life with which I am little acquainted, and which may allow things to pass of which I have no idea, and which may afford opportunities no situation I am acquainted with does afford. It would be of lamentable consequence that such visits could be so paid for years; that every time the husband went out another man could come in with views observed by all, and yet that the husband should have no information communicated to himself or his friends from the variety of servants whom he entertained. There are one or two facts of a peculiar nature that strengthen this difficulty—first, the carelessness with which they carried on their intercourse: the lover came to the house on the husband going out at a late hour; he came within about half an hour; it is not stated that Crewe's absence was foreseen, or a message sent to the lover; the latter continued till the husband returned, sitting in the drawing-room into which there was the greatest probability that the husband would enter, if he returned: he did return, and instead of going there he went to the kitchen and talked to the servant: the servant heard Mrs. Crewe call her maid to let out the paramour; she did let him out; the opening of the door was heard in the kitchen. It is impossible, therefore, that there could be greater negligence; there is no appearance of that cir-**[136]**-cumspection for which a witness gives these persons credit. The facts mentioned by that witness are also extraordinary; and do not convey to the Court the same impression of the circumspection of the parties that he received. This fact of the lover being entertained in the absence of the husband happened twice within his knowledge. The lover was secreted in an adjoining room, and he was let out again with as little affectation of secrecy as may be. An anonymous letter is now produced: it is not a letter of information, but rather seems to refer to antecedent knowledge. It conveys no distinct information to a man perfectly ignorant, but calls upon him to support his honor, as the tongue of the world is loud against him. It is said that subsequent letters are of a different character, expressing passion, and that the wife was apprehensive of his passion; it is, however, suggested that such would not shew sincerity, but are exactly what he would write if he now came to change his conduct, and determined on vindicating his honor by applying for a remedy.

These circumstances press strongly on my mind; but when I consider that the proof of adultery is clear, and, as to the inattention, that the parties had been married twenty years, had had five children, there might be less circumspection and a more unlimited confidence on the part of the husband: but there was not less fervour in her blood than at a former period. What were Mr. Crewe's habits that might produce this estrangement do not appear. I will not take upon myself to say that there may not be modes of life in which there may be such conduct and such ignorance; but it is not **[137]** for the happiness of the world, nor for the security of married life, that such should often occur. Seeing little, or rather nothing, of this gentleman's mode of life, I cannot say it is impossible. Not being able to affect the husband with a direct knowledge; and there being three witnesses who swear, in express terms, that they verily believe in their consciences the visits were unknown to the husband, I think it would be taking upon myself too much to affirm, in contradiction, that they were known to him. Therefore, under all these difficulties I am compelled to pronounce for the divorce, though with no great satisfaction of mind: and I will add that possibly, in other places to which this case may be brought, the nature of it may be more accurately disclosed.

HOAR *v.* HOAR. Consistory, Trinity Term, By-Day, 1801.—Mere imprudence and error of judgment are not connivance; and, in determining whether the husband's behaviour has barred him from relief on proof of his wife's adultery, the honesty of his intentions, not the wisdom of his conduct, is to be considered.—Affectionate conduct to a wife for many years, no appearance during that time of a wish to withdraw from her society, and the absence of any reason to suppose that the husband knew or suspected her depravity, till very shortly before she left him, tend most strongly to disprove connivance at the turpitude of, or active co-operation in, the prostitution of a wife.

Judgment—Sir William Scott (*Lord Stowell*). This is a suit for adultery brought by the husband against the wife. The parties were married in 1787, and went abroad to India in 1790. In the following year Mr. Hoar, leaving his wife at Madras, joined the army, and while on military service formed an acquaintance with an officer whom he afterwards introduced to his wife. A great intimacy ensued; this officer was much at their house, and much intercourse took place between the parties in India.

Mr. and Mrs. Hoar returned to England in September, 1793, and settled in Hampshire. This officer arrived in February, 1800; he paid **[138]** them a visit soon after, and also another the same summer with his mother. Mrs. Hoar was indisposed and recommended to go to Tunbridge, but first to take advice in London: whence she and Mr. Hoar, accompanied by this officer, proceeded to Tunbridge. She used his curricle as easier than her husband's phaeton, but a servant always attended them. On their return they paid a visit to this officer's mother in London, and then went home, where they were visited, on the 12th of September, by that lady and her nieces, and were soon afterwards, viz. on the 25th of September, joined by the officer, who staid there till the 6th of October, while his mother remained till the 7th.

A maid-servant observed "two or three days before some uneasiness between Hoar and his wife, but had not the slightest suspicion of the cause. After the 6th of October Mrs. H. ordered the witness to pack up her things to go to her uncle's for a few days only: the journey was put off to wait for Mr. Hoar's brother. On the 9th they set off. Witness believed they were going to her uncle's; so did the man-servant; and the witness adds she believes her master did the same. At Hounslow Mrs. Hoar ordered the post-boy to go to an hotel in London; witness asked her 'if she was not going to her uncle's?' said, 'Not to-night.' On arrival at hotel asked if rooms were prepared—they were. The officer came, dined, and supped there. Her mistress, in her bed-room, told her she was extremely miserable, but said nothing more. The next day the maid asked to go and see her relations: the officer came before she went: on her return at night she found Mrs. Hoar gone: the next morning the officer came and carried her to Ealing. She **[139]** mentioned the uneasiness between Mr. and Mrs. Hoar, and that Mrs. H. seemed to wish to explain: he said Mrs. H. would explain: near Acton, at a small house, found the officer's mother. She saw Mrs. Hoar's clothes, but was not permitted to see her mistress: the officer told her Mrs. H., being ill, declined to give the explanation she had promised, and he made it by her desire. Mrs. H. had an attachment for him and would not return to her husband: asked if she would stay, she said (very properly) 'she would not live with a mistress whom she could not respect.'" [Evidence of cohabitation at Kensington and subsequent adultery.]

No doubt therefore can exist that Mrs. Hoar was guilty of adultery; and, unless something is proved to bar the husband, he is entitled to a sentence. There is nothing of the same immorality suggested against him: but if there is no turpitude of his own, has he connived at the turpitude of his wife? for that would bar him; still more would it bar him if he has actively contributed to her prostitution. This is suggested, and it is said that it appears from the libel itself—from the depositions of his brother and of his friend—from her letters—and from his own conduct. Two things are to be premised. First, that he had been a very affectionate and kind husband for thirteen years, and during that time there was no appearance of a desire to withdraw from the society of his wife; still less to get rid of her in this foul and dishonorable manner. The second is, there is reason to suppose he neither knew nor suspected the depravity of his wife till within two or three days of her quitting his house.

[140] It does not appear that any thing had occurred to awaken his attention or rouse his suspicions in India. The officer had been separated from Mrs. Hoar for

seven years—time enough to cool the force of any attachment if it had existed; he comes to his house; nothing passes there to excite his attachment; nothing to alarm any person connected with the family; nothing which is not within the limits of such intimacy as modern manners allow; nothing till she acknowledges this attachment herself.

All the evidence therefore of passive connivance, or of active encouragement, is confined to the last two or three days. This is very material; for it is incredible that Hoar should at once so change his principles and conduct, and in so short an interval resolve to dishonor his wife and friend; there must be very precise evidence to bring this home to him. It is not mere imprudence and error of judgment which the law deems connivance; where a man takes a step for the best which turns out otherwise, it is not such an error which is to be laid to his charge. Different men have different degrees of judgment, and judge differently: nor are we to judge by the event. A Court of justice must look quo animo the step is taken, and, if it be meant well, though it have a fatal consequence, it were hard indeed to fasten on mere imprudence the consequence of guilt. Conduct to bar must be directed by corrupt intention. His situation was extremely difficult.

It is pleaded "that on the 1st of October the husband noticed her coolness and indifference, but conceiving that her temper might be affected by indisposition, took no notice of it **[141]** till Friday the 3rd of October, when he asked her 'if they were always to go on in this unhappy way?' She said, 'Yes, for ever.'" She acknowledged a fixed attachment to this officer—"that she had loved him from the first day she saw him in India; that she adored the ground on which he trod; that she had not dishonored him, and she begged him not to mention it whilst the officer's mother was there." By this avowal the unhappy husband was placed in a situation requiring the exercise of the greatest discretion. How was he to act so as to produce good consequences? It is said that he should have resorted to bodily coercion, and perhaps that would not have been improper. At a time when the violence of her blood must have been over, when she had been married thirteen years, to avow such an attachment, to renounce all virtue, modesty, honesty, duty, and regard to her family, did betray symptoms of that malady of mind which requires such discipline; but these extremities are in no case to be resorted to at once—milder expedients should first be tried.

"Sunt verba et voces quibus hunc lenire dolorem."

Hor. Epist. i. v. 34.

Besides, in other respects, she did not shew insanity, and there was nothing which betrayed this to the rest of the family. In this sort of dubious state can it be said that a man does wrong if he takes a little time for honest deliberation of his own, and for consulting with his friends? He did advise with his brother and with a friend, and in the meantime he abstained from any thing violent. If this was an error in **[142]** judgment it was excusable in such delicate circumstances. Before his brother came, viz. on the evening of the 5th of October, the husband communicated his wife's declaration to the officer. This conduct has been much blamed: it is said that it was very indiscreet, nay, very improper, to communicate this attachment: he told him of her declaration of attachment, and the conversation that had passed—represented to him the breach of hospitality and friendship he was meditating—expressed his hopes that his wife would see her error and that things would end well, but declared that in the meantime he could not entertain him in his house. The officer appeared much affected; and accordingly went early the next morning. It has been said that this was telling him how easy a conquest he might make. It was, however, necessary to tell him in some way, for he must be sent out of the house: perhaps it would have been less exceptionable if, instead of proclaiming to him her strong declarations of affection, he had stated that she shewed some uneasiness of mind; possibly some gentle and mild communication might have been more prudent. But I cannot say this explicit declaration necessarily led to the consequences. I know no system of morals by which it is necessary for a man, if a friend's wife or daughter express a guilty passion for him, to give way to the depraved inclination of such a woman, and to forget all he owes to his friend. Perhaps even this mode was not so very imprudent: he might expect, and not unreasonably, that his friend would assist him in counteracting the perverse inclinations of his wife. His account states that the officer was **[143]** affected by this appeal: happy would it have been if this impression had remained! At the same time I give into the observation that the communication might possibly have been contrived in a more discreet manner.

However, the intimate friend of Hoar was sent for—he found Hoar in great agitation. He said he had sent for him to consult with him—that his wife had acknowledged this guilty attachment—that he wished her to go to her uncle's to compose her mind—that he feared suicide; he begged his friend to talk to her—to say he was convinced that nothing criminal had passed, and that if she would conduct herself with propriety he would forgive her: he saw her, she avowed to him her love for this officer, and said, in a determined way, that she would go to her uncle's—that she would see this officer once more, would stay a few days at her uncle's, and then, if she could get the better of the idea of suicide, would return. He remonstrated with her on the propriety of her seeing the man, not against her going to her uncle's: she persisted; he, hoping her uncle might persuade her not to see this man, and trusting that nothing criminal would occur, invited her to his house when she should return. As for the witness acceding to the proposal of her going to her uncle's and to her seeing the man, Hoar is in no degree answerable for it, unless he adopted it. I will observe this only, that there could be no corrupt motive in the witness, which would go far to remove it from Hoar: the witness had no reason to think his advice was asked other than from honorable motives. The same conversation took place with the brother. Other judgments **[144]** might have been differently exercised; but it is not a question of wisdom, but of honesty of intention. It is not distinctly stated in the evidence (as it should have been) whether the dangerous part of this compact—the interview at her uncle's with the officer—was made known to the husband: but it was the duty of the friend and the brother to communicate it, and I must presume that they did.

Assuming, however, that he did know it, yet she was to be placed under such guards at her uncle's, who had a previous knowledge of the whole, that Hoar might anticipate no danger: her uncle might dissuade her from seeing this officer—could watch her if she did—his friend was persuaded no dishonourable consequences would ensue, for he invited her on her return to visit his wife. But, looking at the difficulties with which the parties were surrounded, I see no proof of corrupt conduct; nor any thing to shew they entertained a doubt of her going to her uncle's: they were alarmed at her threat of suicide, more than cooler men might have been. I should have had little apprehension from the bottle of laudanum which she had. The result of their deliberation was, that she should go to her uncle's, should take a last farewell of the object of her depraved attachment, on an understanding that nothing improper should pass, and that the interview should take place in her uncle's presence; but that is no corrupt conduct: I do not say it was wise—perhaps a set of cooler men might determine otherwise, especially after the fact has happened: they might even have foreseen the event—they might have considered that a woman who had so violated **[145]** her duty to her husband was not much to be trusted: but they appear to have had an intense confidence in her sincerity, and possibly might hope that the man would have resisted the temptation, and acted more honorably and generously by his friend. The case seems to have been reduced to a question of bodily coercion, or this allowance. She was going to a venerable relation: other methods of expostulation, of reasoning, and of remonstrance had failed. In determining on the former alternative they perhaps did not act prudently, but they did not, on the other hand, act dishonestly.

She however went, and it is objected that she was not duly accompanied. I think their prudence was asleep: she positively refused the attendance of Hoar or his brother; and they acquiesced. This refusal, couched in these strong terms of resistance, possibly ought to have excited more alarm; and should have made them insist the more firmly on one of them attending her: she was, however, accompanied by a female servant who had been long in the family—a woman whose conduct was not tainted by her mistress' guilt, whose principles are excellent, and one to whose care the duty might well be delegated, as far as it could to any person in her situation.

Another objection is, that on the receipt of her letter Hoar did not post up to town soon enough; but the short interval that elapsed goes far to take off the force of this. The letter of the 9th of October mentioned that she had seen the officer. Hoar had reason enough to presume that her intention of going to her **[146]** uncle's was much shaken, and even that the worst consequences had already followed, or would occur before his utmost diligence could have brought him up: in truth, if he had come, he would not probably have arrived till they were at Kensington, when the

commencement of his dishonour would have begun, and when his wife was only to be regarded with horror and disgust. I am, then, of opinion that, though there may have been considerable mistakes in the treatment of this lady, there has been no corruption.

I am not ignorant that the same case has been before the great tribunal of the country which has held that no damages were due to the husband. If there had been here the same question, on the same evidence, between the same parties, and for the same purpose, it would have been a great comfort to follow the judgment of that eminent person to whom the law and morals of the country owe such important obligations. There, probably, more evidence was given as to the conduct of the paramour: it might be shewn "non rapuit sed recepit"—that he was not the thief but the receiver of her affections—that he was not the active seducer, but that she was the victim of her own loose principles and vicious inclinations; that he therefore owed no compensation in damages. On the very same ground that the action failed there, this Court would—on the question whether Mr. Hoar is obliged to cohabit with his wife—give its sentence in the negative: for if she be the corrupter of her partner in guilt, the husband is so much the more entitled to be relieved from her depraved society. My judgment does not clash with the other **[147]** judgment, but both rest on the same foundation.(*a*) I pronounce that the adultery is fully proved; and that it is not proved that the husband has intentionally contributed to it.

MICHELSON *v.* MICHELSON. Arches, February 27, 1804.—The adultery of the wife being proved, but she having, with her children, but without her husband, resided in a gentleman's house (of which she was treated as the mistress, and where she was delivered of three children), without the husband sufficiently accounting for his absence, or providing for her, or interfering with such residence, the Court dismissed her, on the ground that the husband, by such conduct, had consented to the connection and adultery.

The facts in this case were shortly these. The parties were married in August, 1792; and in 1799 came, on their way to London, to Peterborough, where the wife was confined. The husband shortly returned to Scotland with two of his children. Soon after a gentleman, pleaded to be an intimate friend of the wife and her mother, and known to the husband, was admitted on a familiar footing in the family, but did not live in the house. He was very attentive to the wife, and she complained to a female friend living in the house "that he teazed her." He went to town and returned; she made fresh complaints of his attentions: this female friend left the house "because he returned:" the wife came to town in the middle of December, 1799; but though it was pleaded she eloped, she did not come with the gentleman, nor was there any proof the journey was not taken with **[148]** the husband's consent. In town she resided in lodgings taken for her by this person, and passed under a former name of her husband, but observed no secrecy. The gentleman visited her there frequently: the person, at whose house she was, not from his own observation, but from the reports of others as to her conduct, requested her to quit his house; she moved in succession to the gentleman's house in town and country, was treated there as the mistress, her children joined her there, and a child was born at this gentleman's house on the 14th of September, 1800. The husband was in London from the 4th of February, for two months: during this time the wife was in the lodgings; access was not pleaded, nor was it proved. An accoucheur of great eminence, engaged by the gentleman to attend her, deposed "that he thought the child was full grown, though he could not swear she had gone more than seven months and ten days (from 4th February to 14th September"). There was no hostility at the time between the husband and wife, no complaints, nor any distress on his part at her conduct, though it was pleaded that he heard of the adultery in December. No fact of adultery—no indecent familiarities were proved: there was no plea nor interrogatories on the part of the wife. Action: Judgment by default—damages 8000l.

(*a*) See, however, a report of *Hoar* v. *Allen* (this case), 3 Esp. N. P. C. 276, and a notice of it, 1 Selwyn, N. P. p. 11 (n. 4), and p. 24. The letter from Allen to Hoar, referred to in Espinasse, formed no part of the evidence in *Hoar* v. *Hoar*, and of course the letters from the wife to the husband, after her elopement, could not be evidence for him in his action against Allen.

The cause was appealed to the Arches, from the dismissal of the wife by the Judge of the Consistory Court of London: and the birth of two children subsequently was pleaded and proved.

[149] *Judgment—Sir William Wynne.* [After stating there was full proof of the adultery]: It is for the Court to consider what has been the conduct of the husband; for, however culpable the wife may be, if he has been negligent and suffered her to form a connexion and live on the terms of cohabitation, here proved, with another man, she is not culpable towards him. Where there is so strong a case on the part of the husband, the Court has only to inquire if he has done his duty; if not, the Court will not pronounce a sentence of separation. At Peterborough the husband and wife stopped for her to lie in: after a few days he returns into Scotland, and remains there several months. A physician proves that he was seized with an acute disorder, which confined him for several months: he had likewise business there: this may account for his absence from his wife, but not for her's from him: he did not send for his wife; it does not appear that he wrote one letter to her: he pleads that he knew nothing of her adultery till December—how did this happen? there were many persons from whom he might—her mother, friends, and other acquaintance. What provision did he make for his wife in London? The lodgings were taken for her by the adulterer; the husband's children were sent to the adulterer's house: it does not appear that the husband made any provision for her, and yet his circumstances would have enabled him. This is a total desertion of his wife. If this would be sufficient, what have parties to do but that the man should leave his wife, and that another man should take her for a time, and **[150]** then that the parties should come to the Ecclesiastical Court and obtain a sentence? If, as I think appears here, the husband is totally indifferent to his wife, if she goes with another man—lives in his house as mistress of his family—has children by him (for all that is added in this Court by the pleas is, that she had had two other children since the former plea), I do think that the husband has, by his conduct, consented to her adultery; he is not, therefore, by law, entitled to a separation: and therefore, in this case, I cannot pronounce for such separation.

GILPIN *v.* GILPIN. Arches, June 25th, 1804.—To establish connivance, in bar to a suit on account of the wife's adultery, it is not necessary to shew knowledge of, and privity to, the actual commission of adultery; such extreme negligence to the conduct of his wife, and such encouragement of acquaintance and familiar intimacy, as are likely to lead to an adulterous intercourse, are sufficient.

This was a suit brought by the husband against his wife by reason of adultery. The libel—after pleading the marriage on the 29th of December, 1793, and the birth of four children, and that Mr. Gilpin, having, professionally as a surgeon, attended an officer in the army, introduced him into his family: after which, towards the end of the year 1801, he used frequently to visit at the house—charged three specific acts of adultery in the house of the husband in January, 1802: and that, on the 29th of that month, the maid-servant in Mrs. Gilpin's presence informed Gilpin of his wife's infidelity; that she did not deny it, but quitted the house; and, in the afternoon of the same day went to Marlborough with the particeps criminis, where they cohabited till the third of **[151]** February. Annexed to the libel was a letter, dated 30th of January (the day after her elopement), from Mrs. Gilpin to her aunt, in which was this passage—"You long ere now must have heard the dreadful news of my separation from the best of husbands, by my own infamous conduct."

The defensive allegation, in substance, pleaded: 1st. That in April, 1801, Gilpin was of the age of forty-four years, the officer of the age of twenty-two, and Mrs. Gilpin of the age of twenty-four: that Gilpin seemed very desirous of promoting an intimacy between his wife and the officer, and frequently invited him to his house.

2nd. That the intimacy formed between Mrs. Gilpin and the officer was frequently the subject of conversation with Gilpin's friends; that he did not take any steps to check it, but was very desirous of promoting it, and was also very negligent of his wife; that he frequently requested him to call upon Mrs. G. when he, G., intended to be from home, and to write cards, and do other offices for her, and to walk out with her sometimes alone, and at other times in company, and to attend her to the public rooms and other places of public resort when he, G., did not accompany her: and that in the husband's absence he was almost constantly with her.

3rd. That in August and September, 1801, Gilpin generally slept at a lodging about one mile and a half from Bath, and several times asked his wife and this officer to accompany him there in the evening, and walk home alone, which they did.

[152] 4th. That in September, 1801, Gilpin invited this officer to accompany him and his wife to Chippenham races; that, on their arrival, he left him and Mrs. G. to walk about on the race-ground, and while he, G., was in the stand, he called out to this officer and desired him to give Mrs. G. his arm; and after the races desired his wife to shew this officer the town of Chippenham, which she did; that they dined at the Angel Inn in a room up one pair of stairs, and afterwards he, G., left them alone together at the inn, saying, "I am going to call upon my tenant; you will take care of my wife."

5th. That in the beginning of 1802 Gilpin brought his action for crim. con., that the cause was set down for trial after Trinity Term, 1802, but, "Gilpin being conscious of the impropriety of his own conduct towards his wife, and knowing that he had been the cause of, and had promoted, the intimacy between her and , did, on the day preceding that on which the action was to be tried, withdraw the record, and that he and had since executed mutual releases to each other."

6th. That G., having so connived at the intercourse hereinbefore set forth, was barred from a separation.

The admissibility of this allegation was argued by—

Sir John Nicholl and Dr. Robinson for the wife.

Dr. Arnold and Dr. Laurence for the husband.

[153] *Judgment—Sir William Wynne.* A libel has been given in this case pleading sufficient facts to entitle the husband to relief, and annexing a letter in which the wife admits her guilt, and speaks of her husband as "the best of husbands." This letter may be used at the hearing, but is not such as to preclude the defence now set up. What disposition the wife was in at the time she wrote it—what was the effect expected, the Court cannot say; but it is not a letter that will prevent the admission of this plea.

The present allegation, without admitting the adultery, charges the husband with such conduct as would avoid a sentence, even if adultery were proved. The plea is such as is often admitted—of negligence and encouragement on the part of the husband. Connivance is the word used. It has been argued that it must be such as to shew knowledge of, and privity to, the actual commission of adultery: but that is not so. If there has been such extreme negligence to the conduct of his wife, such an encouragement of acquaintance and familiar intimacy as was likely to lead to the consequence that ensued—an adulterous intercourse—it would subject him deservedly to a refusal of the sentence he prayed. The relative age of the parties is not improper to be pleaded: the husband is older than his wife: that may lead to an obligation in him to exercise a more vigilant superintendence over her conduct.

It is alleged that the husband frequently invited this man, an officer in the army, to his **[154]** house, and promoted his intimacy with his wife. In the libel it is pleaded that he became acquainted with him as a patient: but he did not so treat all patients; this is not an excuse. It is alleged that their conduct was observed, and became the subject of conversation; then if the husband acted with the discretion which he ought, he must have taken some care. On the contrary, he appears to be and was desirous of promoting the acquaintance: he was so negligent of, and inattentive to, his wife, as not to interfere in order to check, but rather to encourage, their intimacy. He sent letters inviting this young officer to his house when he himself intended to be out. It is said, How can you prove this? You can prove the facts—that letters were sent; that the man came; that the husband was out, and from thence the Court would infer the intention. He was invited to walk out with Mrs. Gilpin, sometimes with others, sometimes alone. It was singular the husband should ask them to walk alone: the other part is not of so much weight. He was invited to go to public places where the husband did not go; and the article concludes by alleging that this man was almost always with her, and the husband from home: this, if proved, will be very material, and will go far to establish the allegation, and what is relevant to the defence.

The 3rd article pleads an extraordinary fact, that the husband had a lodging near Bath where he slept alone; that he asked his wife and this officer to walk with him there; and that they returned alone to Bath. This possibly may be explained; but

it is extraordinary [155] that he should have a lodging for himself alone, that his wife should not sleep there; and stranger, that he should leave this man to walk home with his wife.

The 4th pleads that they went together to Chippenham races. There is not much in that: but the article pleads, during this short trip, three different occasions on which the husband studiously took care that his wife and her paramour should be alone together. This was negligence, inattention, and encouragement likely to lead to the consequences which happened.

The 5th pleads that the husband brought his action; and then, conscious of his own misconduct, withdrew it, and that mutual releases were executed. It is said there might be other good reasons: if so, the husband may set them out: on the contrary, if the fact be that he had no other; but that he was conscious of his own misconduct, it may bring out what is material; he must give his answer to it. The fact is very striking.

I admit the allegation.(*a*)

Note.—Shortly after the admission of this allegation the cause determined by the death of the husband.

[156] CAPEL *v.* ROBARTS AND NEELD. Arches Court, Trinity Term, 1st Session, 1830.—An allegation, on the part of the executors, responsive to a libel in a suit of subtraction of legacy, and pleading circumstances dehors the will, is admissible to explain a latent ambiguity as to the object of the bequest; but the Court rejected the testator's declarations to the drawer of the will as inconclusive, and expressed a strong disinclination to their admission, in such a suit, under any circumstances.

On admission of an allegation.

This was a suit of subtraction of legacy brought by John Capel, Esq., treasurer of the City of London Lying-in Hospital, against the executors of the will of the late Philip Rundell.

The testator, by his will, gave 200l. sterling to the treasurer for the time being, of various charitable institutions, to be applied to the purposes of the respective establishments; and, among them, he enumerated "The Lying-in Hospital in Aldersgate Street, London:" and the fourth article of the libel pleaded "that the City of London Lying-in Hospital, Old Street, City Road, was formerly situate in Aldersgate Street, London, and was called 'The City of London Lying-in Hospital:' that subsequently the said hospital was removed to the corner of Old Street, City Road, bordering on Aldersgate Street, where it carries on its charitable purposes, and is now called 'The City of London Lying-in Hospital:' and that there neither now is, nor ever was, any other lying-in hospital in Aldersgate Street, London, save the one which removed, as aforesaid, and to which the testator subscribed during 1818-19-20-21-22. The article further pleaded the identity of the hospitals, and that Mr. Capel was the treasurer, and, as such, a legatee."

The executors gave in their answers to the libel, and they admitted "that the City of [157] London Lying-in Hospital, Old Street, City Road, removed from Aldersgate Street in 1773; but denied that the present building was bordering on, or contiguous to, Aldersgate Street, for that it was more than a mile distant; they admitted that there was not now any lying-in hospital in Aldersgate Street, but denied that there never was any other such establishment save the City of London Lying-in Hospital therein, for the respondents said that for some time after the removal of the said hospital from Aldersgate Street the hospital now called by the name of the 'General Dispensary in Aldersgate Street,' carried on its charitable purposes as a lying-in hospital, although it had now ceased to do so: and that they believed that the testator, by the words 'The Lying-in Hospital in Aldersgate Street, London,' intended the hospital called 'The General Dispensary in Aldersgate Street;' and to which the deceased was an annual subscriber, as well as an occasional donor, from 1786 to his death, and to which hospital during that period he constantly sent patients,

(*a*) Consistory, 16th June, 26th November, 1802.—In *Loader* v. *Loader*, on proof of the wife's guilt, the Court called for an affidavit from the husband explanatory of his delay to bring the suit; and, being satisfied therewith, pronounced the sentence. See also *Best* v. *Best*, 2 Phill. 161.

and in the welfare and management whereof he greatly interested himself, and that the respondents have paid the legacy in question to the use of the said dispensary."

An allegation, responsive to the libel, pleaded, on the part of the executors, in substance:

1. That the testator, from 1786 to his death, was an annual subscriber to, and also a life governor of, the General Dispensary, Aldersgate Street, London; frequently sent patients to it, interfered and voted in the election of the officers, and greatly interested himself in its **[158]** concerns; and in 1817, having sent a greater number of patients thereto than usual, presented to it an additional donation of 20l. That the hospital was instituted in 1769, and had ever since been carried on upon the site of a building on which a lying-in hospital had been.

2. That the testator first came to London in 1769, about which time a certain hospital was removed from Aldersgate Street to a building erected for that purpose in the City Road (next adjoining to St. Luke's Hospital, to which the testator, by his will, gave 200l., by the description of St. Luke's Hospital, in Old Street Road), and hath ever since been, and is now, called "The City of London Lying-in Hospital," and "The City of London Lying-in Hospital, City Road;" that it is not bordering on, or contiguous to, Aldersgate Street; but is five furlongs distant from it, and seven furlongs distant from the site on which the hospital formerly stood: that the testator never sent any patient to, nor interfered in the concerns of, the hospital; and in 1822 discontinued his subscription, and never afterwards resumed it.

3. Exhibited a printed book of the concerns and purposes of the hospital, published by authority of the governors, in 1827; and alleged that in the title page the hospital is designated "The City of London Lying-in Hospital, City Road;" and that in the 16th page, wherein directions are given to persons inclined to benefit the hospital by will, it is described by the same name.

4. That the testator intending by his will to give among other charitable bequests 200l. to the "General Dispensary, Aldersgate Street," gave to Mr. Coles, his solicitor, written instruc-**[159]**-tions for the same, and a list of the various legacies: that in such instructions all the charitable institutions which the testator intended to benefit by will were respectively described by their local situation; that the solicitor on that occasion read the instructions to the testator, clause by clause; *that on coming to the bequest of* 200l. *to the hospital described in the instructions as "The Lying-in Hospital, Aldersgate Street, London;" the testator said "Yes, the hospital in Aldersgate Street:"* (*a*) that a draft of the will (executed) was afterwards approved of by the testator: that by the words "The Lying-in Hospital," &c. the testator meant "The General Dispensary," &c. and that the executors had so accordingly paid it.

5. Recited part of the 4th article of the libel, and pleaded that an institution called "The City of London Lying-in Charity" had since 1815 been, and is now carried on, in Aldersgate Street; and that application for the payment of the said legacy was, before the commencement of this suit, made on behalf of such institution, and also of another lying-in hospital, now situate in Knight-Rider Street.

6. A correspondence, in respect to the said legacy, commenced by a letter from the then secretary of the City of London Lying-in Hospital, City Road, to the executor, Neeld, and answered by Coles on the 1st August, 1827; also a further letter from Coles, on the 9th, mentioning the payment of the legacy, and the reasons generally that enabled the executors **[160]** to fix upon the hospital; also a letter, dated 28th August, 1828, addressed by Coles to the Committee of the City of London Lying-in Hospital, City Road, stating that from the testator's instructions, as well as from oral explanations, there was no doubt as to the meaning and intention of the testator; it further pleaded that, in conversation, Coles had explained the reasons to Mr. Capel.

7. Exhibited the original letters of the secretary, and copies of three letters from Coles.

Lushington and Dodson in objection to the allegation. The three first articles are admissible, but the fourth introduces declarations to construe a written instrument: this is guarded against by the statute of frauds, and does not come within the exception stated and explained by Gibbs, C. J., who, in delivering, in the House of Lords, the unanimous opinion of the Judges, says, "The Courts of Law have been

(*a*) The part in italics, and the 6th and 7th articles were ordered to be expunged.

jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances" (*Doe dem. Oxenden* v. *Chichester*, 4 Dow, 65). There is a wide difference between allowing facts explanatory of an ambiguity, and declarations: if there were a latent ambiguity, facts in respect to either institution might be admissible, but declarations of what the testator said at the time the will was prepared cannot be received as evidence. There **[161]** is a material distinction between an hospital and a dispensary. In the fifth article an application by other institutions is pleaded; but that does not bear upon the question. The correspondence is inadmissible. The jurisdiction exercised by the Ecclesiastical Court in these suits for legacies is very convenient and summary; it avoids the necessity of resorting to Chancery, where the numerous parties and the nature of the proceedings occasion a much larger expence and delay than are produced by the simple and expeditious remedy afforded by these Courts. It is therefore very desirable to keep the pleadings within the smallest possible compass.(*a*)

[162] The King's advocate and Nicholl contrà. This is not a question in a court of probate, but in a court of construction: the inquiry is not as to the factum of the instrument, but as to the meaning of a clause in it; and, in a court of construction, parol evidence is admissible, and is only admissible when the ambiguity is latent. What is the case here? There is nothing of ambiguity on the face of the will itself; and that any such ambiguity exists, only appears from dehors the instrument, viz. from the fact that there is no institution which answers in all respects the testator's description. The existence of this ambiguity is admitted by the manner in which the other side have **[163]** shaped their case. The libel stated, that by the hospital described in the will the testator meant the Lying-in Hospital in Old Street: the claimant, therefore, admits that the description would not, of itself, and without explanation, carry the legacy to this or any other existing institution, and has undertaken to shew that the testator erred in the local description of the hospital he proposed to benefit. The latent ambiguity thus admitted to exist is sought to be explained by extrinsic circumstances: this explanation may be repelled in the same way; and accordingly the present allegation pleads, in reply, facts shewing that it not only was not likely that the testator should give a legacy to the claiming hospital, but it assigns reasons—among others, the deceased's declarations—why it was probable that he intended to benefit another institution to which the legacy in question has been paid.

(*a*) The jurisdiction in personal legacies belongs to the Ecclesiastical Courts:* but the simple mode there pursued of enforcing payment is but little known. This jurisdiction is exercised by the Arches Court in cases of all wills proved in the Prerogative Court, and by the official principals of each diocese in cases of wills proved in the Diocesan Courts.

The course of proceeding in the Arches Court is usually as follows:—The executor being cited to answer the legatee in a suit of subtraction of legacy, a short libel is brought in, pleading that A. B. made a will; that he thereof appointed C. D. executor, and is since dead, leaving bona notabilia, and without revoking or altering his will; that, since his death, C. D. has proved his will in the Prerogative Court of Canterbury; that by his will A. B. left a legacy to E. F. in the following terms [the clause of the will containing the legacy is here recited]; that this legacy remains unsatisfied, and that C. D. is possessed of, and has admitted, assets; has been applied to and refuses payment; and further pleads the identity of E. F. and the legatee, and that he is of age; and the libel concludes with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, age, and identity of the legatee, and the executor is, upon the libel being admitted, assigned to give in his answers. Should he, in his answers, deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes, as in the case in the text, there may be some special circumstances stated in the libel, and the executor also may plead responsively; but in a

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* See *Reynish* v. *Martin*, 3 Atk. 333. 2 Roper on Legacies (White's edition), 691, and the cases there cited: and *Barker* v. *May*, 9 B. & C. 489. See also *Norris* v. *Hemingway*, 1 vol. 4, in notis.

It is admitted that facts, to shew intention, are pleadable as explanatory of a latent ambiguity; but it is denied that the deceased's declarations are. In *Thomas* v. *Thomas*, however, Lord Kenyon said declarations at the time of making a will were admissible to explain a latent ambiguity.(*a*) That there are four different institutions which have claimed the legacy, all of which assert that the terms in **[164]** the will apply to them, is a circumstance in itself against this demand: and the onus to establish a particular and exclusive claim is on the party asserting that claim. It is always pleaded in libels for legacy that demand of payment had been made on the executors, and resisted. The correspondence is annexed, as responsive to this and explanatory of the refusal, and may affect the question of costs.

Judgment—Sir John Nicholl. This question is in respect to a legacy which has already been paid; and the only point is whether it has been paid to the right party. The Court is disposed to enter more fully into the case, as perhaps its observations may prevent a charitable hospital from a waste of its funds, and from exposing itself to costs.

It is a suit for subtraction of legacy brought by the treasurer of the London Lying-in Hospital against the executors of the late Philip Rundell. The libel pleaded the clause in the will by which the legacy was given. Among a variety of legacies to different charities, the legacy demanded is in the words following:—"The Lying-in Hospital in Aldersgate Street, London." The heading of the libel describes the institution for which the legacy is claimed as "The London Lying-in Hospital formerly the Lying-in Hospital in Aldersgate Street:" and the fourth article more fully describes its history and the testator's connexion with it. By thus pleading, the plaintiff seems to admit that the words of the will, without circumstances dehors the will, would not carry the legacy to **[165]** the hospital for which it is claimed. The will is dated in 1827, five years after the testator had ceased to subscribe to this institution; and the allegation now offered pleads that the charity claiming this legacy is not the charity described or intended by the testator in his will. [The Court here shortly stated the substance of the allegation.] The three first articles are not objected to: but a question is raised whether the parol declaration, pleaded in the fourth article, is admissible. The Court would be very cautious in admitting such an article for the purpose of explaining what the deceased intended. If such a course be open to the one side for the purpose of explaining this ambiguity, it is also open to the other in order to shew that the testator meant not the dispensary in Aldersgate Street, but the hospital in the City Road. The will speaks for itself, and the declaration does not carry the matter further. The expression still is "hospital," not "dispensary:" and I do not know whether assistance to lying-in women does not come within the objects of a general dispensary. I am, however, very strongly disinclined, without further consideration, to make a precedent of introducing declarations between the testator and the drawer of his will. There may be circumstances, as where they are the only evidence, and where they are direct and stringent, in which it might possibly become the duty of the Court to admit declarations; but, in

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great majority of cases the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted. From the early stage in which these suits usually terminate, they pass, in a great degree, sub silentio, and are thus generally supposed more rare than is really the case. Of late they have, it is believed, become more frequent than they were a few years since. Sometimes, as a preliminary proceeding, an inventory and account is called for in the Prerogative Court.

The bill for establishing local Courts proposes that those Courts should be entrusted with a jurisdiction for the recovery of legacies, in which the course of proceeding would not be very dissimilar from that above detailed; but possibly, if the extremely simple, cheap and expeditious jurisdiction, now exercised by the Ecclesiastical Courts in this class of cases, were more generally known—still more if it were extended to the recovery of legacies charged on the realty—the want of any further remedy would not be felt.

(*a*) 6 T. R. 671. 1 Phillipps on Evidence, 519. "It seems to be now settled that all conversations and declarations of testators will be received where parol evidence is admissible, whether made before, at the time, or after the making of their wills, but with different degrees of weight and credit." 1 Roper on Legacies, 155 (White's edition), citing Lord Eldon in *Trimmer* v. *Baynes*, 7 Ves. 508.

the present instance, they do not alter the case: the question still remains whether the testator meant the General Dispensary in Aldersgate Street, or this lying-in hospital which was formerly **[166]** situate there, but which is now removed. The fifth article is in some degree contradictory and explanatory of the libel; but yet not directly so, because the title of the institution now existing in Aldersgate Street is "Lying-in Charity," not "Hospital."

The two next articles, pleading the correspondence, appear irrelevant; or, at all events, are unnecessary. The sole question is, the intention of the testator in giving this legacy. I cannot think this correspondence can tend to shew what was the opinion of the testator: it tends to shew the opinion of the executors but not of the testator. It is, indeed, chiefly relied upon as bearing on costs: and also as explanatory of the conduct of the executors: but that requires no justification; no one will impute to them that they are acting otherwise than quite properly. The party suing must make out his case.

The sole question then is, whether the legacy is given to "The City of London Lying-in Hospital, City Road." That institution comes not within the words, neither by name and title, nor by locality; neither by the beginning nor by the end of the description. First, as to the name and title, or beginning of the description. The legacy is not given "to the City of London Lying-in Hospital," which is the description of the claimant; but to "the Lying-in Hospital," which would apply as well to any other charity for lying-in women—of which there are several. Secondly, as to the locality, or end of the description: it is not "the City Road," but "Aldersgate Street." An attempt is made in the libel to remedy this by stating that about **[167]** sixty years ago the City of London Lying-in Hospital was carried on in Aldersgate Street. That was about or before the time that the testator came to London: and, on that account, he was not likely to make a blunder in its locality. On the other hand, the site of the dispensary having formerly been a lying-in hospital, it is likely enough to have retained the name of a hospital, or the Lying-in Hospital, though the correct name was the General Dispensary. The deceased, then, was much more likely to mistake as to its title than as to its locality: and, from the description alone, the probability is in favour of the locality, and that the legacy was not intended for the City of London Lying-in Hospital in the City Road, but for some institution in Aldersgate Street.

The extrinsic circumstances are more decisive. In support of the claim of the hospital in the City Road, it was thought necessary to plead that the testator had subscribed to that institution from 1818 to 1822. This, standing alone, is rather unfavourable than otherwise, for the contribution was discontinued for five years before the will was made. He probably subscribed from some temporary considerations, but his withdrawing, when possessed of immense wealth, shews that he thought the institution did not want funds, or was no longer entitled to his support; and it is expressly pleaded that he never interfered in its concerns, never sent patients there, and never resumed his subscription: but, on the other hand, looking to his connexion with this institution in Aldersgate Street, he was an annual subscriber **[168]** for forty years—a life governor—sent a number of patients—made an additional donation in 1817, because he had sent an unusual number of patients, and took an interest in it by attending the election of its officers. All these circumstances then tend to shew that he meant that institution; and though he was mistaken in the exact title, he was accurate in describing its locality.

The testator has enumerated in his will no less than fifteen charities to which legacies of 200l. each are given, and he is very particular in describing each by its locality, however well the institution may otherwise be known. It is, therefore, very improbable that he should misstate the locality of the charity he intended to benefit, and describe it in Aldersgate Street (where he had never known it) when it was in Old Street, City Road, which is at some distance, particularly when he left a legacy to the hospital next door to it, by the description of St. Luke's Hospital in Old Street Road. It is equally improbable, or still more so, that he should omit altogether this charity in Aldersgate Street which he had so much supported, and about which he so greatly interested himself for forty years, and to the time of his death. I feel satisfied that the testator intended to give this legacy to the General Dispensary in Aldersgate Street, notwithstanding the objection arising from the mistake of the name. But the executors are not bound to prove for whom the legacy was intended: it rests with the other party to shew that the institution, for which he claims, is entitled.

The allegation, excepting the parol declara-**[169]**-tions in the fourth article, and the whole of the sixth and seventh articles—which I direct to be expunged—is admissible; and I may venture now to say that if the facts stated in this allegation, thus reformed, were proved, I should pronounce against the application. If the party stops here, the executors probably will not press for costs, to which they would be entitled if the cause was persisted in.

Allegation to be reformed.

Note.—The proceedings were discontinued.

THE OFFICE OF THE JUDGE PROMOTED BY LEE *v.* MATHEWS. Arches Court, Easter Term, 4th Session, 1830.—Brawling and smiting at a vestry attended only by five persons, and held in a room situate within the churchyard, are, ratione loci, offences within stat. 5 & 6 Edw. 6, c. 4, though of a very slight ecclesiastical character. In such a case, where the promoter, a private individual, was proceeding vindictively, and had in the articles exaggerated the smiting, and suppressed his own brawling expressions, which provoked the smiting, the Court directed the matter to stand over for private arrangement; but, that failing, on a subsequent day pronounced the brawling and smiting proved, decreed the defendant to be suspended ab ingressu ecclesiæ for a week for brawling, and to be imprisoned 24 hours for smiting, and ultimately condemned him in costs.—The minister has, in the first instance, the right to the possession of the key of the church, and the churchwardens have only the custody of the church under him: if he refuses access to the church on fitting occasions, complaint must be made to higher authorities.—Where the office of the Judge is promoted, the whole transaction should be fairly stated in the articles, in order, first, that the Judge may consider whether he ought to allow his office to be promoted, and, secondly, that the defendant may be enabled, without injustice to himself, to give an affirmative issue.

[Applied, *Ritchings* v. *Cordingley*, 1868, L. R. 3 Adm. & Ecc. 123. Discussed, *Reg.* v. *Bishop of Oxford*, 1879, 4 Q. B. D. 267, 585.]

In this cause, brought by letters of request from the official principal of the Consistorial and Episcopal Court of Winchester, the office of the Judge was promoted by Sir John Theophilus Lee, Knt., against Michael Mathews, Commander in H.M. navy, "for quarrelling, chiding, and brawling by words at a meeting of the parishioners of Bedhampton (Hants), held in the vestry-room situate in the churchyard, and adjoining to, and communicating with, the parish church, on Thursday the 29th of October, 1829; and for (then and there) laying violent hands upon and smiting the said Sir J. T. Lee."

The second article charged, "That you, M. **[170]** Mathews, in the course of some explanation arising out of an enquiry you had made of the said Lee, as to the particular object for which the vestry meeting had been convened, in a brawling, &c. manner, said, addressing the said L., 'That is a lie;' and shortly afterwards, 'You are a damned liar;' and that on the said L. remonstrating with and telling you 'that, as a magistrate, it was his duty to keep, and not break, the peace, and that you should not induce him to do otherwise;' you immediately replied, 'You are no magistrate here, sir.' And then, advancing towards him in a passionate manner, you struck the said L. a violent blow on the face with your doubled fist."

On these articles three witnesses, viz. the parish churchwarden and the two overseers, were examined: and from their evidence (as far as respected the brawling and smiting, and the general character of the defendant) it appeared that they and Sir J. T. Lee were alone present at the commencement of the vestry meeting of the 29th of October. Lee was chosen chairman; in about ten minutes after, Mathews, the rector's churchwarden, came and inquired of Lee "what the vestry was for?" Lee read aloud the notice, the purport being, that the vestry should order a new key to be provided for the churchwardens, in consequence of the rector keeping both the keys of the church in his possession. Mathews then, addressing the meeting generally, said with great warmth, "You will do it at your peril;" he repeated the words two or three times. Lee then said to him, "It will be the minister and his churchwarden **[171]** against the vestry who represent the parish, as every act of the vestry is that of the parish generally;" Mathews said, "That is a lie!" L. replied, "You shall not tempt me to break the peace; you are acting like a blackguard to make use of such language." M.—"You are a damned liar." L.—"You are still acting more like a blackguard; as a magistrate it is my duty to keep the peace, &c." M.—"You are

no magistrate here, sir;" and walking up to L., Mathews, with his open hand, struck L. a sharp blow upon the cheek. L.—"Now, sir, I'll trounce you for this, as sure as you are alive." The conduct of Mathews was very violent, and he was in a great passion. A statement, by Lee's direction, was then drawn up of what had passed, which at the time was admitted by Mathews to be correct, except that the blow was not severe.

Upon interrogatories: Mathews is a man of gentlemanly, inoffensive, meek, and quiet manners, except when irritated and provoked; and of high moral character and respectability: he is a constant attendant at church. At a vestry meeting, subsequent to that of the 29th of October, he stated to the effect, "That what he had done was strictly under a sense of his duty as churchwarden, in upholding the character of the minister's sacred office, and that he had never supported the clergyman from any other motive, and certainly not in opposition to the parish."

After the cause had been opened, the Court proceeded to make some observations as follows:—

[172] Per Curiam. This is a suit for brawling and smiting: the first article states the law, the second article lays the facts.

Three witnesses have been examined, viz. the parish churchwarden and the two overseers: no other person was present: they prove both the offences charged. In respect to the brawling, the articles do not state all that passed: the witnesses, even upon their examination in chief, prove that certain words were used by the promoter which are not inserted in the articles. In respect to the smiting, they prove less than what is laid. It is pleaded that the blow was given with the "doubled fist:" the witnesses say with the "open hand." These facts shew that the articles are drawn in an exaggerated spirit; and that circumstance may not only affect the costs, but the degree of punishment. Long interrogatories have been administered suggesting various circumstances which, it is true, are for the most part contradicted, but they do disclose some circumstances tending to shew that this parish is in an unfortunate state of disunion and conflict.

There was in this parish some difference of opinion about painting the church. Sir John Lee, who became a parishioner only at Michaelmas, 1828, appears to have supposed that the minister, and the churchwarden nominated by him, had no voice in matters that were to be paid for by the parish, nor with the vestry book. Sir John Lee was strongly opposed to the minister and his measures—was often called to the chair; and, as chairman, had inserted in the vestry book some entries censuring the **[173]** rector, and which the chancellor of the diocese advised should be expunged. On the other hand, the minister kept possession of the keys of the church, and as it should seem, in order to prevent this painting at that particular time; and surely the minister of the parish is the fittest person to decide at what season the public worship may be suspended with least inconvenience to the religious duties of the parishioners. This vestry was called for the purpose of ordering an additional key of the church to be made for the use of the parish churchwarden. This was very irregular; for the minister has, in the first instance, the right to the possession of the key, and the churchwardens have only the custody of the church under him. If the minister refuses access to the church on fitting occasions, he will be set right on application and complaint to higher authorities. These are miserable disputes, much to be lamented: as to which was the party perverse and blameable, or whether there were not some faults on both sides, the Court is not desirous of forming an opinion; but I much fear that the present suit will be far from tending to promote union.

At this vestry, consisting of the parish churchwarden and the two overseers, and Sir John Lee, the chairman, Mr. Mathews, the rector's churchwarden, attends (no other persons were present); he inquires into the object of the meeting, and protests against the measure; and at length words ensue. From the previous history it appears the parties did not meet in amity and good feeling towards each other. The evidence shews that most un-**[174]**-seemly language was bandied about between the parties: there were mutual brawlings, one gives the "lie," the other uses the word "blackguard:" this was rather a strange mode of "keeping the peace." At all events, it was not observing "the sanctity of the place."

The witnesses describe Captain Mathews as a moral, gentlemanlike, quiet man, except when provoked, but unfortunately he is irritable: he was provoked to give Sir John Lee a slap on the face; and undoubtedly, though an officer in the navy, and

though the insulting and opprobrious term "blackguard" was applied to him, he ought not to have forgotten the sanctity of the place. Immediately Sir John Lee exclaims "I'll trounce you for that" the transaction is reduced into writing, and the suit is brought. But how are the articles laid? Not by setting forth all the words, and the provocation given; the term "blackguard" is entirely omitted: but though the provocation for the smiting is omitted, the smiting itself is highly coloured and exaggerated: the articles lay it to have been "a violent blow with the doubled fist." Now this being a case of office, the whole transaction should have been fairly and candidly stated at once, in order, first, that the Judge might have an opportunity of considering whether, both parties being involved pari delicto, he ought to allow his office to be promoted; and, secondly, that the defendant might be enabled, without injustice to himself, to give an affirmative issue. Had all the facts appeared in the articles, I doubt whether, considering that the promoter is not a disinterested officer of the parish, proceeding in his official capacity ob publicam vin-**[175]**-dictam, but a private individual proceeding for an offence committed against himself, I should have allowed the case to have gone on. At all events, the suppression of the whole truth and the exaggeration of part of the offence is very material, as applying to the question of costs, because it has prevented the defendant from giving an affirmative issue, and submitting to the judgment of the Court. In that case the costs would have been trifling: now they are probably considerable. The Court will let the whole stand over, recommending to the parties to talk together, or rather to get their counsel to talk together, out of Court, thinking it possible that in that case the judgment of the Court may never be required; and trusting that the parish may go on more amicably in future.

On a subsequent day Lushington, on behalf of the promoter, stated that terms of agreement having been settled on the part of Captain Mathews by the King's advocate and by himself, and the defendant having declined to accede to them, the promoter was under the necessity of calling upon the Court to pronounce judgment.

Trinity Term, By-Day.—*Judgment—Sir John Nicholl.* The recommendation of the Court has not been attended with success, and the Court is now called upon and compelled to give its sentence. The brawling and smiting being proved, the consideration remains—what is the proper **[176]** degree of punishment to be applied, and what is to be done as to costs? With reference to both these questions, the Court must look to all the circumstances and to the spirit of the proceedings.

In order to determine the degree of ecclesiastical censure, what, first, are the circumstances of the transaction? The object of the law is to preserve the sanctity of the place, and to prevent public disturbance therein. Here, the transaction did not occur in the church, nor yet in that part of the churchyard appropriated to religious purposes—the Christian burial of the dead—but in the vestry-room, where the temporal concerns of the parish are transacted: and though, as the building stands upon consecrated ground, a long stream of authorities forbid the expression of a judicial doubt as to its coming within the meaning of the statute, still it cannot be denied that the sanctity of the place is of an inferior character.

Again, the transaction was not to the disturbance of public worship, or of any religious service, when the parishioners were met for pious purposes or for the burial of their dead, but it occurred at a vestry very limited in numbers—almost a private meeting of Sir John Lee and the parish officers. It was then, in fact, almost as little of an offence against public decency as if the scene had been laid at a neighbouring alehouse; and it is merely ratione loci, because the vestry-room stands within the precincts of the churchyard, that it becomes an offence at all of which this Court has cognisance. The case, therefore, is of as slight an ecclesiastical cha-**[177]**-racter as can well be imagined, for, as an assault on the individual, this Court has nothing to do with it.

What are, secondly, the character and spirit of the whole proceeding? Offensive conduct on the part of the defendant; and, on the part of the promoter, a feeling not so much of the outrage done to the sanctity of the place, as of the insult offered to himself. By the promoter's own witnesses the defendant is described as a gentleman-like, a moral, and a quiet man, though, by his irritability, he has been surprised into a violation of the law. On the other hand the smiting is laid in a very inflamed manner; while as to the brawling, the promoter's own witnesses prove him equally to have been a brawler; and though the Court cannot punish that brawling under

the shape in which it now comes out, yet when such a promoter asks for his costs, his own conduct necessarily forms part of the consideration. His original motive in commencing this suit is shewn by his exclamation, "I'll trounce you for this:" he has exaggerated the defendant's misconduct, and has suppressed his own: whereas, for the reasons assigned on a former day, all the circumstances ought to have been candidly stated in the first instance. On the whole, then, neither is the ecclesiastical character of the case, nor the character and spirit of the proceedings such as to demand a severe measure of punishment, nor to give the promoter a strong claim to costs.

The Court, therefore, would have been well pleased if, after what had passed on a former day, neither party had moved in this cause; for in that case it would have been dismissed **[178]** as a matter of course; but I am compelled to proceed: and, looking at all the circumstances of the case, I pronounce the brawling and smiting to have been both proved: and—since the law as to the former leaves the punishment to the discretion of the Court, but as to the latter is imperative, though the subsequent statute in commutation of excommunication empowers the Court to regulate the time of imprisonment—I shall, for the brawling, suspend the defendant ab ingressu ecclesiæ for one week, and, for the smiting, decree an imprisonment of twenty-four hours (see 53 Geo. 3, c. 127): and, further, considering the extreme length of the interrogatories, and that, after both parties had referred the matter to the decision of their leading counsel, the defendant refused to abide by the arrangement entered into for him, I shall condemn him in costs.

THE OFFICE OF THE JUDGE PROMOTED BY FIELD *v.* COSENS. Arches Court, Easter Term, 4th Session, 1830.—A defendant, on giving an affirmative issue, suspended ab ingressu ecclesiæ for a month, and condemned in costs for brawling on two occasions at a vestry held in the chancel.

[Followed, *Combe* v. *Edwards*, 1878, 3 P. D. 132.]

This cause came by letters of request from the official principal of the Episcopal and Consistorial Court of Chichester, and was promoted by the churchwarden against the defendant for brawling and creating a disturbance in the parish church.

The third article objected, "that at a vestry meeting held on the 31st of December, 1829, in the chancel, for the purpose of making a rate **[179]** for the relief of the poor, Cosens did by mere noise and clamour, and without any just cause, interrupt the business of the vestry and most grossly abuse F., and utter several profane oaths, and called him a damned infernal rogue, and that he always was a rogue and a rascal, and several times damned him for a rogue."

4th. That on the 11th of March, 1830 (in a meeting of vestry as before), Cosens did again repeatedly by mere clamour, &c. interrupt, and, speaking to and of Field, say "that he was a rogue; and that H., one of the overseers, was another rogue; and that F. and H. were the largest rogues in the parish, and that, speaking of their signatures to the said rate, did assert, 'there are the names of two rogues.'"

An affirmative issue having been given to the articles, the Court suspended Cosens ab ingressu ecclesiæ for one month, admonished him, and condemned him in costs.

TAYLOR *v.* MORSE. Arches Court, Trinity Term, By-Day, 1830.—A respondent may be admitted as a pauper in the Court of Appeal; and the Court looks at his faculties at the time of his application, not at what he may have been possessed of at a former time.

On appeal.

This was a cause of inventory, appraisement, and account, and was promoted originally in the Consistorial Episcopal Court of Wells by Joseph Taylor (asserting himself to be a creditor of James Morse, deceased) against Charles Morse, the brother and administrator of his effects. Taylor's interest being denied, he pro-**[180]**-pounded it in an allegation, and examined one witness in support of it: and the præsertim of the appeal was that the Judge, "on the 25th of February, 1829, pronounced that Taylor's allegation of interest was not proved, and dismissed Morse, and condemned Taylor in costs."

Upon the prosecution of the appeal the respondent, Morse, was put into Bristol gaol under a writ de contumace capiendo for not appearing to the inhibition and

citation which had issued from this Court: but having since made oath that he would obey, in future, the lawful commands of the Court, and upon an affidavit sworn upon a commission that he was not worth 5l. after payment of his just debts, he applied to sue as a pauper: this was objected to by the appellant: and the present question, in respect to that application, came on upon act on petition and affidavits.

On behalf of Taylor it was in substance alleged that "after the death of James Morse, his brother Charles, in October, 1827, administered; and took possession of the deceased's effects, of the value of 170l., and of his other property of the annual value of 32l.: that he had sold the property and premises, or if any part were not sold, he now receives the profits and applies them to his own use; and had not paid the deceased's debts, nor made any distribution; that he has other property of his own, and earns a weekly income as a shoemaker."

In reply. "That upon the death of Charles Morse proceedings were for some time depending, in the Consistory Court of Bath and Wells, between the respondent and the asserted **[181]** relict who claimed administration; that she took possession of property of the deceased of the value of 350l. and upwards, and sold part to the amount of 100l.; that she is dead, and great part of such property is in possession of the appellant, who claims it as the residuary legatee in her will; that the respondent, as administrator, sold property to the amount of 106l. 16s., and that, as to an unfinished house, the fee-simple of which was claimed by different persons, he, to avoid a suit, delivered it up to the lord of the manor for 50l., of which sum 25l. was paid to the deceased's heiress at law, as a compensation for her interest, and that he had also delivered up the deceased's cottage and orchard for 20l., he not knowing what estate or interest the deceased had therein, the whole of the title deeds having been retained by his asserted widow, or Taylor; that the deceased's freehold was taken possession of by his heiress at law; that he was possessed of four acres of land (held on a life of 72), let for 7l. 10s. per annum; and also of another piece of land (not quite two acres) held on life, and let for 3l. per annum; but that he had only received 5l. for rent. That the respondent has been involved in various causes as administrator of the estate; and is now indebted to the Rev. Mr. Hare in 80l., for money advanced to him for defraying the expences of such suits; that he owes a large balance to Samuel Pratt, his proctor at Wells, and to Henry Smith, his attorney at Bristol, upwards of 100l. for law expences; and to other persons several small sums; that he is insolvent and a pauper; that, upon his contempt being signified, he was imprisoned until his fees **[182]** were paid for him; that he is 72 years of age, has a wife and five children; and by his business has not earned for many weeks, and does not now earn, more than four shillings a week; that he and his family are unable to support themselves, and receive charitable assistance; that part of his wearing apparel is now in pawn for 8l.; and that all his furniture and goods, including a few tools, are not worth 5l."

Lushington in objection to the application. Morse is in possession of land worth ten guineas per annum: this income, notwithstanding his debts, is alone quite sufficient to disqualify him as a pauper. His own affidavit does not negative the material facts, and that of the solicitor only enters into particulars not bearing on the present question.

The King's advocate contrà. The appeal has been occasioned by the irregular course adopted by Taylor in the Court below: he exhibited no affidavit of debt, and failed to establish his claim as a creditor. In regard to the income said to accrue to the respondent from land, I admit there is no specific denial on that point: but that arises from there being no averment of it, on the part of the appellant, in the act on petition. The facts are such as amply entitle the respondent to proceed in formâ pauperis.

Per Curiam [after stating the proceedings in the Court **[183]** below and in this Court]. This is an application to be admitted a pauper, and it is objected to by the appellant. Affidavits are exhibited that the party applicant is a pauper and insolvent; that he has no means of livelihood, except four shillings a week, which he earns by his trade as a shoemaker; and that he has a wife and children: while on the other side it is alleged that he got possession of "some property on the death of his brother in October, 1827, and has converted it to his own use:" but it does not follow that he has property at present. Morse's affidavit specifically sets forth his debts; and there is the fact that he was imprisoned for nine months, and at length

got his contumacy fees paid for him: he is also the respondent; he has the sentence in his favour, and this very materially distinguishes his case from that of a person who attempts to appeal in formâ pauperis. On the whole I think he is entitled to be admitted a pauper.(*a*)[1]

[184] LILLIE *v.* LILLIE. Prerogative Court, Michaelmas Term, 1st Session, 1829. —The law presumes, primâ facie, 1st, that if a paper (a will) be left at a party's house, it comes into his possession: 2dly, that if it be thus traced into his possession, and be not forthcoming at his death, he destroyed it. A draft will being propounded under these circumstances, the Court pronounced the deceased was, as far as appeared, dead intestate, and condemned the party setting up the paper in costs.

This was a cause of proving, in solemn form of law, a draft of the will of Charles Edward Lillie, deceased: the will was alleged to have been destroyed without his privity or consent. The draft was propounded by the mother of the deceased, and opposed by his widow.

Lushington and Nicholl in support of the draft.

Dodson and Addams for an intestacy.

Judgment—Sir John Nicholl. The instrument set up in this case is a draft of the will of Charles Edward Lillie: the will itself being alleged to have been destroyed without his privity or consent. The fact that the deceased executed such a will is proved; but, as it is not forthcoming, the party setting it up must satisfy the Court (*a*)[2] that it was not **[185]** destroyed animo revocandi by the deceased; as, for instance, by shewing that he had no opportunity of so doing,(*a*)[3] or that it had been lost or destroyed without his privity or consent.

The deceased died on the 28th of October, 1828, leaving a widow, a mother, a brother, and a sister. Not only was his marriage with Anna Goldsmith (which took place on the 5th of September, 1827) disapproved of by his mother and family, but they objected, on account of his circumstances, to his marrying at all. Soon afterwards he had a violent attack of illness, and in October sent for his friend Mr. Whitmore, a stockbroker, to whom he gave instructions for his will. Whitmore employed his own solicitor: the will was duly executed, and was deposited by Whitmore at his banker's. Whit-**[186]**-more and two other friends were appointed trustees and executors.

This will was not favorable to his wife, and it was executed without her privity

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(*a*)[1] In *Bland* v. *Lamb*, 2 J. & W. 402, a pauper was admitted to appeal: but the case of *Taylor* v. *Bouchier*, 2 Dick. 504, was cited contrà. It appears, however, from the report of that case, Bro. P. C. 709-715, that Taylor and his wife, on the 20th of October, 1758, filed their bill in Chancery as paupers. Bouchier appealed from an order of the Master of the Rolls on the 11th of March, 1774, and from a decree of the Lord Chancellor on the 21st of July, 1775. The respondent, therefore, was the pauper; and if what is reported in Dickens passed, it was a mere dictum—not the point decided.

(*a*)[2] Not by evidence amounting to positive certainty, but only such as reasonably produces moral conviction. *Davis* v. *Davis*, 2 Add. 226. *Colvin* v. *Fraser*, 2 Hagg. Ecc. 325. For the acts, declarations, conduct, and affections of the deceased may raise such an extremely strong improbability, almost amounting to an impossibility, of his having himself destroyed the will, animo revocandi, as to rebut the primâ facie legal presumption, and to compel the Court to conclude that the deceased, at the time of his death, believed the will was in existence, and would act upon his property; and consequently that its non-appearance was the result of some cause other than the wish and intention of the deceased. This was the principle of the decision in *James* v. *James* (an amicable suit), Prerog. Hilary Term, 1829, wherein an executed fair copy was pronounced for; the will itself, though it was known to have been in the deceased's possession, not being found on his death. The facts, proving adherence to the last moment of his life, were quite irresistible.

(*a*)[3] Thus, if the will is traced out of the deceased's possession and custody, it rests with the other party either to shew by the same sort of evidence that it came again into his possession or custody, or that it was destroyed by his directions, or with his privity and consent. *Colvin* v. *Fraser*, 2 Hagg. Ecc. 327.

or knowledge of its contents. His property consisted of a freehold house and of about 3500l. personalty. The house was devised to the mother for life, and then to the brother: he gives to his mother an annuity of 100l., and to his wife the interest of the residue, and that only during her widowhood. Now this interest at 4 per cent. would not exceed 40l. a year. He also gave her some contingent interest after the death of his mother.

The reason suggested for this disposition was that she brought him only 500l. as her fortune; that this was too slight a portion; that her father ought, and was fully competent, to provide for her; and therefore, though at the altar the deceased had endowed her with all his worldly goods, he intended to throw the onus of her maintenance on her own father. But as a professional man he must have known that, having accepted the portion given with his wife, he was bound to support her. If any credit be due to the deceased's declarations, he believed his mother and brother had used means to give him, while on the bed of sickness, unfavorable impressions of his wife; and there are circumstances which tend to confirm the sincerity of his belief, whatever foundation it might have had in reality. Taking, however, the simple fact that the will, made only two months after marriage, when he was dangerously ill, was so adverse to his wife, is it highly improbable that he should revoke it?

[187] That the wife shewed him great attention during his first illness is not denied, and the subsequent history of his own conduct proves that he became greatly attached to her. He went with her to reside at Tottenham: he went with her on tours; he resided for some time with her at her father's house, but they never went to reside with his mother. His ill state of health continuing, his wife was a constant and vigilant nurse, and his great anxiety was lest by her attention to him she should injure her own health. Looking, then, at this history, nothing could be more improbable than that he should suffer this will to stand.

In addition to this conduct there are various confidential conversations and declarations that he would revoke it; but it is said that he did not intend to die intestate; and it is true that he might propose to make another will. There is, however, a declaration "that the law would make his will in a manner that would be quite satisfactory to him." What would that be? His brother would take the small freehold; his widow would take a moiety; and the other half would be divided between his mother, brother, and sister: and the deceased himself, being a solicitor, must have been aware that the law would thus dispose of his property. An intestacy, therefore, in this case is not improbable: and is quite consistent with a continuance of affection for his mother, brother, and sister, though not with its continuance to the same extent, and to that exclusive degree, as when he made this will. The probability, then, is that he would revoke and destroy this will.

On the other hand, what evidence is there to **[188]** shew the impossibility of such destruction by himself? None. It should at least be shewn that no opportunity for it occurred: but the evidence bears all in an opposite direction. It appears from the deposition of Mr. Whitmore (against which and against whose credit and character there is not the slightest imputation) that though, as the deceased's confidential friend, he had been employed in preparing the will while the deceased was ill, he did not agree in or approve of the disposition; and therefore when the deceased recovered from the violence of the attack, Whitmore fetched the will, together with a codicil, from his banker's, and inclosed them, and the solicitor's bill for preparing the will, in an envelope, and called at the deceased's house to deliver the packet to him. The deceased being at dinner, or lying down, Whitmore left the papers at the house, either with the female servant or with the clerk, but with which of the two he does not recollect; nor has the servant nor the clerk (both of whom were in the habit of receiving parcels and messages) an exact recollection of Whitmore's leaving this particular parcel: but there is no reason to doubt the accuracy of that gentleman's evidence; and then the presumption from the will being left at the house is that it came into the deceased's possession. Here, therefore, the paper is traced back to the possession of the deceased, under circumstances which raise a strong probability that he would destroy it.

That the deceased himself did destroy it there is no direct legal evidence: but the widow, in her affidavit of scripts, swears that the will was delivered to, and that it was then torn and burnt **[189]** by, the deceased. She did not even know the contents; but only the fact that it was burnt, and this is no after-thought, for she mentioned

the circumstance in the deceased's life-time. She has therefore purged herself by her oath that it was not she, but the deceased himself, who destroyed these papers.

Looking, then, to all the circumstances—to the contents of the will itself, to the time and circumstances under which it was made, to the subsequent conduct of the deceased, to his very great affection for his wife, to his various declarations, to the positive evidence of Whitmore that he had carried back the will together with the solicitor's bill, and—to what I have hitherto omitted to mention—the admitted fact that the deceased himself called to pay the bill, and though he had not the bill with him, yet that he knew the amount—I am of opinion, not only that there is no proof that the will was destroyed without the deceased's privity, but I am morally convinced that it was destroyed by the deceased himself: it is not necessary to prove that; for the fact that the will was left at the deceased's house is, as I have said, sufficient presumptive proof that it came into his possession; and it is not attempted to be denied that, if traced into his possession, the law primâ facie presumes that he destroyed it; (*a*) and, in this **[190]** case, that presumption is strengthened by the parol evidence of his declarations and of his increased attachment for his wife.

(*a*) Prerogative, September 11, 1723.—In the case of *Pinhallow* v. *Robinson*, administration of Pinhallow, as dying intestate, was granted to his nephew, Robinson: he was called by Pinhallow to shew cause why it should not be revoked, who offered an allegation propounding the draft of a will; that the deceased gave instructions to Mills, which were written over and executed by him; that soon after the execution of the will he went into Cornwall, and there declared, on the Thursday before he died, that he had made his will, and that it was at London; that he had made his kinsman, Pinhallow, his executor, and that "he will be the squire now;" * that since his death the will could not be found.

Per Curiam (Dr. Bettesworth). If the will had been found cancelled, it might depend on circumstances how it came in that state; and, if any declarations near the time of the testator's death, it might be presumed to have been done by the person prejudiced by it. It will lie on the other side to shew that the deceased departed from his intentions, in order to lead the presumption that he cancelled it.

Allegation admitted.

The instructions and execution were proved, but it did not appear how the will was lost, and that the deceased was privy to Mills having preserved the draft. The original will, which had been left with Mills, the writer, was taken out of his hands by Pinhallow, when he was going into the country; but there was no account of it afterwards. The declarations of the deceased relating to his will were not uniform—some, that he had no will.

Trinity Term, 4th Session, 1724.—Per Curiam. The question in law is whether it is necessary that the will should have been seen after his death, and whether the law presumes, if there be no account of a departure from his intention, that it has been lost by misfortune. If it does not appear, it must be supposed to have been destroyed by the deceased himself, unless there were stronger presumptions on the other side.

Pronounced to die intestate.

The presumption in the case of cancellation was thus held in the following case, similar in some respects to *Colvin* v. *Fraser* (2 Hagg. Ecc. 325).

Boughey v. *Sir William Moreton*, Prerogative, June 16, 1758.

Lady Moreton, in pursuance of power on marriage, executed two duplicates of will; one she kept, and the other was left in the hands of an executor. Soon after her death, that in her custody was found cancelled, in a trunk, with other papers, her seal, name, and entire attestation of witnesses torn or cut off. Sir William swore he believed she cancelled it herself, it being found, upon the search, in the state it now is, which was the first time he ever saw it. This cancelled and uncancelled duplicate being brought in, the matter was brought before the Court to determine whether probate should be granted to Boughey of the uncancelled duplicate, or administration should be granted to Sir William as husband.

The Court was of opinion that a cancellation of one duplicate was in law a cancella-

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* The real estate was likewise devised to him by the will; but he was neither his heir at law nor next of kin.

The only difficulty is to find out some fair grounds to justify the mother in setting up such a case. All the facts were fairly communicated to her, and to her friends and advisers. There was no appearance of mystery nor of concealment. The executors were satisfied that the **[191]** will had no existence either in fact or in law; nay, there was the widow's affidavit directly stating that the deceased had burnt it. In opposition to this, the mother chose to set up a case of spoliation against some persons. It is true that no person is directly fixed upon against whom the charge of spoliation is made: but on whom must the imputation attach? Though, however, she does not directly charge spoliation, she, at all **[192]** events, by necessary implication imputes to the widow perjury in her affidavit of scripts and answers, wherein she swears "that she saw the deceased burn a paper, saying, 'he wished he had never made it;' and that while it was burning she read the words 'This is the last will and testament.'" The engrossed copy, which is before the Court, has the words "Last will and testament," in a large text hand, and **[193]** thus strengthens the widow's affidavit. The mother, brother, and sister are entitled to one-half of the personalty, and I think it more just that the expences incurred in this suit should fall upon the mother, the party in this cause, than that any part of the costs should fall upon the widow in diminution of her share of the effects.

I therefore pronounce against the instruments propounded; that, as far as appears, the deceased is dead intestate; and I condemn Mrs. Christiana Lillie, the mother, in costs.

AITKIN *v.* FORD. Prerogative Court, Michaelmas Term, By-Day, 1829.—Administration, as to a creditor, decreed to the mother of an intestate, advanced by her; the father, though alive, having been divorced à vinculo matrimonii and married again.—The Court, before granting administration to a creditor, requires an affidavit (inter alia) that he has no other security; and if the person first entitled to the grant is abroad, and the service of the decree is on the Royal Exchange, that such person has no agent in this country.

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tion of both; and that as the cancelled duplicate was found in her custody, and it did not appear that any other person had access to it, it must be presumed the deceased cancelled it herself: therefore refused to grant probate to Boughey, as prayed, upon the evidence now before the Court, but gave time to the next Court to determine whether he would propound the uncancelled duplicate or would undertake to prove, either that the other part was cancelled by some other person; or, if by deceased, that she did it inadvertently or accidentally, and not animo cancellandi; otherwise the Court decreed administration to her, as dying intestate, to be granted to Sir William as husband.

So, in the case of *Hare* v. *Nasmyth*, before the House of Lords, Lord Chancellor Eldon said: "According to all principle, if a paper, cancelled, and the seal cut off, or the name erased, is found in a fast-locked place of the testator, the primâ facie inference from that is, not that the testator meant it should continue to be his will, but that the testator was the person that did that act himself, which is found to be evidenced by the state of the paper found in his fast-locked closet." Vide 1 Shaw, 73, S. C. 2 Add. 25, n.

Again: "I am satisfied that the seal was taken away by excision; and it appears to me also that this excision is primâ facie to be taken to be an excision by his own act; and that, according to the principles which you apply to cases of this sort, the circumstance that it was found in his own custody, and in a place of security, and with this excision, is to be taken as evidence that it was his own act." Ibid. 77.

But it is believed that the presumption, when a testamentary paper is not forthcoming on the death of a party, and no evidence be given of its destruction by the deceased, or by any other person, has never been ascertained by a judicial decision in the courts of Westminster Hall; however, it seems probable that those Courts would be guided by the principle acted upon in the Ecclesiastical Courts; for in *Moggridge* v. *Thackwell*, 7 Ves. 79, Lord Chancellor Eldon thus expressed himself: "Lord Thurlow, referring to the case of *The Attorney General* v. *Siderfin*, does not take notice of the circumstance that though there had been an appointment, it might have been revoked; and the non-existence of it was primâ facie evidence of that fact that it was revoked."

On motion.

Gostling moved for letters of administration on an affidavit, the substance of which is as follows:—Catherine Aitkin of Weymouth, single woman, made oath: That Charles Ford, late of Trinidad, a lieutenant in H.M. First Regiment of Foot, died on the 1st of April, 1829, a bachelor and intestate, leaving James Ford, his natural and lawful father, now residing in the United States of North America; that the deponent in 1804 was duly married to James Ford in Scotland; that in October, 1817, she separated herself from him in consequence of discovering his adultery, and in 1820 obtained a decree of **[194]** divorce in the Commissary Court of Scotland; which decree was affirmed by the House of Lords; and that James Ford had since married the woman with whom he had been living in adultery: that the deponent, during the time of her marriage, had, by James Ford, her husband, ten children, of which the deceased was one; that from the time of quitting her husband in 1817 she had entirely maintained and educated her children from her own separate property; that in the purchase of two commissions in the army for the deceased, and in fitting him out, she had expended upon him 900l.; that the same was now justly owing to her from the deceased's estate; and that the only property thereto belonging in this country was about 120l. due from the War Office.

Per Curiam. The decree, citing James Ford, has only been served by affixing it to the Royal Exchange: and the affidavit does not state that he has no agent in this country; nor that the party applying for the administration has no other security for the money with which she purchased the deceased's commissions: it is therefore deficient in these particulars: but when such defects are supplied, the administration may pass to Catherine Aitkin.(*a*)

[195] IN THE GOODS OF MARY POWELL. Prerogative Court, Michaelmas Term, 4th Session, 1829.—The Prerogative Court granted an administration, limited to assign a term in the diocese of A., the will of the deceased (who had no goods out of the diocese of B., except this satisfied term) having been proved in the Court of B., and the chain of executors being subsequently unbroken.—Semble, that a diocesan probate can give no authority, nor continue any privity, as to a satisfied term in another diocese.

On motion.

William Powell by his will appointed his wife, Mary Powell, sole executrix and residuary legatee: and in 1775 she proved his will in the Prerogative Court of Canterbury.

Mary Powell by her will appointed her son, her daughter, and John Pocock executors: and in 1784 they proved her will in the Episcopal Court of Gloucester. John Pocock survived his co-executors, and died in March, 1819: and his will was proved by his wife, Jane Pocock, the sole executrix, in the Prerogative Court of Canterbury. She also made her will, and appointed Ann Watts and Reynold Gunter her executors, who in 1820 proved in the same Court.

In 1761, by indenture of mortgage, certain premises in the county of Somerset were assigned to Robert Powell, to be held to him, his executors, &c. for the remainder of the term of **[196]** 1000 years, with the usual proviso of redemption. By an indenture of 1st January, 1828, reciting that the claims of Robert Powell were satisfied,

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(*a*) The Court, before granting administration to a creditor, requires an affidavit of the amount of the effects, and of the debt, and that the creditor has no other security. Justifying security is called for at the Court's discretion, according to the circumstances of each case, save that there is one general rule, that in all cases where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required; and if the party first entitled is abroad, the decree must be served on the Royal Exchange and on his agent, or an affidavit must be made that he has no agent in this country.

When the property is large, and exceeds to a considerable extent the amount of the interest of the party applying for the grant, the Court—even when the party first entitled to the grant is abroad—sometimes requires to be satisfied that he has had notice of the intention to apply for such a grant, and frequently directs the matter to stand over till sufficient time has elapsed since the service of the decree, for an appearance to be given.

but that there had been no assignment of the term to the owners of the freehold, it was witnessed that Watts and Gunter, executors of Jane Pocock, and, as such, the representatives of Robert Powell, had sold and assigned the premises to John Hooper and others: that assignment, however, was considered insufficient, inasmuch as the term assigned was not within the diocese of Gloucester, in which diocese Mrs. Powell's will was proved, and within which were all her effects, except the term stated to have been satisfied; and accordingly an administration, limited to the assignment of this term, was granted to the nominee of Hooper and others: but the purchasers still objected, on the ground that the term, whether satisfied or not, vested in Mary Powell as executrix of Robert, and they required that she should be represented by a grant from this Court to Watts and Gunter, the executors of Jane Pocock.

Lushington, under these circumstances, moved for a limited administration to Mary Powell to be granted to Watts and Gunter for the purpose of assigning this term.

Per Curiam. The property to be assigned is in Somersetshire: a probate therefore in the diocese of Gloucester cannot give any authority in respect to it. I have no difficulty in granting an administration limited to assign the term.(*a*)

Motion granted.

[197] CROSLEY *v.* THE ARCHDEACON OF SUDBURY AND OTHERS. Prerogative Court, Trinity Term, 4th Session, 1815.—The Court will not enforce a monition to transmit the original will proved in an inferior jurisdiction, where the deceased died, but will grant a limited administration to assign a satisfied term situate in another diocese.—Generally speaking, all ecclesiastical jurisdictions are limited in their authority to property locally situate within their district.

On petition.

This question respected the enforcement of a monition served upon the registrar of the Court of the Archdeacon of Sudbury to transmit to this Court an original will; and the grant of letters of administration (with the said will annexed) under certain limitations.

The registrar of the archdeaconry appeared under protest, denying the jurisdiction, and, in substance, alleging "that Thomas Underwood, the deceased, did not leave bona notabilia; that, save the residue of a term of 1000 years in certain premises in Essex, of which he was a mere trustee, and where no money was due, and which was of no pecuniary value, all the rest of his property was in the archdeaconry of Sudbury, where his will was proved by his executor in 1786; that the residue of the term of years was, at his death, a satisfied term, which had been assigned to the deceased merely to attend and protect the inheritance against mean incumbrances, and was of no value as part of the deceased's property, could not be converted to profit, and therefore not bona notabilia:" and prayed to be dismissed.

To this petition it was answered: "That by deed in 1771 between N. of the first part, R. of the second, and Underwood of the third, the premises were sold to Underwood, his executors, administrators, and assigns, during the remainder of 1000 years, then unexpired, in trust as there set forth; that Underwood died without [198] having assigned such interest—made a will—that probate was taken in the Sudbury Court, where the will remained; that the executor was dead and there was now no legal representative; that by sufficient conveyances William Taylor and James Hales were become entitled to the freehold and inheritance of the premises in question, and of the remainder of the term, but they could not make a legal title without a legal assignment of the remainder of the term by the representative of Underwood; that the premises being so situate in Essex, and the legal interest being in the deceased, who had goods, as admitted, in the jurisdiction of the Court of Sudbury, they together formed bona notabilia so as to give jurisdiction to the Prerogative Court; that the term could not legally be assigned under any probate or administration from the Court of Sudbury, nor by any representation except from the Prerogative Court: that in December, 1813, Crosley, as nominee of Taylor and Hales, prayed a monition to transmit the original will which has been duly executed; and now petitions that the protest be overruled and monition enforced."

Jenner and Lushington in support of the protest. To prove a satisfied term forms bona notabilia, it must be proved that it is of some value; but, whatever may be the

(*a*) See the case of *Fowler* v. *Richards*, 5 Russ. 39.

value of such trusts, it belongs to the freehold; they are of no pecuniary value: here the legal interest is in the trustee, but the beneficial interest in the cestui que trust. *Maundrel* v. *Maundrel* (7 Ves. 567), *Villars* v. *Villars* (2 Atkins, 72). The trustee could neither sell [199] nor dispose of it. If the term should be considered as forming bona notabilia, it would be attended with great inconvenience—the will must be transmitted, and the probate, hitherto acted upon, would be void.

Swabey and W. Adams contrà.

Judgment—Sir John Nicholl. The question assumes a very awkward shape from the appearance in this case not being given by the party, but by the Judge of another jurisdiction asserting his own right in opposition to the right of this Court: it is awkward for this Court to have to decide on its own jurisdiction; but as this is cast upon it, the Court must endeavour to discharge the duty. I must first observe that jurisdictions are not established for the benefit of those who exercise them, but of the public who have occasion to resort to them. The emoluments of the Judges and registrars and others connected with them are a very secondary consideration: the primary consideration is the convenient administration of justice to the public.

The metropolitan has, under certain circumstances, the right to grant a prerogative probate for this purpose; that where the property lies in different jurisdictions parties interested may be saved the expence and inconvenience of resorting to more authorities than one. Now (except under very special circumstances),(*a*) [200] all jurisdictions are limited in their authority to property locally situate within their limits. The archbishop to his province—the bishop to his diocese—the archdeacon to his archdeaconry. Here the property is not locally situate within the archdeaconry of Sudbury, the jurisdiction where the party died, but in another jurisdiction and diocese.

There is an absolute necessity that acts should be done in respect to this property in which the rights of parties are interested, and which acts can only be done by the legal representative of the deceased quoad this property: it is quite clear that the Archdeacon of Sudbury cannot grant a representation sufficient for this purpose, because the property (whatever be its value, or if of no value) is not locally situate within his jurisdiction. It seems equally clear also to me that the ordinary of the place, where the property is locally situate, cannot grant a representation because the deceased has left other property, above 5l. in value, in another jurisdiction—Sudbury. What then is to be done? Are the rights of the parties to be lost, and is no legal title to be made to this property? That cannot be. What other jurisdiction has authority but the archbishop's to supply this deficiency? The representation then being necessary, and no other jurisdiction com-[201]-petent to grant it, I think, ex necessitate, that this Court, without inquiry as to the value, has not only jurisdiction, but is bound to exercise it: the grant, however, must be limited, and strictly limited, to the purposes prayed.

The next question then is, as to the mode of making the grant: and whether any and what arrangement can be made in that respect?

It is said that the property is of no value; but the legal property was in the deceased, and his act, if living, would be necessary to make a title: and though, as a trustee, a Court of Equity would compel him to do such act, yet in law he is the proprietor. Still I should be sorry to hold that these naked trusts in all cases create bona notabilia, which would make the grants of other jurisdictions null and void; and it might be an inconvenience to the parties beneficially interested in the property to be obliged to take a prerogative probate, when a local jurisdiction might otherwise be competent; yet I suppose no conveyancer would be satisfied with a conveyance of property situate in one jurisdiction under an administration granted by the authority of another jurisdiction; for manifestly it would not be any conveyance, because the

(*a*) It appears, however, from the case of *The King* v. *Yonge, D.D.*, 5 Maule & Selwyn, 119, that the Archdeacon of Sudbury has, by composition with the bishop of the diocese, jurisdiction, with certain exceptions, over the effects of all persons dying within the archdeaconry, wherever such effects may be locally situate within the diocese. Of course the bishop could only delegate such authority as he himself possessed, and therefore no grant from him could extend the right beyond the diocese; but within the diocese he has delegated to the archdeacon his own authority, limited not by the locality of the effects, but only by the locality of the death.

Archdeacon of Sudbury could not make any person legal representative quoad hoc—to make a valid title to premises in another jurisdiction. However, as an administration, limited to this particular purpose, is only prayed—not a general administration—the former grant will not be revoked, nor the other property of the deceased, nor his representatives, be thereby disturbed. I do not therefore see any substantial advantage in having the will transmitted.

[202] The administration might as well be granted on an office copy, except that it has been the usual practice to have the original transmitted: but I am inclined to grant this administration without ordering the will to be sent up; and thus the probate will not be rendered void. A practice prevailed, I understand, for two years, of granting such administrations without the will—or even a copy of it—why it was discontinued I do not know: but in the present instance I shall not enforce the monition for the transmission of the original will; and will reserve the consideration how the administration shall issue.

Note.—The administration, without any copy of the will annexed, limited to assign this term and sworn under 100l., afterwards passed the seal.

TAYLOR *v.* D'EGVILLE AND BEBB. Prerogative Court, Hilary Term, 1st Session, 1830.—Probate (as of a codicil) refused to a paper as not testamentary, though found in the same envelope as the will and a codicil, and explanatory to the executors of the nature and value of, and most advantageous mode of managing, the deceased's property, but having no dispositive nor revocative effect.

On admission of an allegation.

William Taylor in and by his last will and testament appointed James D'Egville and Joseph Bebb two of his executors; and on the 8th of June, 1825, they took probate of the same together with a codicil. A decree having issued at the instance of George Taylor, the natural and lawful brother (and as such one of the persons claiming the residue of the deceased's undisposed of personal estate), against the executors, they brought in a certain paper referred to in the decree, and alleged to be a se-**[203]**-cond codicil to the deceased's will; but they declared that they would not take probate of it.(*a*)

(*a*) The contents of the testamentary papers, as far as they affect the question before the Court, are here subjoined:

"This is my last will and testament, written with my own hand, this fifteenth day of February, 1823. I hereby will and bequeath all the monies that may come to me from the funds now in Chancery, arising from the sale of the Opera House in the Haymarket, for the purpose of paying all my just debts; and the surplus to be divided equally between the children of my brother, Captain George Taylor. I also will and bequeath all my interest in the property boxes in the said Opera House [the testator then enumerated certain boxes] to Ann Dunn: and my will and request is, that the executors to this my last will shall let all the afore-described boxes for the said two years or opera seasons at the best rents, and out of the said rents to set apart, for the use and benefit of Ann Dunn, the sum of six thousand pounds." The testator, after suggesting certain modes of investment for this sum, directs "that Ann Dunn shall not have the power to assign or alienate any part of the 6000l. or of the income to arise therefrom during her lifetime, but that she shall have the power of bequeathing 3000l. thereof by will, and the remainder of the 6000l. is, upon her demise, to be equally divided between the children of my said brother, George Taylor." Then, after some small legacies, the testator appoints executors, and dates and signs the instrument.

By a codicil, subjoined to the will, he directs that "if by the assignment, during his lifetime, of the before-mentioned property boxes, the rents thereof shall not produce 6000l., his executors shall make up the deficiency out of the rents of certain other property boxes, and divide the residue of the last rents of the said enumerated boxes, for the year 1825, equally amongst his said brother's children. Witness my hand again, this 15th day of February, 1823. "WM. TAYLOR."

There was no disposition of any surplus beyond the 6000l. that might arise from the rents of the first-mentioned boxes.

The paper propounded as a second codicil was headed—

"Memorandum. London, 15th day of Feb. 1823.

"In reference to my last will and testament (of this date) I beg leave to observe,

[204] An allegation in support of the paper was given in on behalf of Taylor, the admissibility of which was now debated.

The substance of the allegation was as follows:—That the testator having a mind and intention to give further directions to his executors as to the administration, distribution, and management of his property, and more particularly as to the provision he had made for Ann Dunn, spinster; wrote the second codicil (pleaded and exhibited) and placed it in the same envelope in which the will and first codicil were enclosed, and deposited it with his other papers of moment and concern; and that by the letters "Mrs. D." was meant Ann Dunn named in the will. The handwriting, finding, and identity of the paper were also pleaded.

Addams in objection to its admission. The paper is in no part of it testamentary: it is a mere calculation, and begins thus, "Memorandum." Whether the date refers to the day on which the paper was written or to the date of the will may be doubted. No sentence in it is expressed in imperative terms. The [205] will is formal; and there is a codicil written on the same paper. If the residue is undisposed of by the will and codicil, there is certainly a disposition of the surplus rents for 1825.

Per Curiam. Can the Court receive this paper unless testamentary? What part is relied upon to make it codicillary?

Lushington in support of the allegation. A suit in Chancery is now depending as to the person entitled to the residue of the deceased's estate: the executors claim a large portion of the property as undisposed of, and the legatees and next of kin have filed a bill to ascertain the point, and they are advised that the paper, now propounded, will assist in shewing that the deceased intended his executors to be trustees only, and not legatees.(*a*) That this paper is testamentary and codicillary appears from these passages—"by way of instructions to my executors"—"It will therefore be advisable to try to make a bargain." The will seems to have been written by the deceased without assistance: the first codicil has no formal com-[206]-mencement; and the second codicil must, primâ facie, be considered as written on the day it bears date—the same date as the will and first codicil. I admit that the testator may not have anticipated the probate of this paper, but the Court will consider it as testamentary if it purports to affect the disposition of the testator's property even under the directions of the Court of Chancery.

Per Curiam. Suppose the testator had omitted in this calculation some of those boxes which he has bequeathed by his will and codicil, would such omission be revocatory?

Lushington. I do not contend that. But the paper is operative as explanatory: it is clear that by it the testator proposed to point out to his executors how the greatest benefit would accrue to third parties from his property. If the paper is excluded from probate, it will deprive the next of kin from making out their case against the executor. The paper was found in the same envelope with the will.

Per Curiam. This paper does not appear to me to be at all testamentary: it is merely explanatory to the executors of the nature and supposed value of the deceased's property, and of the most advantageous mode of managing it. The paper has no dispositive nor revocatory effect. If the paper is not testamentary, the parties

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by way of instructions to my executors, that for 1824, I have bequeathed the centre box in the pit," &c. [the paper then proceeded to enumerate certain boxes, estimating his interest in them to be worth 8150l.] "to secure the 6000l. bequeathed to Mrs. D.," and after stating his tenure, interest, and some considerations which would influence their value, pointed out that the boxes might be more advantageously disposed of to Mr. Ebers than to any other person; as in these terms: "It will therefore be advisable to try to make a bargain at an early period with Mr. Ebers." But there were no further words declaring for whose advantage these arrangements were to be made.

(*a*) The 1 William 4, c. 40, entitled "An Act for making better provision for the disposal of the undisposed-of residues of the effects of testators," provides, that "after the 1st of September, 1830, executors are to be deemed, by Courts of Equity, trustees for persons entitled to any residue under the statute of distributions, unless it appears by the will that such executors were intended to take such residue beneficially"—sect. 1. The Act is not to affect the rights of executors where there is not any person entitled to the residue under the statute of distributions; nor is the Act to extend to Scotland.

(especially when five years have been suffered to elapse since the testator's death) ought not to be put to the expence of a new probate. I must reject the allegation.

[207] BRAGGE *v.* DYER AND OTHERS. Prerogative Court, Hilary Term, 1st Session, 1830.—A paper, written by the deceased herself—at least three months before death—with a blank for the date, an attestation clause, but no witnesses, and unsigned, with other evidence to shew it unfinished; and declarations that she intended to "settle her will in a few days," is not entitled to probate, either as intended to operate in its actual state, nor on the ground that the execution was prevented by her sudden death the day after such declaration.

On admission of an allegation.

An allegation, to establish a paper as the will of Mary Dyer, was offered on the part of one of the executors, and opposed by fourteen of the lawful cousins-german and next of kin of the deceased. The paper began thus: "In the name of God, Amen, I, Mary Dyer of the parish of St. Paul in the city of Bristol, spinster, do this day of one thousand eight hundred and twenty , make this my last will, in manner and form following. I appoint my friends, Benjamin Belcher and John Bragge, and my cousin William Dyer executors:" and the paper, after giving 100l. to each of her executors, and a variety of legacies to her relations, to strangers, charitable institutions, and providing for her funeral, ended with these words, "To this my will I shall annex a schedule of the property I possess to make every thing as plain and easy as possible, and with it the names and places of abode of persons interested in the same, and if any thing in this will should not be understood, I will my said executors should each choose a person and so settle any thing that may be obscure. Signed, sealed, published and declared to be the last will and testament in the presence of us who have hereunto set our hands, witnesses, the day and year above **[208]** written in the presence of the testatrix and each other."

(L.S.)

The allegation, in substance, pleaded:

1. Mary Dyer died a spinster, aged 69, on the 8th of March, 1829, leaving several cousins, and a personal property of 4400l.

2. Some time in 1828 the deceased wrote the paper propounded, and intended to sign and execute it before witnesses; but was prevented by sudden illness and death.

3. That she was a dissenter; was interested for the societies benefited; had affection for the legatees, corresponded with some and gave money to others; that she wished to draw up a schedule of the property and of the residence of the legatees, and for that purpose was occupied in making inquiries till her death.

4. A disagreement between the late father and Josiah Dyer, the uncle of the deceased; that she had scarcely any intercourse with her cousins, some of whom she had never seen, and that she spoke of them very seldom and then with indifference.

5. Displeasure, some years ago, with William Dyer, and also with one of her cousins.

6. That Susanna Palmer died in March, 1812, and appointed her sister (the deceased) sole executrix of her will and two codicils, who never proved them; that by the second codicil she gave to her executrix a note of hand for 50l., in trust for Bragge or her family; that Mary Dyer had a great regard for Bragge, and by her will bequeathed to her the note of hand.

7. Great confidence in Belcher, one of her executors: that on the 7th of January, 1829, an assignment of some leaseholds for an annuity **[209]** for her life was executed by the deceased in Belcher's presence; that on the solicitor taking away the bond for inrolment, and promising to return it in three weeks, she said, "I shall then finally settle my will;" that on the 17th of February the bond was returned, and on the following day she observed to Belcher, "I mean now finally to settle my will; for in that will the vaults and the house adjoining are mentioned as not being sold."

8. That a day or two afterwards she was attacked with inflammation on the chest, thought her illness not serious, went as usual to shops to buy articles; and on the 7th of March told Belcher "she had not settled her will yet, but hoped to do it in a few days."

9. On Sunday, 8th of March, went to chapel; was suddenly taken ill and died immediately: that on the same day Belcher found in her desk the will propounded, carefully wrapped up in a large bill of a tea shop with a red string tied round it.

10. The handwriting of the deceased.

The King's advocate and Pickard opposed the allegation.

Lushington and Addams contrà.

Judgment—Sir John Nicholl. The presumption of law is, I apprehend, against the claim of this paper to probate; and it is necessary to examine precisely what the presumption is that must be repelled. It is true that the paper is all in the deceased's **[210]** handwriting—is fairly written—is correctly worded. In this paper the deceased, who was a spinster of advanced age—possessed of property to the amount of 4400l.—has inserted a great variety of legacies, though she has not disposed of the residue: the inference is that, when she wrote the paper, she had most fully considered its effect and intended to confer upon the several legatees the benefit therein detailed: in short, that the paper contained her testamentary intentions at the time when it was written. It does not require evidence either of affection towards the legatees, or of disaffection towards others, to sustain the probability of the disposition: but what requires to be shewn is the reason why she did not complete it. Here is an attestation clause, but no witnesses: here is a blank for a date, but no date: here is a seal, but no signature, though there is a clause to that effect. It is quite clear, then, that it was the intention of the deceased to do something more to give it effect. From the body of the paper it appears that she intended to annex a schedule of her property, and of the residence of the legatees; but there is no such schedule: the inference, then, is, that it is an imperfect and unfinished paper, and it must be shewn that she adhered to the disposition; and the non-execution must be accounted for.

It has been stated in argument that there are circumstances which would shew that this paper was written late in 1828, but even if it were written quite at the close of that year, there was ample opportunity for its completion. The third, fourth, fifth, and sixth articles plead remote circumstances to support the probability **[211]** of the disposition a priori; but these would in any case be unnecessary. The seventh and eighth articles are the material part; but they are rather adverse to the paper: it is apparent from them that the deceased was not prevented by the act of God, nor did the paper remain unexecuted from her belief that it would operate in its present form; but from the want of having made up her mind to the disposition. The intention was to execute a will, but with alterations of some sort. Her declarations were not—that she would execute this will in its present form, but that she should finally settle her will in a few days. It was natural she should alter it: she had sold the leaseholds, which were bequeathed by it, for an annuity for her own life; which consequently afforded no substitute.

The ninth article pleads her sudden death. In the first place, there had been sufficient time to execute it: some months at least had elapsed since it was written—three weeks since the enrolment of the bond: had the deceased not intended to make alterations, the execution would speedily have been accomplished; no act, however, was done; but, secondly, what was proposed to be done?—not to sign this instrument and get it attested, but to "settle her will." The Court has neither authority nor discretion to give effect to a paper in respect to which the deceased had not finally made up her mind. On these grounds it is impossible, unless all principles are broken down, to establish this instrument—an instrument which is unfinished—which the deceased neither intended to operate in its present form, nor intended, if not prevented by the act of God, to execute. Her intention was, **[212]** after the disposal of the leaseholds, not to execute but to "settle her will."

I reject this allegation, but I allow the expences out of the estate.

M'DONNELL *v.* PRENDERGAST. Prerogative Court, Hilary Term, 2nd Session, 1830.

—An executor who has renounced may, any time before administration has passed the seal, retract.

On petition.

William Prendergast died in June, 1820, having made his will, and thereof appointed John Bushell, Miles M'Donnell, and John M'Donnell executors and residuary legatees in trust. Probate was taken out by Mr. Bushell in December, 1821, power being reserved to the other two executors to be joined. Mr. Bushell died in November, 1828, leaving goods of the testator's unadministered. On the 31st of March, 1829, John M'Donnell was sworn as executor, but before probate passed the seal he changed

his mind and wished to renounce: on the 14th of May following, John, and on the 23d of June, Miles, M'Donnell (who resided in Spain, and to whom his brother John was agent), severally executed proxies of renunciation, which on the 2d of September being exhibited, administration was prayed by the widow, the residuary legatee for life of a moiety: and a requisition to swear the widow (then resident in France) issued. She was accordingly sworn; but before the administration passed the seal, John M'Donnell, being advised that inconvenience **[213]** might follow if he abandoned the executorship, and yet be liable to the trusteeship, executed a proxy retracting his renunciation and desiring probate. This was objected to on behalf of the widow, not only on the facts of the case, but also submitting that, "by the law and practice of the Court, it was not competent to an executor to retract a renunciation at any time previous to a grant of administration being made, if such retractation be opposed by the party next entitled to the administration upon such renunciation."

Dodson for the executor. John M'Donnell has been sworn as executor. An executor cannot renounce after he is sworn. *Anon.*, Ventris, 335, which case is not distinguishable from the present.

Lushington contrà. The subsequent cases and dicta of Lord Mansfield do not accord with the case in Ventris. It is there said that, "an executor having taken the oath, could not be admitted to refuse;" but this does not accord with modern practice. *Jackson and Wallington* v. *Whitehead* (3 Phill. 577).

Per Curiam. The Court has made no grant upon the renunciation; for the grant is only made by passing under the seal. Can you shew a case where a party has renounced and has not been allowed **[214]** to retract before an actual grant? for I have always understood the rule to be, that an executor is at liberty to retract at any time before the Court has acted by its seal. Till then the renunciation is not binding on the party; and might, under circumstances, be disallowed by the Court, as if the executor had in any way intermeddled; for then he would not be at liberty to renounce. After the grant of administration a different rule prevails. "If an executor renounce, and the ordinary commit administration to another, the executor is excluded." *Hensloe's case* (9 Coke, 37); *Robinson* v. *Pett* (3 P. Wms. 251).

Lushington in continuation. In several cases where the Court has allowed an executor (who renounced for the purpose of being examined as a witness) to retract, it has always been said that such permission to retract is not to be considered as a matter of course. In *Rex* v. *Sir Edward Simpson* (1 W. Black. 456; S. C. 3 Burr. 1463) Lord Mansfield, as reported by Blackstone, asked this question: "Is there any case where the Ecclesiastical Court has granted, or this Court has compelled it to grant, a new probate to an executor who has formally renounced?" (*d*)

The *Anonymous case* in Ventris is not now to be considered as binding. If so, then the circumstances must be gone into to shew that, in this particular case, the Court will not allow the retractation.

[215] Per Curiam. I have a note of a case which I will read.

"*Crucifer* v. *Reynolds.* Prerog. 14th April, 1741.

"John Fernsley made his will: John Mace and T. Jameson executors: one shilling to his son: the residue to his two daughters. Mace renounced probate. Reynolds, attorney of Jameson, by an antient letter of attorney 1728, prayed administration. Mary Crucifer, the daughter, takes out a citation against Jameson to accept or refuse: he being in the Fleet in the Mediterranean, Mace, prior to the return, goes before a surrogate, and retracts his renunciation and is sworn. At the sitting of the Court he prays this retractation to be admitted. This is objected against by Crucifer, and that he is going to the West Indies. It being res integra, no probate or administration granted, it is rather a matter of right than discretionary. His retractation is admitted and probate decreed." (*a*)

Lushington. That could hardly, it would seem, be considered as settled law, because the point was solemnly argued in *Rex* v. *Sir Edward Simpson*, before Lord

(*d*) Mr. Elsey, the editor of the new edition of Sir W. Blackstone's Reports, observes in a note that the passage in the former edition was "who has formerly renounced."

(*a*) In *Yorke* v. *Manlove*, Prerog. 2d Sess. Hil. Term, 1717, renunciation of administration retracted before it passed under the seal, though decreed. Prerog. 1756, Dec. 3, *Hayward* v. *Dale* (cited in *Rex* v. *Sir Edward Simpson*), an executor may revoke his renunciation at any time until grant of administration with will annexed.

Mansfield in 1764; he ordered that, prior to an administration being granted by consent to a third party, the cestui que trusts should have notice of the pro-[216]-posal, and, as well as the executors, give their answer to it.

Dodson in reply. In *Rex* v. *Simpson* Dr. Collier admits that in some cases, for good consideration, renunciation might be retracted; and the Attorney General said, "An executor who has renounced has a right to be considered as an executor whenever he thinks proper, provided probate has not been granted." So in the case cited from Peere Williams. *The King* v. *Simpson* was settled; so that case did not overrule the case in Ventris.

Per Curiam. The swearing is not an intermeddling. I confess that the admission of an executor's retractation of a renunciation, in order to become a witness, has always presented difficulties to my mind: he is allowed to renounce for the purpose of being examined as a witness to forward the ends of justice, and then is allowed to retract for the benefit of the estate: but this is not done without the consent of all parties in Court. However, the whole tenor of the authorities go to the distinction before mentioned, that, before the grant, the Court must allow the retractation. I think, therefore, that I am bound to decree probate to the executor and residuary legatee in trust.

Lushington asked the Court to order the costs to be paid out of the estate.

The Court made the order.

[217] IN THE GOODS OF J. WILLIAMS. Prerogative Court, Hilary Term, 3rd Session, 1830.—The grant of administration to the widow is discretionary; and the next of kin may be preferred, sufficient cause—in this case the lunacy of the widow—being shewn: but the Court called for an inventory, and directed the securities to justify.

[Followed, *In the Goods of Anderson*, 1864, 3 Sw. & Tr. 489.]

The deceased died intestate, leaving a widow, a lunatic, and two grandchildren his next of kin.

Addams moved for an administration to the two grandchildren, the next of kin, for the use and benefit of the widow: observing that he understood this was the constant practice.

Per Curiam. The widow is stated to be of the age of 85 and imbecile. It is quite discretionary in the Court to grant an administration to the widow or to the next of kin (21 Hen. 8, c. 5, s. 3). Much expence, in this instance, will be saved by a direct grant to the next of kin in their own right, and not for the widow's use and benefit. The Court can feel no difficulty in making this grant, since it has been always held that the widow, upon good cause, may be set aside.(*b*) I decree administration to the two grandchildren jointly, upon their exhibiting an inventory, and the securities justifying.

[218] THE KING'S PROCTOR *v.* DAINES. Prerogative Court, Hilary Term, 3rd Session, 1830.—The party setting up, as a will, a paper not on its face testamentary, must shew testamentary intention; and as the law in such cases lends its aid only to effect intention, the question is whether such a paper, if treated as testamentary, will, in truth, give effect to the deceased's intention, though the Court cannot look at the effect of an instrument clearly testamentary on its face. An administration with a paper having the character of a donatio inter vivos

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(*b*) Prerogative, February 6, 1807.—In *Fleming* (*late Worsley*) v. *Pelham* Sir William Wynne granted administration to the husband of a daughter, next of kin, for her use and benefit, in exclusion of the widow, who had, in 1781, eloped from her husband, and cohabited with other men till his death in 1805, when she married the man with whom she was then cohabiting. The Court cited the cases of *Lewis* v. *Lewis* before Dr. Bettesworth, in 1727, where there were a widow and five minor children, and administration was granted to the brother as guardian of the children in exclusion of the widow—of *Voss* v. *Cotton*, before Sir George Hay in 1770, where the Court, not thinking the objection sufficiently strong, granted the administration to the widow, but said he should have granted it to the guardian if the objection had been sufficient.

Sir John Nicholl and Dr. W. Swabey for the husband of the next of kin.

Dr. Arnold and Dr. W. Adams for the relict.

annexed, revoked, since, if treated as testamentary, the deceased's intention would be defeated.—If there is proof, either in the paper itself, or from clear evidence dehors, 1st, that the writer intended to convey the benefits by it which will be conveyed if the paper be considered testamentary; 2dly, that death was the event to give it effect, an instrument, whatever be its form, may be admitted to probate.

[Referred to, *Jones* v. *Nicolay*, 1850, 2 Rob. Ecc. 294. Applied, *In the Goods of English*, 1864, 3 Sw. & Tr. 586.]

The question in this case arose upon a paper propounded as the will of Robert Spink Newson: the instrument, probate of which was opposed on the part of the Crown, is recited in the judgment.

Phillimore and Dodson for Mrs. Daines, in support of the paper propounded.

The King's advocate and Lushington contrà.

Judgment—Sir John Nicholl. This is a question respecting an instrument propounded as the will of Robert Spink Newson, deceased, who died so long ago as the 23rd of August, 1815, at the age of nineteen, a bachelor, and illegitimate. The instrument is dated upon the 29th of June, 1815; and is set up by Mrs. Mary Daines as the universal legatee appointed by it, in which character she took out administration, with this paper annexed, in June, 1828; that is about thirteen years after the death of the alleged testator. That administration has since been called in, and she has been put on the proof of the instrument as the will of the deceased: and if it be not valid as a will, the legal property will belong to the Crown; though the real party in the cause is the brother of the deceased. The main question, therefore, for the consideration of the Court is whether the paper propounded is a testamentary instrument.

[219] It seems material and convenient in the first instance to consider the contents of the paper itself, whether it imports a present gift, or a testamentary bequest to take effect on the death of the deceased, and to be ambulatory till that event consummates it.

The instrument is in these terms:—

"June 29th, 1815.

"I, Robert Spink, in the presence of the two undermentioned witnesses, Thomas Whitmore, of the parish of Stratford St. Mary, in the county of Suffolk, esquire, and Sarah Chapman, of the parish of Peasenhall in the said county, spinster, do give all my goods and chattels unto Mary Daines, of the parish of Peasenhall aforesaid, spinster.

"Signed the day and year above written, "ROBERT SPINK.

"Witnesses, Thomas Whitmore and Sarah Chapman."

These are the words of the instrument. What then does the person do in the presence of these witnesses? What is the import of the words which he makes use of? "I do give all my goods and chattels unto Mary Daines." It is hardly possible to use words more directly and strongly importing a present gift. Here is no ambiguity respecting the intention: he declares, per verba de præsenti, that he gives those things to Mary Daines. Whether the instrument could be considered valid as a gift, or as evidence of a gift, is not what I am now considering; but the import of the words contained in the instrument itself; and there can be no difficulty, I think, upon their construction.

[220] Is the import of these words "I do give" varied by any thing else contained in the instrument leading to a different understanding, or tending to shew it was future and prospective, more especially that it was something to take place after his death—that his death was to consummate and give effect to the gift? By any thing, in short, rendering it testamentary? There is not one word that has any such tendency. It is not entitled a will; nor a codicil: it has no reference to any legacy; nor to any executor; nor to the death of the party writing it: he does not use the words "I give and bequeath:" he does not use the words "I leave:" there are no solemn words of inception, such as "In the name of God, Amen;" nor any of those expressions which are usually, or frequently at least, found in a testamentary instrument. It then seems to me that no instrument could be more anxiously or ingeniously devised, and more carefully drawn up, to import a present gift—"do give," and to exclude an appearance of, or reference to, an act of a testamentary nature—to any thing at all prospective.

Such, in my judgment, is the import of the instrument itself, looking simply and solely to the words and form in which it is conceived: and in that case it lies on the parties setting it up as a will to prove that it was made with a testamentary intention; that it was to be consummated by, and to operate upon, death.

It is true that if, in point of form, it is drawn up as a deed, yet if it appears, from something in the instrument itself, that it was intended to convey a benefit upon and after death, it may, notwithstanding the apparent form, operate as [221] a will; or if it is equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition. Most of the cases upon the subject are to be found referred to in *Thorold and Thorold* (1 Phill. 1), and in the subsequent case of *Masterman and Maberly* (2 Hagg. Ecc. 225). One or two additional cases have been referred to in the course of the discussion; but they do not appear to me either to carry further, or to alter, the principle which is laid down in those cases—that the form of the instrument is not conclusive against its testamentary effect; that although it may not be valid in the form in which it was drawn up as a deed of gift, yet that it may operate as a will. But no case has gone the length of deciding that because an instrument cannot operate in the form given to it, it must operate as a will; it may operate as a will if shewn to have been written with a testamentary intention.

If there is any proof, either in the paper itself, or from clear evidence dehors; first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it, if considered as a will; and secondly, that death was the event that was to give effect to it, then, whatever be its form, it may be admitted to probate as testamentary. But the present instrument goes far in the contrary direction; it not only contains nothing that refers to death or to a testamentary disposition, but it rather seems carefully to confine itself to a donatio inter vivos per verba de præsenti—"I do give." To give it effect as a will, then, it would require [222] clear evidence that the deceased intended it should operate as such: and perhaps it would require something more; namely, evidence that it was the intention of the deceased to do that which the instrument, as a testamentary act, might possibly effect from supervening circumstances.

It appears that the deceased was the illegitimate son of Robert Spink. The father afterwards married the mother and had another son, nearly ten years younger than the deceased in the cause. This other son, as I have before intimated, through the Crown, is to be considered the party principally interested in the present question; rather than the Crown itself, because, in cases of this description, the Crown very liberally grants the principal part of its interest to a person standing in the situation of John Spink.

Mrs. Daines was many years ago employed, not as a servant, but as a sempstress, by Mr. and Mrs. Spink: she became a great favourite of Mrs. Spink; and after her death she retained the confidence of Robert Spink, the father. The father, by his will, has disposed of his property in the following manner:—First, he appoints Mr. White and Mr. Man his executors. He then bequeaths "unto Robert Spink Newson, his natural son, the sum of 500l. of lawful British money, when he attains the age of twenty-one years, hoping that he will superintend and take upon himself the care and guardianship of his brother John Exeter Edward's education." In a further part, where he disposes of the residue, he says: "All the rest and residue of my real and personal estate, corn tithes in Sibton and Peasenhall [223] aforesaid, goods, chattels and effects whatsoever, with all my ready money, book debts and other debts, securities for money, whether in the public stocks or elsewhere, I devise, give and bequeath unto the said Robert Spink Newson and John Exeter Edward, my sons by Anne, my late wife, or the survivor of them, and to their heirs and assigns for ever, as tenants in common, and not as joint tenants, to be equally divided between them, share and share alike, when the youngest of them shall be of the age of twenty-one years." In a further part respecting the care of those children he says: "I particularly request my said executors to pay due attention to the education of my said children, and they will cause them to be piously educated and instructed in their moral and religious duties. And, as it was their mother's particular desire, I request that Mary Daines of Sibton aforesaid, spinster, her intimate friend, will take upon her the care and guardianship of my said children during their childhood, so far as to select any part of my goods, linen, or any other thing or things that she shall or may think will be convenient and useful for them, and to keep and reserve the same for them, and that she will buy,

procure, and make up and mend, or see to the buying, making up and mending, such linen and clothing and apparel as my said children may want during their minority, as she shall judge necessary and proper for them, according to the instructions she received from their mother my late wife for that purpose; and that the said Mary Daines do from time to time make her own charge on my said executors for all costs, [224] trouble, labour, care and attention in buying, procuring, making up and mending such articles for their use, and that my said executors do from time to time pay and discharge all such demands out of my annual income."

"In case the children shall both die before they or either of them shall attain the age of twenty-one years, without leaving a wife or lawful issue," then the property is devised over, among several persons.

This will is dated the 26th of April, 1810.(*a*)

In September, 1812, he made a codicil to his will; and by that codicil he recites that, "Whereas I have purchased the house at Peasenhall-street, now in the tenure and occupation of Henry Oldring; and I do order and direct my executors to settle and pay the purchase money of the same, if not settled for as aforesaid, before my decease; and I will the same as a dwelling-place for Mary Daines, who has undertaken, and it is my will she should superintend, the care and clothing of my two children, Robert and John Spink; [225] and I will that her said dwelling-house be considered as their home during their minority; and I will and direct my executors to pay all reasonable expenses the said Mary Daines may be put to on their account: and I do further desire she may be allowed to select what furniture she may want from my dwelling-house, to furnish the same; and also I will she shall have all the wines and other liquors that are in my house after my funeral, to her's and the said children's use. And it is my will and desire, that she shall have the dwelling, and use of the furniture, free from any rent and charge, during the term of her natural life, without any molestation from any one; and also shall be paid, yearly and every year, the sum of 20l. of lawful money also during her natural life, for a compensation of her care and trouble as aforesaid." Thus, though the executors are to have the general superintendence of the education and pious instruction of these youths, yet the care of their persons is more particularly devolved upon Mrs. Mary Daines; she is to live at this house, and to have whatever furniture of the deceased's she shall think fit to select.

Accordingly, upon the death of Mr. Robert Spink, Mrs. Mary Daines occupied the house at Peasenhall-street: she selected certain articles of furniture for the purpose of furnishing that house; the eldest son continued at school; and afterwards was removed to the University of Cambridge. The other son was at school; but they both spent their vacations with Mrs. Daines at this house, which was intended by the father as a home for them during their mi-[226]-nority. The eldest son, when about nineteen, having fallen into a decline, quitted the university and came to Peasenhall-street, and there died on the 23rd of August, 1815.

There is no reason whatever to doubt that Mrs. Mary Daines faithfully discharged the duty thus committed to her; nor that Robert Spink Newson had a great affection and regard for her. The letters which have been exhibited, as well as the parol evidence, I think, fully establish that he had that attachment which would naturally flow from the relation existing between him and Mrs. Mary Daines; from her maternal kindness at all times; and more particularly from the care and attention she shewed during his illness. But this goes a very short way towards the real question in the cause: it tends as much to support the instrument as evidence of a

(*a*) It was pleaded by the Crown that, on the younger son attaining the age of 21 years, the executors of the father's will paid over to him, as the person entitled to the [whole] residuary estate of his father, 25,000l., and also delivered to him the title deeds of the real estate, of the value of 2200l.

On the other side it was pleaded that from the deceased's death Mary Daines retained, in virtue of the will (the paper propounded), possession of the deceased's effects, of which he died possessed at Peasenhall-street, not exceeding 30l. in value; and (as a reason why she did not sooner take probate of the paper) that John Exeter Edward Spink did not attain, till 3rd of February, 1827, the age of twenty-one, at which time he was unmarried, and that Mary Daines was not aware that a moiety of the residuary property of the father vested in the said deceased, so as to be transmissible to his representatives.

gift inter vivos of those little personal articles which he possessed, as to prove that he intended it as a disposition of his property by will. In all this correspondence I do not observe one single word shewing any testamentary intention; nothing indicating a wish to increase that provision which his father had made for Mrs. Daines; not one expression tending to shew a desire of making any will; not a word of dissatisfaction or disaffection towards his younger brother; not a hint that he should himself decline to do, when he came of age, that which his father had, in his will, expressed a hope he would do, namely, "superintend and take the guardianship of his brother John." These letters, then, of which there are between forty and fifty, establish a great affection for Mrs. Daines, but no testamentary intention whatever [227]—nothing to give the instrument a character different from that which the words of it import.

Under the powers given to Mrs. Daines by the will of the father she exercised the right of selecting furniture and other articles. The executors required that she should furnish them with an inventory of what she had taken: this she refused to do, and a quarrel ensued between her and the executors, more particularly between her and Mr. White; and in this quarrel, naturally enough considering his situation, the deceased took part with Mrs. Daines. The account of this part of the transaction is given by Mr. Man and Mr. White, the executors of the father, who have been examined as witnesses in this cause. Mr. White was the acting executor. Mr. Man is very advanced in life, and complains of his memory being feeble; still, however, his evidence, as far as it goes, tends to confirm the testimony of Mr. White. Mr. White in his deposition on the 6th article of the allegation gives this account of the quarrel: "The deponent, as the acting executor, paid all Mary Daines' accounts for the necessary expenses of the house at Peasenhall for some time after she and the children had removed thither. He forgets when it was that he ceased to make such payments, but it was in consequence of the circumstances of which he is about to depose: he made several applications to Mary Daines for a regular inventory of the furniture and effects which she had removed to Peasenhall from Sibton, but she refused to give, and declared that she never would give, an inventory. Upon one occasion she gave the deponent an inventory of some [228] of such effects; but not of the plate, linen, and many other things that had been removed: he mentioned those omissions to her, and asked her for a more complete inventory, but she declared that she never would, nor did she ever, give him any other. Mr. Man was with the deponent when he asked her for the inventory the last time, and so was her brother John Daines, but when that was the deponent does not remember. He has lost the memorandum he made of the circumstances. Mary Daines, on the deponent's applying to her as aforesaid, claimed the effects of which she refused to give an inventory as her own; she said Mr. Robert Spink had given them to her in his lifetime. The deponent observed that he might as well say that Mr. Robert Spink had given them to him, and asked her if she had any paper to shew, or any witness to prove, that they had been so given to her, and she acknowledged that she had not. In consequence of Mary Daines' conduct as deposed, the deponent and she very much disagreed, but he endeavoured to avoid dispute with her as much as possible; whenever he had anything to say to her he used to get Mr. Man to go to her. When she refused to give the inventory the last time the deponent told her that he would not pay her any further accounts she might send to him until she had furnished him with a correct and proper inventory: she threatened to go to law with him, but he persisted in refusing to pay her accounts, and in consequence thereof she, in May, 1814, brought an action against him and Mr. Man, as executors, for the recovery of her demands. They were served with a [229] copy of a writ, but on an appearance being entered by them the action was abandoned. In Hilary Term, 1816, Mary Daines filed a bill in Chancery against the deponent and Mr. Man to enforce the payment of her annuity under the codicil to the deceased's father's will, and of certain monies expended by her for the use of the said two children of Mr. Robert Spink. The deponent does not recollect any thing that was set forth in the bill in Chancery; but he remembers that it stated that John Exeter Edward Spink would, on coming of age, be entitled to the whole of his father's property; his brother Robert being then dead; and he also remembers that the bill did not state any thing about the said Robert Spink Newson having made or executed any will, or any paper of a testamentary description, disposing of his property after his death. The deponent and Mr. Man put in their answer, and the same was then dismissed with costs against Mary Daines. The deponent gave R. S. Newson

money to pay his own bills with, and also paid himself all bills incurred by the brother."

This is the account which Mr. White gives of the dispute between him and Mrs. Mary Daines. It is not at all necessary for the Court to decide whether any blame was imputable to Mrs. Daines on this occasion or not, but several of those facts are important; particularly that passage where the executor states that he asked her whether she had any paper to shew, or any witness to prove, that the testator, Mr. Robert Spink, had given those articles to her in his lifetime; for this part of the evidence does seem [230] to furnish a pretty tolerable clue to the instrument now produced. Mrs. Daines communicated her quarrel with the executors to the deceased, and the deceased took part with her: he had a few things of a personal nature, but the bulk of the furniture, and the other things, not his, but in the house, were left by the father for the use of Mrs. Daines and his sons, and for her use even after they became of age, during the remainder of her life. Robert Spink Newson, then, had nothing but those few articles which a young man coming home from the university would carry with him. The term "goods and chattels," in the legal acceptation of the words, certainly is of great extent; but is often used as a sort of cant term to designate personal articles of little value. Thus, in this instrument the deceased probably used the words "all my goods and chattels" in the common acceptation of them, as applying to all his "personal articles," rather than in the sense which they would have in a formal legal instrument.

What, then, is the import of this paper more than to meet the sort of suspicion thrown upon Mrs. Daines, and the demand that was made upon her by the executors? She avers that Mr. Spink gave her certain articles: his executors doubt it; they ask her, Have you "any paper to shew" that he gave you those articles? Have you any witness to prove it? A quarrel ensues: she will not give any account of the articles; and they will not pay her her demand till she renders that account. She complains to the deceased; and he says, Well, "I will give you all these 'my goods and chat-[231]-tels,' and here is a paper for you signed by myself, shewing that 'I do give' them to you, and it is a paper written in the presence of witnesses, therefore, there can be no dispute." Is this the true construction of the paper? or is the Court to consider it as a will, constituting Mrs. Daines his universal legatee—giving to her every thing which he possessed at that time, and every thing he might ever become entitled to, in total exclusion of his younger brother, the legitimate son of his father—the source of the whole of the property which either he or his brother might possess. Was it the intention of the deceased to make this inofficious disposition? Was it his intention at this time to do a testamentary act, or to shew Mrs. Daines a kindness, by simply making this gift of those few personal articles which he had at the time?

The onus probandi—that it is a will, as I have already said—lies upon the party setting up, as testamentary, this instrument, which upon its face has no such import, but bears the character of a present gift. In such a case the aid of the law is extended only to give effect to the intention of the party: surely, then, the Court should be satisfied that it looks at the whole intention of the deceased: it must take into its consideration even the effect the deceased intended the instrument to have. If an instrument upon the face of it is manifestly executed as a will, the Court cannot look at its effect; it must have legal operation without regard to the intention as to effect: but if the Court of Probate is called upon to assist in carrying into effect the [232] intention of a deceased party, by pronouncing an instrument to be a will when, upon the face of it, it is a deed of gift, the Court must have the clearest evidence that the instrument was intended to be a will; more especially supposing that the paper, if pronounced for as a will, would carry away half the property of the father from his legitimate son; and such might possibly, though I do not undertake to say that it would, be the effect.

Now all the circumstances satisfy me that there was no such intention on the part of Robert Spink Newson; that he never intended to dispossess his brother; that he never intended to convey all his personal property to Mrs. Daines; but that the utmost he intended was, either at that moment to give her all those little articles he possessed at the time, or to provide that she should have the use of them for her life, even if he had lived till he had become of age; for on that event he would be entitled to 500l.; and would take more especially the care and management of his younger brother, Mr. John Exeter Edward Spink.

What, then, is the evidence laid before the Court that this instrument, couched in the present tense, "I do give," was intended as a will? A maid-servant, who lived in the family, I think, for about eight months as a servant of all work, was called in for the purpose of putting her name to this instrument; and now, fourteen years subsequent, without any thing occurring at the time to impress particularly upon her attention and memory what were the words made use of by the deceased, or any thing in **[233]** the intermediate time, which would cause her to retain them in her memory; she is produced to prove that the deceased called it "his will:" "I want you to subscribe your name to my will." Having examined her deposition very carefully, and having considered the observations made upon it, the Court, without stating it minutely and in detail, may venture to say that it cannot rely upon her evidence as proof that the instrument was at that time intended and declared by the deceased to be a will. Whitmore, the other subscribed witness to this paper, is dead: but if his evidence is lost, that loss has arisen through Mrs. Daines' laches in not setting up this instrument as a will at the proper time; namely, when the deceased died. If Mr. Whitmore could have proved it was a will, it would have been very important that his evidence should have been produced: there is, however, just as much reason to suppose that he would have proved it was not a will, but was intended as evidence to Mrs. Daines of a gift of these few articles, for the purpose of preventing any disputes.

The fact that Mr. Whitmore was present and attested the paper, and that the deceased sent for him, is quite as consistent with the intention of drawing up a paper as a deed of gift, as with the intention of making a will. And if the deceased sent for him to assist him in making his will, really this paper is expressed in the most extraordinary terms that could possibly have been made use of. The deceased was a person who had a good deal of intelligence, and Mr. Whitmore is described as a man of business, so **[234]** that it might be supposed that if a will had been intended, it would have been worded differently: for, as was before stated, the very form in which it was drawn seems to shew that they were careful not to give it a testamentary form; but merely to render it a proof of a gift of these little articles. What, then, is the reasonable probability, on looking at all the circumstances? That neither the deceased, nor any of them, were aware that a minor had a power to make a will even of personalty. The Rev. Mr. Westhorp states that "he heard the deceased say he had promised his watch to the Rev. Mr. Robinson, as he had no power to leave his money." So that, apparently, he supposed he had, as a minor, power to give, by way of donation, the few personal articles that belonged to him, but not to make a will.

The evidence seems all to bear the same sort of construction. There is no person about the deceased who ever heard he had made, or had expressed any wish or intention to make, a will, or that Mr. Whitmore was to be sent for for the purpose of assisting him in making one. Mrs. Daines' own witnesses speak to that effect. His own medical attendant, Mr. Wilson, never heard him say any thing about a will. Dr. Brown never heard him say any thing about a will; nor did the Rev. Mr. Uhthoff. Even the brother, John Daines, never heard him say any thing about a will; "He was not aware, he says, that a minor could make a will." The deceased had many confidential friends and attendants about him during the latter part of his life, but there are none of them brought forward to shew **[235]** that the deceased had it ever in his contemplation to make a will.

If, however, he sent for Mr. Whitmore to make a will, or had any intention or inclination whatever to do such an act himself, it does seem very extraordinary, I think, that it never came to the knowledge of any person whatever; because the production of this maid-servant, fourteen years afterwards, and the pretended declaration by Mrs. Daines to her brother, I cannot admit as proof of any intention of a testamentary act in the mind of the deceased at the period in question. What was the conduct of Mrs. Daines herself? She did not on the death of the deceased produce this instrument and take probate of it; she kept possession of these articles, as she would do under a gift made to her in the lifetime of the deceased; but she never came forward at all to prove this instrument as a testamentary act; she brought an action against the executors of the father's will for her expenditure; she filed a bill against them for the same purpose; which bill, in the year 1816, was dismissed with costs; not merely upon the ground, as pleaded, that she had not funds to go on with the suit, but "because the Attorney General was not made a party to the suit, Robert Spink Newson having died a bastard and intestate." That is the reason assigned by

counsel.(*a*) Still this instrument **[236]** was not produced as a will, though it would at once have removed that difficulty: for Mrs. Daines had only to obtain probate of the paper as a will, and that would have entirely removed out of the cause the necessity of the Crown being made a party, and made her the proper party to sue.

[237] In the year 1828, after the younger brother became of age, a new bill was filed in the Exchequer against the executors of the father, and against the son John, and against the Attorney General, for the annuity and account; but still in that bill there was no mention whatever of this instrument as a will; but, in consequence of some doubts raised in the course of discussion upon that bill whether John was entitled to the whole of the father's residue, then this paper was for the first time brought forward, and, in June, 1828, Mrs. Daines took probate of it as universal legatee: she did not however call on the Crown, but took it out in common form; the paper having been examined, the administration was called in.

These are material circumstances in this case. On looking to all these circumstances—looking first to the circumstance that the paper upon the face of it is not testamentary, but rather that it is a declaration of a donatio inter vivos per verba de præsenti, that it lies upon the party setting up such a paper to prove that it was intended to be testamentary, to take effect after death, and to be consummated by that event: considering that this burthen of proof is not lessened by its being the act of a minor, nor by the circumstance that it might have the effect (if it be considered as a testamentary paper) of depriving the legitimate son of the father of this property, and that it would act quite contrary to the intention of any of the parties, I am of opinion that Mrs. Daines has not only failed in proving that this was intended to be a will, but I think that the inference from the evidence is that the instrument was drawn up to be that **[238]** which on its face it purports to be, namely, a declaration of a gift inter vivos made in consequence of the dispute between Mrs. Daines and the executors of the deceased's father respecting the gift alleged to have been made by him to Mrs. Daines in his lifetime, but in proof of which Mrs. Daines had neither paper nor witnesses to produce. The deceased and his friend Mr. Whitmore therefore determined that she should have a paper of this description to shew that the deceased had given her those articles during his lifetime.

This is the result I think of the evidence upon this instrument with respect to the intention of the deceased, and therefore I am of opinion that Mrs. Daines is not entitled

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(*a*) Mr. Cufaude, formerly employed as solicitor for Mrs. Mary Daines, upon the 13th interrogatory, answered: "The respondent did take the opinion of counsel through his agent, upon the bill in Chancery filed on behalf of Mary Daines, and the counsel, Mr. Wingfield, did give his opinion that the bill was defective, by reason that the Attorney General had not been made a party thereto. It appears to the deponent, from that opinion, to have been considered necessary, in order to protect the rights of the Crown in that moiety of the personal estate of Robert Spink the elder, to which his son Robert, had he lived, would have been entitled, that the Attorney General should be a party, as representing the interest of the Crown in that moiety, in consequence of Robert Spink the younger having died intestate, a bachelor and illegitimate. Mr. Wingfield also gave it as his opinion that the testator's heir at law should be a party to the bill if the plaintiff was not so; and also that the persons to whom the property would go in the event of the plaintiff, John Exeter Edward Spink, dying before he should attain twenty-one years of age, should also be parties; and that the bill should therefore be amended in those respects."

The above answer was objected to on behalf of Mrs. Daines, as being the evidence of her solicitor, and as purporting to give the effect, or the witness' opinion of the effect, of a written document without producing it.

Per Curiam. I think this evidence is admissible. It was pleaded by Mrs. Daines —and Mr. Cufaude was produced, for the purpose of proving—that the plaintiff had not funds enough to go on with the prosecution of the bill she had filed. On cross-examination, Mr. Cufaude (being examined to that particular fact) admits that it was dismissed, not for the want of funds, but parties. I think the question to the attorney being limited to that particular point, the Court cannot allow the objection to the answer (*Vaillant* v. *Dodemead*, 2 Atk. 524). If an objection were made to any part of the interrogatories that went not to the point on which he was examined in chief, the Court would sustain it.

to this property, but that the deceased, Robert Spink Newson, has died intestate, and I direct the administration, granted to Mrs. Daines, to be revoked, and decree administration to the nominees of the Crown.

On an application for costs out of the estate the King's advocate said the Court had no power to grant them; but that the Crown would not object.

Per Curiam. The party must be left to the liberality of the Crown.

[239] MORWAN *v.* THOMPSON. Prerogative Court, Hilary Term, 4th Session, 1830. —A will of a feme covert, made during marriage under a settlement, is not revoked by her surviving the husband.

[Doubted, *Willock* v. *Noble*, 1875, L. R. 7 H. L. 580.]

On admission of an allegation.

This was a cause of proving the will of Mrs. Robinson; it was dated on the 27th of June, 1807, and was made during coverture, in virtue of certain powers vested in her under a bond executed by her husband in contemplation of marriage. The will contained no appointment of executor nor residuary legatee; and was not republished after the husband's death; it was propounded by a legatee, and opposed by a second cousin—one of the next of kin. The substance of the allegation is set forth in the judgment.

Lushington in support of the allegation.

Phillimore contrà.

Judgment—Sir John Nicholl. This allegation pleads in substance "that Dorothy Robinson, the deceased, married in 1785 William Robinson, who died in 1819: she survived her husband about a year, and died on the 18th of February, 1820, leaving some second cousins, of whom Robert Morwan is one; that a settlement was executed before her marriage giving her the power to dispose of 700l." This settlement is in effect that "if the wife dies before the husband, the sum of 700l. is to be paid on his death to such persons as she by **[240]** will, notwithstanding coverture, shall direct: if she survives him then the 700l. are to be paid to her, to be disposed of at her will and pleasure:" so that there were two events contemplated—in the one of her husband surviving, she might dispose of this money by will—in the other, of her surviving him, the money would become her property absolutely. The allegation further pleads: "That the deceased intending to dispose of all property to which she was entitled under the bond of her husband, dated the 4th of April, 1785, and of all other estate and effects over which she had a power of disposition; executed a will on the 27th of June, 1807:" by that will she provided for the disposition of this money after the death of her husband: she gave him the 700l. for life; but after his death she bequeathed over certain legacies. The allegation then proceeds: "That her husband, by his will, dated in April, 1816, added to his wife's provision by directing that the annuity of 25l. secured to her by marriage settlement was to be increased to 50l. ('as she has disposed of her principal money by her will'), to be paid from the time of his decease to his daughter Alice and her husband, for the maintenance of the deceased, if she continues to reside with them: or more at the discretion of his trustees."

Here, then, the husband provides for his wife, the deceased, surviving him: he recognizes her will as having disposed of the 700l., and he seems to refer to what is pleaded to have been her then state of incapacity, for the allegation sets forth "that the deceased, for several years **[241]** before the death of her husband, was in a state of imbecility; and was incapable of recognizing the will after his death."

Why then is the fact that she survived her husband to revoke that will? There is no change of condition: she was testable when she made the will and when she died—both under the settlement and under her husband's will—there is no alteration of circumstances from which an intention to revoke can be presumed. She has provided for the death of her husband: it is on the event of his death that the legacies are given. In his lifetime she had the power of disposing of the 700l. notwithstanding coverture; on her surviving him, the 700l. absolutely vested in her and became her property disposeable at her pleasure: and her will having disposed of it in the event of the husband's death, I can see no reason nor principle why the will should become invalid or be revoked. There is no rule of law, of which I am aware, that holds a will validly made during coverture to become invalid merely by reason of the husband's death. The case of *Stevens* v. *Bagwell* (15 Ves. 139), cited in the argument for the

next of kin, is, as far as it goes, directly the other way; for there the will was made during coverture, and the husband died before the wife, yet the will was valid. Where a will is made before marriage and the wife survives the husband, in order to render such a will valid there must be something of a republication, because there the intermediate marriage has revoked the will, and has transferred all the property. That is an intelligible princi-**[242]**-ple.(*a*)[1] So a will made during coverture where there is no power under settlement to make a will, but a mere revocable assent, on the part of the husband, to her disposing of her chattels real, or choses in action, and property acquired after his death, may require something in the nature of a republication,(*b*) because she was not testable when the will was made, and she could derive no power from him beyond the extent of his interest in the effects of which her will purports to dispose: but in the present case I can see no principle or presumption of law on which this will was revoked: and on the ground already stated, I am of opinion that it remained valid after the husband's death, and I therefore admit the allegation.(*c*)

Note.—It having been agreed between the parties that the case should be determined by the admission or rejection of the allegation, the suit here dropped; and administration (with the will annexed) limited to the property of which the deceased had a right to dispose, and had disposed of by her will.

Costs were decreed out of the estate.

[243] LORD TRIMLESTOWN *v.* LADY TRIMLESTOWN. Prerogative Court, Hilary Term, By-Day, 1830.—An administration, with a will annexed, obtained after a caveat entered had expired, but without notice to the adverse party, and while the will was in suit in Ireland—the forum domicilii—revoked, as surreptitiously obtained, and the party condemned in the costs of a petition in support of it.

On petition.

Nicholas Baron Trimlestown, of his last will, dated the 8th of December, 1812, named John O'Shee and Henry Eustace executors, and his wife, Lady Trimlestown, residuary legatee. In June, 1813, Mr. O'Shee proved the will in the Prerogative Court of Armagh; he died in the beginning of 1815, and on the renunciation of the surviving executor Lady Trimlestown took letters of administration in the Prerogative Court of Canterbury, with the will annexed, as residuary legatee.(*a*)[2]

On the 14th of July, 1829, a decree was directed to issue against Lady Trimlestown to bring in the administration, and shew cause why it should not be revoked. An appearance being given to that decree, an act on petition was entered into on both sides, when, on behalf of Lord Trimlestown, it was alleged: "That the deceased died on the 17th of April, 1813, aged 87, leaving a widow, and (by a former marriage) one son—the present lord—and one daughter; and that he was domiciled in and died in Ireland; that on the 9th of June, 1813, probate of **[244]** his will, dated 8th of December, 1812, was granted, in common form, by the Prerogative Court of Armagh, to John O'Shee, one of the executors; that in September, 1813, Lord Trimlestown commenced a suit in that court why the will should not be declared null and void." [The petition then detailed the proceedings in that cause.] "That various suits were instituted in the Court of Chancery in Ireland by Lady Trimlestown, and by the deceased's daughter, to establish the will of 1812 as to the real estates, and Lord Trimlestown also filed a bill in the same Court to set aside the will as fraudulently obtained; that the Court directed an issue to be tried in the King's Bench in Ireland

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(*a*)[1] "This is a will made before marriage; and, as to that point, it is extremely clear that no will made by a feme covert can bind after marriage; because it is contrary to the nature of the instrument, which must be ambulatory during the life of the testatrix, and as by marriage she disables herself from making any other will, the instrument ceases to be of that sort, and must be void." Per Lord Thurlow in *Hodsden* v. *Lloyd*, 2 B. C. C. 544.

(*b*) See *Miller and Ross* v. *Brown*, 2 Hagg. Con. 209.

(*c*) See *Dingwall* v. *Askew*, 1 Cox, 427. *Doe on demise of Collins* v. *Weller*, 7 T. R. 478.

(*a*)[2] A caveat had been entered, on the part of Lord Trimlestown, in the registry of the Prerogative Court of Canterbury, but an administration pendente lite having been granted by the Prerogative Court of Armagh to the nominee of Lord Trimlestown, it had not, since the 26th of November, 1825, been renewed.

whether the alleged will was in fact the will of the deceased or not; that the trial came on in June, 1818, before a special jury, and after lasting seventeen days a juror was withdrawn by consent, and there was no verdict: that in February, 1819, the same issue came on for hearing in the Common Pleas, where, after a trial of twelve days, there was a verdict against the will: that various proceedings have since been had by appeal to the House of Lords, and that the suits still remain undetermined. That, notwithstanding the opposition of Lady Trimlestown, an administration pendente lite was on 4th of September, 1819, granted to the nominee of Lord Trimlestown under condition of his not disturbing Lady Trimlestown in the possession of the family plate and furniture, and produce of the stock at Turvey, she giving an inventory and security as to the same, and that the said administration is still in force. That in 1822 **[245]** Lady Trimlestown filed a bill in the Court of Chancery in England against Lord Trimlestown and others claiming to be entitled under the deceased's will to a large sum of money awarded to Lord Trimlestown by the commissioners for the liquidation of the claims of British subjects for estates confiscated in France; that the said suit is now depending in that Court; that on the 25th of June, 1829, administration, with the will of December, 1812, was taken in the Prerogative Court of Canterbury by Lady Trimlestown, as residuary legatee, the surviving executor having renounced." The petition concluded with a prayer "that the administration should be declared void, and Lady Trimlestown condemned in costs."

For Lady Trimlestown, it was alleged "that in the cause depending in the Prerogative Court of Armagh, publication of the evidence having passed, an exceptive allegation, offered by Lord Trimlestown, was, on the 13th of October, 1827, rejected by the Court; that an appeal—thereupon asserted—had not been further prosecuted than by a service of the inhibition. That the Lord Chancellor of Ireland having refused to set aside the verdict of the jury in the Common Pleas, in February, 1819, an appeal was made to the House of Lords, when the decree was reversed, and the cause remitted; but that since the 14th of June, 1827, no new trial had taken place; that Lord Trimlestown had, without notice to Lady Trimlestown, though apprized of her claim, received a large dividend upon the sum awarded **[246]** by the commissioners, and issued a receipt for the same as executor under a will of the deceased, dated in July, 1805, but which will has not been propounded; that in August, 1822, Lady Trimlestown filed a bill in the Court of Chancery in England, praying an account of all sums of money, or rentes perpetuelles of France awarded to Lord T.: and that the right and interest of Lady T. as the widow and residuary legatee might be ascertained and secured: that an injunction issued to the commissioners, who have, in consequence thereof, paid several sums into the hands of the Accountant General, subject to the further order of the Court in the said cause; that in May, 1829, Lord T. served a notice of motion for the purpose of dissolving the injunction, and that the funds might be transferred to him; and Lady T. being advised that she could not safely proceed to a hearing without a representation to the deceased in this Court, and the caveat, entered by Lord T., not having been renewed since the 26th of November, 1825, she obtained letters of administration: that the motion made by Lord T. was refused. That if the administration were revoked, Lord T. might renew his application with success, and deprive her of all beneficial interest in the fund to which she would be entitled under the will of the 8th of December, 1812, if the same were established, and that, if established, the administration is valid;" wherefore it was prayed that the letters of administration might be retained in the registry, and not revoked.

[247] To this answer there was a rejoinder, which—after entering into some explanations respecting the several suits between the parties at law and in equity, and alleging "that they were impeded by Lady T. not delivering her case in the Delegates, nor paying certain costs ordered by the Lord Chancellor of Ireland; and that the claim upon the money awarded by the commissioners was not made in due time, and that the claim of Lord T. was preferred as the seul heritier of his late father, and not under any will, and that the receipt for the orders for the dividends had been signed by him in blank, and were without his knowledge filled up by the clerk of the commissioners, describing him as executor"—concluded with the original prayer.

Lushington for Lord Trimlestown.

The King's advocate and Addams contrà.

Judgment—Sir John Nicholl. In this case administration with the will annexed was

taken in this Court by Lady Trimlestown, and yet it is admitted that the will was at the time in suit in various Courts in Ireland: and it cannot be denied that this administration was surreptitiously obtained. The deceased was domiciled in and a peer of Ireland. The Irish Courts then were the proper tribunals to try the validity of his will. How the proceedings have been there carried on is not a fit question for this Court. It cannot examine whether the party was right or wrong, whether he has unneces-**[248]**-sarily protracted the suit or not; the only question is whether the administration should be revoked. The taking of an administration with a will annexed, which will was in litigation, is, at least, practising a deception upon the Court. During the proceedings in Ireland Lady Trimlestown, it appears, had obtained an injunction from the Court of Chancery in England against the transfer of certain funds to Lord Trimlestown, and, on the suggestion that there had been on the part of Lord Trimlestown an endeavour to get the injunction dissolved, comes here for an administration, as if this Court could decide whether the injunction was proper to be dissolved or not. The administration too was obtained, after knowledge that a caveat had been entered which was never warned; and that caveat having expired, this administration was taken without giving any notice to the other party. At least then it was obtained, to use a tender expression, irregularly, and the party, when ordered to bring it in, resists that order by entering into a long petition. I am bound to revoke and declare this administration void; and, as there is no ground for defending the application, I must condemn the party in the costs of this petition.

Petition rejected.

[249] RICHARDSON AND LANG *v.* BARRY. Prerogative Court, Easter Term, 2nd Session, 1830.—Deceased having, under a trust deed, power to dispose of certain effects by a will attested by two witnesses, such a will is revoked by a subsequent will containing an express revocatory clause, duly executed, but attested only by one witness; the disposition intended by the deceased being thereby completely effected.

[Referred to, *In the Goods of Eustace*, 1874, L. R. 3 P. & D. 186.]

On petition.

This was a cause of bringing into the registry the letters of administration with the will annexed (dated the 16th of June, 1824) of William Barry, heretofore granted to the residuary legatee, the father of the deceased, and of accepting an administration with the said will, together with an asserted will, dated the 2nd of October, 1821, as together containing the will of the deceased. The cause was promoted by the executors of the will of 1821, who were also trustees under a deed of settlement dated the 10th of August, 1820.

The petition in substance alleged "that the deceased, William Barry, in 1820 invested 10,000l. navy five per cents. in trustees to pay him the dividends for life, then in trust for such person or persons as he by his last will in writing, or by any writing purporting to be or being in the nature of his last will, or any codicil or codicils thereto to be by him signed and published in the presence of and attested by two or more credible witnesses, should direct; and in default of such direction, or so far as any such appointment, if incomplete, should not extend, then in trust for such purposes as therein expressed and declared: that on the 2d of October, 1821, he made a will, appointing the trustees executors under it; and that this will was duly attested by two wit-**[250]**-nesses; that on the 16th of June, 1824, he made another will, but attested by one witness only, and died in July, 1824, without having altered or revoked his will of 1821 so far as related to the trust fund."

It was answered—"that in June, 1824, he executed a will, whereby, after referring to the provision of the deed of trust with respect to the 10,000l., he left the same to be disposed of by the said deed, and by his said last will bequeathed the rest of his property, and appointed his brother sole executor (who renounced); and, revoking all former wills by the said will, declared the same to be 'his only last will;' and that therefore the Court would confirm the letters of administration heretofore granted to the deceased's father."

Lushington and Addams for the executors and trustees. This Court is always anxious to enable a party to have the benefit of a construction of a testamentary paper by the Court of Chancery: and that Court, before it will decide upon an instrument, invariably requires, if in the nature of a will, that it should first be proved in the Ecclesiastical Court (*Ross* v. *Ewer*, 3 Atk. 160, 356). The question to be decided in

Chancery will be, whether the property is available for the deceased's debts. Our prayer is that probate may be granted of the will of 1824 and of so much of the will of 1821 as is limited to an execution of the power, as together containing the deceased's will. That **[251]** seems to us the proper course: for the latter will, being only attested by one witness, cannot operate on the settled property, nor revoke the former will as far as it applies to that property.

The King's advocate and Nicholl contrà. The question is whether two inconsistent wills formally drawn up, regularly and duly executed to carry personalty, each, as far as the intention and belief of the deceased go, complete, and distinct and independent in all its parts and dispositions, can be taken together. The will of 1821 has no clause of revocation, but the latter will has. A power, created by a man in limitation of his own rights, is to be construed less strictly against him. The Courts follow a clear expression of intention when the donor and donee are the same. Supposing no prior existing operative instrument, if the latter will purported to make an appointment of trust money, equity would supply a defective execution. *Sayle* v. *Freeland* (2 Ventris, 350). A will and a paper purporting to be a will are synonymous. *Longford* v. *Eyre* (1 P. Wms. 740). If a power is to be executed by a will, or paper purporting to be a will, such paper must have all the properties of a will: inter alia, it must be revocable and by the same means as other wills; and herein differs from a power under a deed. Sugden on Powers, 315, 329-30. The settlement enjoins two requisites for an instrument to convey away the 10,000l. different from the provisions of the settlement. 1st. That the **[252]** disposition should be by last will: 2d. That the will should be executed in the presence of two witnesses. Here, one is the last will, but attested by one witness; the other is attested by two witnesses, but is not the last will. Neither, therefore, is a due compliance with the settlement. Then, as there is no appointment or direction by will, the money must pass under the settlement —it must pass as provided for in default of an appointment. This is the express intention of the will of 1824. "I will and direct that the same (viz. the 10,000l.) be held by my trustees for the same ends, intents, and purposes as are expressed and declared in the said indenture of the 10th of August, 1820." This is no substantive disposition, but a mere declaration that he had no intention to appoint: but it is not necessary to rely upon this; there is a positive revocation.

The same formalities are not required for revocation as for execution. Between the statutes of wills (32 Hen. 8, c. 37; 34 & 35 Hen. 8, c. 5) and the statute of frauds (29 Car. 2, c. 3) wills in writing could be revoked by parol. *Cranvel* v. *Saunders* (Cro. Jac. 497). Under sections 5 and 6 of the statute of frauds what is requisite for the execution of a will is different from what is requisite for its revocation; a writing signed in the presence of three witnesses, but not attested in the presence of the testator, might revoke, though it could not dispose. Other revocations—as cancellation, burning, tearing—are effected without any witnesses. The 12 Car. 2, c. 24, s. 8, which allows a testamentary appointment of guardians, requires two witnesses: but any paper directly **[253]** purporting to revoke, unless the revocation is expressly, or by implication, conditional on the completion of a new disposition, is sufficient to revoke a previous appointment of a guardian, made in conformity with the provisions of that statute. *Ex parte Lord Ilchester* (7 Vesey, 348). Here the paper is competent to effect all it purports; and revokes the former disposition—not by a new and substantive disposition to which it is incompetent, but by express and positive words. A Court of probate—whose object is to follow the intention of a testator—is bound to look with jealousy at an attempt to throw impediments in the way of a free disposition, and will uphold the doctrine that testamentary intentions are ambulatory. In this case the first intention of the testator was clearly departed from, and the last explicitly declared, a month before his death, in a will duly executed to carry personalty according to law, by a person capable, under ordinary circumstances, to execute a will. This is not like the case of a married woman, where the power is the foundation of the will; but here a common right is limited by the act of the party. The settlement is to be construed to restrain a disposition of that property by any instrument other than a will executed in the presence of two witnesses, but not to restrain a revocation, neither expressly nor by implication forbidden by the settlement.

This revocation is not subservient, as in *Onions* v. *Tyrer* (1 Peere Wms. 343), to a new disposition invalid by reasons either intrinsic or dehors, but to a new disposition valid in all its parts.

[254] *Judgment—Sir John Nicholl* [after shortly stating from the petition the facts of the case and the prayers on both sides]. The latter instrument, so far as respects personal property, is a completely valid will; and of the intention of the testator there is no doubt: it is clear that he intended the 10,000l. should pass under the deed of trust; and he has inserted in the latter will an express revocatory clause: the former paper, therefore, so far as respects this Court, is revoked and is no longer a will. How can this Court grant probate of a former paper as containing, together with a complete will revoking all former wills, the will of the deceased?

It is true that the statute of frauds (29 Car. 2, c. 3) has declared that certain formalities are necessary to revoke a will of lands; but there is no clause in this deed referring to a revocatory paper; the deceased has imposed upon himself the restriction of not altering the disposition of the deed except by a will attested by two witnesses; but he has not imposed upon himself any restriction as to revoking that will in the way in which a will of personalty may ordinarily be revoked. The will of 1824 in express terms revokes all former wills, and declares that he reverts to the disposition of the trust deed. I am of opinion that the right to do that was not taken from him; that I must consider this as his only will, and that no former will exists, and that, on the authorities stated by counsel, other Courts would hold the same principle. If, however, the former paper be **[255]** good as an appointment, the party must resort to other jurisdictions, but I am of opinion that, as far as this Court is concerned, the administration with the will of 1824 annexed was rightly granted.

IN THE GOODS OF LADY HATTON FINCH. Prerogative Court, Easter Term, 19th March, 1830.—On complaint against a proctor of an extortionate charge (88l. 4s. 4d.) for taking out probate in common form, the bill was referred to the registrars, who reported the proper charge to be 52l. 15s. 8d. The Court suspended the proctor for three months and condemned him in costs; it being the first time his conduct had been brought before the Court, and a medical certificate of his inability to attend to business when the bill was delivered being produced.

This was a complaint against Frederick William Pott, respecting his account for passing in common form the probate of a will. The proctor appeared in person, and, in addition to the contents of his memorials and medical certificate, stated (in the course of the observations of the Court) that, if required, he was ready to make oath that the charge complained of was not conformable to his usual habit; and that he had been in practice for twenty years, during which period only one of his bills, before the bill under consideration, had been brought to the notice of the registrar for taxation.

Judgment—Sir John Nicholl. This is a complaint laid before the Court against one of its practitioners on account of his having made an exorbitant charge for passing the probate of a will in common form. The public are peculiarly entitled to be protected against charges for business of this sort, because, being ex parte, it is less likely to come under the immediate notice of the Court than contested busi-**[256]**-ness: but the Court, under the authority inherent in every Court over its practitioners, is bound to examine such complaints, and to correct the proctor if the complaint be well founded.

The bill, as delivered, after deducting 480l. "cash for duty," left the proctor's charge at 88l. 4s. 4d. This bill was, upon application to the Court in the usual way, referred to the registrar for examination and report. The registrars (for as it was a matter of importance and delicacy all the registrars together took the bill into consideration) heard the proctor who delivered the bill and the proctor of the complainant, and they reported the bill at 52l. 15s. 8d.: thus from 88l. 4s. 4d. taking off 35l. 8s. 8d. as an overcharge—that is, considerably above one-third of the whole bill.

When the report was made by the registrar the proctor sent in a memorial in which he did not attempt to justify the charge; but the excuse offered was that he was ill at the time (and a medical certificate has been exhibited in proof of that fact); that the bill was made out by his clerk, and "that he never saw, read over, or was informed of a single item contained in the bill, and that it was made out totally in error and from inexperience." He afterwards delivered a further memorial, stating that in passing this business there were some circumstances attended with unusual trouble: the Court, then, in order to give the proctor every fair opportunity of exculpating himself, referred the bill back to the registrars for their reconsideration, whether the memorials contained any reasons for altering **[257]** their report; the

answer was that they saw no ground for varying the report: the Judge inquired of the registrar whether, in proof of the bill having been drawn through the error and inexperience of the clerk, the proctor had offered to produce his books; the answer was that he had not made any such offer, and, on its being proposed to him, he had declined to produce them: the proctor now in open Court admits the correctness of that statement.

These, then, are the facts: here is an overcharge of 35l. 8s. 8d., being above one-third of the whole bill. The circumstance that the proctor was ill and never saw the bill would have been much in the proctor's favour if he could have shewn that the bill was framed entirely by the error and inexperience of the clerk—even that would be no complete exoneration of himself; for if a proctor who is ill has only an inexperienced clerk, he should not authorize such a clerk to make out and deliver a bill without submitting it to the revision of some other experienced practitioner; but the excuse fails in this case, for, as the proctor has declined the offer of producing his books, I must presume that the bill was made out, not by the inexperience of the clerk and through error, but conformably to the general charges made by this proctor.

Such being the view which the Court is compelled to take of the matter, there devolves upon the Judge the very painful duty of applying the proper correction. Strongly as the inclination of the Court may be disposed towards lenity, it is yet due to the interests of the public, and to the character of the profession, to administer **[258]** that degree of correction which shall be sufficient by the example to put a stop to such malpractices.

On the favorable side it must not be overlooked that this is the first complaint against the individual either of this or of any other sort: a former delinquency, even of a different description, would have called for a heavier punishment on the second offence.

The Court, upon the whole, thinks that the ends of justice will be satisfied by a suspension of three months, and by payment of the costs occasioned by the reference of the bill to the registrars.

IN THE GOODS OF ELIZABETH ADAMS. Prerogative Court, Easter Term, 4th Session, 1830.—Without the consent or citation of the next of kin the Court will not, on motion supported by affidavit of the drawer (the executor and a legatee), grant probate of a will, unsigned, dated some years before, and with an attestation clause and no witnesses, and a recent codicil with a space between the last clause and signature.

On motion.

The deceased died on the 6th of March, 1830: she left a will, dated on the 10th of July, 1822, with a formal attestation clause, but no signature nor subscribed witness: also a codicil (referring to the will) written in the summer of 1828: this was signed at the bottom, leaving a large space between the signature and the last clause of the codicil. The property was under 600l.

Curteis, upon the affidavit of the drawer of the will and codicil, who was the sole executor and a legatee in the sum of 10l., moved for probate. The affidavit stated that the deceased, at the time the will was read over to her, fully approved of it, and **[259]** said that she would postpone the execution of it till her return home, when she would ask two ladies with whom she resided to witness it: that the space between the last clause of the codicil and the deceased's signature was purposely left for the insertion of any further legacy.

Per Curiam. Before this grant can pass, there should either be a consent on the part of Mrs. Long, the sister, the sole next of kin, or she should be cited; for I cannot, upon the single affidavit before me, decree probate of these papers. The case must stand over.

GRINDALL *v.* GRINDALL AND GRINDALL. Prerogative Court, Easter Term, 4th Session, 1830.—An allegation, pleading a verdict in ejectment, and the remarks of the Judge thereon, and the names of the witnesses examined, rejected.

On admission of an allegation.

The allegation in substance pleaded—

1. That an action of ejectment was brought in pursuance of an order of the Court

of Chancery by Charles E. Grindall, one of the parties in this cause, against H. E. P. Sturt Grindall, to try the validity of the last will of Thomas Grindall—being the will here propounded—as relating to his real estate; that the same came on for trial in the King's Bench on the 20th of April, 1830, and continued during two days, and that the (special) jury found a **[260]** verdict for the defendant, thereby establishing the validity of the will, so far as respected the realty; that thereupon the Lord Chief Justice declared "that he perfectly concurred with the jury in their verdict," or to that effect.

2. An official copy of the record of the judgment on the verdict.

3. That on the said action the following witnesses [enumerating twenty-three—among whom were the drawer of, and subscribed witnesses to, the will, and four medical men] were examined on behalf of the defendant, and submitted to cross-examination: that for the plaintiff twelve witnesses [and among them John Stone Grindall, the brother of the plaintiff, and one of the parties in the above cause] were examined; and that the whole of the said witnesses, except J. S. Grindall and two other of the plaintiff's witnesses, have been, or are intended to be, examined as witnesses in this cause.

Phillimore opposed the allegation.

Lushington and Dodson contrà. It was said that a verdict in an action of ejectment, for the purpose of trying the validity of the will as to realty, is not admissible in a suit respecting the same will in these courts. But a verdict in assumpsit was admitted in *Dew* v. *Clark*.(*a*) **[261]** The allegation is admissible to shew that the

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(*a*) February 23, 1824.—The allegation in the case referred to in the text consisted of twenty-two articles, of which the 16th and 17th pleaded a verdict in substance as follows:—"That the husband of Mrs. Dew, as sole heiress at law of the deceased (in order to try the question of the deceased's sanity at the execution of the will), brought in June, 1822, an action in the King's Bench against F., the devisee in trust, for money received by him as rent of freehold property accrued since the deceased's death: that issue was joined on a plea of non-assumpsit; and on the 20th of December a verdict with costs was given for the plaintiff: that F. defended the action under the direction of the nephews [the residuary legatees under the will, and the parties to the suit in the Prerogative Court]; and in the course of the proceedings changed from his own attorney to the confidential attorney of the nephews, and that he has been since reimbursed his costs by the nephews, or that they have made themselves responsible for them."

From reference to three different notes of the argument it would seem that the main objection to the plea was that Mrs. Dew, the deceased's daughter, had, in her former allegation, only set up a case of insanity quoad hanc; and that the plea then under discussion alleged general insanity, and pleaded facts not noviter perventa; the introduction of this verdict was also objected to; and the argument on this point was, in substance, as follows:—"Verdict on action in assumpsit against a devisee in trust, not one of the parties here, is pleaded. If verdicts of this kind are to be admitted, it should be stated whether any defence or not, whether witnesses examined, but objectionable altogether."

Contrà. "Verdict not conclusive, but adminicular evidence. Dr. Lushington says, none such has been given during his time; if not so, a short time before" (probably alluding to *Mill* v. *Mill and Leslie*, in 1807, reported infra, p. 264, n.). Verdicts in matrimonial cases are inter alios acta: so in writs de lunatico inquirendo.

The Court rejected from the 3d to the 9th articles inclusive, as remote, equivocal, or sufficiently pleaded in the 1st article; and admitted the rest, saying, in the course of its observations on the plea, and on the objections thereto, that, "considering Mrs. Dew was the only child, and that her former plea was given in hastily, at the same time as the condidit, for the purpose of examining witnesses of advanced age, it was not inclined too rigidly to exclude any thing."

From this admission the nephews appealed to the Court of Delegates: Mrs. Dew did not appeal.

The arguments, which were at considerable length, were directed almost entirely to the point that the allegation set up a different case from the former, and pleaded matter not responsive, nor noviter perventa. The objection to the verdict was shortly renewed, as appears from two notes, the substance of which is as follows:—

witnesses examined in this cause have undergone an examination before a jury; and the relative weight given, at common law, to their testimony. The declaration of the Judge is **[262]** important as a valuable confirmation of the decision of the jury.

Judgment—Sir John Nicholl. It is well worth consideration whether it would be desirable to admit such verdicts. Divorce causes are under very particular and special circumstances. To this action the heir at law **[263]** alone was the party, and the verdict might, possibly, be by collusion. The Ecclesiastical Court must decide on its own evidence. This allegation would tend to expence and delay; if the one party is entitled to plead that the Chief Justice approved of the verdict, the other party is entitled to plead that he disapproved; and then this Court would be required to try the propriety of the verdict, and the Chief Justice might be called on to be examined as to his opinion. In *Price* v. *Clark and Pugh* (*a*)[1] the question was raised and decided on much consideration. I am disposed to follow that decision, unless authorities, quite in point, can be shewn of a contrary purport. Verdicts may possibly have been admitted in some instances, not as evidence on the main question, but as affecting costs, where there was an appearance of delay, and that the suit was vexatious and litigious.(*b*) I do not, at the present moment, recollect the circumstances under which the verdict in *Dew* v. *Clark* was admitted; possibly it was on some such grounds: but assuming that I did there, inadvertently and erroneously, admit such a verdict, I do not feel myself precluded by that circumstance from reverting to what appears to me the ancient and more correct practice. In **[264]** *Mill* v. *Mill and Leslie* (*a*)[2] a

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[Dr. Adams, Dr. Lushington, and John Williams in objection to the 16th and 17th articles.] Judgment went by default; it was an undefended cause; the plaintiff obtained his verdict, the defendant not appearing and making no defence; the verdict proves nothing—is not legal evidence—will lead to further pleading.

Hullock, Baron. The verdict can be no evidence as to capacity: but may it not affect costs?

Argument. It certainly has no bearing upon the sanity: how far it may have an effect on the question of costs we do not wish to examine.

Jenner and Phillimore contrà. These articles are pleaded as shewing the conduct of the parties: they bear on the circumstances of the case, and on costs. At law the daughter's rights could only be impeached by setting up this will. The nephews would not go to a jury. Exhibit No. 3 shews that 3l. 18s. 9d. was the sum recovered, but that the costs amounted to 376l. 1s. 3d. Such large costs prove that the parties must have been prepared to go into the whole case, and that the nephews afterwards abandoned it. It is said that this should have been pleaded before; but judgment was not obtained till February, 1823, although the verdict was obtained on the 20th of December, 1822. The former allegation was given in July, 1822: the verdict, therefore, could not have been pleaded at an earlier period.

The Court affirmed the decree of the Prerogative Court with 100l. nomine expensarum.

Note.—In *Grindall* v. *Grindall* it was not stated that the allegation in *Dew* v. *Clark* had been before the Court of Delegates.

(*a*)[1] See the next case.

(*b*) As one of the next of kin, a party to this suit, was examined, at common law, against the validity of the will, it is clear that a verdict against the will could not have been received: and as "nobody can take benefit by a verdict who had not been prejudiced by it, had it gone contrary" (1 Phillipps' Evid. p. 309, 6th edit. citing Gilb. Ev. 28), the verdict for the will was not admissible. If these verdicts were evidence in the Ecclesiastical Courts, it is conceived that legatees and others, interested in the personalty, would not be competent witnesses in the action at common law.

(*a*)[2] *Mill* v. *Mill and Leslie.* Prerogative, Easter Term, 1st Session, 1807.

On admission of an allegation.

Dr. Arnold and Dr. Adams in objection.

Sir John Nicholl (King's adv.), Dr. Laurence, and Dr. Burnaby contrà. [No cases in which verdicts had been admitted were cited.]

Per Curiam (Sir Wm. Wynne). Three codicils are propounded and opposed: the will is not opposed. A long allegation, in answer to the allegation propounding these papers, pleading insanity and incapacity, has been admitted. The present plea is responsive; the bulk of it, which is not objected to, goes to shew the connexion

verdict was admitted principally as bearing on costs: but, besides, it was part of a long allegation otherwise admissible, and the admission might produce less expence and delay than if the allegation had been reformed. Here the verdict may be brought in at any time as an exhibit, for the purpose of affecting the question of costs: but if now admitted, it might have a very improper effect and lead to much expensive litigation.

[265] Dr. Lushington stated that though he had felt bound, in conformity with the precedent in *Dew* v. *Clark*, to offer this allegation, his own opinion was adverse to the admissibility of such verdicts.

Allegation rejected.

PRICE *v.* CLARK AND PUGH. Arches, 7th May, 1795.—A verdict in an action of ejectment cannot be pleaded in a testamentary cause.

An allegation, responsive to one given in the Court of Appeal,(*a*) pleaded in the first and second articles a verdict in an action of ejectment **[266]** establishing the validity of the will. These articles were objected to.

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between the deceased and the party benefited. The 6th and 7th articles, which plead that a verdict at law has been given in favour of the earliest of these codicils, are opposed; and the question is whether they can be, in any way, relevant or of use. It is true that this Court must decide upon its own evidence, and this is not offered as decisive or conclusive; but is the verdict of any weight in this Court? Verdicts are received in divorce causes; in testamentary causes verdicts under a commission of lunacy and of a coroner's inquest are received.* If there be evidence in favor of the codicil, this verdict may possibly give it some additional weight; at least it will be satisfactory to know that another Court was of the same opinion: but what chiefly weighs with me is that it would tend to shew the conduct of the parties, and thus bear on the question of costs: there is an appearance of delay, and it may shew that the opposition is vexatious and litigious. Under these circumstances, particularly, I shall admit the allegation.

(*a*) *Price* v. *Clark and Pugh.* Trinity Term, 2nd Session, 1794.—On appeals from definitive sentences, matter which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined below, is not admissible: but matter more generally responsive may with caution be received, especially where the cause has not been properly conducted in the Court below.

On appeal from Hereford.

This cause respected the will of Samuel Williams: the will was dated on the 29th of August, 1791; and the party died three weeks afterwards: it was propounded in a common condidit, upon which the three subscribing witnesses were examined: the executors afterwards gave in an allegation, and examined witnesses upon it. The Court below pronounced for the will. Upon an appeal from this sentence the next of kin, who had hitherto given no plea, now offered an allegation: and, upon the admissibility of this plea, the Dean of the Arches observed:

Per Curiam (Sir Wm. Wynne). It has been said that though the Court, even in an appeal from a definitive sentence, may admit an allegation, yet that it ought to be cautious, and not allow any thing to be pleaded which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined in the Court below (Oughton, tit. 318, s. 1). This is a rule which the Court will observe as exactly as it can; but where causes come from country courts, this Court cannot always, consistently with justice, observe it: because, in the Courts below, causes are often awkwardly conducted. I have looked into the proceedings, and all that I will say is that they are such that the Court is not inclined to reject any thing which may tend to elucidate the transaction. I think there is something which requires examination.

The first article pleads, in contradiction to the condidit, incapacity at the time of the execution: it is so contrary to all rules to admit, on an appeal from a definitive sentence, witnesses to speak to a fact directly pleaded and examined to, that I must reject this article. The second, "that the deceased, though his bodily strength was

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* See 1 Starkie on Evid. 275-8, as to the grounds on which such verdicts (which are analogous to adjudications in rem) are received in evidence.

[267] Per Curiam. I wish to know whether there is any instance where a verdict at common law has been received in a testamentary cause: if not, I shall be unwilling to break in upon the practice. I shall let the allegation stand over for inquiry.

On a subsequent day the Court delivered its opinion as follows:—

Judgment—Sir William Wynne. This is a testamentary cause; and is here by an appeal from Hereford, where, on the 10th of August, 1793, sentence was given for the will; an appeal was prosecuted on the second session of Trinity Term, 1794, an allega- was admitted in this Court on behalf of the appellant, the opponent of the will: and now an allegation is offered responsive, pleading a verdict in a cause of ejectment tried at the assizes at Shrewsbury, in which the question was whether the testator was of sound mind and capable at the time of making the will, and a verdict was given for Margaret Williams, the defendant, the real party here. The se-[268]-cond article exhibits a copy of the judgment. On debate it occurred to me that it was a new practice. I did not recollect an instance, and no case was quoted, where a verdict in ejectment had been pleaded. Counsel alluded to cases in the Consistory Court in causes of adultery where verdicts for damages against the party seducing have been admitted; and it is now the usual practice. The Court thought that even there the practice was novel; for in 1736, in the case of *Dinely* v. *Dinely*, the Court of Delegates refused to admit the verdict. Now, however, the practice to receive them is not to be controverted: but it is said by counsel that those cases are not parallel with a testamentary cause: and I think truly; for as matrimonial causes may be brought by collusion, the Court is always to proceed with extreme caution; and I think that, therefore, such cases are not parallel with a testamentary cause, where there is no reason to suppose that the parties are not sincere in their opposition to each other. Considering these circumstances, I took to this day to inquire whether, in any testamentary cause, such a verdict had been received; and after all the inquiry I have made, I cannot find an instance where an article has been admitted introducing a verdict: nor do I find any instance in which it has been attempted and rejected. The absence of all precedent proves, I think, that in practice a verdict in ejectment is not considered admissible evidence; because, without doubt, cases in which the will has been put in question, both in the ecclesiastical and common law Courts, are very frequent; and, in such cases, it generally happens, from the different [269] mode of proceeding, that the verdict will be obtained first: but still the attempt has never been made.

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much impaired, was in his senses, notwithstanding a paralytic stroke twenty years before, and so continued till a second stroke; that he had a second stroke six weeks before his death, which rendered him incapable, and that he was so considered." It is material for the Court to know the state of the deceased's mind and body: a weakness of body makes a man liable to imposition; the first part of this article is therefore proper: but "that he was struck with a second paralytic stroke six weeks before his death," &c. this may introduce evidence contradictory to witnesses on the codicil: still, however, under the circumstances of the case, I will admit general evidence of the state of the deceased's capacity.

3. "That before this fit he made a declaration in favor of his relations; and further pleaded the importunity of his wife with great passion." This is proper to admit. It appears that there was a controversy between the deceased and his wife about the disposal of some effects. I think that this article is material to shew the deceased's intention, and the attempt of his wife.

The 4th states more than the mere disposition of the will; for it pleads a relationship of some of the legatees with the deceased's wife.

5. That the wife was violent, kept her husband in subjugation, and prevented a communication with his relations: this is material, for though it pleads not incapacity, yet it tends to shew a complete subjugation to the wife.

The 6th pleads circumstances respecting a will said to be made by the deceased two years before his death, whilst he was ill; that it was obtained by the procurement of the wife, who was violent. This regards a will not before the Court, but the article charges that it was done by the direction of the wife; that two persons, executors in this will, were present; and that the same person wrote that will who wrote the present. This is an accusation of the same nature as that charged here on the same person; and I cannot reject it: but I reject a conversation of the wife afterwards pleaded. When these articles are reformed, I admit the allegation.

I believe that what the practitioners have in general understood is, that a verdict is irrelevant and not proper to be received. If, then, it be so; if there be no precedent to guide me, the point comes to be considered on principle, and on the reason of the thing. There are many cases where the parties in both Courts are the same, where proceedings may be, and have been, introduced from one Court into another. There are also instances in which depositions from Chancery have been here introduced: as in *Middleton* v. *Forbes*,(*a*)[1] depositions relating to a deed of gift by the party whose will was contested (*Wells* v. *Middleton*, 1 Cox, 112): so also in *Bainbridge* v. *Gee*, Hilary Term, 1777, depositions between the same parties in the Exchequer were received. The practice in Chancery is the same. *Mildmay* v. *Mildmay*.(*c*) But in all these cases the very evidence itself, which was given in the other Court, was received. The Judge, therefore, had the opportunity of weighing the evidence given in another Court with the evidence of the same witnesses, or of other witnesses in his own Court: he had then before him that upon which he could form his own opinion: then the objection was taken away.

There are also other cases where a verdict is introduced into the Ecclesiastical Court, and is **[270]** binding; and vice versâ, where the sentence of these Courts is introduced into, and is conclusive upon, other Courts: as where a clergyman is accused of a crime indictable at common law, and for which he may be deprived in the Ecclesiastical Court, the verdict there is conclusive evidence; and the Court must admit the verdict as proof of his conviction and guilt, and must proceed thereon.(*a*)[2] So, in common law, where the legality and not merely the fact of marriage is in question, the Court writes to the ordinary: the ordinary tries and certifies, and the Court is bound by his certificate.(*b*) If an action is brought upon a contract of marriage, and before the marriage act a proceeding was had here on the same contract, and sentence against it, such sentence was held binding in a Court of Common Law. *Da Costa* v. *Villa Real* (2 Strange, 960), *Hatfield* v. *Hatfield* (5 Brown, P. C. 100). The principle is, that the Court, before which the verdict or sentence of another Court is brought, was not competent in jurisdiction to examine, or to determine upon, the facts; and the judgment introduced was therefore conclusive.(*e*) That is not the case in a testamentary cause; for the Ecclesiastical Court is as competent to determine on a will of personal estate as a Court of Common Law on a will of real estate: it is not suggested, indeed, **[271]** that the verdict is binding and conclusive, but that it is circumstantial evidence: I cannot see how the Court can pay any regard to it in that light. Suppose the Court should think that the executors fail in proof of the will, would any counsel take upon himself to argue—"I think the evidence before the Court is insufficient; but here is a verdict by which it is apparent that another Court has pronounced for the will, therefore though there is no legal evidence here you must pronounce for it, because another Court has." This cannot be said. What is the use of the verdict? If there be sufficient legal evidence here, I shall pronounce for the will; then the verdict is of no avail: but if there be not sufficient evidence I cannot, upon the ground of the verdict, pronounce against the evidence before me. Then I do not see upon what ground it is relevant.

But it does not rest here: for I think pleading a verdict is not only useless, but may be productive of great inconvenience, and of that this allegation affords a strong instance. The first article pleads that "at the trial at law the question was whether, at the time of making the will, the testator was of sound mind and capable:" but this is not the issue before me. The allegation of the next of kin here pleads "that Ralph Heartshorn wrote the will by the direction of Margaret Williams without the consent of the deceased; that it was carried into the room where the deceased lay

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(*a*)[1] For the judgment and some further particulars of that case, see 1 Hagg. Ecc. 395.

(*c*) 1 Vernon, 53. In *Taylor* v. *Bouchier* the Master of the Rolls made a general order for reading the proceedings in the Prerogative Court. See 4 Bro. P. C. 715.

(*a*)[2] *Searle's case*, Hob. 121, and see 1 Hagg. Con. 141, in notis; also *Wilkinson* v. *Gordon*, 2 Add. 158.

(*b*) See *Ilderton* v. *Ilderton*, 2 H. Bl. 145; 1 Phillipps' Ev. p. 322, 6th edit.; 2 Starkie Ev. p. 217; Woolrych on Certificates, s. 2, p. 10.

(*e*) Cases of this class are proceedings in rem: as to which and the effect of sentences therein, see 1 Starkie Ev. p. 227, 231, 243.

groaning, and it was signed under the controul of the wife." Then here are facts to overthrow the will, though the deceased might be of sane mind. It is also pleaded "that she was of a violent temper." Dr. [272] Nicholl, her counsel, who was aware of this, has said that the plea was incautiously drawn; that it might have been more proper to plead generally that the question was upon the validity of the will, and that the verdict was for the defendant. Suppose it had been so: that would not remove the objection. If the verdict had been pleaded generally, and the allegation had been admitted; and the other party had given an allegation that the question of custody was not matter before the jury, for that there was no evidence to that fact, I do not see how the Court could reject that allegation: for if it is relevant for one party to give an allegation pleading the verdict, it is relevant for the other to say it does not apply to the facts in issue in this Court. Suppose again, after publication, the party was to say, "I will shew that the evidence before the jury differed materially from that now given, and will prove it:" could the Court properly reject an allegation for that purpose? if not, what a door to litigation and expence would be opened—an inquiry into what was done in another Court: the inconvenience would be infinite and endless: therefore if it be res integra, which I take it to be, the Court ought not to admit the plea, but ought to adhere to the ancient and established practice that you shall not be at liberty to give a judgment of another Court in proof where the Court cannot see the evidence upon which that judgment was given; but that the Court is to decide secundum allegata et probata. I will not make a precedent, thinking it will lead to inconvenience: I shall therefore reject the first and second articles of this allegation.

Allegation reformed.

[273] KEMBLE AND SMALES *v.* CHURCH. Prerogative Court, 8th March, 1830.—Where the attesting witnesses—disinterested medical men—speak strongly to sanity, the Court will not set aside a will on proof by interrogatories, but without plea, that the deceased, many years before, had been under an insane delusion.

Elizabeth Wilson died on the 18th of September, 1829, a widow, of the age of 70 years, leaving three daughters and a son. By her will and two codicils dated, and executed, on the 10th of September, 1829, she left, among other legacies, 400l. in specific bequests to different charities, and, to several dissenting ministers, some legacies of 50l. each, and the residue among her children. She appointed Henry Kemble, a friend of the deceased, and her cousin, Maria Smales, who had lived with the deceased and her mother for a great many years, executors, and legatees of 50l. each; and to Maria Smales she also gave an annuity of 25l. The object of the first codicil was to secure to her married daughter, Mrs. Church, her share independent of her husband; and upon her death, to her children: the second codicil—instead of increasing the annuity to Miss Smales to 50l., which the deceased, at the execution of the will, had at first contemplated—left her a small leasehold cottage. The will was in the hand-writing of Miss Smales, and was pleaded to have been prepared from a former will drawn up in 1827, and from verbal instructions from the deceased; but that she declined to execute it at that time, as she had not made up her mind as to the disposition of her property to Mrs. Church. The deceased, in the beginning of September, went to Southampton, and was [274] there seized with a severe illness. On the morning of the 10th her medical attendants pronounced her in danger, and being informed that her will was unexecuted, she was asked if she wished to execute it, and she gave an affirmative answer. Dr. Down, her physician, understanding that the will had not been prepared by a professional man, recommended that one should see it. An attorney was accordingly called in, and after some blanks were filled up, and some alterations made, Dr. Down read the will over to the deceased, in the course of which she suggested an additional annuity to Miss Smales, which ultimately ended in the making of the second codicil and the substitution of the small cottage; the will was again read a second time to the deceased, who, having approved it, was raised in bed for the execution, when a book was brought for her to rest the paper upon: but, after looking at it, she said, "I won't use that, it is the Bible." The four witnesses, viz. the two medical men, the attorney, and Mrs. Margaret Smales, the aunt of the executrix, examined upon the allegation given in on behalf of the executors deposed that they entertained no doubt of her capacity and volition.

On interrogatories it appeared that, seventeen years before her death, the deceased had been affected with insane delusions, chiefly on religious matters; and, in June, 1828, had experienced a return of the malady: and, from that time to her death, was attended by a nurse accustomed to the care of persons afflicted in that way; but there was no proof of the presence of this malady, or of any symptoms of it, **[275]** either at the time the will was prepared, or at the time of the execution.

Addams and Haggard for the executors. The will and codicils are opposed by the husband of Mrs. Church, who has been admitted a contradictor for this purpose, but his wife, the daughter of the deceased, has declined to join in the proxy. There is no case in which insanity has been allowed to be made out on interrogatories merely; but we have established a lucid interval; though to do it we were not bound.

Lushington and Dodson contrà. The principles applicable to this case are defined in the recent case of *Groom and Evans* v. *Thomas* (2 Hag. Ecc. 433). Here insanity is proved; the onus to rebut it is upon those who had the means of ascertaining a return to soundness. The nurse has not been examined. At the execution of these papers the deceased's particular delusions were not touched upon. If a will may not be set aside on evidence obtained upon cross-examination alone without pleading, what is the effect of calling for proof in solemn form of law? The allegation pleads soundness of mind—and the evidence negatives it. There is a failure of proof as to sanity.

Per Curiam. What do the attesting witnesses say?

[276] Argument. They put no question to the deceased, except as to her immediate illness, and her state of health.

Judgment—Sir John Nicholl. The inclination of my opinion is strong in favour of this paper. Where there are two attesting witnesses, both being medical men, and in attendance upon the deceased; and when she herself at the execution directs an additional bequest, approves of what she is about to sign, and is shewn to manifest capacity and volition, it would be the strangest thing to pronounce against the paper, because it appeared, on interrogatory, that, about seventeen years before, the deceased had laboured under insane delusions. The witnesses are disinterested—the medical men perfectly so: they were aware that she had been under delusion, but saw no appearance of it at the time. If there had been a case to set aside the will, it should have been put in plea. It is my present impression that I must pronounce for the papers propounded.

The cause stood over till the 19th, when the Court decreed probate to the executors of the will and codicils; and recommended that the expences should be paid out of the estate.

[277] MILLER *v.* WASHINGTON. Prerogative Court, Trinity Term, 1st Session, 1830.—Where administration to a person long dead was prayed by a creditor, and there had been no personal service on the next of kin (who had no known agent in this country), the Court required full information as to the debt and the cause of the delay, and that notice should be given to the next of kin in the West Indies.

On motion.

William M'Gill died in the West Indies in 1809, intestate, leaving Mrs. Washington, his niece and next of kin, now resident at Nevis, and who has no agent in this country. In 1815 Mr. Ward, formerly Judge of the Vice Admiralty Court at Nevis, and a creditor of the deceased, died, having appointed Sarah Miller his residuary legatee; she proved the will, and thus became a creditor of M'Gill's estate. The debt amounted to more than 500l., and exceeded the effects.

On 20th of April, 1830, a decree with intimation was served upon the Royal Exchange; and Lushington now moved, on behalf of the creditrix, for an administration to M'Gill.

Per Curiam. M'Gill has been dead upwards of twenty years: when such a length of time is suffered to elapse, and when there has been no personal service on the next of kin, the Court requires a fuller account as to how the debt was incurred, and what is the proof of it: the Court must also be furnished with a fuller affidavit of the particulars of the debt, and an explanation why an earlier application has not been made. Mr. Ward, the original creditor, died in 1815, and his representative has not taken any steps towards this administration till the present year. **[278]** As the applicant has waited so long, and as the niece is resident in the island of Nevis, some

notice should be given to her; a mere service on the Royal Exchange is not sufficient; Mrs. Washington may be ignorant of her uncle's property; and for the present I must reject the motion, but I will allow a fresh decree to issue, which may be served upon Mrs. Washington: and I wish it to be considered rather as a general rule that where a next of kin or party in distribution is as accessible as in this case, a notice should be sent to the party.(*a*)

Motion to stand over.

[279] COPELAND *v.* RIVERS. Prerogative Court, Trinity Term, 2nd Session, 1830. —The residuary legatee in trust having renounced administration cum testamento annexo for the purpose of being examined as a witness, the Court, hesitatingly, but as matter of necessity, appointed a next friend guardian ad litem in order to propound, on behalf of the minors, residuary legatees, the paper which their father opposed; but required the guardian to give security for costs.

On motion.

Josiah Rivers died on 10th of March, 1830, leaving a testamentary paper, unexecuted and without date. By it he had appointed William Taylor Copeland residuary legatee in trust for the children of William Rivers, the deceased's brother. William Rivers opposed the will; and Mr. Copeland, who was willing to take administration with the will annexed, had renounced in order to be examined in support of it. The property was under 2000l.

The King's advocate moved for the appointment of William Hammersley, Esq., as guardian to the minors for the purpose of propounding the paper.

Per Curiam. The minors have not executed a proxy of election, and the eldest is of the age of seventeen. But is there any instance of this Court appointing a next friend as guardian ad litem? Who is to be liable for costs if the paper should not be established? In the Court of Chancery such an appointment is of ordinary occurrence, but here it is a novelty. The circumstances, however, seem to require it; and I shall therefore appoint Mr. Hammersley guardian ad litem: and direct him to give security in 200l. for costs.

Motion granted.

[280] HEADINGTON *v.* HOLLOWAY. Prerogative Court, 1st June, 1830.—The Court will not pronounce for a paper on the evidence of handwriting alone, but that proof joined with circumstances of probability is sufficient. Costs are peculiarly in the discretion of the Court; and though the general rule is, that a legatee, loco executoris, propounding and establishing a paper is entitled to his costs out of the estate, his unwise delay in producing the paper, and thus occasioning the suit, is a ground for refusing them.

[Applied, *Burls* v. *Burls*, 1868, L. R. 1 P. & D. 475.]

Elizabeth Headington, widow, died on the 25th of March, 1829, at the age of

(*a*) Michaelmas Term, 2nd Session, 1829.—So in *David* v. *Rees*, where the will had been proved by the attorney of the executor, who died on the 23d of July, 1829, a decree—at the suit of a legatee, calling upon the executor and residuary legatee, both resident in the West Indies, to shew cause why administration de bonis non, with the will annexed, should not be granted to him, served on the Royal Exchange—was returned into Court on the 1st Session, and an affidavit was made that neither the executor nor residuary legatee had any agent in this country; the Court directed the matter to stand over, saying, "It did not even appear that the executor was acquainted with the death of his attorney; the communication with the West Indies was so easy that some notice should be given to the executor, or, at least, sufficient time should be allowed to elapse, since the attorney's death, for the executor, on receipt of the intelligence, to take probate himself, or appoint a new attorney."

Trinity Term, By-Day, 1830.—In *Norrington* v. *Nembhead* the Court granted administration, with a will annexed, to a legatee, on a service on the Royal Exchange, and on an affidavit that there was no agent in this country; observing, "Here the party having died in Jamaica in 1823, the residuary legatee living there, and no steps having been taken to prove the will for so long a time, I will grant this administration to the grand-daughter, who is a legatee; but it is to be understood that, generally, where the parties interested are only in the West Indies, the Court will require notice to be given them by a requisition."

80 years, leaving no near relation: of her will, dated the 11th of September, 1828, she appointed Richard Clement Headington and the Reverend Henry Holloway, the parties in this cause, two of her executors. The question respected a paper propounded by Mr. Holloway as a codicil.

The King's advocate and Addams in support of the paper propounded.

Lushington and Dodson contrà.

Judgment—Sir John Nicholl. The deceased in this cause died in 1829: her husband had died in 1819. Her property is said to be of the value of 10,700l. The paper, propounded as a codicil, is dated on the 12th of October, 1828, and is to this effect:

"I give to my dear Henry [meaning the Reverend Henry Holloway] a policy of insurance on my own life effected in the Sun Life Office for the sum of five thousand pounds, and this may act as a codicil to my last will and testament. (*a*)

"ELIZABETH HEADINGTON."

This paper is alleged to be in the deceased's [281] handwriting: and though the Court will not pronounce on evidence of handwriting solely,(*b*) yet when that proof is joined to circumstances rendering the instrument probable and natural, it is not necessary to have any thing more immediately connecting it with the deceased.

The account of this codicil given in the plea is that the deceased, having sealed the paper up in an envelope, delivered it to Mr. Holloway about a week before her death, desiring it might not be opened till after her will was read. This injunction Mr. Holloway observed, and by his concealment of the paper till after the funeral he has led to the present investigation. The deceased died on the 25th of March, and the paper was not produced till the 10th or 11th of April, when he shewed it to Mr. Parnell, the deceased's solicitor, who prepared her will: he, from the late period at which the paper was produced, could not avoid feeling some suspicion, and took up an unfavorable impression of the instrument, because he knew nothing of the paper before it was thus shewn to him; and, undoubtedly, the conduct of Mr. Holloway was extremely incautious.

The deceased, it is true, was very secret: she did not communicate her concerns even to Mr. Parnell, further than his professional assistance was absolutely necessary: and the handwriting [282] of the signature is admitted, by the executor in his answers, to be genuine. The ground of opposition, however, is, that the paper was obtained by undue influence. Mr. Parnell will not go beyond doubting the handwriting of the signature—even as to the body of the instrument his reasons are insufficient—he doubts it, because he thinks it is too well worded for the deceased. But here is also another instrument, written a few months before the will, and found in conjunction with it; this instrument—which is signed, and at the bottom has a bequest to the Reverend Mr. Holloway, the party in this cause—is extremely well written and as well worded as the paper in dispute. There is no reason, then, to suspect any forgery; but yet I do not feel surprised that suspicions should be excited. It appears however that this paper was produced, three days after the deceased's death, to a gentleman, the head clerk in the secretary's department of the Sun Fire Office; and the paper produced on that occasion is clearly identified with the codicil in question; though it was not shewn to Mr. Parnell, nor produced to Mr. Headington, till some time after the death of the deceased, and after the time had been fixed for Mr. Headington to take probate of the will.

In respect to costs, though the general rule is, that when a party propounds a paper, loco executoris (see *Williams* v. *Goude and Bennet*, 1 Hagg. Ecc. 610), and establishes it, he is entitled to his costs; yet, adverting to the imprudent and unwise conduct of Mr. Holloway; and that the [283] matter of costs is a question more peculiarly left to the discretion of the Court; and, further, that the rule as to a legatee having his costs out of the estate on establishing a codicil is not so general as in a case of a will, I do not think that his costs—occasioned, as they are, by his own delay in producing the paper—ought to fall on the residue. I direct that Mr. Holloway shall pay his own costs; but that the executors shall have theirs out of the estate.

(*a*) The deceased, by her will, did not make any provision for the Reverend Mr. Holloway, but she provided for his mother, and also for his two sisters, and appointed the latter residuary legatees.

(*b*) See *Constable* v. *Steibel and Emanuel*, 1 Hagg. Ecc. 60. *Crisp and Ryder* v. *Walpole*, 2 Hagg. Ecc. 531.

PEDDLE *v.* TOLLER. Prerogative Court, 24th July, 1830.—Where a bill of particulars for business done in the Court of Delegates had been recently delivered, though a general account had been rendered, settled, and paid three years before, the Court, on petition (though such petition contained impertinent matter), directed the bill to be examined by the registrar, in order 1st, that the suitor might decide as to proceeding in other Courts to recover the excess (if any); 2dly, to found a complaint against the proctor if the charges were exorbitant or fraudulent; but the Court cannot notice an asserted undertaking that disbursements only, and those not exceeding a certain sum, should be charged; nor will it make an order for the production of vouchers; which, if demanded, are produced as of course before the registrar.—On the registrar's report that the bill was just and reasonable, and on the proctor for the complainant declaring he proceeded no further, costs against the petitioner were not given, only because he was almost a pauper.—The Court will exert all its powers to restrain proctors from undertaking causes on condition of sharing in the effects, or of any benefit beyond the payment of fair costs.—The Court inclines to discountenance an agreement on the part of a proctor to accept only disbursements from his client—an appellant—as it is the policy of the law to protect both respondents and appellants from useless litigation.—When a detailed bill of costs has been delivered and long acquiesced in, and payment made after the suit was at an end and when the party was not inops concilii, the party would not be entitled to have it referred to the registrar for examination: aliter where the payment took place without a detailed bill, and application for reference to the registrar was made shortly after the delivery of the bill.

This was a petition presented by William Peddle, one of the parties in a suit entitled *Peddle* v. *Evans* (Prerog. Trin. Term, 1824. Deleg. 20th May, 1826), relative to the conduct of his proctor in that suit; his petition concluded with the following prayer:—"That this honourable Court will order that Messrs. Toller and Son shall produce for the inspection of your petitioner and his present proctor all vouchers, receipts, or other acknowledgments by them or either of them taken on making such payments [those detailed in the petition] respectively, in **[284]** order that your petitioner or his said proctor may inspect and examine into the correctness of such charges, and be at liberty to make copies or extracts from such vouchers, receipts, or other acknowledgments as occasion may require, or as he may be advised may be necessary; and that Messrs. Toller and Son may be directed to refund to your petitioner the excess they have received over and above the sum of 200l. for their disbursements in the said Court of Delegates, and which was paid them on my account in consequence of the aforesaid (in the petition) misrepresentations of Mr. Toller, of deductions from their bill of business done in this Court, and that in case it shall be found on investigation that their actual and lawful disbursements in the Court of Delegates do not amount to 200l., that they be ordered to refund the full amount of what it shall appear they have so received over and above their actual disbursements, and that they be condemned in the costs attendant upon this application."

The nature of the case sufficiently appears from the sentence.

Phillimore and Lee for the petition.

Addams contrà.

Judgment—Sir John Nicholl. This is an application of an unusual if not of an unprecedented nature, being a petition by a party against his former proctors respecting transactions in a certain suit begun in 1822, and **[285]** finished several years ago. This petition alleges that certain charges, not for business done in this Court but in the Court of Delegates, not contained in a regular bill of costs but made under an asserted special agreement—charges actually paid above three years since—were improper: and the party prays "that the proctors shall be ordered to produce vouchers of their disbursements; that copies of, or extracts from, the vouchers may be taken: that the proctors may be ordered to refund all they have received above 200l. for their disbursements in the Court of Delegates; and, if the disbursements do not amount to 200l., to refund all above their actual disbursements." Such is the substance of the prayer, which is preceded by a detail of all the circumstances happening in the suit, and is supported by the affidavits of the party and his solicitor, and by some correspondence. To this petition an answer was given by the proctors

verified by affidavits and correspondence; and, in reply, a further affidavit has been made by the solicitor accompanied by some further correspondence.

The circumstances set forth in the petition and affidavits have now been referred to, and discussed by the counsel on both sides: but those facts only are material for the consideration of the Court which tend to support the prayer of the petition—all other matters are quite extraneous and irrelevant to the present enquiry. The question, however, is of some importance to the proctors, complained of, personally—to the profession in general—and to the suitors of the Court—the public at large. It may therefore be proper to examine some of **[286]** the points more fully than the mere decision of the prayer of the petition may appear to require.

The first consideration is whether the Court has any and what power to grant the prayer of the petition. The second, what is the proper mode of granting such relief as the Court may have the power of affording.

This Court, like all other Courts, has considerable authority over its own practitioners and officers. This authority forms a part of the jurisdiction inherent in all Courts, which they are bound to exercise for the protection of their suitors against imposition and extortion. The principle has been laid down and acted upon in various instances in the temporal Courts: it will be sufficient here to state one or two cases, though the principle will also appear in some others which will be hereafter referred to for a different purpose. In *Newman* v. *Payne* (4 Bro. C. C. 350) the marginal abstract runs thus: "An attorney cannot take from his client a bond for unliquidated costs: notwithstanding such bond and a mortgage have been given, the bills may be taxed, and upon payment the defendant to reconvey—and the bond declared void." The Lord Chancellor said, "I have had no doubt as to the relief in this case: I do not go on any particular rule of equity, but upon a principle that would operate in the same manner in any Court of law. All Courts will protect their suitors, and attornies cannot act, in respect to the parties for whom they are concerned, as other persons may do. **[287]** I have no doubt what a Court of law would do. The master must tax the costs and take an account of money lent." The same principle of protecting suitors against improper charges is laid down in *Balme* v. *Paver* (1 Jacob, 305). These authorities are sufficient to shew that it is the duty of the Court to go as far as it can in relieving the petitioner, if he has any claim to relief: but still that duty is limited by circumstances; it is limited, first, by the powers and jurisdiction belonging to the Court; and, secondly, by circumstances which may have previously taken place.

What are the powers and jurisdiction of this Court in respect to costs between proctor and client incurred in a contested suit? The Court has no power to decide what is due, nor to enforce payment. Even in common form business in which the proctor is acting more in the character of an officer of the Court, and for which there is an established table of fees, and which therefore is subject to a more direct control, the Court has, of its own authority, no such power: but where costs are given against a party, the Court, in order to carry its sentence into execution, is empowered to tax the costs and to enforce payment: but, as between proctor and client, the Court has no such authority: it can neither decide what shall be received nor what shall be paid, nor can it enforce payment. The proctor can only recover his charge by action at law, when he must prove the items of his bill. All that this Court can do is, upon the application of the client, to refer the bill to the **[288]** registrar for examination. The Court does this for one of two purposes: first, to enable the suitor to judge what he will pay or tender before bringing the matter into a Court of law by refusal of payment; but this is not properly a taxation of the bill: the registrar does not report the bill to the Court: the Judge does not tax the bill—the proctor first making oath that the amount reported has been necessarily expended: nor does the Court issue a monition for the payment of the sum taxed. It has no such authority between proctor and client. The reference to the registrar is merely in aid of justice, and for the convenience of suitors.

The other purpose is, in order to found a complaint of extortion against a proctor, if he has made out and attempted to obtain payment of an exorbitant bill, or of fraudulent charges.

Whether the temporal Courts had, without the authority of an Act of Parliament, any other or greater authority than is now possessed by this Court of proceeding in a summary mode between solicitor and client, or attorney and party, it is immaterial to enquire; but it is certain that, in order to regulate such matters, it was thought

expedient to obtain an Act of Parliament under the authority of which, and under certain regulations therein specified, proceedings in the temporal Courts now take place (see 2 G. 2, c. 23, s. 23). First, it is upon the party submitting to pay the sum taxed that he is entitled to demand a taxation. Secondly, if he neglects to pay the sum taxed he is liable to an attachment, enforcing payment summarily, or the attorney may still **[289]** bring his action at law. Thirdly, it is the officer of the Court and not the Judge who is to tax the bill. But there is no such act applying to the Ecclesiastical Courts. Here, after the registrar has examined the bill the client is not obliged to pay the amount, nor the proctor to receive it, nor can the Court enforce payment. In the present case this Court (supposing the money had not already been paid) could not compel Peddle to pay the amount which the registrar might think to be the sum due. The Court, nevertheless, at the prayer of Peddle, is now called upon (as I have before said) to compel the proctor to refund a part of the money already paid for charges in the Court of Delegates—not upon a regular bill of costs made out as between proctor and client, but upon an alleged undertaking to charge only disbursements out of pocket, and upon a further alleged undertaking that such disbursements should not exceed 200l. The demand of producing vouchers I will consider presently. Upon the other question—whether the Court can compel the proctors to refund any and what part of the money received—Peddle has gone into the whole history of what passed either by letter or otherwise between his solicitor, Walker, and the Messrs. Toller from the commencement of the cause in 1822 to the present time: and all the supposed understandings during the course of that period, all the inferences that can be raised, and all the imputations that can be made, are brought forward. It is not, however, necessary for the Court to travel through them: they bear very little, if at all, upon the decision of the main **[290]** question: but it may be remarked that in the whole of this history Peddle's name very seldom occurs, till the costs are finally to be settled, and then the unfortunate client is brought prominently forward as the person upon whom the hardship is ultimately to fall. Walker, his solicitor, seems pretty much to have decided every thing for himself upon his own judgment as if he were the real party; for, as a solicitor, he was not very competent to form a proper judgment upon the expediency either of undertaking a suit, or of prosecuting an appeal in an Ecclesiastical Court. Mr. Toller in his answer states, and he has verified it upon oath, that he verily believes Mr. Walker was interested as a party. "He verily believes that Charles Houlden Walker had entered into an agreement with William Peddle that he should carry on the said suit at his own risk as to the costs, and in the event of success therein divide with him, William Peddle."

Mr. Walker, though he has made a long affidavit of several sheets of paper, very argumentative and very inferential, yet has not ventured to contradict this very important fact, and the res gestæ tend strongly to confirm its truth. This practice of an attorney "buying a cause," or participating in the property to be recovered, is most dangerous to public justice: (*a*) it exposes the adverse parties to the harassment of most vexatious litigation. How other Courts **[291]** may consider such a matter I will not stop to enquire, but if any practitioner in this Court were to undertake a cause upon condition of sharing in the effects, or of receiving any other benefit beyond the payment of his own regular fair bill, I should think it would call for the utmost powers of the Court to prevent the recurrence of such bargains, and to repress such a practice. The Court takes advantage of this opportunity to express publicly that opinion.

In respect to the imputations against the proctors: they knew nothing of Mr. Peddle, nor of his cause, except from the information of Mr. Walker, and Mr. Walker himself was a new client, introduced to them by a respectable agent's house in this town, Messrs. Adlingtons and Gregory—old clients of the Messrs. Toller. There was at the outset, therefore, no claim upon the proctors to depart from their usual course of practice. The proctors, however, do not urge their client into the cause: on the contrary, at an early stage of it they recommend a compromise in a letter to Walker on the 2nd of October, 1822, taking a very judicious and liberal view of the cause and its probable result. The compromise was prevented by the advice or decision of Walker: and a very expensive suit for a small property was the consequence. The

(*a*) See as to champerty, and the punishment thereof, Com. Dig. tit. Maintenance (A. 1 & 2), and (C. 1 & 2), 4 Bl. Com. 135. Also *Wood* v. *Downes*, 18 Ves. 120.

sentence was unfavorable to Peddle, and it was unsatisfactory to his law advisers. The case was one of great intricacy—of much conflicting evidence—of considerable difficulty—of so much difficulty that it was a matter of consolation to the Judge that his sentence might be revised by a superior [292] tribunal, except that the property was but small. The Court of Delegates affirmed the sentence, but without costs; except that as to the expences arising from offering, in that Court, an exceptive allegation on behalf of Peddle, he, Peddle, was condemned in costs. The offering of that allegation however was communicated to Walker, nor could that plea have been given in without being settled and supported by counsel.

It is suggested that Mr. Toller excited the appeal and expressed his conviction that the sentence would be reversed, and undertook to accept his mere expences out of pocket. Here happens to be Messrs. Tollers' letter to Walker, dated 27th November, 1824, expressed in very correct terms and very far from urging on an appeal. The letter acknowledges the receipt of 200l. on account, in the cause of *Peddle* v. *Evans*, and thus concludes: "The opinion of Dr. Adams coincides with our own—that the decision of Sir John Nicholl is wrong; but neither he nor ourselves can say whether the Delegates will reverse the decision." This is quite correct: they are acting in concurrence with the opinion of their leading counsel: and they had previously, viz. on the 23rd of September, 1824, suggested the expediency of a compromise.

In respect to the agreement to accept mere disbursements, it at least shews the sincerity of the proctors in their opinion and hopes that the sentence would be reversed: but I much doubt the public policy of such undertakings, and the propriety of giving them any countenance or [293] judicial recognition. An able and experienced proctor may form a strong opinion that a sentence is erroneous and that opinion may be right; but, whatever be the condition of the party in the cause, and however strong the opinion that the sentence is erroneous, the correct course, in my judgment, is to wait the result of the appeal before undertaking to accept fees out of pocket instead of the regular charges. The proctor may then, without injury to the adverse party, exercise his liberality as extensively as he pleases: but the policy of the law is to protect both parties—respondents as well as appellants—from useless litigation: and no party should be excited to appeal without the ordinary check of the risk at least of his own costs, and possibly of those of the respondent. By these observations no blame is meant to be imputed to the proctor in this particular case for agreeing to take disbursements out of pocket: it is possible that it is not unfrequently done from very kind and liberal motives; but observe the injury to the other party, which is apparent in this very case: the respondent, though successful in both Courts, has probably expended the greater part of the stake in the litigation. Upon public grounds, therefore, I doubt the propriety of these agreements to accept mere disbursements as an inducement to an appeal.

But this is quite clear: that this Court has no power of deciding upon, and inforcing, such an agreement. The Court can only proceed in the regular and ordinary way to direct the bill of costs to be examined by the registrar, and [294] that it ought to do, unless there be some reason to bar and preclude the suitor from being assisted by that examination. Still less can the Court take any notice of another matter that has been suggested, namely, a sort of understanding that the disbursements should not exceed about 200l. This Court will not decide upon that question further than to say that the whole conduct of Mr. Walker is inconsistent with any such agreement. He would not have suggested a higher fee to the common law counsel without at least some reference to the limit of 200l.: but what seems more conclusive, he never would have agreed to pay 350l., the balance of the account in which the disbursements are distinctly charged at upwards of 300l.

In respect to what is stated in this long affidavit about the bill in the Prerogative, this Court must consider that question as completely closed. First, because no part of the prayer of the present petition applies to it: secondly, because the bill had been long ago delivered, and after certain allowances was actually paid by the solicitor, Mr. Walker: but, further, a year after payment, Walker desired to have the bill for the business in the Prerogative taxed: Mr. Toller consented, and an appointment was made with the registrars: but because Mr. Toller objected to the attendance of Mr. Walker, as Peddle's solicitor, and because the Court, after hearing the case and enquiring of the registrars as to the usage, refused to make any order to allow the attendance of Mr. Walker as solicitor, the matter was dropped (see *Peddle* v. *Evans*,

1 Hagg. Ecc. 684). Mr. Walker would [295] have had full opportunity of instructing Mr. Peddle's proctor, or of proving by his affidavits any facts in objection to the charges contained in the bill: but because his claim of right to attend as solicitor was overruled, that part of the case was abandoned, and the present petition is now brought forward with all these statements and affidavits, in order to do what?—to support a demand for the production of vouchers and for permission to take copies of them, so far as they relate to the disbursements in the Court of Delegates: and in what mode is this required? by a letter from Mr. Walker to Mr. Toller. As Peddle is nominally appearing by his proctor, the latter, whose duty it was to have written any such notice, would find it difficult to justify his conduct in allowing Mr. Walker to interpose and write that letter. If Peddle had employed his proctor to make that demand, his proctor would have known, or at least he ought to have known, that upon the bill being referred to the registrars for examination the vouchers or other proofs of payment would have been produced as a matter of course, if demanded. Why, therefore, this unusual mode was adopted it is difficult to say, unless the object be to compel this matter to proceed out of the regular course.

The question then is, whether the Court can and ought now to put the matter in a train to afford the petitioner an opportunity of being satisfied that these charges are true and proper. If a regular and detailed bill of the costs and charges in the Delegates had been sent with the account current, I should have held that the [296] payment which took place would, after such long acquiescence, have precluded the party from a taxation. But here was no detailed bill delivered till the third of July instant. Before that time it was impossible the party could ascertain whether the charges had been fairly made or not, though Walker had paid them. Even where there is actual payment, other Courts will, under some circumstances, still order a taxation: but only on strong grounds. One ground is where the client has paid the bill in the course of the proceedings—under their pressure—inops concilii—without advice—and subject to the influence of his solicitor. Such was the case of *Crossley* v. *Parker* (1 Jac. & Walker, 460), before Sir Thomas Plumer, then Master of the Rolls. But here the bill was paid long after the suit was at an end, and so far from the party being inops concilii, it was paid by his solicitor, to whom he had intrusted the whole management of the suit and of the payments. Another ground for opening and having the bill taxed after payment is where some strong and clearly improper charge is discovered and pointed out. *Wilkinson* v. *Foster* (7 Moore, 496). *Plenderleath* v. *Fraser* (ib. notis. And 3 Ves. & Beames, 174). *Langford* v. *Nott* (1 Jac. & Walker, 291). How do these cases apply to the present? Here is no improper charge of any importance even suggested. It is admitted that the disbursements in the bill delivered amount to about 329l., without any charge for the proctor's own professional assistance: and it is stated and proved that they offered to allow Mr. Peddle's [297] proctor to see their books: there was, therefore, no concealment of the items; it was rather a point of punctilio that they would not, when so called upon, deliver a bill. Now I think that in this respect the proctors were wrong. I think the party was entitled to a detailed bill from the first, and whenever required: it was impossible to ascertain the truth and fairness of the charge without such a bill: and, however affronting and insulting such a demand might be, I think it ought to have been complied with.

A bill was at length delivered on the third of July; and instead of the petitioner merely applying to the Court desiring that the bill so delivered might be referred to the proper registrar for examination, Mr. Walker, on the 5th of July, wrote a letter to Messrs. Toller and Son demanding the production of vouchers, and requesting that either he or Peddle might take copies of them. No answer being returned, this long petition and affidavits were presented, and all these transactions were gone into at no inconsiderable length: and, I must add, without much necessity or propriety.

It remains for the Court to see what can be done in order to arrive at true justice between the suitor and proctor.

The Court is bound to afford every suitor all just protection. It is no less due to the proctor: but such protection can only be afforded according to the limited powers of the Court and according to the regular course of proceeding. This Court cannot enter into, nor decide upon, special agreements for disbursements only, and that such disbursements should not exceed 200l. Those agreements, if validly made, must be set [298] up and enforced in other Courts. On the other hand, though the

account was rendered and actually settled and paid above three years ago, yet as no bill of particulars was delivered until about three weeks ago, I think the Court, if still desired, is called upon to refer that bill to the proper registrar for investigation. Under that examination the various charges made will be considered and proved by proper vouchers. If any of the charges shall be found gross and fraudulent (which is in no degree probable), it may not be too late for the party to seek a remedy in other Courts, by bringing his action for the amount of any sum that he may have overpaid, or by such other means as he may be advised there to have recourse to: but this examination must take place in the regular and ordinary course: it is not a case in which the Court ought to depart from its usual forms. The charges have been incurred in the Court of Delegates; the registrar of that Court seems to be the proper officer to examine the bill. If, however, upon application to him, he declines to act, as this Court has no authority over him as registrar of the Delegates, it will then direct its own registrars to examine the bill delivered. When the Court has proceeded thus far, it will have done every thing that it has the power to do for the protection and assistance of the individual suitor; though should the charges turn out to be gross and fraudulent, which, as I have before said, is in no degree probable, the Court may still have the power to correct its own practitioner by suspension or otherwise; and thus, by the example, protect other suitors from similar misconduct.

[299] In respect to the costs of this petition, I shall reserve them until the investigation has taken place: if the charges, made in one item, shall turn out false and fraudulent, the petition, though erroneously brought in this voluminous form, will be justified by the result: but if the charges turn out fair, the petition, both in its mode and in its substance, will have been frivolous and vexatious, and will call for costs against the petitioner.

On the 1st Session of Michaelmas Term the registrar of the Court of Delegates reported that Messrs. Tollers' bill was just and reasonable.

The proctor for Peddle then applied to be heard on his petition in objection to the report, and was accordingly directed to enter into an act on petition: but on a subsequent court-day he waived his act on petition and declared that his party proceeded no further.

Addams for Toller moved that Mr. Peddle be condemned in the costs of the original petition.

Per Curiam. I shall make no order for costs, but I forbear solely on the ground that Peddle is almost a pauper, and that it cannot be worth Mr. Toller's while to attempt to inforce costs. The registrar's report, to which it is now admitted no objection can be made, has proved that there is no foundation for any imputation on **[300]** Mr. Toller's conduct respecting these charges. His character, therefore, stands completely cleared from the aspersions which have been attempted to be cast on it by these proceedings.

Addams said: Mr. Toller was quite satisfied with the manner in which the Court had disposed of the question.

Petition dismissed.

[301] DUINS *v.* DONOVAN, OTHERWISE DUINS. Consistory Court of London, Hilary Term, 3rd Session, 1830.—Lapse of time offers no bar to a suit for nullity of marriage, by licence, by reason of minority and want of consent of the father. An entry of baptism in 1820 (the marriage taking place in 1813) reciting that the party was "said to be born in 1795" is not admissible—either as proof of the non-age, or in order to prevent a suspicion of suppression of evidence. A letter from the father—two months after marriage—expressive of his anger at the marriage is admissible as part of the res gestæ; and a subsequent de facto marriage of the woman with another man is pleadable to shew that the parties did not live together as husband and wife.

On admission of the libel.

This was a cause of nullity of marriage, by reason of minority, promoted by the man. A libel, on his behalf, with five exhibits was offered to the Court: it pleaded:

1. The 26th Geo. 2, c. 33, s. 11.

2. The 3rd Geo. 4, c. 75, whereby so much of the 26th Geo. 2, c. 33 (recited in the first article), as related to any marriage to be thereafter solemnized is repealed. It

then set forth the 2nd section as to marriages by licence before the passing of the act—3 Geo. 4.

3. The 4th Geo. 4, c. 76, s. 1.

4. That George Parlby Duins was, and is, the natural and lawful son of Robert (now dead) by Ann, his lawful wife, born in Stoke Damerel parish, Devon, on 16th July, 1795: "that he was at and about that time baptized at Stoke Damerel, but not according to the form of baptism of the Church of England as by law established, by reason that his parents were dissenters;" that on 4th of December, 1820, he was lawfully baptized and registered.

[302] 5. Exhibited a copy of the entry of baptism in Stoke Damerel church, "and that George Parlby Duins therein mentioned, and 'said to be born 16th July, 1795,'" is the minor aforesaid.

6. On 1st July, 1813, a marriage de facto between G. P. Duins and Mary Donovan in the parish church of Portsea, Southampton, by virtue of a licence in which Duins was described as a bachelor, aged 21 years and upwards; that at that time he was a minor—and that the marriage was had without the knowledge or consent of his father.

7. Exhibited a copy of the original affidavit (signed G. P. Duins) upon which the licence was granted.

8. A copy of the entry of marriage. Identity.

9. That Robert Duins, the father, was, previous to and at the time of the marriage, totally unacquainted with Mary Donovan and her family, and was entirely ignorant of the marriage until some time after it had taken place; that upon hearing of it he was greatly displeased thereat, and expressed the greatest surprise and regret that it had taken place.

10. That on 4th September, 1813, he wrote a letter to his daughter, Mrs. Ann Bedford, and, therein alluding to the said marriage of his son, expressed his great displeasure and concern thereat, and his disapprobation of the same, and of the conduct of the mother of Mary Donovan in relation thereto.

11. Exhibited the letter.

12. That about 12 months after the pretended marriage, G. P. Duins and Mary Donovan finally discontinued to live and cohabit together **[303]** as husband and wife; that Duins went to reside with his father in London and Mary Donovan in Ireland: that Duins continued to reside generally with his father until his death (which took place in 1810), and afterwards at Stoke Damerel and other places: that since they discontinued their cohabitation together as aforesaid the residence of Mary Donovan hath at times, for several years together, been wholly unknown to G. P. Duins, nor hath he from such time at all contributed, or been called upon to contribute, to her support and maintenance: and that they have never since they separated as aforesaid lived or cohabited together, or owned or acknowledged each other as husband and wife, and that they did not discontinue their cohabitation aforesaid merely for the purpose or during the pending of any proceedings touching the validity of their said pretended marriage.

13. That on 3rd of August, 1818, the said Mary Donovan intermarried in fact with R. K. L. by and under the name and description of Maria Montague, widow: that the said marriage was solemnized in the parish church of St. George, Middlesex, by virtue of banns.

14. Exhibited a copy of the entry of the marriage; and pleaded the identity.

15, 16, and 17, were formal articles, pleading jurisdiction, &c.; and praying a sentence of nullity.

The King's advocate and Haggard in objection to the libel. The exhibit annexed to the 5th article is no **[304]** evidence of the time of birth. In the 10th article a letter from the father in respect to this marriage is pleaded; it is dated more than two months after the marriage, and may have been written with a view to a suit of nullity. The 13th article sets forth a second marriage; but the citation is for the party to answer in a suit of nullity by reason of minority.

Phillimore and Addams contrà. The certificate is introduced merely to account for the previous non-baptism of the party: if it had not been exhibited the Court might have supposed there had been some suppression. We admit that the entry of the time of birth is no proof of the fact; but we cannot expunge the insertion: it is not pleaded as evidence of minority. The letter of the father shews his disapproba-

tion and surprise; and is admissible in supply of proof. The marriage pleaded in the 13th article plainly shews that the parties were not living together as husband and wife.

Judgment—Dr. Lushington. This is a suit brought by George Parlby Duins against Mary Donovan, calling herself Duins, for the purpose of having the marriage, which took place in the year 1813, declared null and void. It is true that a very considerable time has elapsed between the period at which this marriage was contracted, and the institution of the present suit: but suits of a similar description have been brought after the lapse of at least as long a period. In *Johnston* [305] *and Johnston* (3 Phill. 39), upwards of twenty years had intervened between the solemnization of the marriage and the commencement of proceedings. Considering, therefore, that the Court has to pronounce only a declaratory sentence, and to determine whether the law has made this marriage null and void, I think the lapse of time offers no bar to the inquiry.

The sentence is prayed in this case by reason that the marriage was had during the minority of the man, and without the knowledge or consent of his father. To enable the Court to arrive at such a sentence it is first requisite for the party to plead such facts as shall bring his case within the clauses of the old marriage act, the 26 Geo. 2, c. 33, known by the name of Lord Hardwicke's Act; and to satisfy the Court that, if those facts were proved, it would be right to pronounce the sentence which it is empowered to do by the provisions of that statute. But since the passing of that act other statutes have introduced various alterations and regulations into the marriage law of this country. The 3rd Geo. 4, c. 75, s. 2 (pleaded in the libel), generally and practically speaking, may be said to render valid, with certain exceptions, all marriages of minors previously solemnized by licence without the consent of the parent or guardian, thus far restoring the general law as to the validity of such marriages which the former act declared absolute nullities. It is clear that, according to the facts alleged in the libel, the marriage would be null under the old marriage act; the question, therefore, is whether it [306] is rendered valid by the 3 Geo. 4, c. 75, s. 2, or comes within what I have just called the exceptions. The second section is only pleaded; and it enacts "that in all cases of marriage had and solemnized by licence before the passing of this act without any such consent as is required by so much of the said statute, as is hereinbefore recited, and where the parties shall have continued to live together as husband and wife till the death of one of them, or till the passing of this act, or shall only have discontinued their cohabitation for the purpose or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, shall be deemed to be good and valid to all intents and purposes whatsoever."

I presume that it is intended to shew the invalidity of this marriage upon this second section only; and not to rely upon the provisoes contained in the 3rd and the following sections to the 7th inclusive. Two cases only have occurred in which the construction of this second section has come under judicial consideration; and some difficulty may possibly arise in applying to that section the precise meaning intended by the legislature: but, whatever may be the eventual proof in support of this libel, there is sufficient, upon the face of it, as far as relates to the law, to call upon the Court to admit it to proof; it will, however, be necessary that I should bear this section in mind when I consider the objection to the 13th article.

The principal fact is the minority of the son, the party bringing the suit: and that is pleaded in very distinct terms; but, by way of [307] collateral proof, a copy of an entry in a registry of baptisms for the year 1820 is exhibited, it being alleged that his birth took place in 1795. It appears to me that, whatever may be the contents of that exhibit, it is utterly impossible it can have any bearing on the question: for, if I were to admit it, it is no evidence of the time at which this individual was born: the clergyman who performed the ceremony did on that occasion insert in the register that the person baptized was "said to be born on the 16th of July, 1795" (see also *Rex* v. *Clapham*, 4 C. & P. 29); but that is no evidence of the fact; it is mere hearsay and information, and cannot be adopted by the Court as any ground for the decision at which it may ultimately arrive upon the present question. For what purpose, then, can this exhibit be allowed to remain as part of these proceedings? It is very true that, where the baptism takes place, as it generally happens, soon after the birth of the child, it has been usual to plead it; not even then as

evidence that the child was born at any given period, but that, in conjunction with other circumstances, it might perhaps tend to elucidate the period of the birth: here, however, where the entry of baptisms is not made until twenty-five years after the alleged birth, the admission of it can be of no assistance whatever.

It is said that this certificate was introduced to obviate, in the mind of the Court, any idea of undue concealment and suppression; but it being pleaded that the father was a dissenter, no suspicion could arise that the entry of baptism had been suppressed: and it would be the duty [308] of the Court, before it indulged in any such suspicion, to have some evidence to awaken its vigilance. The party will have all the benefit which can be derived from pleading this certificate by the circumstance that he was the child of dissenting parents. I reject this exhibit.

The next objection is to the article which pleads a letter from the father dated two months after the marriage of his son; and it is said that the father might have written this letter for the purpose of manufacturing evidence in his own cause. Certainly such a deception might, under particular circumstances, be attempted; but the Court has not the slightest reason to suppose that any such attempt has here been made. The letter is admissible, not as the declaration of the father simply, but as part of the res gestæ connected with this marriage. It will not be sufficient proof of the father's ignorance of the intended marriage, nor of his disapprobation after it had taken place: but, in conjunction with other circumstances, it may assist the Court, and may also be useful, should any question arise as to the degree of credit due to the witnesses upon this point.

In respect to the 13th article, which alleges that the party proceeded against contracted a second de facto marriage in 1818, the difficulty that occurs to the Court is that the third section of the 3 Geo. 4, c. 75, is not pleaded: by that section it is enacted "that nothing in this act contained shall extend or be construed to extend to render valid any marriage declared invalid by any Court of competent jurisdiction, before the passing of this act, nor any marriage where either of the parties [309] shall at any time afterwards, during the life of the other party, have lawfully intermarried with any other person." Now, no reference is made in the libel to this section; the Court therefore infers that, though a marriage in 1818 is pleaded, it is not the intention of those who framed this libel to rely upon it as valid, and as a substantive fact; because if it had been their intention to rely upon it, this 3rd section would, I conceive, have been set forth as well as the second. The words used are "lawfully intermarried:" in order, then, to set aside a marriage distinctly on the ground of a second marriage, it would certainly be requisite to shew that the second marriage was a legal and valid marriage.

Supposing, however, that this marriage has been introduced as a circumstance of conduct in the woman, is it evidence in illustration of her conduct, so as to bring the party within the provisions of the 2nd section? and, in that view of the case, it is, I think, admissible. The words are, "where the parties shall have continued to live together as husband and wife until the death of one of them, or until the passing of this act." Whatever may be the true construction of those words, it appears to me important to admit a circumstance which at least tends to shew the view of one of the parties in relation to the marriage in 1813; for the woman considered herself at liberty to contract a second marriage. On that ground therefore I allow that article to stand: and I am of opinion that this libel, after expunging the entry copied from the baptismal register, is admissible.

The Court directed the libel to be reformed by striking out the fifth article.

[310] Upon the evidence taken in support of the libel, the Court was clearly of opinion that all the material facts were proved; that the evidence, in respect of the 13th article, satisfactorily established, primâ facie at least, a marriage de facto; and, without hearing counsel for Mr. Duins, pronounced the sentence of nullity.

CROFT *v.* CROFT. Consistory Court of London, Hilary Term, 3rd Session, 1830.—Where a libel pleaded facts, 1st, to establish the adultery of the wife; 2nd, to shew that the husband had not forfeited his claim for relief by misconduct, the Court directed parts to be reformed on the several grounds of too great minuteness, hearsay, and pleading the contents of a letter not exhibited nor accounted for; and admitted the rest.—In considering the admissibility of pleas, the Court must be cautious not to exclude matter essential to a due decision, nor allow pro-

ceedings to extend to an unnecessary length; but if a serious doubt arise as to the ultimate effect of any averment it should be admitted.—Though the Court will not, on presumption and in the absence of matter strongly inculpatory, impute connivance to the husband, it will not debar him from pleading that which makes the history consistent and natural.—That the conduct of the wife, during the absence of her husband, was so indecorous as to induce a lady with whom she resided to recommend her removal to her mother, is pleadable.—On a negotiation between the husband and third parties, in the wife's absence, relative to his receiving her back, that the husband declined, as it did not appear that her conduct had changed, is not pleadable when unnecessary to his justification.—Where parties are living separate, the commencement of the acquaintance with the alleged paramour, and of the suspicions of the person under whose care the wife was, should be set forth circumstantially.—A declaration of the paramour, in the wife's absence, that she had committed adultery previous to the adultery charged in the libel, is not admissible; but a declaration, in her presence and confirmed by her, is: and the Court cannot reject it on the ground of its reflecting on third parties, nor that it does not establish adultery previous to the charges in the libel.

On admission of the libel.

This was a suit by reason of the adultery of the wife. The marriage took place on the 9th of September, 1824, the lady being a minor: of this marriage there was born one child, a daughter. The parties cohabited till April, 1828. The libel pleaded an action—judgment by default, verdict for plaintiff, damages 2500l.: and a continuance of criminal intercourse at the time of the present suit.

Dodson and Nicholl opposed the libel.

The King's advocate and Phillimore contrà.

Judgment—Dr. Lushington. To the admissibility of this libel, generally, no objection is raised. It is said, however, some parts of it are unnecessary for the pur-**[311]**-poses of justice, and that other parts, according to the established rules of evidence, ought not to be received.

The practice of objecting to the admissibility of pleas, in the whole or in part, is one of the most wholesome and beneficial usages which can prevail in any Court; and is a practice resorted to in these Courts more frequently, and in a more convenient manner, than in any other Court: it is attended with little expence, and it occupies but little time, except perhaps upon some occasions when the whole question, and the result of the suit, are to be determined by the rejection or admission of the plea. When the facts of the case are not disputed, but when legal questions of importance arise, on the decision of which the question at issue depends, nothing can be more advantageous or convenient to suitors than the practice of considering, in this early stage of the proceeding, the application of the law to the facts pleaded, and of thereby disposing of the case without putting parties to the expence of going into evidence. Beneficial, however, as this practice is, it often entails upon the Court the exercise of an arduous and difficult duty: on the one hand, the Court must be cautious not to exclude any matter essential to the due decision of the case, and, on the other, not to allow proceedings to extend to an unnecessary, inconvenient, and expensive length. The better and more discreet line to be adopted is—if a serious doubt arise as to the ultimate effect of any averment in a plea—to allow it to stand and come before the Court in proof: for then the utmost extent of mischief is to occasion some additional expence; **[312]** while, wholly to exclude the averment, might work absolute injustice.

I have thought it not unimportant to make these observations, as it is desirable that suitors should know that here they will receive at least as great advantages as they can elsewhere, in the exclusion of irrelevant or redundant matter; and in bringing a case to the narrowest and most simple issue which justice will allow.

The objects of this libel are twofold—first, to establish the adultery of the wife; secondly, to shew that the husband has not, by misconduct, forfeited his right to apply to the law for redress. In respect to the second point, the Court has occasionally remarked that it would not, on presumption, and in the absence of matter strongly inculpatory, impute to the husband the guilt of connivance; but it never meant by any such expressions to debar him from pleading circumstances that make the history natural and consistent; for the party ought not to be forced ultimately to

depend, for an explanation of his conduct, on the ingenuity of counsel, or the discrimination of the Court.

Some peculiarities present themselves upon the face of this plea. The marriage appears to have been contracted at a very early period of Lady Croft's life, the courtship having commenced when she was about seventeen years of age: the cohabitation continued from September, 1824—the date of the marriage—until April, 1828, when Sir Thomas Croft, in consequence of ill health, was under the necessity of going into the country. On that occasion Lady Croft declined to accompany him; and she remained **[313]** in London confided to the care of Sir Thomas Croft's mother: and it is impossible to suppose she could be under safer, or better, protection. It is objected that the fourth article of the libel—which pleads "her improper and indecorous conduct during her residence with her mother-in-law, and that the latter recommended that she should be placed, during her husband's absence in the country, under the care of her own mother"—goes too much into detail; and that the opinion, or recommendation, of the husband's mother affords no legal evidence as to her conduct: but I think it desirable that the Court should be in possession of the fact that, during the necessary absence of her husband, and while under the roof of her mother-in-law, Lady Croft so comported herself as to induce that lady to advise her removal to what many persons might conceive a safer and more effectual protection—viz. the protection of her own parent.

The 5th article pleads, "That from the end of April, 1828, until October of the same year, Lady Croft frequently expressed the strongest dislike of her husband and his family, and conducted herself with unbecoming levity and indecorum; that Sir Thomas Croft expressed a wish that she should remain under the care of her mother until she manifested a proper sense of, and contrition for, her misconduct, and a permanent inclination to return to her duty to her husband and child." No objection has been raised to the admission of the first part of this article, but the remainder of it is objected to; and which pleads, "That in the beginning of September, 1828, Sir Thomas Croft, who had then somewhat recovered from **[314]** his illness, had a meeting with R. M. [Lady Croft's step-father] and with T. H., a friend of his wife's family, and a trustee under her marriage settlement, relative to Sir Thomas Croft taking his wife back again, but as it did not appear that her conduct and behaviour had undergone any material alteration he declined at that time to receive her." I am of opinion that this part of the article may be very easily spared; I do not think it essential to the justification of Sir Thomas Croft, and it relates to transactions which took place entirely without the knowledge of the other party.

The 6th article, after pleading "that in October, 1828, R. M., his wife, and family, accompanied by Lady Croft, took up their residence at Boulogne; that in June, 1829, they there were introduced to William Lyster, who passed and was generally known by the appellation of colonel—an unmarried man then living at Boulogne"—alleges that "on the 14th day of July, 1829, R. M., his wife, and Lady C. dined at Boulogne with Mr. and Mrs. B., and that Colonel Lyster also dined there. That on such occasion the said Lady C. and Lyster paid marked attention to each other, so as to attract the notice of her mother, who, on the next morning, mentioned what she had so observed to Lady C., who denied the truth thereof, or that Lyster had said any thing that was improper to her." Some objection was raised to the particularity with which the commencement of this acquaintance is pleaded; but it appears to me that, in this case, it should be set forth in rather more particular terms than might be requisite, had the **[315]** husband and wife been living together; and the Court should also be apprized of the earliest period at which the conduct of Colonel Lyster excited the observation and attention of Lady Croft's own mother, under whose protection she was at that time residing.

Objections have also been taken to the 7th article, which in substance pleads, "That on the 16th of July R. M. and his wife, accompanied by Lady C., went to a public concert at Boulogne: that at the concert L. came and sat by Lady C.: that after the concert was over Lady C. retired to her bed-room, remained there about an hour, and would not allow her servant to put away her bonnet and shawl; that R. M. was apprized thereof, and, suspecting that Lady C. had formed some plan, watched her." The objection goes principally as to the language in which the article pleads R. M.'s having been apprized of certain circumstances, and his suspicions as to what was about to follow: but the party would not be in the least benefited if a few words,

as "apprized and suspected," were struck out, for the evidence would be in effect the same. It is unnecessary, therefore, that any alteration should be made in that respect. The latter part of this article is also objected to: it pleads, "That R. M., from a room above, observed Lady C. had opened her window, and kept looking up and down the street as if she expected to see some person; that Colonel L. came under the windows of her room, and entered into a conversation with her; that R. M. thereupon went into her room, and having sent her to her mother, directed the maid-servant to look out of the **[316]** window, when Colonel L. in a low tone of voice said to her, If the street-door makes a noise when opened, open one of the lower windows and shutters; or to that effect: that R. M. thereupon directed the maid-servant to tell Colonel L. that he knew of his being there, and to go away, which, after some hesitation, he did." Now it is said that this took place in the absence of Lady C., and cannot be admitted as an instance of her guilt, nor as auxiliary proof. It is certain, however, that a conversation ensued under the window between the maid-servant and Colonel L. after the previous facts had occurred; and this, I think, ought to be received, because it is a continuation of that which must be admitted to have been an impropriety on her part: and the transaction would be incomplete, unless the whole of it were set forth, and allowed to go to proof.

The 8th article is objected to on the ground that it states with too much particularity the cautions adopted by R. M. in order to prevent any intercourse between Lady C. and Colonel L.; and I think these are pleaded at unnecessary length; and that it would be quite sufficient to plead, generally, the measures of security and precaution to which R. M. resorted: this will shew that he adopted all those measures which he deemed requisite. With respect to the communication to Sir Thomas Croft of his wife's conduct—that appears to me to be properly stated; for I think it is desirable that the Court should be put in possession of Sir T. Croft's behaviour upon the receipt of that communication.

[317] The 9th article contains and sets forth a letter of Sir T. Croft, and also Lady Croft's answer. This latter letter is annexed to the libel; but of Sir Thomas Croft's letter the original is not produced, nor is there any draft or copy; and it is said, therefore, that the contents cannot be properly pleaded verbatim et litteratim; for that it will be impracticable to prove them. To a certain extent it may be true that it may be impracticable to prove that a letter, precisely of the same contents, was written by Sir T. Croft and delivered to Lady Croft; but supposing that there should be this failure of evidence, no use can then be made of the letter; and Lady Croft will not suffer the least injury from its admission in plea. The original letter is alleged to be in her possession; it is not possible, then, that Sir T. Croft can now obtain possession of that letter unless Lady Croft will produce it. If it were in the hands of a third party, the possession of it might possibly be obtained: but I am of opinion that, being in the wife's possession, the husband may plead either passages from or the contents of the letter, and may substantiate them as best he can, leaving it to the other party to produce the letter or not as she may deem advisable. The answer is strictly admissible as evidence against her.

The 11th article, after pleading "that after Col. Lyster had been detected in carrying on the clandestine communication with Lady C. as pleaded in the 7th article, he made complaints to various persons that she was improperly confined by the said R. M., and threatened to apply to the British Consul **[318]** and French authorities to interfere and protect her," goes into a considerable detail which has been objected to; and which, in the judgment of the Court, it is unnecessary to plead. It will be quite sufficient to state that, under the circumstances, R. M. thought it right to remove Lady Croft from Boulogne and to place her under the protection of her mother. The remainder of the article, pleading his embarkation with Lady C., and that, notwithstanding his precautions, Col. L. was a passenger on board the same vessel, may go to proof.

The objections to the 12th article have been argued at great length. It pleads, "That, whilst on board, Col. L. several times *addressed* [declared to R. M.] *R. M. on the subject of the intercourse which he stated had been carried on between him and* [in the presence of Lady C.] *Lady C., and in her presence he declared,*(*a*) and she admitted the

(*a*) The parts in italics were struck out and the words in brackets substituted.

same to be true, that he and Lady C. had had sexual intercourse at Boulogne on four different occasions previous to his being discovered talking to Lady C. as pleaded in the 7th article: that, on their arrival in London, M. proposed to Lady C. to go to the Bridge Street Hotel until he could consult T. H., her trustee: that L. objected, and said 'he and Lady C. intended to go to another hotel, but would meet M. at H.'s office the next morning:' that M. refused to leave Lady C. till he had first seen H.; and Lady **[319]** C. declared she would not see him unless L. gave his sanction.' It then pleaded that the three went to H.'s, that he was from home, that Lady C. again refused to go to the Bridge Street Hotel, but went to the Percy Hotel; and that M. remained there with her and L. till late in the evening, when H. came, and he and M. retired to confer: on returning to the room where he left Lady C. and L., that neither of them were therein, *and he was then informed 'they were together in a bedroom in the said house;'* upon which he instantly quitted the house, and, having been informed by H. that the husband had left England, he directed H. to apprize the husband's family of the improper intercourse between Lady C. and Colonel L."

It is said that, admitting such a statement was made, it is not necessary for the purposes of justice; and that it reflects very seriously on the character of the paramour who is not a party to this suit. Again, that no adultery is pleaded to have taken place at any anterior period; and, therefore, that the Court could not take this conversation as evidence of the actual commission of any guilt at Boulogne with which the wife was not then nor is now charged. It is further objected that part of this conversation is not pleaded to have taken place in the presence of Lady Croft. Now the Court is of opinion that it would have been admissible if, at the commencement of this article, it had been pleaded more specifically that the conversations which did pass between Colonel Lyster and R. M. had taken place in the presence of Lady Croft: but if they did not take place in **[320]** her presence, then I am of opinion that the objections are thus far well founded, and that it is the duty of the Court to reject any conversations which passed in the absence of Lady Croft: but as to the objection to the other part, that which alleges the declarations of Colonel Lyster in Lady Croft's presence that sexual intercourse had taken place between himself and Lady Croft, and that she admitted that such was the fact, I am at a loss to conceive on what principle the Court would be justified in rejecting it. With respect to the consequences that may result to third parties, however much the Court may regret if any injustice or misfortune should accrue to them, yet justice must be done to suitors; so that it is impossible to exclude matter which ought to be admitted in evidence, because incidentally it may affect the character and involve the conduct of those who are not parties to the suit. The rejection of matter on any consideration of this kind would lead to great inconvenience and injustice.

But another ground of objection is that the declarations will be no evidence of the previous commission of adultery, and that deserves a little more consideration. Now suppose that the declarations were false (and it is not at all impossible from the res gestæ, and from the manner in which the conversation is set forth in this libel, that actual connexion had not taken place between these parties until after their arrival in London, but that Colonel Lyster, if he did so declare, did it for the purpose of obtaining more free and unrestrained access to Lady Croft), yet still the conversation would be the strongest proof of what the ultimate intentions of Lady **[321]** Croft were; and if it should turn out to be a case in which any doubt at all should arise as to the actual commission of adultery, it would be very auxiliary testimony as proving the animus and object with which she allowed any communication whatever between herself and Colonel Lyster. It is therefore my duty to admit, substantially, this article.

The Court is entitled to exercise a discretion as to what parts of a libel may or may not be unnecessary, yet it is a discretion very considerably restricted. It cannot exclude substantive facts. If twenty facts of adultery were pleaded, though one might be sufficient to entitle the husband to his remedy, the Court would hesitate before it struck out one of them. It cannot foresee to what extent the husband is in possession of evidence, nor in what particular instances the averments of the libel may be proved; and it would be extremely dangerous and, I apprehend, going beyond all precedent, if it were to strike out that which must be admitted to be a very material point towards enabling the Court to arrive at a satisfactory conclusion on the case. The few words towards the close of the article, which plead the

information as to Colonel Lyster and Lady Croft being in a bed-room together, have been properly objected to as hearsay and must be expunged.

The other objections are not very material: one, however, it may be proper to notice; it arises on the 13th article, which commences by pleading, "That, on the evening of the said 7th of August, Lady Croft wrote and sent in the name of R. M., but without his privity or con-**[322]**-currence, to her maid-servant, directing her to come to her at the hotel." In respect to this, according to the strict principles of evidence, the contents of a note cannot be pleaded without annexing the note. As this is an important rule of evidence, though it may be of no very great consequence on the present occasion, that article must be reformed. It is extremely desirable that rules of evidence, which are acted upon by courts of a superior jurisdiction, should be here observed. When these alterations have been made, the libel may go to proof.

Allegation to be reformed.

Easter Term, 3d Session.—Note.—The case upon the evidence was fully proved; and there being nothing in the slightest degree to bar the husband of the remedy he prayed, the Court signed the sentence of separation.

DE BLAQUIERE *v.* DE BLAQUIERE. Consistory Court of London, Easter Term, 1st Session, 1830.—Where both parties had long abstained from applying to the Court, the one for a reduction of alimony, the other to enforce the regular payment, it will not enforce arrears, nor inquire as to the sums paid by the husband for his wife's debts incurred by reason of non-payment of that alimony; nor will it reduce alimony on account of an express waiver of a part thereof by the wife, the additional expences of the husband occasioned by the mature age of children, the failure, from the mismanagement of her trustees, of a portion of the funds set apart for the wife's alimony, or slight additions, aliunde, to her means.

[Referred to, *Kerr* v. *Kerr*, [1897] 2 Q. B. 443.]

In May, 1820, a sentence of separation, by reason of the adultery of the husband, having been signed (3 Phill. 258), the Court decreed that Lady Harriet de Blaquiere should receive for her separate maintenance, in addition to the interest **[323]** of 6000l. —her own fortune—then producing 300l. per annum, a further sum of 80l. per annum, being a moiety of the annual estimated value of Hill House Farm, near Cuckfield, the residence of General de Blaquiere.(*a*)

The present question originated in an application on his behalf for a reduction of this allotment; and in support of it a joint affidavit was made by himself and his housekeeper—who kept the accounts of, and whose husband managed, the Hill House Farm, in which both stated "that it never produced any profit." The affidavit also embodied a letter from Lady Harriet to the general's solicitor in terms following:—

"June 29, 1822.

"Sir,—As I find there is not a clear understanding with regard to the additional 80l., and that my intention of leaving the payment of it to General de Blaquiere's equity subjects me to continual family discussions, terminating in unpleasant differences, I consider it best to dispose of the contention altogether, and I beg you will from this moment understand that I entirely relinquish that specific sum of 80l. per annum, reserving the remaining annual amount of 300l. for life."

The affidavit then stated "that, till Novem-**[324]**-ber, 1823, Lady Harriet received 300l. per annum, when a mortgage of 4000l.—part of her settlement money—was paid off and invested in Exchequer bills at a diminution of interest of 58l. 13s. That in July, 1824, her solicitor, together with her trustees (to whose management the settlement money was intrusted) lent this 4000l. in equal moieties upon mortgage, and that he (de B.) had conceived Lady Harriet was in the receipt of 300l. per annum, but that lately he had been informed and believed that for the moiety lent to Mr. White no interest for two years and a half had been, and that none was likely soon to be, paid: that he had incurred great expence in the repairs of his farm, that his sons were wholly maintained and educated by him, and now were of an age to be advanced in

(*a*) General de Blaquiere was entitled for life to the interest of Lady Harriet's fortune; but, upon a private separation in 1814, he agreed that she should receive it for her support. The permanent alimony was allotted upon a joint income amounting to 1190l. per annum; and there were two sons of the respective ages of eight and six.

a profession, and that his whole income, including the interest of Lady Harriet's money, was 958l. 7s. 2d. That in 1826 Lady Harriet received—as derived under her mother's will—two separate sums of 666l."

Lady Harriet's affidavit set forth a letter from her, dated July 13, 1820, to the general, in which she proposed "that if he would allow one son to be with her altogether, she would release him from the payment of 80l. of her alimony to enable him to bestow a better education upon the other." This proposal was not acceded to, and the general declined allowing Lady Harriet to have any intercourse with her children. That in answer to several applications for the payment of the 80l. as it became due the general, in March, 1821, wrote "that he would, as soon as his estate was sold, pay the arrears and provide for the regular pay-**[325]**-ment of it in future." "That Lady Harriet agreed to wait his own time, but expressly refused to relinquish it; and that her letter of 29th of June, 1822, was written when her mind was greatly excited by discussions with her own family, in consequence of her having so far acceded to General de B.'s wishes as to defer receiving payment of such additional alimony; but that she was more especially induced to write it, in the hope that he would comply with her most anxious wish to see her children, and to have them occasionally with her, and in the full impression and belief that if he should persist in a refusal her declaration would not be binding. That the balance of alimony, up to 16th May, 1829, was 1265l. 4s. 8d. That on the payment of the mortgage of 4000l. the Exchequer bills were deposited in the joint names of her solicitor and the solicitor of General de B.; with whose full concurrence (*a*) and that of the trustee on the part of General de B.(*b*) the money was again lent out on mortgage: that she received in July, 1826, a legacy of 666l. 13s. 4d., but **[326]** neither then, nor at any other time, the whole, or any part, of a second sum of the like amount."

In reply to this affidavit General de Blaquiere made a further affidavit, stating that "since 14th February, 1829—the date of his former affidavit—he had paid upon actions by tradesmen on account of bills incurred by Lady Harriet for furnishing her house at Brighton, taken in 1824, and for other bills, 1288l. 15s. 5d., and that he was threatened with further actions for other debts to the amount of 140l.; that she has, for her life, apartments in Hampton Court Palace, and lets her house at Brighton for four guineas per week, amounting to 218l. 8s. per annum: that from June, 1822, to March, 1828, no intimation was ever made by Lady H., either to him, or, as he believes, to his solicitor, that she did not consider her letter of 29th June, 1822, binding upon her: that there now remains justly due to him, for sums paid to her or for her use, 1286l. 15s. beyond what she was entitled to as alimony: that he therefore trusts that her ladyship's income may be reduced suitably to the diminished income of the deponent, and the increased heavy claims which fall upon it."

Phillimore and Addams for General de Blaquiere.

The King's advocate and Dodson contrà.

[327] *Judgment—Dr. Lushington.* In 1820 Lady Harriet de Blaquiere obtained a sentence of separation by reason of General de Blaquiere's adultery; and, on a consideration of all the circumstances, there was an allotment of alimony of 80l. per annum, in addition to the interest of 6000l.—her own fortune, which, at that time, amounted to 300l. per annum. Until last year there had been no application to the Court by either party, on the one hand to reduce the allotment, or, on the other, to enforce the payment of arrears: either party might have proceeded to take the remedy afforded by the law. An application is now made by General de Blaquiere for a reduction of alimony; this is met by an affidavit of Lady Harriet's, stating a diminution of the funds which had supplied her separate maintenance; and making a counter-demand for certain arrears: in reply it is said that General de Blaquiere has incurred

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(*a*) This gentleman was dead; but in Lady Harriet's solicitor's affidavit it was sworn that General de Blaquiere's solicitor had approved of the security, and that the mortgage deed was prepared by an eminent conveyancer.

(*b*) This was denied in the affidavit of the trustee—who said "that the sum of 6000l. and the receipt of the interest thereon for her use was entirely under the control and management of Lady Harriet's own solicitor; and that till December, 1828, he, deponent, was wholly ignorant, as he believes were also both his brother and his then solicitor (now deceased), that any part of the sum of 6000l. had been lent upon a security—doubtful or unproductive."

great expences on account of debts contracted by Lady Harriet; that she has received an increase of income from other sources; and that the defalcation in her means, if any, has proceeded from the mismanagement of her own trustees.

It is true that, should I decree the payment of arrears, General de Blaquiere would be entitled to a deduction for all sums paid on account of Lady Harriet's debts: and I should then be obliged to take into my consideration the questions that have been raised respecting the 80l. per annum, which was allotted in addition to the interest of her own fortune. I am of opinion that she did, in fact, abandon that sub-**[328]**-sidiary allotment; but I doubt whether in law it was competent for her, in that form, to relinquish the benefit of the decree of the Court. This is a contract between husband and wife; and though the principles applicable to such contracts are not strictly the same after a legal separation, as they may be regarded while the parties are living together, yet they are not widely different. In the one case, here is the influence arising from affection; afterwards an influence of a different sort, arising from an anxiety to communicate with her children. If it were necessary to settle this point, I should be of opinion that the whole alimony decreed to her in 1820 must be placed at her disposal, and then she will be at liberty to appropriate it as she pleases.

In respect to the mortgage for 2000l., upon which but little interest has been paid, I cannot exactly agree that it was in the power of the husband to relinquish all care and superintendence of that sum: it was his duty to see that the money was advanced upon proper security; but, upon the defalcation occurring, no application was made to this Court by Lady H. de Blaquiere: she abdicated her claim to that protection to which she might have resorted; and, in like manner, General de Blaquiere, by leaving the alimony unpaid instead of seeking his remedy here in an application for a reduction of it, has made himself subject to her debts. On the other hand, there was a species of acquiescence, in this diminution of alimony, on the part of Lady H. de Blaquiere, evidenced by her forbearing to resort to this Court, and by her allowing her husband to be sued for her **[329]** debts. I am not, therefore, inclined to meddle with the arrears; for though General de Blaquiere was abroad from 1821 to 1827, and consequently the process of this Court could not be enforced against him, yet, upon his return, no step was taken by Lady Harriet de Blaquiere to obtain payment of the arrears by the authority of this Court. It is clear, therefore, that Lady Harriet did not intend to call for the arrears; and if I were now to travel into that question, I should involve both parties in much intricacy of account. I shall not therefore decree for the arrears: and I come to this decision, principally upon the ground that no application was made to this Court either to enforce payment or to obtain a reduction of alimony.

Where there is a material alteration of circumstances, a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased; and if the husband is lapsus facultatibus, the wife's allowance ought to be reduced. Applications of this sort are of rare occurrence; I only remember two instances where applications of either kind have been successful—the case of *Foulkes and Foulkes* for an increase (Consistory, Hil. Term, 1814); and of *Cox and Cox* (3 Add. 276) for a reduction: (*c*) and I think that, **[330]** under the present circumstances, Lord Stowell, if he had continued to occupy this chair, would not have made

(*c*) Trinity Term, 4th Session, 1830.—In *Wilson* v. *Wilson*, upon an application by the wife to enforce a monition for the payment of alimony, six years in arrear, the Court said: "Unless the husband is absent from the country, or some particular reasons are set forth, it would be productive of great inconvenience and injustice if, after a lapse of so many years, the Court should enforce such a monition. If the wife is aggrieved, she should make her application within a reasonable time, otherwise the Court will infer she has made some more beneficial arrangement. As a general rule, therefore, the Court is not inclined to enforce arrears of many years' standing. Alimony is allotted for the maintenance of a wife from year to year. However, as there has, in this case, been no application to reduce the alimony, but the parties have gone on satisfied with some private arrangement of their own, I think I shall best consult the interests of both by decreeing alimony from one year prior to the monition, the husband being allowed all payments on account of the wife during that year; and, from the date of the present monition, I shall continue the alimony according to the original decree."

a different allotment from what he did when he originally fixed the rate of this alimony.

The principle point is, what is to be done in respect to Hill House Farm. There is an extraordinary affidavit from General de Blaquiere's housekeeper, whose husband manages the farm while she keeps the accounts, "that during the last fifteen years no profit has been derived from it;" but the point to be considered is, what the farm would let for. In 1820 it was estimated at 7000l. Lord Stowell put the produce of it at a low rate, and I see no reason to depart from the view he then took of it. On the ground of the alteration in General de Blaquiere's income, I am not inclined to alter the allotment of alimony. Then, as to the mature age of the children: their growing years must have been taken into consideration at the time the alimony was originally fixed; and I see no ground on that account to alter the allotment and diminish the comforts of the wife. There may, indeed, be cases where the Court would relieve the hus-[331]-band owing to heavy expences arising from children; but I do not think this a case of that sort.

Again, has the income of the wife so improved as to call for a change? There are three items: First, the house at Brighton: but there is no proof by what tenure she holds it. It is true it was furnished at the expence of the husband; for the tradesmen recovered from him the amount of their bills: but these sums have in fact been taken as part of her income, since the arrears are not enforced: the one must be set off against the other.

The second item, the sum of 140l. still due, is too trifling to cause any variation. The third item is the apartments at Hampton Court, which are estimated at 100l. per annum, and it is sworn that Lady Harriet has them for her life: I doubt whether that can be accurate. I should think they were held at the will of the King: but, even if otherwise, I should feel a great difficulty in stepping in to control, and interfere with, the munificence of the Sovereign. I will then, if called upon, enforce payment of alimony, at the rate settled by Lord Stowell, from the quarter day immediately preceding the commencement of these proceedings; but I shall make no order, on one side or the other, as to any of the previous matters. The husband will, of course, pay the costs of this application: for I cannot call that which is paid as alimony under a decree of the Court separate income of the wife.

On the 3d Session of Easter Term, upon an application on the part of Lady Harriet de [332] Blaquiere to the Court for further directions as to the precise time from which the payment of alimony should commence, the Court, referring to the date of General de Blaquiere's first affidavit, and the communication of it to Lady Harriet's proctor, directed that it should commence "from the quarter day next preceding the 16th of February, 1829."

WILTSHIRE *v.* PRINCE, OTHERWISE WILTSHIRE. Consistory Court of London, Trinity Term, 3rd Session, 1830.—A marriage by banns—where, by the consent of both parties, one of the Christian names of the man (a minor) was omitted for the purpose of concealment—is null and void under st. 4 Geo. 4, c. 76, ss. 7 and 22. Quære, if only one of the parties knew of the false publication.

This was a suit of nullity of marriage by reason of an undue publication of banns, and was promoted by Henry John Wiltshire against Elizabeth Prince, calling herself Wiltshire.(*a*)

The libel pleaded, first, st. 4 Geo. 4, c. 76, ss. 7 and 22.

2d and 3d. The birth of H. J. Wiltshire on 20th April, 1809; and his baptism in the church of St. George, Bloomsbury, on the 23d April, 1812, by the names of "Henry John."

4th. That in March, 1827, Elizabeth Prince, aged 30 years, entered, as cook, the service of Robert and Mary Wiltshire (the parents of the complainant), living in Great Russell Street.

(*a*) The citation was taken out on behalf of Robert Wiltshire, the natural and lawful father, and guardian of his son, a minor. On 1st of May, 1830, this citation was returned into Court; the libel was admitted on the 29th. On the 7th of June the proctor for Robert Wiltshire alleged the son to be of age; exhibited as proctor for the son, and the father, being then dismissed from the suit, was, on the 16th, examined as a witness in the cause.

5th. That Prince prevailed upon H. J. Wilt-**[333]**-shire to procure the publication of banns between himself and her at St. Bride's on 20th January, 1828, and two following Sundays; and it was arranged between them, with a view to concealment, that he should, in the banns, be described by the name of "John." That, in pursuance of such banns, a marriage was had on the 5th of February, 1828, without the consent or knowledge of R. Wiltshire: "and that such marriage knowingly and wilfully had without due publication of banns was and is void."

6th. Exhibited a true copy of the entry of the banns; and also of the marriage.

7th. That H. J. Wiltshire from his infancy was invariably called by the name of "Henry John," and not "John;" and that as well before as after the marriage Elizabeth Prince constantly addressed and spoke of him by the name of "Henry," and no other.

8th. That Robert Wiltshire and his family did not discover nor were apprized of this marriage till 15th May, 1828, when H. J. W. was immediately sent abroad, where he remained till the commencement of this suit; and that Prince was, on the 19th May, 1828, dismissed the service of R. and M. W.

9th. That after her dismissal Prince remained some short time in the neighbourhood, when she quitted it, and R. W. was not able to discover her place of abode until shortly before the service of the citation.

The fact of marriage was admitted: and the minority, want of consent, and that Elizabeth Prince was cognizant that the name of the promoter was "Henry John," and that the **[334]** banns had been published by the name of "John" only were fully proved.

The King's advocate for Mr. Wiltshire.

Dodson contrà.

Judgment—Dr. Lushington. This is the first case in which the st. 4 Geo. 4, c. 76, s. 22, has undergone any judicial investigation. The true interpretation of the section is important: it enacts "that if any persons shall knowingly and wilfully intermarry without due publication of banns, or without a licence from a person having authority to grant the same, the marriages of such persons shall be null and void to all intents and purposes whatsoever." This is the substance of this section as relating to the question for my consideration. Now, whatever might be the construction of this section when one only of the parties knew of the false publication, here there is sufficient evidence to shew that both the man and the woman were aware that the banns had been published in a manner calculated to conceal the identity of one of the parties. The omission of a Christian name may operate as a concealment as much as the omission of a surname. Looking to the whole of the evidence, I am satisfied that in the present case the publication was contrary to this section of the act of parliament, and that both parties were perfectly cognizant, before the marriage, of the violation of its provisions. I pronounce the marriage null and void.

[335] SHARPE AND SANGSTER *v.* HANSARD. Consistory Court of London, 17th July, 1830.—Where no substantial inconvenience was shewn by one individual, who opposed the faculty, and when the plan had been adopted at a vestry on the unanimous report of a committee, the Court will grant a faculty to level a churchyard and lay flat upright head and foot stones, with a clause that no expence shall fall on individuals.

This was an application for a faculty for the purpose of laying flat the grave-stones standing upright in the churchyard of St. Bride's, London, and for levelling the ground: and was promoted by the churchwardens against the vicar and parishioners. A decree, with intimation, having issued, Thomas Hansard—a parishioner—declared that he opposed the faculty: and, in substance, alleged: "That there is now standing upright in the churchyard a gravestone erected by him to his wife and three children, that he paid to the churchwardens a fee for the erection thereof; that no benefit can accrue to the parish by levelling the gravestones, and that, by the application, many parishioners (who object) will be put to an unnecessary expence."

On the part of the churchwardens it was alleged "that the purposes for which the faculty was prayed would be a great benefit and convenience to the parish in the judgment and belief of a very considerable majority of the parishioners; that there were now above one hundred and fifty upright head and foot stones placed in such an irregular manner that a great portion of the ground—of great value for sepulture—

was rendered useless; that, if laid flat and regular, much ground would not only be gained, but the churchyard would have a more neat and decent appearance; that it might then be kept in [336] proper order, and the circulation of air—at present greatly impeded—be made freer; that the soil of the churchyard was elevated several feet above the level of the surrounding streets and foot-paths. That at a vestry on 6th of January, 1830, it was resolved to refer to a committee of fourteen the state of the burial ground, and other matters appertaining to the expence of burials, and to report thereon; that on 2d of April a report (signed by all the committee), recommending an application for the faculty in question, was unanimously adopted in vestry. That many persons who have relations buried in the churchyard, and to whose memory grave-stones have been erected, consent to the faculty, that the expence would be inconsiderable, and greatly exceeded by the benefits and convenience."

In rejoinder, some slight inconveniences were pointed out: a specific denial was given as to the soil being elevated, and as to the benefits and conveniences averred by the churchwardens; and it was asserted new stones would be required.

Affidavits on both sides were exhibited.

Addams in support of the faculty.

The King's advocate contrà.

Judgment—Dr. Lushington. This is an application for a faculty with a view to make certain alterations in the churchyard of St. Bride's. It appears that grave-stones have been there erected without resorting to this Court for a faculty; and it is not very usual in [337] such cases to make application for faculties. The leading object of the Court in granting faculties is the convenience of the parishioners: in this instance it seems that a committee, having been appointed to examine the churchyard, recommended certain alterations: their report was unanimously adopted: the vestry meetings, connected with this matter, were duly convened: every publicity requisite was afforded to the parishioners: notice of an intended application for a faculty was given, and there was no expression of dissent: the vicar of the parish offers no opposition, the Court must, therefore, consider him as consenting: the proposed alteration is sworn to be advantageous to the parish; and it is not denied that space, a most important consideration in this metropolis, would be acquired.(*a*) It is also stated that the appearance of the churchyard would be materially improved: this, however, does not weigh very much with the Court. Clearly, if there had been no opposition to the grant, the Court would have allowed the faculty: and in regard to the objections, the Court, looking to the affidavits before it to ascertain to what grievance any individual might be subject, does not think that the application can be effectually resisted. It is not probable that by laying the stones flat any serious inconvenience will arise, and that the general objects contemplated by [338] this measure will be advantageous, cannot, I think, be doubted. I am, therefore, of opinion that the faculty, prayed by a majority of the parishioners, must pass: but at the same time I direct that the laying the stones flat shall not subject any individual to expence.

Faculty decreed.

TURTON *v.* TURTON. Consistory Court of London, Trinity Term, 1st Session, 1830.

—In a suit for separation for the husband's adultery with his wife's sister, proof that the wife, after knowledge of previous adultery, allowed, under peculiar circumstances, this sister to accompany them to India and to live in the same house with them, will not bar the wife on the ground of connivance: her conduct, though imprudent, not being traced to a disregard of her own honor, nor to any motive necessarily criminal.—After publication, in a suit for separation for the husband's adultery, the Court will not, in the first instance, delay the hearing in order that the wife may counterplead her letters annexed to the husband's interrogatories, from which connivance, or a par delictum (neither pleaded), is to be inferred; but semble, that it will not ultimately allow her to be barred by reason of such letters without affording her an opportunity of explaining them. —In a suit for separation for the husband's adultery, the Court will not direct

(*a*) The committee reported "that the churchyard, if properly arranged, would hold about 300 graves; that owing to the lines of graves being irregular, some ground was rendered useless; that about half the ground was occupied, and that there were about 100 graves which could not at present be disturbed."

the husband to give security for costs, on a suggestion, unsupported by affidavit, that he was going abroad.—The Court will not, before the hearing, rescind the conclusion in order to admit an allegation counterpleading letters annexed to interrogatories, nor will it direct such letters to be disannexed; but semble, that if at the hearing the letters appear important, it will then allow the admissibility of the allegation to be debated.—Condonation and connivance are essentially different in their nature, though they may have the same legal consequence.—Condonation may be meritorious: connivance necessarily involves criminality; and therefore the evidence to establish it should be the more grave and conclusive.—To found legal condonation as a bar to adultery there must be a complete knowledge of all the adulterous connexion, and a condonation subsequent to such knowledge.—The Court, or the husband's counsel, may take the objection of the wife's connivance when it clearly appears on the evidence adduced by her: but quære, whether such a defence can be set up on interrogatories alone; at all events, to support such a defence so set up, the conduct and evidence to prove it must be most unequivocal and incapable of explanation.

[Discussed, *Dempster* v. *Dempster*, 1861, 2 Sw. & Tr. 438.]

This suit was promoted by the wife against her husband, on the ground of adultery with her sister. The marriage took place in November, 1812: and the cohabitation ceased in February, 1824. The libel was admitted without opposition: it consisted of twelve articles.

Five witnesses were examined. A sister of the wife deposed, upon the 4th article, "that late in October, 1821, she had reason to believe an improper, but not a criminal, attachment existed between her sister A. and Mr. Turton; that, as the elder sister, she interfered, and it was arranged that A. should not go into his house unaccompanied by some one of her family. Out of regard to the feelings of the family deponent kept it a secret. Early in January, 1822, while the wife and deponent were on a visit in the country, the wife opened a letter from A. to Turton; they both read it, and instantly ordered horses and returned home, when deponent had an interview with **[339]** T., and it was agreed between them, with the concurrence of A., that all further intercourse should cease, and what had taken place be carefully concealed from the family, and that he should go to India. That early in February deponent and A. went with their father to Bath, where they remained together till the 20th of July, when A. clandestinely went off. Deponent never saw T. or his wife from the time of her going to Bath, nor A. after she quitted it, previous to her proceeding to India."

In answer to interrogatories, it appeared "that in April and in November, 1821, A. was at Brighton with Mrs. T. Respondent does not believe that T. was there at such times unless merely on a Sunday. After the unequivocal terms of the letter shewn to her by Mrs. T. both T. and A. confessed (in the wife's presence) that a guilty connexion had taken place between them. Mrs. T. in October, 1821, informed respondent that in that month she had intercepted a letter from her sister A. to T. which made her acquainted that there was a warm attachment between A. and T. The elopement of A. from Bath was not discovered until nine at night; respondent and her father (who knew nothing of this criminal intercourse then, nor for years after) got to Portsmouth the next morning; were there informed that Mr. and Mrs. T. were at Cowes, at which place they were to be taken on board; that, not believing this account, they travelled to a friend's house, but not finding them at it, they returned to Portsmouth on the next morning, where, unable to learn any tidings, **[340]** they remained a few hours, and returned to Bath." (*a*) She believes "that on or about 21st July, 1822, T., his wife, and A. went over to the Isle of Wight, and that Mrs. T. consented rather than that her father should be made acquainted with the misconduct of A.: and that had she not consented she would have been left behind by her husband. Mrs. T. arrived in England from India in July, 1824: she told respondent that her husband accompanied her upon her embarkation. Since her arrival she has received valuable presents from him. Respondent swears that the conduct of Mrs. T. with

(*a*) In a letter written by Mrs. T. to a sister of her husband's from Andover (bearing the postmark July 22, 1822) were these passages: "We are waiting here the arrival of my sister A.; she was suffering so much from my departure that I have consented to her wish of accompanying us, unknown to my father." "I confess I do not feel quite happy about it, but I could not bear to leave her in misery."

reference to Mr. F. L. (a friend of T.) was such as was approved of by her and the rest of her family, that is, there was nothing to disapprove of. She never observed familiarities, or a habit of familiarity, between them, which appeared to respondent unbecoming in Mrs. T. as a married woman."

A physician, after deposing that "in January, 1823, he was introduced to T., his wife, and A., upon their arrival in India:" went on, upon the 5th article, "that in April, 1823, he was sent for on an emergency, in the night, to the house of T., where he delivered A. of a child: until the moment of his entering the **[341]** room he was not informed of her pregnancy. Mrs. T. asked him 'what could be done to save appearances?' She was in great agitation: her husband came into the room: he concurred with her in urging secrecy: the child was conveyed out of the house within a few hours after its birth to be nursed. Deponent was left to his own suspicions as to who was the child's father. Upon the 6th, that on A.'s recovery, he suggested to T. the expediency of sending her to England: he repeatedly urged it: he made the remonstrances in consequence of representations by Mrs. T. and of rumours prejudicial to T. Just before T. was taken ill it was said Mrs. T. was to proceed to England in the 'Woodford:' but that, in consequence of his illness, the project was abandoned. She sailed for England in February or March, 1824."

7th and 8th. "A. continued to reside with T. till February, 1829, when deponent sailed for England. In January, 1825, he was called to attend her at T.'s residence; about two months previously he had been informed by T. that she was again with child, and that he would be wanted to attend her. Since deponent's arrival in England he has seen A. and T. at the house of T.; there was one child with them, which he believes to be the child born in January, 1825."

Upon interrogatories. "The child born on 27th of April, 1823, lived about two months. "Its birth appeared an unexpected event. The mother could not have been aware of such pregnancy on the 3d of August preceding. **[342]** He had many conversations with Mrs. T.: she informed him that a criminal intercourse was carried on between T. and her sister: she never gave him to understand that A. was pregnant when she quitted England, or that Mrs. T. believed her sister so to have been.(*a*) T. never promised in his hearing that A. should return to England. After the recovery from his illness in August, 1823, T., his wife and A. went into the country together for about a month or six weeks. In November he had a relapse. His wife and her sister indiscriminately attended on and nursed him. Respondent repeatedly found A. alone with him when Mrs. T. was from home."

Two servants deposed, "That in the autumn and close of 1829 and early in 1830 A. was considered the mistress of the house in which she was living with T.; that they associated together at meals, but occupied separate bedrooms; and that there were three children who called T. 'papa.'"

To the interrogatories several letters of the wife were annexed: those to her husband at the end of the year 1823, and two (after her arrival in England) dated respectively September, 1824, **[343]** and January, 1825, were written in terms of extreme affection for him. They were, with others, introduced for the purpose of shewing that she acquiesced in the arrangement for her sister to accompany her and T. to india; and that while there she resided with them; and further, that Mrs. T. had, in India, corresponded very familiarly with a young single man.

On publication of the evidence the counsel for the wife applied to the Court for leave to bring in an allegation with certain exhibits—which formed the other part of the correspondence between her and her husband—in order to explain her letters to him (annexed to his interrogatories) and to remove any inference, prejudicial to her cause, that might be drawn from her letters.

Phillimore and Dodson for the wife. No defensive plea has been given: but several

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(*a*) It was pleaded in the 4th article that "while at Portsmouth, about to embark, T. declared to his wife that A. was pregnant by him; . . . that on his knees he solemnly promised never to renew his criminal intercourse with her, and that she should return to England as soon as recovered from her expected delivery; and that he would never see her, except in her (his wife's) presence: that she being alone, without any friend to advise with, and most anxious to protect her family and herself from the scandal and disgrace necessarily incident to such an exposure, did, upon the faith of such promise, allow A. to accompany T. and herself to India."

of the interrogatories have been framed, and some of the letters introduced, with a view to convey insinuations against the wife: the circumstances suggested in these interrogatories should have been pleaded, and the letters annexed, to have enabled the wife to counter-plead and rebut them: they have been clandestinely imported into the suit: they are not exculpatory, but recriminatory. Our object is to meet the letters of the wife by letters in the husband's hand-writing. Pleading after publication is not frequent, but it is in the discretion of the Court: *Webb* v. *Webb* (1 Hagg. Ecc. 349). *Middleton* **[344]** v. *Middleton* (2 Hagg. Ecc. 134 (Supplement). See also *Hamerton* v. *Hamerton*, supra, 1). But the application stands so obviously on every principle of justice that it requires no authority in this instance to sustain it.

The King's advocate and Addams contrà. The wife could not be ignorant of these letters. Some were written during cohabitation, others after she had left her husband in India: parol evidence is not admissible for the purpose of explanation. If, at the hearing of the cause, it should appear that any part of the letters relied upon are particularly stringent, and that the wife has had no opportunity of giving an explanation, then, according to the maxim "causa nunquam concluditur contrà judicem," the Court may give her that power. In the cases cited there were facts of adultery "noviter perventa." This is an application for permission to explain.

Per Curiam. I have had no previous intimation of this motion; but, as I feel no difficulty in disposing of it, it is not necessary for me to read the letters, nor make myself any further acquainted with the cause: the contents of the documents would not affect my present decision. These letters must, I apprehend, have been annexed to the interrogatories either to substantiate a charge of connivance in the wife, or as recriminatory. Now, I am not aware of a case in which, upon answers to interrogatories, the Court has decided either that connivance or recrimination has been proved **[345]** so as to dismiss the suit of the wife: and on principle, I conceive it would be difficult to arrive at such a decision. If at the hearing of the cause reliance be placed upon the letters annexed to the interrogatories, and I should be of opinion that the charge against the husband is proved, and that some explanation is required on the part of the wife, I should not do justice to her, unless I afforded her a full opportunity of making a defence. Something has been said as if this explanation were a matter of strict necessity; but the Court must judge for itself, and I shall allow the cause to come on, in its present state, for argument; and unless it should then appear indispensably requisite to admit an explanation, I shall proceed to sentence, even though there be some minute matters which the wife might be anxious to explain.

Phillimore. The absence of an explanation, we are apprehensive, may prejudice the wife in case she resorts to a higher tribunal for a dissolution of her marriage.

Per Curiam. I rely on the wisdom and justice of that superior tribunal to enable the wife, if necessary, to vindicate herself. I must confine myself to what is material for the administration of justice in this Court.

The Court was then prayed—upon a suggestion that Mr. Turton was about to return immediately to India—to direct him to give security for costs and alimony.

[346] Per Curiam. I do not consider that the order (see "Orders of Court," No. 13, vol. 2, p. xvi.) in respect to a security for costs entitles the wife, in a matrimonial suit, as a matter of course, to enforce the regulation: it applies principally to testamentary causes: but still may be introduced into cases of another description. The application, in this instance, is not supported by affidavit: I decline to make any order, and I conclude the cause.

[Note.—These "orders" the Judge of the Consistory Court of London, on the 1st Session of Easter Term, 1830, had directed should operate and take effect in the Consistory Court as far as the nature of the suits would allow.]

On a subsequent day an application was made to the Court, in chambers, to rescind the conclusion of the cause for the purpose of receiving this allegation: the application was again refused; and on the 30th of June, at the hearing of the cause, the counsel for Mrs. Turton having again applied to the Court either to allow the allegation and exhibits to be brought in, or to direct Mrs. Turton's letters to be disannexed from the interrogatories, the Court observed: "I am yet in doubt to what extent it is intended, on the part of the husband, to press the letters annexed to his interrogatories, and also the answers to those interrogatories which the wife is so desirous of noticing. It is then, I repeat, necessary for me first to ascertain what use is made of these **[347]** documents and answers by the husband's counsel; and if,

during the argument, they are insisted upon as a bar to the separation prayed by the wife, and I should consider them important, I will allow the admissibility of the plea, now tendered, to be debated: but otherwise its contents will be immaterial."

The case was then argued upon the merits. The King's advocate, with whom was Addams, admitted there was sufficient evidence of the adultery; but that the wife, having continued to cohabit with her husband after she had full knowledge of his connexion with her sister, at least six months before she consented to her accompanying them to India, was barred by her own conduct of legal relief.

Per Curiam. Is there any instance of a bar on the ground of the wife's connivance, where no defensive plea has been given? Secondly, if connivance on the part of the wife be established, will that debar her from a decree of separation in a case of incestuous adultery?

The King's advocate. In *Walker* v. *Walker* (2 Phill. 153) there was no defensive plea, and the wife was held barred: that was the effect of great length of time; so far the circumstances are not similar; but the principle is there recognized that the acquiescence of the wife, though not pleaded, yet if clearly proved in the cause, is sufficient. This is admitted in *Beeby* v. *Beeby* (1 Hagg. Ecc. 795-7). If the law does not permit a wife to acquiesce in **[348]** the adultery of her husband, a fortiori, not in incestuous adultery. In *Denniss* v. *Denniss* connivance at incest barred the husband.(*a*)

Phillimore and Dodson for the wife, in reply. The fourth article of the libel (see ante, p. 342, in notis) has not been counterpleaded: it must, therefore, be taken pro confesso. The forgiveness was conditional. There is nothing to shew that the criminal intercourse was renewed while the wife was in India; nor, even if it could be inferred that it took place, that she was cognisant of it. No instance has occurred of the wife being barred by condonation, or connivance, merely suggested on interrogatory. *Durant* v. *Durant*: (*c*) and, in that case, the Court said, "All authorities shew that condonation is not so readily presumed, as a bar, against the wife as against the husband. The injury is different: the for-**[349]**-giveness on the part of the wife is meritorious, while, on the part of the husband, it would be degrading and dishonorable." *Walker* v. *Walker* was an extreme case; it furnishes an exception to the general rule. In *Beeby* v. *Beeby* the Court held the wife's forbearance highly laudable, and condonation not established. The passages relied on were doubts dropped to guard against misrepresentation. The present case is so completely proved that we are now satisfied with the evidence, as it stands, without an explanatory allegation.

17th July.—*Judgment—Dr. Lushington.* This is a suit brought by Mrs. Turton against her husband for a divorce, by reason of adultery alleged to have been committed by him with her own sister. The parties were married in November, 1812, and, so far as can be collected from the peculiar circumstances of the case, the commencement of the intercourse between Mr. Turton and the sister of his wife was towards the end of the year 1821. The first question is whether the charge of adultery is substantiated; and although the evidence perhaps has not been produced in quite so satisfactory a form as the Court could have desired, yet, looking to all the circumstances of the case—to the difficulties which interposed to the completion of the proof in a better shape, and to the fact that Mr. Turton's counsel do not deny the guilt with which he is charged—I am satisfied that sufficient is proved to enable me to proceed to the consideration of the remaining parts of the case.

[350] The cohabitation of Mr. Turton and the sister of his wife appears to have

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(*a*) Consistory, Hilary Term, 1808.—This was a suit for separation for the wife's adultery with the husband's brother. On the part of the wife an allegation—recriminatory and pleading connivance—had been admitted. At the final hearing of the cause the Court refused a sentence of separation, on the ground of connivance, and thus concluded its judgment: "Upon the evidence of this conduct, it is painful to pronounce that the husband is not entitled: he acted with imprudence in admitting such a brother: this was followed by the discovery of the adultery, which he severely felt; he repressed his feelings because he was under pecuniary obligations and suffered the intercourse to go on till the brother urged his demand; this the law will not permit. The husband is charged with adultery with three persons; into this it is unnecessary to enquire; for no alteration of the sentence would take place. I dismiss the suit."

(*c*) 1 Hagg. Ecc. 733. See also, upon the doctrine of connivance, *Rogers* v. *Rogers* (supra, 57), and the several cases appended to it.

continued up to the commencement of the cause; for I take it to be clear that, according to the doctrine of this Court, and according to all the principles in similar cases, if it can be once shewn that the parties had been cohabiting in an illicit connexion, it must be presumed, if they are still living under the same roof, that the criminal intercourse subsists, notwithstanding those, who live under the same roof, are not prepared to depose to that fact. The next point is, whether Mrs. Turton, who would thus be entitled to a separation from her husband, is barred by any misconduct of her own, or by any circumstances developed in the course of these proceedings. It must be manifest that if once the guilt of the husband be established, the onus probandi shifts; and if he seeks to deprive her of her remedy, by imputing a charge of criminality of any kind, he should make good that charge by evidence which admits of no dispute.

By way of defence to this suit, nothing has been set up in plea; but it is argued on behalf of Mr. Turton, from the answers to the interrogatories, and from certain letters attached to those interrogatories, that Mrs. Turton has so misconducted herself as to forfeit her claim to the remedy she prays. This branch of the case divides itself into two points: the first is, whether there has been any thing which can be termed condonation on the part of Mrs. Turton; and secondly, whether there has been connivance; for I apprehend these are essentially different in their nature, though either may have the same legal consequence. Condonation may take place, without imputing, either **[351]** in the case of a wife or of a husband, the slightest degree of blame, especially in the case of the wife, whose conduct might be more meritorious from her forgiveness of injury. But connivance necessarily involves criminality on the part of the individual who connives; and as the blame sought to be imputed is the more serious, so ought the evidence in support of such a charge to be the more grave and conclusive. As to condonation, it is impossible that any such defence can be maintained on this occasion; for I take the doctrine to be perfectly true, as laid down by the learned Dean of the Arches in the case of *Durant* v. *Durant* (1 Hagg. Ecc. 733), that in order to found a legal condonation, there must be a complete knowledge of all the adulterous connexion, and a condonation subsequent to it. Although it might be argued with a semblance of truth, that in 1822, even prior to the period when Mrs. Turton quitted England, she had pardoned the offence against her bed, yet there is not the slightest degree of evidence, or the least circumstance, to induce the Court to suppose that she ever intended to extend her condonation to the subsequent intercourse between the parties.

The attention of the Court must be confined, then, to this single point—Has Mrs. Turton connived at the injury of which she now complains? Before I proceed further I must repeat that no such averment has been given in plea. If I am called upon to decide, even in the present stage, on the charge of connivance sought to be established against Mrs. Turton, I should have to decide it on letters, which are annexed to interrogatories, and which consequently the wife **[352]** has had no opportunity to explain.(*a*) I am not aware of any previous instance in which a decision has been made on evidence thus ex parte. If I were of opinion that there was a primâ facie case against Mrs. Turton, it is manifestly clear that, according to all principles of justice, I should be bound to afford her an ample opportunity of explaining her conduct. There can be no rule of practice, in this or any other Court, so strict as to defeat the ends of justice; and I may with truth affirm that this Court possesses in common with, and to the full extent of, other Courts, the power of adapting its rules of practice to the exigency of the case; and that it will never defeat justice by adhering to technical rules. Though, indeed, the Court, or the husband's counsel, might take the objection of connivance where it clearly appeared on the face of the evidence adduced by the wife herself, it is a serious question whether it is competent to the husband to set up such a defence by interrogatory only, without giving the adverse party a full opportunity to answer: at all events, in such a case, the conduct, and the evidence to prove it, must be most unequivocal, and incapable of explanation. But it is not necessary for me to determine to what extent the answers to the interrogatories

(*a*) According to the practice of the Ecclesiastical Courts, documents annexed to the interrogatories cannot be known to the other party to have been so annexed till publication of the evidence has passed; and when, without special leave, no further plea, unless exceptive, can be admitted.

and the letters ought to be admitted, or whether they ought to be excluded altogether; for, in the present instance, taking them as part of the case, **[353]** I can, with satisfaction to my mind and conscience, arrive at a decision respecting which I entertain no doubt: for there is nothing in the letters which, in my apprehension, tends, in the slightest degree, to support the imputation of connivance upon the wife in the continuance of the intercourse between her husband and her sister.

It has been said that, after her suspicions had been awakened, Mrs. Turton allowed her sister to remain under her roof at Brighton, where Mr. Turton had the means of access to her. But so far as the proof goes, such opportunities, if they existed at all, must have been extremely rare, for Mr. Turton was at that time engaged in London, and only went there occasionally for a day: but as soon as she knew the connexion had taken place, Mrs. Turton, through the medium of her eldest sister, contrived an arrangement whereby the object of Mr. Turton's attachment was removed.

Unquestionably at that period there was a condonation of the husband's offence. It is perfectly clear that during the year 1822, and for a subsequent time, Mrs. Turton made up her mind to forgive, and to cohabit with, her husband, as if no such calamitous disgrace had occurred; and if the connexion had not been renewed, however disgusting that connexion was, there would remain no question that, by admitting her husband to her bed, the condonation was complete.(*a*)

[354] In 1822, it would seem, in consequence of this unfortunate intercourse, Mr. Turton determined to quit England and go to India. It would appear that when Mr. Turton and his wife were on their way to the sea-coast, preparatory to embarking for Calcutta, the sister joined them, and, with the acquiescence of Mrs. Turton, sailed with them to India. Now, reviewing this transaction at the present period, it is impossible not to entertain more than a doubt as to the propriety of Mrs. Turton's conduct. I may feel it to be strange that when the insult was thus renewed she did not resent the conduct of her husband, and at once separate herself from him. But I must consider the peculiar situation in which Mrs. Turton was placed. This was no ordinary case; the circumstance is not one of frequent occurrence. If, refusing to accede to the request of her husband, she had determined upon instant separation and public exposure, she knew the consequences—which must have had some influence upon a feeling mind and an affectionate heart—the exposure of her own family, and the degradation of her own sister. Alone, without the benefit of advice and assistance, if not under the control, at least under the superintendence, and within the influence, of her husband, and with every consideration to induce her to wish for concealment and prevent disgrace, I must not judge her conduct, on this occasion, with too much severity; and I am not prepared to conclude that, in allowing her sister to accompany them to India, and there to remain for the purpose **[355]** of concealment, Mrs. Turton has forfeited her claim to the remedy which she now seeks. It must be recollected that Mrs. Turton has expressly averred (see ante, p. 342, in notis) that, at this period, Mr. Turton represented her sister to be pregnant, and strongly urged that circumstance as a ground of her leaving this country, and sailing with them to India, promising that when the child should have been born and the desired secrecy attained she should be sent back to England.

After arriving in India there seems to have been a rather long space of time before Mrs. Turton returned to England; but this delay is chiefly explained by the dangerous illness of Mr. Turton, and by other circumstances.(*b*) At all events, there is nothing to satisfy my mind that she became reconciled in the slightest degree to the continuance of the intercourse between her husband and sister: and I am of opinion, therefore, that she is not guilty of connivance. These facts appear then to me to comprehend the whole of the case.

I have read the letters with care and attention; but I can see no reason to detail

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(*a*) In *Denniss* v. *Denniss* (supra, p. 348) the Court said, that though the wife was entitled to her dismissal on the ground of the husband's connivance at her incest with his brother, it did not necessarily follow that, in a suit for restitution of conjugal rights, the Court would compel the husband to return to an incestuous bed.

(*b*) The cabin on board the "Woodford," which Mrs. Turton had secured for her voyage to this country, and had afterwards relinquished upon the serious illness of her husband, was, at his recovery, engaged to another party; and Mrs. Turton had no subsequent opportunity of sailing that season for England.

their contents at any length, nor to doubt as to the judgment which it is my duty to pronounce. Mrs. Turton was placed in a situation of painful difficulty; and if I am of opinion that throughout the whole of this calamitous case she has not adopted that line of conduct which prudence **[356]** might consider best, yet I am unable to trace it to any disregard of her own honour, or ascribe it to any motive necessarily criminal. I think she is entitled to the remedy she prays; and I feel it the more especially in a case of this peculiar description, where the parties are so nearly connected in blood, and where the offence has been committed against the wife. All reasons unite to convince me that the justice of the case requires that the wife should be removed entirely from the control of a husband who has so repeatedly sinned and offended against her. I pronounce for the separation.

THE OFFICE OF THE JUDGE PROMOTED BY JARMAN *v.* BAGSTER. Consistory Court of London, Easter Term, 4th Session, 1830.—On debating the admissibility of articles in a suit for brawling, the question is whether they contain a substantive charge of brawling and riot in a sacred place: and no occasion nor provocation can exempt from the penalties of the law; nor can the Court listen to a suggestion that the articles do not truly detail the circumstances.—Articles for brawling, at a vestry held in a room within the church, being only proved in part, the Court monished the defendant to abstain from future misconduct, and condemned him in 20*l.* nomine expensarum.

This was a suit promoted by one of the churchwardens of St. Bartholomew the Great, London, against a parishioner for "quarrelling, chiding, and brawling, and for creating a riot and disturbance in the vestry-room."

The first and second articles pleaded, in the ordinary form, the law.

3. After alleging a select vestry, pleaded, in substance, that "on Tuesday, 6th of April, the overseers, churchwardens, and others of the select vestrymen of the parish were duly assembled in the vestry-room, which is within, and forms part of, the parish church, for the purpose of making a poor-rate: that, while there engaged in considering, and receiving for consideration, certain appeals from assess-**[357]**-ments, you, Samuel Bagster—not being a select vestryman of the parish—accompanied by divers other persons, in a tumultuous manner rushed forcibly into the vestry-room, and seated yourself therein; that you and such other persons were thereupon reasoned with on the impropriety of your conduct, and were informed that, upon retiring, you would be individually attended to without delay: that thereupon you, S. B., in a chiding, brawling, and quarrelsome manner, declared you would be present at the making of the rate: that in consequence of such your violent conduct the business was completely impeded and the meeting necessarily adjourned: that you, S. B., in the vestry-room, used other quarrelsome, chiding, and brawling expressions, and otherwise then conducted yourself in an outrageous manner, and created a riot and disturbance in the vestry."

4. "That, immediately after the adjournment of the meeting, you, S. B., were requested by the churchwarden to leave the vestry-room, but refused: that he expressed his surprise at seeing you in the vestry-room after a declaration which you had some time before made, viz.—'that you would be happy to see the church (of St. Bartholomew the Great) burnt to the ground.' That you, S. B., seated yourself upon the table in the vestry-room, abused Jarman, and called out to him in a loud and angry tone of voice, 'You are a liar;' and then used other brawling expressions."

Addams in objection to the articles. The **[358]** parish is one of the smallest in the diocese: it has hitherto been governed by a select vestry—the subject of much dissatisfaction and complaint; and upon the authority of Lord Tenterden's opinion in *The King* v. *Woodman* (4 B. & Ald. 509) the parishioners are about to apply for a mandamus respecting its validity. There is no brawling, by words, charged in the early part of the third article: it only objects to the defendant's manner: and the amount of the whole article is, that he seated himself where perhaps he had no right. In the recent case of *Lee* v. *Mathews* (supra, 169) the Court strongly animadverted upon the office being promoted without laying before it the whole transaction: there are, in this case, many facts of extenuation, if not justification, suppressed.

Dodson contrà. The constitution of the vestry has nothing to do with the question. In *Lee* v. *Mathews* the observations were not made on the admission of the articles, but when the case came on for argument upon the evidence.

Judgment—Dr. Lushington. The citation calls upon the defendant to answer to a charge clearly of ecclesiastical cognizance; and I have only to consider whether the articles contain a substantive charge of brawling and riot in a sacred place. It is much to be lamented that, notwithstanding the notoriety of the proceedings in cases of brawling, parishioners will not be convinced that, what-[359]-ever may be their own private opinions as to the matters under discussion in vestry, they must not press those opinions in an undecorous and irreverent manner. It is not rectitude of intention nor accuracy of judgment that will, if charges of disturbance arising from such conduct are proved, exempt them from the penalties of the law.

In respect to the third article, this Court has not to determine the legality of the select vestry: if the defendant thinks that, as a parishioner, any of his rights are infringed, he can have no difficulty in finding a remedy: but he must not attempt to establish one right by the infringement of another: whatever may be the occasion or whatever the provocation, consecrated ground must be respected. I am of opinion that enough is stated in the third article to render it incumbent upon the Court to admit it.

It is said that there are many circumstances immediately connected with this transaction which, if detailed to the Court, would much alter the complexion of the case; and it is urged, in reliance upon what fell from the Dean of the Arches in *Lee* v. *Mathews*, that the whole history of what occurred at the vestry should be disclosed: but the observations of that learned Judge are not applicable to this stage of the proceedings: because I cannot take, in opposition to the articles themselves, a mere statement by the defendant's counsel: if, however, such circumstances can be proved as will materially vary the case, it may be judicious for the promoter well to consider whe-[360]-ther he will persevere in the suit; but, at present, it is my duty to admit the articles to go to proof.

Articles admitted.

Michaelmas Term, 2nd Session.—Eight witnesses were examined upon these articles; and upon their depositions and the answers to the interrogatories addressed to them the cause was argued by the King's advocate and Dodson for the promoter, and Addams for the defendant: when the Court was of opinion that the articles, except the fourth article, were proved; and said that, considering that only part of the charge was legally proved, it did not therefore think it necessary to decree a suspension ab ingressu ecclesiæ, but should content itself with admonishing the defendant to refrain from any future infringement of the law, and condemning him in the payment of 20l. nomine expensarum.

THE OFFICE OF THE JUDGE PROMOTED BY JARMAN *v.* WISE. Consistory Court of London, Easter Term, 4th Session, 1830.—On proof of violent conduct and great personal abuse, at a vestry held in a room within the church, the Court suspended the defendant ab ingressu ecclesiæ for fourteen days; but, under the circumstances, condemned him only in 35l. nomine expensarum.—In criminal suits the Court will sometimes inquire into the motives of the promoter, but it will presume proper motives unless there be strong proof to the contrary.

This was a suit for brawling and riot: and the third article charged the defendant that, "not being a vestryman, he, accompanied by other persons, in a tumultuous manner, rushed forcibly into the vestry-room," and so forth, as laid in the preceding case, and on the same occasion.

[361] The fourth, in substance, charged "that, immediately after the adjournment, you, Richard Wise, were requested by the churchwardens to leave the vestry-room; that you refused, and expressed your determination to keep the seat you had taken therein, and, in a chiding, brawling, and quarrelsome manner, said 'that you came there expressly to provoke a breach of the peace, and would not leave the vestry-room until turned out:' that you abused Jarman—called him 'a drunken churchwarden,' and declared that 'he and his fellow churchwardens were drunk every day:' and said to Jarman, 'A pretty fellow you are for a churchwarden, only an under-clerk to a woollen draper:' and then and there used other brawling expressions."

Michaelmas Term, 2nd Session.—The articles being admitted without opposition, the cause came on upon the evidence arising from the depositions and cross-examinations of the eight witnesses who were examined in the preceding case.

The King's advocate and Dodson for the promoter.

Addams contrà. The third article is not proved. I cannot deny but that the fourth is proved: it is, however, shewn that, previous to the expressions used by the defendant, there was much of taunt and provocation. The motives of a prosecutor are always inquired into as affecting costs: if **[362]** the proceedings had been for the purpose of example, one suit would have been sufficient.

Judgment—Dr. Lushington. The circumstances of this case are admitted, in some degree, to correspond with the case upon which I have already expressed my opinion. The question for my present consideration is whether any distinction can be established in favor of this defendant: and it is said that, as against him, the third article is not proved: and that, in respect to the fourth, there are many circumstances of extenuation. In criminal suits, it is true, the Ecclesiastical Court will sometimes inquire into the motives of a party bringing a suit (see *Bennett* v. *Bonaker*, supra, 17); but it is always difficult to ascertain accurately the motives with which a person is actuated: frequently, no doubt, they are of a complicated nature. On the present occasion I should have great hesitation in coming to a satisfactory conclusion as to what induced the institution of these proceedings; it is, however, unnecessary: but thus much I may say, that unless I manifestly saw proof of decidedly bad intentions in a promoter, the rules of law, as well as of charity, would oblige me to suppose he was solely influenced by proper feelings, and by a right sense of what the demands of the law peremptorily required.

It appears from the evidence of the beadle, on the third article, that Wise, with several other of the parishioners, was waiting in the church to complain of his assessment: and that he was requested to walk into the vestry-room: there **[363]** was therefore, in his case, no forcible entry: but I am of opinion that, as soon as he had entered the room, his conduct was such as is deserving of severe reprehension, and was calculated not only to insure a breach of the peace, but was so regarded and contemplated by himself. Mr. Clarke—who describes himself as an inhabitant householder of this parish for three or four and twenty years, and who has, it seems, filled the office of both upper and under warden, and is one of the select vestry-men—was present at this meeting; and he deposes "that Wise and two others were the most active in creating the disturbance; and declared that they came there for the purpose of being present at the making of the rate, that they insisted upon being so, and refused to retire unless forcibly turned out: that all persuasion failing, and it being impossible to proceed with business, the meeting was adjourned."

The conduct of the defendant, then, after he was in the vestry-room, so far from being decorous, brings him, in my apprehension, strictly within the charge.

The fourth article is admitted to be proved: it displays conduct of a gross and offensive kind: the words used by the defendant were words of great personal abuse, and applied to the churchwardens themselves, in their individual and private character, and not in regard to any matter arising from the business then before the vestry. It only, then, remains to award a due punishment.

The statute (5 & 6 Edw. 6, c. 4) under which this proceeding has been instituted enables the Court to exercise a discretion as to the period **[364]** of suspension ab ingressu ecclesiæ; which, under all the circumstances, I direct to be for the space of one fortnight. Full costs should, in strict justice, accompany this sentence. The worst language was commenced by the defendant; his behaviour was indecorous and reprehensible; but bearing in mind the commotions and jarring interests in this parish in respect to the select vestry; that the meeting was for secular purposes; and remembering the object and principle upon which all punishments should proceed, and that they should not be more than commensurate with the offence, I shall not, in this instance, go beyond a condemnation in 35l. nomine expensarum. The Court is sensible that if, in the opinion of the public, it should exceed in the punishment it inflicts what is necessary for the due correction of the offender, the salutary effects, which would result from a temperate exercise of this jurisdiction, would be much diminished: upon this consideration also—though I am aware that many of the interrogatories that have been addressed were not at all justified by the answers, nor by the merits of the case—I content myself with the sentence which I have pronounced.

The Court pronounced the articles proved; directed the defendant to be suspended for one fortnight, ab ingressu ecclesiæ, and condemned him in 35l. nomine expensarum.

[365] FLETCHER *v.* LE BRETON. High Court of Delegates, 24th June, 1830.—On an appeal from a definitive sentence, the Court rejected an allegation pleading facts not shewn to be noviter ad notitiam perventa.

This was an appeal from a sentence of the Prerogative Court of Canterbury, by which the will of a married woman, opposed by the husband, had been established. The party died on the 19th of April, 1829, and the sentence was signed on the 21st of July following.

The will had been propounded in a short allegation upon which the two attesting witnesses, in the husband's service, and Sir Thomas Harvie Farquhar, the executor, who renounced, were examined. The attesting witnesses, in opposition to their own act, deposed "that the deceased was unfit to make a will." Sir T. H. F., who was her friend and trustee, deposed to the factum of the will, and that it was drawn up, under his directions, in conformity with a paper, tantamount to instructions, signed by the deceased: he also deposed, in answer to an interrogatory, "that the deceased and her husband did not live upon very affectionate terms together, at least that he frequently occasioned great uneasiness of mind **[366]** and personal inconvenience to the deceased by his extravagance: he, respondent, believes so, because she on many occasions complained that her husband had left her without money, and without even the means of procuring necessaries, and continually lamented that she had married him; that, in other respects, the deceased did admit that the personal behaviour of her husband towards her was kind." The residuary legatees were two sisters, who lived much with the deceased: but it was admitted that they were not related nor connected. Under a former will—drawn up in November, 1826, a month after the marriage, but not executed till the 19th of January, 1829—the husband, in case there were no children, was left the whole property.

In the Court below the husband, the present applicant, had offered no plea: and the present question respected the admissibility of an allegation now brought in on his behalf: it pleaded—

1st and 2nd. A draft marriage settlement varying, in its provisions, from the settlement executed: and that the latter was drawn up without his being consulted.

3rd. That in November, 1826, a will, in favor of her husband, was prepared for the deceased according to her request to Sir T. H. Farquhar; that she expressed herself perfectly satisfied, and stated that she would execute it the first time she had friends visiting her who would attest it.

4th. That in January, 1829, being unwell, she expressed a wish to execute her will; and exe-**[367]**-cuted it in the presence of two witnesses who had called to see her; that, when executed, it was delivered, unsealed, to Sir T. H. F., and remained in his care, and open to inspection, until after the deceased's death.

5th. That Fletcher and wife lived together, until her death, upon the most affectionate terms; that he at all times used his utmost endeavours to promote her happiness and comfort; and that she invariably, when speaking to her acquaintances of him, expressed the greatest regard and affection for him, and that she was perfectly satisfied with his uniform attention and kindness.

6th. That he invested the 2000l. he received upon marriage in the purchase of a coasting vessel, which had nearly been unproductive; that his income was reduced by the payment of his life insurance; and that although the deceased received from her trustees from 250l. to 300l. per annum, yet he continued to supply her with every comfort she required, much beyond what his income would warrant, and to the injury, as she well knew, of his own property.

7th. That her health declined progressively during the last four months of her life; that her mental faculties—from the exhaustion of Nature, induced in part by habits of intemperance contracted previous to the marriage—became very much weakened; that for about a month before her death she scarcely knew her own servants; and was, during the last week of her life, quite incompetent to understand the nature of a will.

8th. That by the will propounded she had bequeathed to one of her trustees a gold repeater which she gave to her husband on the **[368]** day of his marriage, at the same time expressing a wish "that he might live many years to wear it:" that from that day till her death he had kept possession of it.

9th. That the residuary legatees were not related to the deceased either by consanguinity or affinity.

On this day (the 24th of June) an affidavit was sworn by the husband, in which he specified the names of certain witnesses intended to be produced in support of the 5th, 6th, and 7th articles especially: and further stated that, "acting under professional advice, he had declined to plead in an earlier stage, from a perfect conviction that the incapacity of the deceased to make the will propounded would appear from the evidence of the attesting witnesses, who, through ignorance of the nature of the paper, had been induced to attest its execution." (*a*)[1]

Phillimore for the respondent, opened the proceedings. The power of the Court, upon an appeal from a definitive sentence, to receive a fresh plea, cannot be disputed; (*b*)[1] but the present allega-**[369]**-tion, in every point of view, is inadmissible: it manifestly grows out of the evidence already published; the fifth article especially. Besides this, every one of its averments might have been put in plea, and offered in the Court below. No facts are alleged to be noviter ad notitiam perventa; this alone is a complete bar. The allegation must be rejected, and the sentence affirmed with costs.

Haggard contrà. The admission of the appellant's allegation is not barred by any general rule of law: appeals are favored; and one of the objects of appeal is the admission of fresh pleas, and, in this instance, the justice of the case requires it. There may be some difficulty in ascertaining the precise meaning of Oughton's words "modo non obstet publicatio testium:" it is clear, however, that publication is not universally conclusive, because it necessarily precedes a definitive sentence. In the case of *Girdler* v. *Lamb* (Prerogative, Easter Term, 2nd Session), a will—propounded by the executor, and opposed by the next of kin (a cousin-german once removed)—was established on the evidence upon a common condidit: and, on appeal, after Girdler (having asserted an allegation) (*b*)[2] had declared he would no further prosecute his appeal, the Court of Dele-**[370]**-gates (*a*)[2] gave him leave to retract such declaration, rescinded the conclusion of the cause, and allowed him to give in an allegation, pleading derangement, influence, and control.(*b*)[3]

Phillimore. Girdler was in great distress. The case stands upon its own very strong and peculiar circumstances; and can form no precedent for the application, in this instance, which has nothing entitling it to indulgence.

The Court—consisting of Mr. Justice Bayley, Mr. Baron Garrow, Sir Herbert Jenner (King's advocate), Dr. Daubeny, Dr. Gostling, Dr. Dodson, and Dr. Chapman—after hearing counsel upon the contents of the plea, rejected the allegation.

Allegation rejected. Sentence affirmed without costs.

[371] SCALES *v.* HOILE (Office of the Judge promoted). High Court of Delegates, 4th December, 1830.—In a criminal suit for smiting under 5 & 6 Edw. VI. c. 4, the proof must not admit of a doubt. Two concurrent sentences, pronouncing the smiting proved, reversed, and both parties left to pay their own costs.

From the sentence of the Consistory Court in this case (see 2 Hagg. Ecc. 566) an

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(*a*)[1] In the evidence, one of the two witnesses had stated "that she suspected it was a will."

(*b*)[1] Oughton thus states the rule. "In causâ appellationis à sententiâ diffinitivâ licet tam appellanti quam parti appellatæ non allegata allegare, et non probata probare, dummodo non obstet publicatio testium in hâc parte productorum," tit. 308. Consett also says, "So as the publication of the witnesses, produced in the first instance, hinder not." Ecclesiastical Practice, p. 216. See further upon this point. Gail. lib. 1, Observationes, 108, s. 9. Also Obs. 128, n. 1. Maranta, p. 408, s. 159. Gotofred: in Cod. 7, tit. 62, s. 6, p. 1. And see *Price* v. *Clark and Pugh*, supra, 265, in notis.

(*b*)[2] He had also asserted an allegation in the Prerogative Court.

(*a*)[2] The Judges who sat under the commission were: Mr. Justice Lawrence, Mr. Justice Le Blanc, Mr. Baron Wood, Dr. Arnold, Dr. Swabey, Dr. Ogilvie, Dr. Daubeny, Dr. Dodson.

(*b*)[3] The allegation was admitted after being reformed: a responsive allegation was also admitted; and on the 7th of December, 1812, the sentence of the Prerogative Court was affirmed with 100l. nomine expensarum.

Adams for the appellant.

Jenner and Edwards contrà.

appeal to the Court of Arches was interposed, where the sentence was affirmed with costs; but, on an appeal to the Court of Delegates, the Judges reversed the sentences of both Courts, and left each party to pay his own costs, on the ground, it is understood, that the evidence as to the smiting was not conclusive; and that, as it was a criminal matter, the defendant (Scales) was entitled to the benefit of the doubt.(*b*)

[373] STANLEY *v.* BERNES. High Court of Delegates, Hilary Term, 1830.—A natural born British subject may acquire a foreign domicil; nor will the animus revertendi, and claim to be considered, and treatment as a British subject, preserve his original domicil, and, if domiciled abroad, he must conform in his testamentary acts to the formalities required by the lex domicilii.—The will and first two codicils of a British born subject, resident and naturalized in the Portuguese dominions (the will disposing of effects partly in Portugal and partly in England), executed and purporting to be executed according to the laws of Portugal, but inferring that he considered himself an Englishman, admitted to probate; but two later codicils, fully proved as to capacity and intention, disposing solely of money in the British funds, attested by three witnesses, but not executed, nor purporting to be executed, according to the law of Portugal, refused probate by the Delegates, reversing a sentence of the Prerogative.

[Referred to, *Moore* v. *Budd*, 1832, 4 Hagg. Ecc. 352. Applied, *De Bonneval* v. *De Bonneval*, 1838, 1 Curt. 356; *Countess of Zichy Ferraris* v. *Marquis of Hertford*, 1843, 3 Curt. 487: affirmed nomine *Croker* v. *Marquis of Hertford*, 1844, 4 Moore, P. C. 339; *Anderson* v. *Laneuville*, 1854, 9 Moore, P. C. 325; *Bremer* v. *Freeman*, 1857, 10 Moore, P. C. 358; *Whicker* v. *Hume*, 1858, 7 H. L. Cas. 165; *Bloxam* v. *Favre*, 1883, 8 P. D. 104: affirmed 9 P. D. 130.]

On appeal from the Prerogative Court of Canterbury.

The deceased, John Stanley, died at Madeira on the 15th of November, 1826, being upwards of eighty years old; Helena Stanley, his widow, since dead, and John Stanley, the party in this cause, his only child, were the only persons entitled, in distribution, if he had died intestate. The deceased also left a natural son, Joze Maria Bernes (the other party in the cause), who was married and had five children, and was with his children largely benefited under the testamentary papers propounded.

The material parts of the testamentary papers were as follows:—

"In the name of God, Amen. I, John Stanley, born in Ireland, &c. do determine, as my last will and testament, as follows:—Having been brought up in the religion of the Established Church of England, I intend to die in that religion, and request that my burial may be in the English burying ground. Having a natural son named Joze Maria Bernes, now one of my family, he living in the same house with me, whose mother, of Pernes in Portugal, died when he was but two years old, and was reared by Roza Maria Joaquina, **[374]** also now of my family, who, having a niece, I caused her, being reared and educated from a tender age, and that my said natural son should marry her, she having a deal of merit, which in fact he did, and they have now five children. I hereby do acknowledge the said Bernes to be my son, and that his said children are my grand-children, and that they shall be always considered as such, as also any farther children they the aforesaid may have, for inheriting the property of mine, I bequeath them, or may hereafter bequeath them, or as my grand-children they may come entitled to. That in this consequence I bequeath to my eldest grandson, Joze Joaquim Bernes, 1000l. sterling money of Great Britain for himself and his heirs, and to the other four my grand-children 2400l. sterling money of Great Britain, being 600l. for each, for themselves and their heirs, with condition, that should they or any of them die minors or unmarried, such part or parts to devolve to the succeeding, my grand-children of said Joze Maria Bernes, and in failure to them living; should the eldest son, Joze Joaquim Bernes, die a minor, and unmarried, the legacy for him is to devolve to the other children aforesaid, and in failure of all the children, then these legacies are to devolve to the father and his heirs. That being under immense obligations to the aunt of said children, say, their mother, Joaquina, for rearing and promoting the education of my said natural son, she also aiding the rearing of my son John Stanley, junior, and being also indebted

(*b*) The Judges who sat upon this commission were: Mr. Justice Gaselee, Mr. Justice Littledale, Mr. Baron Vaughan, Dr. Phillimore, Dr. Gostling.

for her very great care of my health, to which end she left her country, and came hither with me to take care of me in my old age, serving also as company, these are services deserving the most grateful returns: and considering that the [375] house I gave her in Lisbon for her services there does not produce sufficient for her support, I bequeath her 1000l. sterling money of Great Britain, understood, the interest arising only during her life-time, and that she continues unmarried, for in such case of marriage, or she dying, this capital and interest is to devolve to the children of said J. M. Bernes, divided between them, and in failure to him and his heirs. Some transactions with my said natural son, I hereby declare are settled, and that he owes me nothing, and do hereby prohibit and forbid my son Stanley, jun., from investigating any thing relative to said transactions, nor what may concern Joaquina, neither to inquire for any money of any description there may be in the house, which cannot be much, having disposed and invested the same already in bills I sent to England. That know my son J. Stanley, jun., the only child I have surviving of my children in matrimony, I say that know he has very good principles, and will not oppose anything determined by me in my present last will and testament, so as to affect his own character and my memory; moreover, he must have a handsome property of his own, as is learned from existing circumstances regarding him, which have become acquainted with, so as the legacies I bequeath, or may bequeath hereafter, he can well afford. However, as I wish to provide and protect my poor family here from ties of blood and gratitude, should it unfortunately happen from being led astray, and instigated by connexions inimical to my family, he has formed, or may form, in such case, as a fine, I bequeath to my said natural son, for use and benefit of his children, and to be considered their property, and this to be considered an additional legacy for them. The legacy afore-[376]-said, as a fine, is 3000l. sterling money. That from the veracity my son J. Stanley, jun., possesses, he will not deny that a writing I signed in his favour in Lisbon many years ago, making over to him a large part of my property, was purely, and only fictitious, as a kind of a temporary provisional measure, by reason of the French at the time menacing to invade Portugal, conceiving, as being born in Portugal, that it may be more respected under his my said son's name; moreover, I acquired after a great deal more property now under my name, and solely mine, and this, independant of the large share of even more than half my property, I gave him, by putting it under his name when I intended retiring from Lisbon, which part or half of my property put into his hands is to be understood and considered, and also was his mother's share of the same, according to the laws of Portugal, though no writing was made between she and me to that effect. She laboured for many years, and does yet, under a disorder of mental derangement, causing her going to Ireland, where she still remains, and a yearly income established for her support, which my said son was to provide, by my retiring out of a part I gave of my property. I had a partnership with my said son several years ago, wherein, for the advantage or profits arising to him, he has been fully and amply compensated. The income for his said mother little exceeded the interest, say, a tenth part of the interest of the property belonging to me, which I gave him as aforesaid, as the state she was and is in rendered more useless, wherefore all that property becomes his. I repeat again, that am not afraid of the want of candour, veracity, and honour of my [377] said son J. Stanley, jun., as he possesses a great deal; it is only his connexions I fear, that he may be instigated by such, so as to forget the duty and respect due to my memory, and offend his own character, in which case only the aforesaid fine is established, of 3000l. sterling money of Great Britain, and to be applied for a legacy of that sum, I hereby bequeath to my natural son, for use and benefit of his children, as an indemnification for the great vexation such an unjustifiable proceeding may occasion." [He then gives certain powers to his executors as to 2056l. 11s. 1d. Navy 5 per cents., bought for him, and in his name, by Messrs. Campbell, of London: and also 1200l. sterling, invested for him, and in his name, by Messrs. Whitmore, of London.] "I hereby provide and determine, that should I outlive my son J. Stanley, jun., I give to Joaquina, 1000l. sterling, independant, and so much more than the legacy I have already bequeathed her, and to be for herself and her heirs. To my natural son, for use and benefit of his children, three-fourths of my said property, and to devolve, in failure of them, to himself and his heirs. To my brother, William, for himself during his life only, and to devolve to the legitimate children he may have in matrimony, the remaining one-fourth part of my said property; but in case of failure, or by his

death, to devolve to my natural son, for use and benefit of his children, and in case of failure of them to himself and his heirs. The residue of my property, which was acquired by my industry, and therefore solely mine at my disposal, and after payment of the legacies by this my last will and testament given, as also any farther and future ones I may give, I hereby give and bequeath to my son J. Stanley, jun., whom I name as my heir for such residue, or heir to the residue **[378]** of my said property, under condition for his attending to the dispositions on my part made in my present will, and that they are complied with on his part; said residue consists in money I have in the English funds, the Three per cent. Consols, Five per cent. Navy Annuities, and Four per cent. Annuities, also different sums of money in hands of correspondents abroad; also some here, in hands of Messrs. Gould and Co.; money I have under my said son's name, in the funds of the United States, and houses in Lisbon in my own name. All my furniture of my house, linen, and plate, I hereby give and bequeath to my natural son J. and R. M. Joaquina, a half for each, and to devolve to their heirs for their use and benefit. I farther give to my natural son, and R. M. Joaquina, for themselves and my family, the use of the house I reside in, up to the end of the leases to July, 1824, as also for any farther time I may rent the house for, I hereby declaring that they the aforesaid and my family are my true and only representatives. That considering the sum of 2400l. sterling I have bequeathed for use and benefit of four of the children, my grand-children, of J. M. Bernes, is not sufficient, I hereby bequeath them 600l. more, sterling money of Great Britain, thereby making the sum of 3000l. sterling money, to devolve, in case of failure of any of them, to the other children, my grand-children, of him, J. M. Bernes, as already determined and established in my present will. I hereby name my successor, my son J. Stanley, jun., for the second life, for having and receiving the yearly pension or pencao of two hundred milreis per ann. in the Royal Erazio in Lisbon, which his Majesty was so gracious to grant me; and I hereby name and empower my said son to have the arrears that may be due to me; in failure of **[379]** my said son before my decease, I nominate my natural son, J. M. or his eldest son, as my successor for said second life, to have said pension and the arrears." [Executors, W. N. Roope, Webster Gordon (W. Cossart, J. Anglin, substituted). Funchal, 21st of June, 1820.]

(Signed) "JOHN STANLEY."

"Codicil to my last will, dated 21st of June, 1820. I hereby confirm my last will in every particular, and add, that considering I have not left a sufficiency to the children of my natural son J. M. Bernes, I, by this my last will and testament, bequeath to them 2000l. sterling money of G. B. more, making, in the whole, the sum of 5000l. sterling money aforesaid, for their use and benefit, to devolve, by decease of any of them, to the others living, and in case of their failure, to devolve to the father, my natural son, for himself and his heirs. My executors will be so good as to place this sum at interest in England, or invest it in the public funds there, as they shall think it most expedient, and to go on accumulating until the children come of age, and then to be at their disposal. Should my executors judge it a-propos to make the investment in a part of the funds I have in my name in said public funds in England, I hereby empower them, in the most legal manner, so to do, and in same manner to cause transfers from my name in the Bank of England, to the name of the father Joze Maria Bernes, should he be living, and in failure, to the trustee, a safe one, that he may nominate, or be named, if necessary, by my said executors, as it is to them I look for protecting the children: the trustee appointed, to sign a deed of trust, even the father, that said **[380]** investment in his name is solely for use and belonging to the said children, and the dividends arising to go on accumulating as aforesaid, for benefit of them the children." [James Gordon to be an additional executor.] Funchal, 4th July, 1820.

(Signed) "JOHN STANLEY."

"Second Codicil to my last will and testament. Reflecting I have not made a separate consideration for my natural son, as a token of my regard, as also that he is unhealthy, so as to require an aid for himself and his family ere many years passes over, I hereby, by my last will and testament, give and bequeath to him the sum of 2000l. sterling money of G. B. for himself and his heirs. As half the revenue of the house in Lisbon I give to R. M. Joaquina during her lifetime, devolves to my son J. Stanley, jun., by her decease, and but the other half devolving to J. M. Bernes, and only during his life, when wish the whole should be for himself and his heirs, whereas it returns and becomes the property of my heirs; I therefore, as an indemni-

fication, bequeath to him, my natural son, 800l. sterling money, for himself and his heirs. Should it unhappily happen that my son J. Stanley, jun., from instigation (otherwise he will not) wish or attempt to cause my last will and testament to become subject to the laws of Portugal, so as for not being able to dispose of more than a third part of my property, I therefore hereby declare, that the different legacies I have bequeathed by my said last will, and codicils thereto, are all of them from said third part of my property, a minha terça, in the Portuguese language; as a penalty for my said son so attempting, I give the surplus arising of my third part of **[381]** my property, a minha terça, to him my said natural son J. M. Bernes, and R. M. Joaquina, a half for each; but this is not to take place if my son J. causes no such measure either from himself, or indirectly by means of any other person. Under the like penalty my son becomes liable for any investigations he may be instigated to make, from suppositions that I gave sums in bills of exchange or monies for purposes, to J. M. Bernes and R. M. Joaquina, as I deny such being given, on the contrary, that they were loans, and such sums only lent, the payments of which I hereby forgive them the parties, and such payments are legacies I by this my last will and testament bequeath to them, for themselves and their heirs, out of third part of my property aforesaid. As the property I gave to my son John Stanley, jun., and the part by me under his name was only verbally given, and not by any irrevocable agreement in writing, and as it is but formally and legally given by my will, it consequently becomes a part for adding to the other part of my property for forming a total, and thereof a third part at my disposal, according to the laws of Portugal.(*a*) As my son is in affluence, according to certain informations I have received, he by no means wants my aid, as does my natural son, and Joaquina, independent of the immense obligations I am under to her, therefore I beseech and beg leave recommending them most particularly to the protection of my executors, as **[382]** such may be very necessary, from the motives already alleged. Funchal, 11th July, 1820.

(Signed) "JOHN STANLEY."

The third codicil, dated Funchal, 24th, and the addition to it, dated 31st October, 1822, were only to alter the executors.

"A Fourth Codicil, made this day, to my last will and testament. Finding I have not made sufficient provisions for my grandchildren, now increased in number, I hereby confirm the provisions I already made, which are to be considered as making a part of my said last will and testament, which provisions by donations on my part from me, are in trust with James Campbell, Esq., of London, namely, one for a limited sum, a considerable time back, to two of the children as per trust-deed he passed, and two other donations, given by me in July last, say, one of 1000l. sterling to Joseph J. B. and John M. B., a half for each; the other donation I hereby bequeath to Joseph J. B., of 1200l. stock (twelve hundred pounds sterling) I have in the 4 per cents. Annuities, latterly reduced to 3½ per cent. Dividends receiving by Messrs. James Campbell and Co. to whom have advised, for being transferred to and under the name of James Campbell, Esq., in trust for him Joseph J. B. until he comes of age, for being transferred to and under his name, mean time the dividends arising and receiving are for his use and benefit; and in case of his decease, to devolve and pass to the other children, as determined in my letter of advice to that effect, and the respective trust-deed preparing by the aforenamed esteemed friend, which **[383]** is to be considered valid and had, as if declared herein in this my last will and testament. Finding I have not made such provision as intended and promised to my said grandson Joseph J. B., my favorite, the eldest son, I hereby bequeath to him 2159l. 7s. 7d. stock, part of 4259l. 7s. 7d. stock I have in the New 4 per cents., hereby revoking any power my son J. Stanley, jun., may claim from my will, for having and transferring that part of the said stock to and for himself, and said power is exclusively vested in them, as also for entire of that sum of 4259l. 7s. 7d. stock I have in the New 4 per cents.; it is to be understood, that the aforementioned power of transfer is exclusively vested in my executors, should I not in my lifetime make the transfer or sale. In case

(*a*) The Portuguese lawyers stated that if a testator in his lifetime make advances to any of his children, such advances must be brought into a calculation of his effects after his death, so as to increase the proportion of which he has a right to dispose. One or two limited the application of this rule to questions arising between children having a right to the inheritance.

Joseph J. B. should die, one-half of the sum of the 2159l. 7s. 7d. stock I now bequeath him, is to pass to John M. B., and the other half to Joaquim M. B., Antonio J. B., Vicente F. B., and Maria J. B., divided in equal parts between them; and should any of them die, his part is to pass to the surviving ones, divided between them, and should they die, then to devolve and pass to the children born after. Considering that to the three last-mentioned children no certain provision is made by me, being but casual, to John M. B. being but small, and to Joseph J. B. not so much as I wished, I hereby, by my last will and testament, bequeath to them of the 2100l. stock aforesaid in the New 4 per cents., in manner following; 525l. to Joseph J. B.: 700l. to John M. B., and in case of death of his brother Joseph, his part to pass to him John M. B.; the remaining 875l. I bequeath to Antonio, Vicente, and Maria, divided in equal parts between them; and in case of one **[384]** dying to pass to the other two, and should two of them die, one part to the survivor, and the other part to the next born, and in case of death to the other or others following; and should John die, his part or parts to devolve and pass to the three latter children mentioned, and in default, to the next born, divided in equal parts between them. In case I did not mention in my general will, the sum bequeathed to and for the children to be invested in the funds in England, and continue until they come of age, I hereby beg the favour of my executors to cause such to be done, and their respective parts to be only delivered to them when they come of age. Funchal, 29th October, 1825.

(Signed) "JOHN STANLEY.

"This codicil is in my hand-writing, being wrote by me.

(Signed) "J. STANLEY.

"Witnesses—(Signed) William Bellringer, merchant; Jno. Blandy, Do.; A. H. Renton, M.D.(*a*)

"I hereby revoke the words "donations" I made use of in my present codicil, as meant them advances or loans, which hereby I forgive and are forgiven by me, they the said advances or loans being constituted by this codicil legacies, and are to be had as such. Date as before. (Signed) "JOHN STANLEY.

"Done on recollection, after signing the witnesses."

[385] The allegation in support of the papers pleaded generally that the whole of these papers were in the deceased's hand-writing, and signed by him. The will and first two codicils the deceased declared, in the presence of a notary and five witnesses, to be his solemn will and testament, and desired they might be considered as good, firm, and valid; and requested the notary to draw up an act thereon, which, being done, the deceased approved and signed such act; the notary attested it, and the five witnesses subscribed their names thereto. That the third codicil, the addition thereto, and the fourth codicil, were each published and declared as codicils in the presence of three witnesses, who attested them. The addition to the fourth codicil was not attested. That deceased was at all times of sound mind. That he died at Madeira, and being a British subject his will and codicils were soon after his death deposited at the British Consul's office, wherein the testamentary dispositions of British subjects, resident at Madeira, are usually deposited. That the will, &c. remained there: and that paper A was a true and authentic copy of such papers.

On this allegation fourteen witnesses were examined: two at Lisbon, eleven at Madeira, and one in London.

The opposing allegation pleaded that the deceased was a native of Ireland, which he left prior to 1770 and settled at Lisbon, where, and at Madeira—an island within the dominions and subject to the laws of Portugal—he resided uninterruptedly till death. That in January, 1770, the deceased, then at Lisbon, abjured by a public act of renunciation the Protestant religion, and professed that of the Roman Catholic Church, and af-**[386]**-terwards, in the same month, married Helena Doran, of Irish extraction, a natural born Portuguese subject, his widow, without any marriage articles, and had by her Stanley, the party in the cause, his only surviving child, born at Lisbon in December, 1777. In 1798 the deceased, desirous of perpetuating his residence in the kingdom as a Portuguese subject, obtained an act of naturalization; and on the 6th of March, 1801, in virtue of permission duly granted on the 26th of February, 1801, signed a bond of allegiance whereby the act of naturalization came

(*a*) The third codicil, and also the addition to it, were attested in the same manner by three witnesses.

into operation, so that, from such signature, he became ipso facto naturalized in Portugal, entitled to all the privileges and liable to all the obligations of natural born subjects of Portugal. That during the occupation of Portugal by the French in 1808, on production of such act of naturalization, he was treated as a native Portuguese subject, and his property as that of a natural born subject of Portugal. That in 1823 the deceased, then at Madeira, authorized his son to take, and he accordingly took, on his father's behalf, an oath of observance of the constitution under the Portuguese monarchy; that the deceased having so renounced his own country and become permanently resident and naturalized in the kingdom of Portugal, thereby became and thenceforward was in all respects subject to the laws, &c. of Portugal. That in the absence of a will valid by the laws, &c. of Portugal, his effects, wheresoever situated, should be disposed of as if he had died intestate. That by the laws, &c. of Portugal any Portuguese subject leaving a widow not endowed by her marriage articles, and issue, cannot dispose by will of more than one sixth of his whole property, **[387]** the widow necessarily taking a moiety (of two thirds of which moiety the issue is necessary heir at her decease), and the issue two thirds of the other moiety, or the whole of the moiety if the father does not dispose by will of his third thereof: that any will of a Portuguese subject (leaving a widow and issue) contrary to such laws, &c. is null, and such subject is deemed to have died intestate. That the will and first two codicils in this case, though apparently made with all the legal formalities and executed according to the laws of Portugal, are in their whole substance repugnant to such laws, &c., inasmuch as he gives considerable legacies to a natural son (a spurious and adulterine offspring not legitimated by royal authority), and to others without taking account of the widow's moiety, or constituting his son heir of two thirds of the other moiety, and confining himself to legacies not exceeding one-sixth of his whole estate, as he was bound to do by the laws, &c. of Portugal. That the latter two codicils are in the same manner repugnant to the Portuguese laws, &c., and are not executed according to the forms prescribed by that law.

In supply of proof were annexed No. 1, a copy of the act of abjuration of the Protestant religion by the deceased at Lisbon in 1770; No. 2, a copy of the act of naturalization in 1798; (*a*)[1] No. 3, a certificate **[388]** of the record of the execution of the act or bond of allegiance; (*a*)[2] No. 4, a copy of the recognition of the deceased, by the commander of the French forces at Lisbon in 1808, as a native Portuguese subject, releasing his property from the sequestration made by the French of English property in Portugal at that time; No. 5, a copy of the power granted by the deceased to his son, John Stanley, to appear for him, and take and subscribe the oath of observance to the constitution of the Portuguese monarchy in the year 1823; (*b*) and

(*a*)[1] The material part of this act was, in substance, as follows:—"Doña Maria, &c. We make known that John Stanley, a native of Ireland, having put himself under our immediate protection, and given satisfactory proof of his being established in this kingdom, with an intention of residing therein for life, as our subject, we naturalize him in these kingdoms, so that he may be entitled to all franchises, dignities, and privileges enjoyed by the natives of these realms, it being understood that, before he can have the benefit of this mandate, he shall first subscribe a bond, in virtue of which he shall be inscribed amongst, and as one of, our subjects, so that he may enjoy the said rights and privileges to which, in that quality, he shall become entitled." Lisbon, 2d of July, 1798.

(*a*)[2] The certificate was to this effect: "On the 6th of March, 1801, upon a dispatch of the 26th of February, 1801, an act and bond of allegiance was subscribed by John Stanley, a native of Ireland, upon the conditions of renouncing all the rights and privileges of his nation, subjecting himself to the laws, &c., of these kingdoms, and to the observance and payment of the several obligations, duties, and imposts to which native subjects are liable, as if he were a native, not to absent himself from this kingdom without licence from her majesty, the whole, upon the pains established by the laws of Portugal, he hereby binding himself voluntarily to the above conditions, and promising to conduct himself as a true subject of this kingdom, otherwise to incur the penalties attached to delinquents in such cases, and particularly to the forfeiture of his property, in case he should at any time claim or avail himself of the rights and privileges of the nation which he doth renounce."

(*b*) "I give full authority to my son, for me and in my name, to declare upon oath, that I promise to uphold and observe the political constitutions of the Portuguese

of a certificate that John Stanley did, in 1823, in virtue of the said power, and as the representative of [389] his father, take such oath. Thirteen witnesses were examined at Lisbon on this allegation.

The allegation in reply pleaded that the testator was a native-born subject of the King, and from his birth resided in Ireland, until he went to Portugal to transact certain commercial affairs. That on signing the bond the deceased did not become naturalized in the kingdom of Portugal; for that by the laws of Portugal all grants or privileges granted by letters patent, or otherwise, are obliged to pass through the Chancery Court within four months from the time of the granting, and that otherwise the letters patent or decrees are absolutely null and void; that the act of naturalization was never passed through the Court of Chancery, and therefore was altogether invalid. That the French did not treat the deceased as a Portuguese subject, but as a British subject, and caused him to be imprisoned, and his property sequestered on that ground alone, until by the payment of a considerable sum of money he obtained the liberation of his person and the release of his property; and thereupon, and for no other reason, procured the recognition of his naturalization. That John Stanley (party in this cause) did not, in 1823, in the name of the deceased, take the oath to the Portuguese constitution, in consequence of the deceased being a Portuguese subject, for that no oath was at such time required from a Portuguese subject as such; that in 1823 the deceased received a pension from the Portuguese Government as a reward for having, as an English merchant, obtained a loan for the Portuguese Government, and that by the [390] then law of Portugal all persons who received pensions were obliged to take an oath to the constitution. That the deceased being a British-born subject, any will made by him in conformity to the laws of England is good and valid as to the disposition of the whole of his property wherever situated; that a will made by a Portuguese subject, leaving a widow not endowed, and child, and being contrary to the laws, customs, and usages of Portugal, is not null and void, but is, by the law of Portugal, void only as to the disposition exceeding one-sixth of the whole property. That the deceased professed the Protestant religion until his death, but that being desirous of marrying a Portuguese Roman Catholic subject, and it being contrary to the laws of Portugal for a Portuguese Roman Catholic subject to marry a Protestant, he, to enable him to marry, and for no other purpose, submitted to a form of renunciation of Protestantism, and made an open profession of the Roman Catholic religion, but did not comply with the orders, or attend to the religious services of that Church, but always conformed to the Protestant worship. That the deceased as well previously as subsequently to his will declared he was a Protestant, and that he wished to die in the Protestant faith, and, at Madeira, he frequently, and until within a short period of death, declared that, if prevented from returning to England, he wished to be buried in the English burial ground in Madeira. That whilst at Lisbon, and in Madeira, he always intended to return, and permanently reside in his native country, and frequently declared his intention so to do; that on several occasions he [391] actually took steps for, but by unforeseen occurrences was prevented from executing, such intention, though he never abandoned it.

On this allegation twenty-seven witnesses were examined; nine at Lisbon, seventeen at Madeira, and one in London.

It was proved that the deceased was a native of Ireland, that he went to Lisbon prior to 1770: that in 1809 he went to Madeira, and from the time he first left Ireland he was resident in the Portuguese dominions: that his wife, though of Irish extraction, was a native Portuguese subject and a Catholic: that the deceased in 1770 abjured the Protestant religion. That his legitimate and illegitimate children and grand-children were all brought up as Catholics, and that all the inmates of his house were Catholics; that he did once at Lisbon receive the sacrament as a Catholic. That in 1801 the deceased signed the bond of allegiance: in 1823 made a declaration of adherence to the Portuguese constitution, which was required to be taken by all Portuguese subjects who held office or received pensions.(*a*) That he had houses at Lisbon and money invested in the American and other funds, as well as in the English.

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monarchy, as decreed by the extraordinary general Cortes of that nation, my said son having my authority to subscribe the act witnessing my said promise, upon oath. Madeira, 3d of January, 1823. (Signed) "JOHN STANLEY."

(*a*) The deceased did receive a pension.

That though the deceased, on account of his name, was at first, in 1808, thrown into prison and his property sequestered by the French, yet both he and his property were afterwards released; but, except exhibit No. 4, there was no direct evidence on what ground he was released.

On the other hand, that the deceased abjured his religion only in order to marry, since a Portuguese Roman Catholic subject and a Pro-**[392]**-testant could not intermarry (some of the lawyers said not even with a dispensation). That he did not at Madeira conform to the worship and ceremonies of the Church of England; that he was not treated by the Catholic curate of his parish as a Catholic; that though not of strong religious feelings he did occasionally, though rarely, attend service at the English Church; and in his last illness sent for the English Protestant clergyman. That he frequently declared himself a Protestant, and expressed abhorrence of Catholicism. It was further proved that he described himself as a British subject, that he often expressed his earnest wish and intention to return "to end his days in Ireland," or "to lay his bones in his native country." That once, about 1822, being requested to wait a little for his rent he said "he could not, because he was preparing to leave the island and go to his native country:" he would say, "God forbid I should die or be buried here." Latterly he used to say "he feared from his infirmities he should not be able to accomplish his return;" and about a year before his death, on passing the English Protestant chapel and burying-ground at Funchal, he said "he feared, notwithstanding all his hopes and intentions of returning home, that place would receive his bones." That on his death he was there buried, and his will taken possession of by the British Consul, as was usual with the wills of the subjects of England. That he invested his money principally in the British funds, and when his wife became deranged he sent her over to Ireland and made her an allowance there. That in expectation of the French invasion he had, as a precautionary measure, transferred his property **[393]** into the name of his son, who was born in Portugal.(*a*)

(*a*) The prominent points of evidence as to the deceased's religion and national character on both sides are set forth in the following parts of the depositions.

Henry Veitch, Esq. (examined in London), deposed: "That the deceased was a British subject was never doubted or disputed by the Portuguese authorities; deceased resided in that island as a British subject, claimed to be so considered, and was so considered, from first to last; upon his death deponent, as British Consul, attended at deceased's house, and having found the will and codicils, carried them to the British Judge Conservator, in whose presence they were opened, and the usual act thereof was recorded; the will and codicils were by their joint act deposited with deponent, and remained in his official custody in the office of the British Consul, where they were left by deponent when he quitted the island in the autumn of the last year (1828); if any of the executors had acted, the testamentary papers of deceased would have been duly registered in the office of the Consul, and then delivered back to be acted upon; but as all the executors declined to act, the papers were deposited as before deposed.

"Deceased informed deponent that he was a Protestant, but had married a Roman Catholic; deponent never understood from him that he had conformed in any degree, or at any time, to the Roman Catholic religion; he did not do so in Madeira; he paid very little or no attention to religious services, but deponent does not doubt he was a Protestant; he was buried in the Protestant ground at Madeira, which certainly would not have been allowed by the Portuguese clergy had deceased at any time, to their knowledge, conformed to the Roman Catholic Church."

Edward Porter, Esq., Acting Consul at Madeira: "He knew deceased. In the registers of the deaths of British subjects kept in the office of the British Consul in Funchal the death of deceased is entered. On the death of a British subject dying testate in the Island of Madeira, their wills are registered at the British Consulate; the will and codicils in question were registered as usual."

Andrew Forrest of Lisbon, exchange broker: "Deponent knew deceased from 1785 until he (deceased) went to Madeira in 1809; deceased was continually resident in Portugal during deponent's acquaintance with him; he was the principal of a mercantile house of eminence in Lisbon; deponent was accustomed to see him at least once every week; during the period of deponent's acquaintance with him deceased professed the Roman Catholic religion; he was married when deponent first knew

The Portuguese lawyers deposed that the carta, [394] or act of naturalization, unless passed within four months through the Chancery, would be null; but [395] that the time might be extended by the favour of the Crown. One indeed, Matta, said, that as it [396] was for a naturalized permanent residence, it would take effect without passing through Chancery. There was no proof that it had so passed; but the lawyers said it could not have been recorded unless all the necessary formalities had been observed. That on signing the bond of allegiance the carta of naturalization

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him; deponent knew his wife Helena, formerly Doran, and her parents, she was born in Portugal of Irish parents; deceased had, by his said wife, three children; John, party in this cause, is the only one that survived deceased; they were all educated in the Roman Catholic religion; the mother was a Roman Catholic. Deponent was in Lisbon during the occupation of Portugal by the French, and he believes that the naturalization of deceased was a protection to him, and saved his property. Of his having abjured the Protestant religion, deponent often heard his parents speak as that to which deceased had recourse for the purpose of marrying. Deponent went through the ceremony of being naturalized at the time of the French invasion: that was only an expedient on the part of deponent."

Dennis Connell, merchant, aged 64, a native of Lisbon, and always resided there: "Knew deceased from 1780 till 1809, when deceased left Lisbon. He never knew deceased when a Protestant; he professed the Roman Catholic religion during all the time deponent knew him, and once (in 1794) deponent was present when deceased received the blessed sacrament; all deceased's children were educated as Catholics."

The Rev. W. W. Deacon, chaplain to the British residents at Madeira: "Deponent since October, 1821, knew deceased till deceased's death; deponent had very little communication with deceased, but during his illness he sent for deponent, about three months before his death; deponent apologized for apparent inattention, saying that he had supposed him to be a Catholic; deceased replied, he held the Catholic religion in abhorrence; he had lived too long in a Catholic country to be ignorant that it was a system of delusion; he spoke of the ceremonies of that Church as mummeries, and reprobated the whole in very strong terms; he appeared a man who had been long indifferent to all religion, though awakened to an anxiety respecting it when illness and infirmity pressed; deceased wished, as he said, to put himself into deponent's hands, adding that he must make up his accounts, as he was not long for this world; deponent continued his visits to deceased to the last, and deceased received and welcomed them; deponent lent him books, of which deceased afterwards expressed his high approbation, and unless deceased were a most practised hypocrite, he died a Protestant; deponent did not communicate or pray with him, for deceased did not express any wish that he should do either, though deponent gave him the opportunity of so doing. That deceased ever conformed publicly, with the religious services of either Church, Protestant or Catholic, deponent does not know; he said, as an excuse for never attending the English chapel, that he was afraid of sitting in a draught of air, and must have something on his head, which would have excited ridicule among the younger parts of the congregation; deponent considered that but an excuse; during his illness, however, and as long as deponent visited him, which was as long as deceased was in a state to receive him, when he could speak but little, and was gradually sinking under the influence of stupor, deceased appeared to be, and was, as he believes, sincere in his declarations of adherence to the Protestant faith."

Januario da Costa of Madeira, notary public, aged 59: "Deponent (after the execution of the will) inquired of deceased, as it was his duty to do, of what Crown or kingdom he was a subject; and deceased having declared himself to be a British subject, it was so expressed in the approval."

The Rev. Joze da Costa: "He has been curate of the parish of St. Peter, Funchal, during the last ten years: deceased never during that period attended or conformed to any part of the worship service, orders, or acts of the Roman Catholic Church, public or private, to the best of deponent's knowledge or belief; deponent believes him to have been a Protestant.

"On interrogatory, respondent never saw deceased at the English Protestant chapel; all the inmates and servants of the house in which deceased resided in Funchal were Portuguese and Catholics; J. Bernes is a Roman Catholic, and his children have been baptized and educated in that faith; Joaquina was a Catholic."

comes into operation, and thenceforth is of full effect: the party becomes entitled to all the privileges, and is liable to all the obligations of natural born subjects of that kingdom; and some of the lawyers expressed an opinion that, in the absence of a will, valid by the law of Portugal, the effects of a person so naturalized must be disposed of as if he died intestate.(*a*)[1]

It was admitted on one side and the other that the execution of the will and first two codicils was in accordance with the formalities required by the Portuguese law for a sealed will (Ordenaçoens, **[397]** b. 4, t. 80 and 86).(*a*)[2] That to render testa-

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The Rev. F. da Silva: "He knew deceased; he resided in the parish of St. Peter, of which deponent is vicar, from 1811 till his death; deponent has been vicar since 1815; deponent has examined the register of the parishioners, which contains the names of all persons residing in the parish, in whatever capacity, who are Catholics, and are therefore required to attend confession; that register has been regularly kept, and the name of the deceased does not appear from 1811, when he became a resident, till his death; deceased was never known by deponent to attend confession, or the public service of the church, or to conform in any way to the religious services or acts thereof at any time, in public or in private; deponent does not know that deceased conformed to the worship or service of the Protestant Church, but on two or three occasions deceased told deponent he was a Protestant and not a Catholic, because it would interfere with his commercial concerns; deponent believed deceased to be a Protestant, and therefore allowed him to be buried in the ground belonging to the English Protestants at Funchal, which deponent could not otherwise have suffered to be done."

The Rev. C. Salgado, head vicar of the parish of the Sé, in the Cathedral of Funchal, aged 63: "Deponent knew deceased from the time of his arrival at Funchal, in 1809; the first parish in which he resided was that of the Sé. In the parish registers of the Sé for 1810-11 the house of deceased is registered, and the names of the persons being Catholics therein are registered, but in that list the name of deceased does not occur, he is mentioned only as the occupier of the house; hence deponent saith it clearly appears that deceased did not at that time profess the Catholic faith, or conform to the discipline, service, or orders of that Church."

(*a*)[1] The lawyers were all of Lisbon, LL.DD., advocates in the Casa da Supplicaçao, the first tribunal of justice; and to which causes concerning wills are brought by ultimate appeal. Four were examined on each side; viz.

FOR STANLEY.		FOR BERNES.	
Felipe de Medeiro .	Aged 62	Adriano Barreto .	Aged 27
Joaquim Simas . .	„ 24	Antonio da Silva .	„ 40
Inacio de Matta . .	„ 81	Manoel Verdades .	„ 45
Joao Ferreira . .	„ 78	Joze da Veiga . .	„ 34

(*a*)[2] Extracts (translated at Lisbon) from the Ordenaçõens, b. 4 (t. 36, s. 3). "If the leaseholder, making his will, institutes his descendants or ascendants, it will be acted as when he dies abintestated, although in the will he may bequeath his third part to any person that is not his descendant or ascendant. Sec. 4, what we say about sons and grandsons by line of descent will be observed with those of the line ascent, viz.: Father, mother, and grandfathers and mothers, when there are none in the line of descent, because, while there are descendants, the lease will not come to the ascendants; and if there is no legal descendant, although there may be a legal ascendant, his natural son, though his father was a nobleman, shall come to it, and the spurious son shall not be entitled to the lease, unless he is legitimated by us in such a manner that he may succeed abintestated, and not in any other way" (tit. 46). "All marriages in our kingdoms are understood to be done by contract of halves, except when another thing shall be agreed, what was agreed shall be fulfilled" (tit. 80). "When any person wishes to have his open will made by a notary, he must have five witnesses, free men, or reputed such, of more than fourteen years of age, so that with the notary that writes the will there may be six witnesses; the will the notary must write in his register, and shall be signed by the witnesses, and by the testator, if he can sign, and if he cannot, one of the witnesses must sign for him, near the mark declaring that he signs by order of the testator, because he cannot sign, and such will shall be valid. If the testator wants to make a sealed will, after writing or having his testament written by some person, he shall sign it if not written by himself: for if so written it will be sufficient, though it might not be signed by him: and not

mentary papers valid by the law of that country [398] those formalities were requisite; that the third and fourth codicils were not executed with [399] those formalities, and were consequently invalid if the Portuguese law were to govern the case. [400] It was further admitted that, when a marriage takes place without marriage articles, the surviving party is entitled to a moiety of the whole property absolutely: if there be legitimate issue, such issue is in like manner entitled to two-thirds of the other moiety; and over the remaining one-sixth of the whole the deceased has a disposing power: (Ordenaçoens, b. 4, t. 46 and 82). Thus far all the lawyers were agreed; but on

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knowing how to sign, it must be signed by the person that has written it, sealed and sewed, and the testator shall deliver it to the notary before five witnesses, free men, or reputed as such, over fourteen years of age, and before them the notary will ask him if that is his will, and if he holds it to be good, firm, and valid, and if he says 'Yes,' the notary shall immediately, in the presence of the witnesses, make the instrument of approval on the back of the will, declaring the testator delivered it to him, and took it for his good and firm will, and the same instrument of approval all the five witnesses must sign, and the testator, if he can sign; and not being able to sign, one of the witnesses shall sign for him, declaring near the mark that he signs by order of the testator, because he is not able to sign, and in no other manner shall the will be valid; and this notwithstanding any usage to the contrary in any place; and the notary which shall make an instrument of approval to any will or codicil, without having it signed by the witnesses, and by the testator, shall lose his office, and the instrument of approval shall be null. Sec. 2. To avoid forgeries in wills, the instrument of approval is to be written on the will, or if that is impossible, so annexed that the true will may not be taken from such instrument and another be put in its stead. 3d. In the absence of a notary the will may be made with five witnesses, if written or signed by the testator, or with six, if written by another person. 4th. Provides for nuncupative wills at the point of death" (tit. 82). "If a father or a mother make a will, and knowing they have children, take the third part of their moiety of the property, and dispose of it in favour of any person they may think proper, or shall order it to be distributed after their deaths according to their wishes, although in the will the children may not be positively instituted or disinherited, such will is valid, because, as he disposed of the third part of his property in the will, and knew he had children, it seems that he wanted to leave to them the other two parts, and to institute them in the same, although he did not mention them positively, and so they must be held as instituted heirs in the manner as if they had positively been instituted in the will. 1st. And the father or mother disposing in their will of all their property and goods, making no mention of the legal children, knowing he or she had one, or disinheriting him, not declaring the legal cause of so disinheriting him, such will is, by law, null, and of no validity as to what respects the institution or disinheritance in the same made, but the legacies contained in the same will shall, in all cases, be firm and valid, inasmuch as they may come within the testator's third part, so and in such manner as if the will had been good and valid by law. 2d. And the father or mother declaring in their will the reason why they disinherit their legal child, if the instituted heir in the will wishes to have the inheritance so disposed in his favour, he necessarily must prove such reason to be true as declared in the will, and that it is a legal and sufficient one for the child to be by virtue of it disinherited, and being proved, the will shall be valid, and the instituted heir shall have the inheritance so disposed in his favour, with no other impediment. And if he does not prove the cause of the disinheritance to be true and legal, the will shall become null, and the child shall inherit the whole of his father or mother's property if he wishes, but must pay the legacies contained in the will, as above stated. 3d. But if the father or mother, at the time of making their will, had a legal child, and believing him dead, did not mention him in the will, but bequeathed all their property and goods, instituting another heir, in such case the will shall be null, not only in what respects to the institution, but also to the legacies contained in the same. 4th. All that is above stated, as taking place when the father dies, leaving children, will also take place when he makes a will, and dies without children, but leaves grandsons or other descendants; and also when the son or other descendant dies, and makes a will, leaving no descendants, and has his father, mother, or other ascendants living. 5th. Also, if the father or mother, at the time of making their will, had no legal son, and afterwards he had one, or had one

other points they differed. Of those examined for Stanley, Medeiro thought it was necessary expressly to institute the issue heirs of two-thirds of the moiety, and if the testator did not expressly do so, or if he left away more than one-sixth of the whole property, or left legacies to an adulterine issue, the will was void in toto. The others all agreed that it was not necessary expressly to institute his legitimate issue to two-thirds of the moiety, and that if he disposed of more than one-sixth of the whole the will was not absolutely null in toto, but only as to the excess; and that the legacies must abate in proportion: and those to the adulterine issue (if illegal) would only vitiate such legacies, and not affect the general validity of the will. Simas thought neither **[401]** Bernes nor his children could take legacies. Matta, that Bernes could not but that his children could. Ferreira, that both Bernes and his children could.(*a*)

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already, and did not know it, and this one is alive at the time of the death of the father or mother, this will, as also the legacies in the same, shall be null and of no effect."

(Tit. 86). "As to codicils, whether opened or made by public notary, or sealed with instrument of approval, in the back, or made and signed by the testator, or by any other private person, it is sufficient that four witnesses be present (when they are made), men or women, of more than fourteen years of age, free, or reputed as such, so that with the notary, or with the person which makes them, there are five witnesses, upon condition that the witnesses named in the instrument of approval shall all sign the same; and when any child of an ecclesiastic, or of any other connexion reproved or punishable by our laws, or by the common law, to which the father or mother cannot succeed, because he has been so born of a reproved or punishable connexion, dies abintestate, his brother, son of his mother, although he may be born of an illegal, reproved, or punishable connexion, will succeed to him, and be his heir, if there is no other impediment but the one of being the offspring of such connexion; and also he may succeed to any other relations and kindred by the mother's side and blood; so that the brothers and the other ulterior kindred may succeed between themselves abintestated, though they may descend from a condemned and illegal connexion by the mother's line and blood; and as to what respects the succession of those who are of an illegal though not of a condemned nor punishable connexion, what in our laws and the common law is determined will be executed."

(Tit. 95). "On the death of the husband the wife remains in possession and in the administration of all the property, if at the time of such death she was living and maintained as man and wife, and from her hand the heirs of her husband will receive the division of all the property remaining at the husband's death, and the legatees their legacies, insomuch that if any of the heirs or legatees, or any other person, takes possession of any thing belonging to the inheritance, after the husband's death, without the wife's consent, she may consider herself dispossessed thereof, and it must be to her restituted, and as from the moment that the marriage is consummated by copulation the wife becomes entitled to the half of all the property of both, and the husband, on the death of the wife, continues in the old possession he had before, it is just, that on the death of the husband, she should remain in possession, and with the administration of all the property."

(*a*) Medeiro deposes: The formalities necessary for the validity of a will or codicil are set forth in the Ordenaçao de Regno, t. 80, s. 1, and t. 86, that any will or codicil be valid depends not only on the observance of extrinsic formalities, but also on that which is intrinsic, for if the latter be wanting, the former are of no value; there may indeed be certain prohibited dispositions in wills that do not affect the validity of the whole instrument, as, for instance, by a law passed on the 9th November, 1769, not in the Book of Laws, but altering the law found under tit. 18, of the second book; and there are others of a similar kind, the bequest of some estate in favour of a convent, in which case the particular disposition is null, and the estate passes to the legal heir, but the rest of the will is good; if a legitimate child be not constituted heir of two parts of the moiety aforesaid, or if the will contain dispositions in favour of an adulterine son, one born from a condemned connection, who is by law prohibited to succeed in any thing to his father, unless legitimated by royal patent, the will or codicil is altogether void, and of no value; 4th Book of laws, t. 82, s. 1 and 3, t. 93, s. 1, and t. 36, s. 4. His opinion on the testamentary papers in question is that, the deceased having declared that he had a child of the legitimate marriage, and not

[402] Of those examined for Bernes, all agreed that the will could only be void as to the excess over [403] one-sixth. And Verdades, Da Veiga, and Barreto said generally, after a perusal of the will, that it [404] was good as far as the disposition of the one-sixth went. Da Silva more precisely said: "In his [405] opinion the legacies to Bernes were not void, for, with reference to the law found in book 2d, t. 35, s. 12, he thought that Bernes, though a spurious and illegitimate child, might inherit from his father as a legatee in his will."

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having instituted him positively an heir to the two parts of his half of his property aforesaid, but bequeathing to him only an uncertain residue, there results therefrom an incurable nullity in the will generally, the whole of which will, together with the codicils, and every part thereof, is thereby rendered absolutely null and void, as if the same had not been written (4th Book of Laws, t. 82). It is indispensable that the father disinherit his son, or institute him positively in the said two parts, knowing that he has one, and naming him in his will; no contradiction arises in this case from what is mentioned in the Ordenaçao, book 4, t. 82, in the beginning, and 1st sect. because in that commencement the law mentions the case in which the father positively disposes of his one-third part, without speaking of the legitimate child or children, and as he only brings the said third part into the disposition, it supposes that the children are tacitly instituted in the other two parts, and, as such, the disposition of the third part is valid; but always under condition of being disposed of in favour of a person capable of being heir to such third part: in the 2d sect. the law states the case in which the father or mother makes a disposition of all the property without restricting themselves to the third part, and then the law also declares the will null, but also favours the legatees (from a pious cause), limiting them to the third part, if the legatees are proper persons to succeed to the legacies; and from this it results, in the second place, that deceased making bequests in favour of an adulterine son, and of his children, who, by the Portuguese laws, cannot be heirs to any thing of the father, if they do not appear legitimated by the Sovereign, with Royal Provisáo to allow them to succeed, either in will or by intestacy, such legacies would be null, supposing that the will itself had not been a nullity in toto; as it is, the law will in no case dispense with the extrinsic formalities which it directs to be observed; it declares that in any other form it shall not be valid; if the original will and first two codicils possess the requisite formalities, the objections to them are those only which he has mentioned; the two remaining codicils are null in toto by the want of extrinsic formalities; they have not either the approval of the notary or a sufficient number of witnesses. He leans himself also on the Roman law, which is the origin of those laws as to the rights of legitimate sons, and wills, called inofficious; the will in question, though made with all requisite formalities, is, in his opinion, null and void in all its parts and legacies.

Simas deposes: The extrinsic formalities which the laws of Portugal require for the validity of a will are mentioned in the 4th Book of Laws, t. 80, s. 1 and 3; those for a codicil in t. 86. When any of these be wanting, the instrument is void in toto; but if these be complied with, intrinsic formalities are still requisite; one of these is, that the party constitute an universal heir; the disposition of property which the law prohibits, made in a will having all extrinsic formalities, will make it void in the whole, or in part, as the case may be. According to the laws of Portugal, a spurious and adulterine son cannot be the heir of any part of his father's property, as is seen by reference to the 4th Book of Laws, t. 93; and in consequence, if the father, in a will made with all the solemnities, dispose to him any legacy, such legacy is void, though the will itself otherwise subsists; if a testator, having children, make a will, by which, without disinheriting them by virtue of any of the stated causes declared in the Book of Laws, No. 4, tit. 88, should supersede them, not mentioning them in the will, and should dispose of all his property to a stranger, such will would be null in toto, as appears from tit. 82 in the 4th Book of the Laws. If the will should contain such a disposition of property as that the issue be not disinherited, but is appointed to receive under it less than two-thirds of the moiety aforesaid, to which they are absolutely entitled, the will is not null in toto, but the legacies to others must abate in proportion, so as to make up the two-thirds for the issue; a child must either be disinherited, and be declared to be so by the will, for some cause allowed and specified by the law, or be entitled absolutely to two-thirds of the property which the parent

The cause now came on for hearing in the Prerogative Court: when the proctor for Bernes prayed the judge to pronounce for the will and four codicils, and addition; and to decree administration with these papers annexed to his party, and to condemn Stanley in costs. The proctor for Stanley prayed the judge to pronounce against the will, codicils, and addition [the will and first two codicils were, in argument, admitted]; and to decree administration of the deceased, as dying intestate, to his party.

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had a right to dispose of by will, that is, of his own moiety of the whole, in the present alleged circumstance; as to the rest of his property, he may dispose of it as he pleases, except to such persons as are forbidden by law to inherit. In regard to the will and codicils in question, of the third part of the moiety of which deceased could dispose to strangers in blood, or generally as he pleased; he could not dispose in any hereditary manner in favour of his natural son. That it is an unanswered principle in the Portuguese law, as in the Roman law, that there is a reciprocity in the right of succession, that is, when the father cannot be an heir to the son, the son cannot be an heir to the father. Ordenaçao, book 4, t. 93, positively declares that the father cannot be an heir of a son born from reproved or repudiated connection, and in consequence the son cannot succeed to the father. It is also declared in the Ordenaçao, book 4, t. 92, s. 3, that the person which is not a piaõ, that is, has some kind of nobility, and has legitimate sons and a natural son, cannot dispose to the natural son of the whole or any part of his one-third; in Portugal, merchants of great traffic are not piaõs, and in consequence, if deceased was, when Bernes was born, a merchant of great traffic, he could not have bequeathed to him any part of his remaining third of property, although Bernes had not united in him the qualities of spurious and adulterine, but had been only illegitimate; in consequence deponent judges that, according to the laws of Portugal, the will of deceased is null in all parts where he disposes of more than one-third of the half of his property; and also null in what he disposes of in favour of Bernes and the children of Bernes, because they all participate in the same disqualification; it is null also in the point where deceased prohibits his legitimate son from inquiring into the transactions which deceased had with the natural son, not only because thereby the laws would be evaded, but because if Bernes were even a legitimate brother of Stanley, the latter would have, notwithstanding any prohibition of his father, a right to investigate what the other had received from their father in his life-time, Ordenaçao, book 4, t. 97. He thinks the will to be null also in the parts where a penalty is put upon the legitimate son, in case of his opposing himself to the dispositions made by deceased, because deceased had not the power of altering the laws, or of imposing any penalty on asking their observance, and requiring the judgment of nullity of all acts contrary to them, and such penalty being a legacy in favour of a spurious son of condemned connection, is of course as null as any other legacy given to him; the will is null also in so far as it institutes the son, Stanley, heir only conditionally; whereas he being the forced heir of deceased, the father could not in any manner restrict the institution of him as such; the will is also null, inasmuch as it disposes of the son's property, because the father was not the owner of it; these nullities do not however entirely annul the will, which must subsist in what respects the other legacies included in the one-third of deceased's moiety; Ordenaçao, book 4, t. 82, s. 1; it being a rule in Portuguese law that he who cannot be an heir by will, cannot be such by a codicil; the codicils in question are null in all that relates to the disposition in favour of Bernes and his children; in the rest they are valid if they possess all requisite formalities.

Matta says: All legacies to a spurious and adulterine son are void in toto, for such child can inherit nothing from a father; the law, at book 4, t. 93, declares that such a father cannot be heir to such a son, and, by reciprocity, the son cannot inherit any thing from a father; but the legacies to the children of Bernes are not void, they may be liable to diminution or abatement, as conflicting, if they do so, with the rights of the widow and the lawful children, but they are not necessarily invalid; the condition of their father does not attach to them, and they take as individuals, irrespective of their father's inability to inherit.

Ferreira deposes: It is not the opinion of deponent that an adulterine offspring can in no case inherit any thing from his father; he is aware that some advocates maintain a different opinion, and found it upon the 93d title of the 4th book, but that law, he considers, refers only to cases where a person has died intestate, and under an intestacy: he considers it clear that an adulterine son cannot inherit, but he is not

The King's advocate and Phillimore for Bernes.(a) Execution and capacity are not denied: the [406] question is one of law—whether, in this case, testamentary papers must be executed according to the forms of the Portuguese law. No question will arise as to the will and first two codicils. It was at first, indeed, said that the will is repugnant to the law of Portugal; but it clearly appears from the evidence that it is void so far only as the deceased has disposed of more than one sixth of his whole property; and though an adulterine issue cannot inherit, a legacy to such does not render the will void in toto. The expressions of the will and second codicil, admitted to be valid, and to have been executed when the testator was perfectly capable, shew strongly his desire to effect the disposition in favour of his natural son and his issue: the codicil of October, 1825, disposes exclusively of property in the English funds in favour of such issue. We shall contend, 1st, that the evidence does not establish that the testator, notwithstanding his long residence in Portugal, was a domiciled subject of that kingdom, for that he intended not to finish his days there, but to return to his native country, and that he frequently declared that such were his intentions; he remitted his money for investment in England, and sent his wife, who became deranged, to Ireland—his native land—and he always claimed the privileges of a British subject, which were not denied to him by the Portuguese authorities.

If the Court should have any doubt upon this point; we contend, 2dly, that by the law of England the will of a British subject, disposing of property in this country, though the testator may have been domiciled abroad, is valid in this Court, if made according to the law of England. In the present case, if the instruments are not valid [407] according to the law of Portugal, they are valid as to property in this country, and are here entitled to probate. They are executed in the presence of three witnesses, and are exclusively confined to property in England. They are not executed, and do not purport to be executed, according to the law of Portugal; whereas the will which disposes of property in Portugal is regularly executed according to the Portuguese forms.

1st, as to the domicil. The domicil of origin continues till another is acquired—*Somerville* v. *Somerville*, 5 Ves. 750. Did the deceased acquire a new domicil? The marriage in Portugal shews but little intention of changing his domicil; the lady though born in Portugal was of Irish parents. But the Court has not to judge of his intentions merely from circumstances. It has before it, in these instruments and in facts proved, that the deceased did not intend to throw off his character of a British subject: he could not divest himself of his allegiance, though he might owe a temporary allegiance to the State wherein he resided. An intimate connexion has always subsisted between the two countries. Treaties have taken away the distinctions between their respective subjects. The ports of the United Kingdom are to the Portuguese like the ports of their own kingdom; and the subjects of one kingdom are treated like the subjects of the other. Madeira is like a British factory, and the British Consul there has the custody of English wills, and, as such, has the custody of this will. His taking the oath of allegiance, his formal abjuration of the Protestant faith, his marriage, are of no weight: the only point is whether his continued residence in Portugal is sufficient to deprive him of the character of [408] a British subject, and give him the character of a person domiciled in Portugal. We submit, not; his intention to return to England,

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satisfied that the law referred to prevents a father from instituting an adulterine son heir by will, when there are no legitimate children, and he has seen cases adjudged to this effect, but as in this country there are no authorized reports of cases adjudged, nor even any record of them made by the courts, he is unable to refer to any such; admitting that an adulterine son cannot be instituted an heir by his father, this would not affect the right of such father to bequeath to such son any part or the whole of that third over which he had an absolute power, as to which deponent considers the legacies to deceased's natural son, though adulterine, to be undoubtedly valid, and a portion of the legacies to the children of that son are good in law, so far as the aforesaid third part of the deceased's property, over which he had absolute power, extends; they will be liable to abatement, but they are not void in law.

(a) The arguments both in the Prerogative Court and in the Court of Delegates are principally confined to the points of law; and in reporting the arguments in the latter Court, a repetition of those urged in the Prerogative Court has been generally avoided.

and that he considered himself a British subject, and was admitted so to be by the Portuguese authorities, being proved by incontestable evidence. To create a new domicil, two things are necessary—actual habitation, and a wish to fix it there permanently. Denisart, tit. Domicile, s. 11.

Now, assuming that the deceased was domiciled in Portugal; no doubt a native Portuguese subject is bound to adhere to the forms of the law of Portugal for testamentary purposes, and if he had not so adhered he would be considered to be dead intestate; but is the law of Portugal binding on the subject of any other country domiciled there? Though it has been laid down generally that succession to personal property ab intestato is to be governed by the law of the country where the party is domiciled, it does not follow that a British subject, domiciled in a country other than that of his origin, is bound to conform, with regard to the disposition of his property by a testamentary act, to the laws of the kingdom where he was domiciled, that property being situated in the country of his origin, and the instrument not purporting to be executed according to the formalities required by the lex domicilii. There is no decided case, even as to intestacy, in which there has been a question between a foreign domicil and a domicil of origin; all the cases are between two British domicils. And, as to wills, there is no case even that an English subject domiciled in Scotland is bound by the law of Scotland as to the disposal, by will, of his English property; or, vice versâ, that a Scotch subject domiciled in **[409]** England is freed from the restraints of the Scotch law as to his property in Scotland. The consideration of this point has arisen only with respect to intestacy: but testamentary questions are to some extent juris gentium, and the general result of the opinions of writers on the law of nations is, that in Europe there is nothing to restrict persons, not natives of the country in which they reside, from disposing of their personal property according to the law of their own country: nor, from the evidence of the Portuguese lawyers, does it appear that there is any thing in the law of Portugal which should prevent a British subject, established at Madeira, from making a will and disposing of his property in England according to the forms of the English law. Vattel says (liv. 2, c. 8, s. 111), "If a traveller makes his will and sends it sealed into his own country, it is the same thing as if the will was written in that country." Here the will and codicils were deposited in the archives of the British Consulate—which is equivalent to sending them home. Is there any thing in the English law to render such a will invalid? In *Curling* v. *Thornton*, 2 Add. 6, the Court decided that, under particular circumstances at least, a British subject is not bound in the disposition of his property by will to conform to the law of the country where he was domiciled. If an acquired domicil so totally destroys the character of a British subject that it operates against the distinct expressions of his testamentary intentions, it is impossible to support these papers; but, as in all countries, intention governs testamentary acts, the Court would struggle hard against a doctrine requiring it to pronounce invalid instruments so clearly and unequivocally expressing the intentions of the testator. There is no case which imposes **[410]** upon the Court the duty of pronouncing that a British subject, by taking up his residence in a foreign country, has divested himself of his British character so far as to render invalid, even for the purposes of probate, his will, not purporting to be executed according to the forms of a foreign country where it is asserted he was domiciled, but regularly executed and attested by three witnesses, and containing his express and deliberate intentions as to property situate in this country, to which he owed his origin. In this absence of direct authority the onus of establishing the disqualifying position rests with the other side.

Lushington and Addams contrà. We confine our opposition to the last two codicils. The Court can hardly be of opinion that the deceased was not a domiciled subject of Portugal at his death: if so domiciled, the intention of returning to his native country would not vary the case. His domicil of origin was undoubtedly Ireland; but he acquired a Portuguese domicil, which cannot be put off but by the acquisition of a new one. We contend that the law of Portugal governs this case; and that the Court can only try the validity of the instruments by the Portuguese law; and it is admitted that, by that law, the last two codicils are null and void. It is true a British subject cannot shake off his allegiance, but he can acquire a foreign domicil. 3 Inst. c. 84, pp. 177-9. 2 Dyer, 165 b. A British subject quitting England, and proceeding to the United States, can trade to India; Lord C. J. Eyre laying down in *Marryatt* v. *Wilson*, 1 B. & P. 443, that a British subject violated no law of his parent State in

procuring himself to be received as a sub-**[411]**-ject of the United States, but could enjoy all the privileges conceded to the other subjects of the State which has adopted him. It is impossible then to contend that a British subject may not change his domicil, though that cannot destroy his allegiance. The question is, did Mr. Stanley become domiciled in Portugal; not, whether he became a subject of Portugal? A man may be domiciled in a country where he may never be admitted or deemed a subject, yet his personalty will be governed by the law of that country even when the law of the domicil shall say that personal property shall go by the law of the forum originis.

The facts of this case leave the domicil beyond the possibility of doubt: the deceased was married in Portugal; all the essential consequences of the marriage contract attached to him under the law of Portugal: he was naturalized; received a pension; took the oath of allegiance; and he resided within the Portuguese territory for fifty-seven years, without any absence, and without having returned to his native land for a single hour. In *Curling* v. *Thornton* it was not decided that the will was good because the deceased could not acquire a foreign domicil, nor, if he had acquired it, that the law of domicil would not govern the case; but that he had not acquired a domicil in France. He had been out of the country only a short time; his goods were here; he had a house here; he visited this country occasionally, and his will was not only conformable to the laws of this country, but was made in this country, and was a will in which British subjects alone were concerned. Here the legatees are all Portuguese; the deceased had been long resident in the Portu-**[412]**-guese territories; he had no house here; he never visited this country; his will was not made here, and was not to be carried into effect here. In *The Duchess of Kingston's case* (*a*) the will was admitted to probate here, because she was not naturalized in France; but in this case the deceased was naturalized in Portugal. The whole history of his life—all his connexions—were Portuguese; it is not even shewn that he considered himself an Englishman, or ever seriously contemplated returning to England: nor would the animus revertendi be sufficient. *Bruce* v. *Bruce*, 6 Bro. P. C. 566.(*b*) There, notwithstanding a clear intention to return to Scotland—his forum originis—and his remitting money to that country, in furtherance of that intention; notwithstanding that no European can possess real property in India; and that all the servants of the Company have necessarily an animus revertendi, yet Mr. Bruce, being in that service, was held to have acquired a domicil in India; and this, by a decision of the House of Lords, upon which all the law, learning, and research of the ablest men of the day were concentrated.

But it is said the relation between England and Portugal is very intimate: if so, the more nearly does it resemble the relation between England and Scotland; and the more directly do the decisions on questions of British domicils bear on the present case. It is true that residence in a factory does not change domicil; but then that must be residence in a factory as a British subject.

The Portuguese domicil, then, being established, **[413]** what law is to govern the decision? The ruling doctrine is—mobilia sequuntur personam. Testacy and intestacy; bankruptcy, lunacy, and all the other relations as to personal character, or personal property, are governed by the lex domicilii, in opposition to the lex loco rei sitæ—no matter where the property is—though real property is liable to the law of the country. If, between England and Scotland, in a case of intestacy, the lex domicilii governs the personal property; on the same principle the proposition, above stated, may be maintained. It is admitted to hold as to our colonies, in which French, or Dutch, or Spanish law prevails separately or mixed. But the more general proposition is also fully established. In all the cases, whatever may be the individual circumstances, they are argued upon the principle of intestacy entirely; but if a court of common law adopts the principle in cases of lunacy and bankruptcy, it may be applied to cases either of testacy or intestacy. In *Balfour* v. *Scott*, 6 Bro. P. C. 550, the House of Lords are said to have decided that the lex domicilii, and not the lex loci rei sitæ, governed the whole moveable succession of the deceased—both testate and intestate; though his personal property might be in different places and under different laws.

(*a*) Cited in *Curling* v. *Thornton*, 2 Add. 21.

(*b*) See Lord Thurlow's judgment in *Bruce* v. *Bruce*, reported in a note to *Marsh* v. *Hutchinson*, 2 B. & P. 229.

In *Hog* v. *Lashley*, 6 Bro. P. C. 577, the question arose on two interlocutors, where the Lord Ordinary in one, and the whole Court of Session in the other, found that personal effects—wherever situated—must be governed by the lex domicilii: this was affirmed by the House of Lords in 1792. In *Ommaney* v. *Bingham* (*Sir Charles Douglas' case*, see 5 Ves. 757, et seq.), decided by the House of Lords in 1796, and in *Drummond* v. **[414]** *Drummond*, 1799, 6 Bro. P. C. 601, it was admitted that it could no longer be disputed that the lex domicilii—not the lex loci rei sitæ—governed the whole question.(*a*) The same principle **[415]** governed the decision of this Court in *Ryan* v. *Ryan*, 2 Phill. 332.

(*a*) The decisions of the House of Lords in the cases of *Ommaney* v. *Bingham* (*Sir Charles Douglas' case*), and of *Hog* v. *Lashley*, are the most direct to the point, that the lex domicilii applies to cases of testacy as well as of intestacy. However, in those cases the question was not whether the deceased was testate or intestate, but, being testate, by what law his will was to be construed. Neither case expressly decides that a paper must, in order to be entitled to probate in an English Ecclesiastical Court, be executed according to the formalities required by the lex domicilii—whether that domicil be a British or a foreign domicil. The main circumstances of *Sir Charles Douglas' case* and a portion of Lord Loughborough's judgment in it will be found at 5 Vesey 757-9. And at 3 Vesey, 202-3, the effect of the judgment is stated by Lord Loughborough himself. See also 6 Bro. P. C. 550. From a reference to the will and codicil proved in the Prerogative Office, it appears that they were both executed according to the English forms and were attested by three witnesses. The will is dated on the 13th of May, 1788, and the codicil on the 11th of October, 1788: at neither of which times was the testator in Scotland; and one of the witnesses to the codicil is described as notary public, London, and the two others as his clerks. It probably, therefore, was executed in England. The will appoints two gentlemen described "of London" and one "of Gosport" executors and trustees: all the property disposed of was in the English funds, except 5000l. lent in 1765 on the estate of Langton in N. B. and two flats in Edinburgh purchased in 1771, which flats he directs to be sold and the money to be invested in the English funds; he leaves to his wife the use of the furniture in his dwelling house.

It does not appear by the will where this dwelling house was, but it is stated, in 5 Ves. 758, to be at Gosport—and was probably so proved to be by extrinsic evidence.

The codicil, which was the subject of question in the case of *Ommaney* v. *Bingham*, recites that one of his daughters had formed an attachment for, or been married to, a gentleman at Gosport, and directs that in case such marriage had already taken place, or should thereafter take place, she should forfeit all benefit under his will and her share should go to his other children. It was contended that this condition in restraint of marriage was void by the law of Scotland, but valid by the law of England by reason of the bequest over. The House of Lords held that the law of England—his domicil—was to prevail; the effect of which was, not only that the law under which the deceased intended to make his will governed the succession; but also that his intentions were carried into effect.

In *Hog* v. *Lashley* the instrument was executed in Scotland by a Scotsman resident there, and solely with reference to the formalities required by that law. The paper is in the form of a Scotch settlement. It describes the deceased as of Newliston, N.B.; it disposes of several real estates in Scotland; it directs all his personalty to be invested in the purchase of landed estates in Scotland; it gives to his eldest son, among other things, his household furniture (except the household furniture and plenishing of his house in London, which he had already given off to his second son); it speaks of money in the public funds, and of shares in the Bank of Scotland, and of annuities in the French funds. The deceased had, however, attempted to dispose of more than the law of Scotland permitted, and to exclude Mrs. Lashley of her legitim—a moiety of the moveables. The Court of Session, whose decree was affirmed by the House of Lords, pronounced that the lex domicilii ought to prevail even though part of the property was situate in England: but it will be observed that, though the intentions of the deceased were thus defeated, that law, under which the deceased intended to make his will, governed the succession.

Prerog. M. T. 4 Sess. 1789.—A suit respecting the claim of this paper to pro-

[416] The inconvenience of adopting the lex loci rei sitæ is manifest: e.g. if a person died possessed of **[417]** personal property in England, France, Russia and Holland,

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bate in England was instituted between the same parties in the Prerogative Court of Canterbury, and thence appealed to the Delegates. An allegation propounding the instrument pleaded the execution of the paper on the 5th February, 1787, at Edinburgh: capacity—death at Alverstone, in the county of Edinburgh, in 1789—registration of the original on the 13th May, 1789, and that No. 1, the paper propounded, was an authentic copy. It then prayed probate of such copy to be granted to Mr. Hog as executor, and Mrs. Lashley to be condemned in costs. This allegation was opposed on the ground that the paper was not of a testamentary nature—but was admitted.*[1] From this admission an appeal was prosecuted to the Delegates, and Mrs. Lashley prayed the Court to reject the allegation, or to suspend the consideration of the admission thereof till the proceedings then depending in the Court of Scotland respecting the paper propounded were determined.

Sir William Scott, Sir John Scott, Dr. Nicholl, Mr. Adam for Mrs. Lashley.*[2] Our prayer is either to reject the allegation altogether or to suspend its admission. The paper is not testamentary; the whole language, purview, and entire contents shew this. There is by the English law a distinction between a will and a deed. A will passes no present interest; a deed does. This instrument gives a present interest both in realty and personalty; it converts the testator into a tenant for life with reversion to another. It is not then a testamentary disposition by the law of England: but the deceased was a domiciled Scotsman, and by the law of Scotland (as may be gathered from the Dictionary of Decisions, a book of perfect authority in Scotland) the mere nomination of executors and testamentary words do not make a testamentary instrument, if, upon the whole view of the instrument, it appears to be a disposition inter vivos; if, however, the character of the instrument—a Scotch instrument throughout, executed according to the forms of Scotch law by a man domiciled in Scotland—be dubious according to the ideas we possess of that law, it ought not to have been propounded in this simple manner, but as a foreign will—as a will according to the law of Scotland. In wills of Englishmen only in itinere the Court does not inquire into foreign law; but in the will of a Frenchman or a Dutchman, made in his own country, the Court engrafts its own probate on the probate transmitted from that country. So a probate here binds the Judge in the Plantations. *Burn* v. *Cole*, Ambler, 415.

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*[1] The following expressions occur in the paper, some pointing to a conveyance inter vivos; others to a testamentary disposition:—

"Being determined after my decease that all my estates, which I have not disposed of in my lifetime, shall be entailed as Newliston, and all my personal estate shall after my decease be invested in the purchase of lands in same entail as Newliston." "With full power to my son after my decease, to intromit with the hail subjects and to sell, &c., as fully as I could in my own life." "I recommend my son to execute my intentions with all convenient dispatch after my decease." "As soon after my decease as may be, to realise the subjects hereby conveyed, after discharging all debts, legacies, donations, and burthens"—"to take effect at my death"—"this disposition, assignation, and conveyance." "I do hereby give, grant, dispose, assign, and make over to my son, in case he survive me, all land that shall belong to me at my death, and shall not at that period be otherwise disposed of by a deed under my hand duly executed, and all my real and personal estate which may happen to belong to me at the time of my death, and not otherwise disposed of." "I do hereby nominate, constitute, and appoint my son my sole executor and universal legatee and intromitter with my goods and gear, with full power to him, immediately after my decease, to meddle and intromit with the hail subject before disposed to him, and that in virtue of this present right, and without the necessity of confirmation, administration, or other form of law." "I declare that these presents, though found lying by me at the time of my decease, shall be as valid as if delivered to my son, with which delivery I dispense and consent to the registration hereof." "Provided always, as it is hereby specially provided and declared, my son is to be bound and obliged, and as by accepting thereof he shall bind and oblige himself to execute my intentions."

*[2] The argument as to the testamentary nature of the paper is omitted.

his succession would be regulated by [418] four different laws: but in the present case the testator is not only domiciled in Portugal but [419] married a Portuguese wife, and all the rights of that Portuguese wife are governed by the law of [420] Portugal. The obligations that attached to him on that marriage made his property divisible in [421] certain proportions between the husband and wife, and he could not deprive her of it. How, then, [422] can it be asserted that the lex domicilii does not govern the distribution of property? On the same principle it governs the forms on

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It must not be forgotten that the question is not what will be the effect of the instrument propounded as a will as to its efficacy in disposing or not, but whether in its nature it is to be considered as testamentary and entitled to probate, regard being had to the domicil of the testator. If you say you will not grant probate, you do not exclude any claim to the effects that Mr. Hog may have; for, if it is a deed, to refuse probate of it as a will is no injury, since then the question would be open elsewhere as to the effect it shall have. Supposing you grant administration: if it be no disposition, a distribution as in a case of intestacy would be made: on the other hand, if it should be held a disposition by deed, the administrator would be accountable and bound to distribute according to the deed: so also, if by the law of Scotland it be a will, the deceased being a domiciled Scotsman.

It is now too late to contend that in the construction of instruments the will of a domiciled Scotsman, proved in the ecclesiastical courts in England, will have a different effect from what it would have in Scotland. The law, by the latest decisions, is that effects in intestacy are to be distributed by the lex domicilii. In *Bruce* v. *Bruce*, 6 Bro. P. C. 566, this was held to be clear law to set the Lords of Session right. *Brown* v. *Brown*, ib. 569. *Pipon* v. *Pipon*, Ambler, 26. Erskine's Institutes, i. 3, t. 9, s. 4 (6 Bro. P. C. 582). *Thorne* v. *Watkins*, 2 Ves. sen. 35. In this case the Court of Sessions have proceeded according to that law, and have held it to extend to English effects also.

By the acts which regulate the transfer of stock, stock cannot be disposed of but by a will executed in the presence of two witnesses: but if a person in Scotland or Holland make a will, valid by the law of his country, though not thus attested, it would not pass the stock, as to which he would be intestate here: yet by the principle of the law of nations the representative of the deceased must be the trustee of the legatee. If an Englishman makes a will, giving all his effects to his son or a stranger, the rest of his family will be disappointed, but a Scotsman can do no such thing. If this instrument is to be considered as a will of a Scotsman, a moiety of the effects only will pass by it as a will: as to the other moiety he is intestate. *Kilpatrick* v. *Kilpatrick* (6 Bro. P. C. 584), where Lord Kenyon sent to Scotland to inquire, and being informed that a Scotsman could only dispose by will of a moiety of his effects, made a decree in conformity to that law.

Suppose a domiciled Scotsman in Scotland makes a nuncupative will clearly against the statute, consequently not good by the English law; and suppose in Scotland it were good; the Ecclesiastical Court in England could grant no probate, yet the persons entitled under it by the law of Scotland would be authorized to come to an English court of equity, and, on proof of the law, have an account of the effects as against the administrator. This supports the argument in favour of our client, and is the application of the very principle laid down in *Thorne* v. *Watkins*. Being intestate here, the ordinary could, by statute, only grant the administration to the widow or next of kin; but the administrator would be bound to distribute according to the will valid by the law of Scotland. That is precisely the case of *Thorne* v. *Watkins*. The right accrued in Scotland, but the deceased being domiciled in England, the administrator was bound to distribute by the law of England. If to recover the effects in Scotland it had been necessary to sue as the representative of the intestate, and administration had been taken in Scotland, the administrator would still have been made to account by the law of England.

This allegation, if admitted, can lead to no decisive conclusion; nor will the rejection of it bear hardly on Mr. Hog's interests. As a deed this paper, if valid, is good without administration. By the law of England it clearly is not testamentary; but if valid by the law of Scotland (and the will of a domiciled Scotsman, wherever the property to be disposed of is situate, admits of a different consideration from the will of an Englishman), Mr. Hog can have relief in a court of equity. If, however, you

which the validity of a will must be established. Suppose an individual goes abroad knowing nothing of the English law; he makes an instrument valid according to the forms of the country in which he resides—perhaps a nuncupative will—what a hardship it would be that such will should be vitiated in this country!

Per Curiam. All this argument is equally applicable to real property. The true question is whether a British subject who has acquired a foreign domicil is deprived of the right of disposing of his British property according to the forms of British law.

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will not absolutely reject, your Lordships will at least suspend the admission of this allegation. If the instrument is to be set up as a Scotch will, Mr. Hog should have pleaded that it was a valid disposition by the law of Scotland, and should have had a probate engrafted on the Scotch probate. Your Lordships will not assume the character of foreign jurists and foreign judges. What may be the effect of your judgment, if you admit this paper to probate? You may decide that to be a testament which the proper tribunal of the country shall decide against. If the question was proper at first to have been decided in the Scotch Courts, there will be no impropriety that the case should stand over. The effects are to be governed by the Scotch law, and an actual decision has been given in Scotland that our party is not excluded from her legitim. Still, by your probate, Mr. Hog would get possessed of all the property without giving security. If the property is in a precarious state, we should have no objection to a joint nominee for administration pendente lite.

Dec. 4, 1790.—The Court, Perryn, Baron; Heath, J., and Grose, J.; Arnold and Laurence, LL.D.; without hearing Mr. Hog's counsel, affirmed the decree of the Prerogative Court, with the costs of the appeal, and retained the cause.

Feb. 8, 1793.—Witnesses having been examined by Mr. Hog, but no plea given by Mrs. Lashley, the Judges after hearing counsel for Mr. Hog only * pronounced for the will, but at Mrs. Lashley's prayer directed an act on petition to be entered into as to whether a general or limited probate should issue.

The substance of the petition was: That the deceased died at Newliston, N.B., on the 19th of March, 1789, possessed of personalty in Scotland, England, and France, very considerably exceeding his debts: he left, among several children, Thomas Hog, his eldest son, the respondent, and Rebecca (wife of Thomas) Lashley, his daughter, the appellant: he executed certain deeds of settlement, and among others a general disposition (the will in question) containing a nomination of executors, dated 5 Feb., 1787, in favour of the respondent, of lands and of all his personalty in Scotland, England, and France, burthened with debts, legacies, and provisions to younger children; the residue and interest to be employed in purchasing land to be entailed on the series of heirs in the entail of Newliston: that he had executed two bonds in favour of the appellant exclusive of her husband's jus mariti, one for 1300l. containing a declaration that it should be in full satisfaction of all portion, natural, legitim, bairns' part of gear, or other claim on his or his wife's death: and another for 200l. exclusive of the jus mariti, but without the declaration. That these bonds, being short of her legal claim, she and her husband called, before the Court of Session in Scotland, the respondent to account to them for half of the deceased's moveables as legitim, and for her third of the goods in communion at the dissolution of the marriage, to which the children were entitled as next of kin of their mother: that in defence Hog had contended that from certain letters it appeared Mr. and Mrs. Lashley were satisfied with the provisions made by her father, and were thereby barred from demanding legitim, the deceased having it in his power by a suitable and rational provision for Mrs. Lashley, calculated bonâ fide for the performance of his paternal duty, to exclude her claim of legitim: that certain renunciations by his other children operated in the deceased's favour, and Mrs. Lashley could demand no more as legitim than if these renunciations had not been made, and that in estimating her claim either for legitim or as next of kin of her mother the personalty in England or France was not to be included. That in answer, Mr. and Mrs. Lashley had contended they had never accepted these provisions; that the deceased could not exclude her by any testamentary deed from her legal claims; that as the other children were forisfamiliated, and did, in consideration of the patrimonies they received, renounce their legitim, she

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* It is presumed Mrs. Lashley did not by counsel oppose the sentence pronouncing for the will.

Is there any decision by which, in a case of testacy, the lex domicilii has been applied so as to avoid a will executed with reference to the law of the country where the property was situate, and so as at the same time to defeat the intentions of the testator? In the present case, if the law of Portugal is to prevail, neither the law, which the deceased contemplated as governing his testamentary acts, will prevail, nor will his intentions be carried into **[423]** effect. Is there any decision going to that length?

Argument continued.

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was now entitled to the whole legitim, i.e. a moiety of the whole personal estate; and that as all such questions must be regulated by the lex domicilii, the claim extended as well to the English and French as to the Scotch personalty. That the cause came on first before the Lord Ordinary, and then before the whole Court of Session, who, after several hearings, on the 7th of June, 1791, pronounced, first, that the succession of personal estate of the deceased, wheresoever situated, must be regulated by the lex domicilii, and that Mrs. Lashley's right of legitim extends to the personal effects in England, or elsewhere, as well as in Scotland; 2ndly, that the renunciation of legitim by the other younger children operated in favour of Mrs. Lashley, and had the same effect as their death; and she, the only younger child who did not renounce, was entitled to the whole legitim—one half of the free personal estate wheresoever situate. That on the 29th of November, 1791, after further petitions, the Lords adhered to this interlocutor, and on the 23rd of December further decreed that certain government annuities in England belonging to the deceased were moveable, and fell under the claim of legitim. That on the 7th of May, 1792, these decrees were affirmed by the House of Lords (see 6 Bro. P. C. 577, 591, 621); that consequently Mrs. Lashley was entitled to a moiety of the personal estate in her own right, and that any disposition thereof by her father was null, and that he had no power to appoint an executor in respect thereto: but that he must be considered in point of law to have died intestate as to the same: Mrs. Lashley therefore prayed that the probate might be limited to a moiety of the personal estate of the deceased in England, the only part over which he had any power to devise or appoint executors; and that administration of the other moiety pronounced by the decrees of the Court of Session (affirmed by the House of Lords) to be the sole property of Mrs. Lashley, and over which no executor appointed by the deceased ought to have any power, might be granted to Mr. and Mrs. Lashley on security to pay a proportionate share of such debts as might be legally chargeable thereon.

On the other side the decrees, &c., were admitted; but it was submitted that by law the respondent was entitled to a general probate as sole executor, whatever might be the effect or operation of the will in regard to the duty or office of executor so appointed.

14 June, 1796.—The Judges having heard counsel on both sides, rejected Mrs. Lashley's petition, condemned her in the costs, and decreed a general probate to Mr. Hog.

By the admission of the allegation the Court of Delegates seem to have decided, as Sir William Wynne (in the Prerogative Court) had before decided, that the instrument was by the law of England testamentary; and inasmuch as the case of *Bruce* v. *Bruce*, then so recently determined, and the doctrine of the lex domicilii was pressed by counsel, the refusal to suspend the allegation infers that in their judgment the decision of the Scotch Courts ought to make no difference in their sentence; and that the paper would be entitled to probate here whatever might be its character in Scotland. It would therefore appear that the Court of Delegates, in *Hog* v. *Lashley*, proceeded on the same principle as the Prerogative Court in *Stanley* v. *Bernes*. It is believed that there is no note extant of the arguments of counsel, as to any of the proceedings when the Court pronounced for the will, or when it subsequently rejected Mrs. Lashley's petition for a limited probate. The latter decision, it is conceived, has no bearing on the question in *Stanley* v. *Bernes*, since whichever law governed the case, Mrs. Lashley's legitim, as forming part of the deceased's estate, could only be obtained through a representation to him, and she therefore stood very much in the same situation as a next of kin entitled to an undisposed residue. The executor, as the deceased's general representative, would be trustee for her, and be compellable in a court of equity to account for the legitim.

We do not take the point as one that has received a distinct decision. It is said, whatever is the law, you may grant probate and leave the consequences to be disposed of by another Court. The question for the Court to decide is whether the deceased died testate or intestate according to law; as, in the case of the will of a married woman, you must decide whether she is testate or intestate according to the power. If the question were mixed with other questions belonging to other jurisdictions, it might be a ground for leaving it to another Court; but it is one of those questions infinitely better known to those who are familiar with the civil law and the public general law. The codicils are ipso facto null—not invalid in part: it is therefore contrary to the practice of the Court to grant probate of such papers and then send them for construction to the Court of Chancery. Here was no conflict of domicils: the deceased lares constituit exclusively in Portugal. There is no doubt in case of intestacy that his property must be distributed according to the law of Portugal; and in the absence of a paper valid by that law the deceased is intestate as to this property.(*a*)[1]

Per Curiam. Is there any case in which a party domiciled **[424]** abroad has executed an instrument for the disposal of personal property in England?

Dr. Lushington. The only case I am aware of is that of *Mr. Waddington*, who went to reside in France and remained there several years, and by a will executed in France disposed of property here; and the Court of Chancery applied the French law.(*a*)[2]

(*a*)[1] 1 Hale, P. C. 68. Henry's Judgment of the Court of Demerara, &c. *Hunter* v. *Potts*, 4 T. R. 192. *Sill* v. *Worswick*, 1 H. Bl. 690. *Philips* v. *Hunter*, 2 ib. 402. *Brodie* v. *Barry*, 2 V. & B. 131, were cited for Mr. Stanley.

(*a*)[2] Case of *Mr. Waddington* drawn up from a comparison of the statements furnished to the Court on either side.

Mr. Waddington—a British-born subject, previously resident in England—went to France in 1813, where he purchased an extensive farm; and also mills and premises in which he carried on the business of a cotton-spinner. In 1816 he became by letters patent a naturalized French subject, and resided in France till his death in 1818: he left eight children—some minors—and also real and personal property in France, and personal property in England: he made, in January, 1818, at the same time, two wills; one in the English form, by which he gave all his property in England, and also a claim he had upon the French Government (and which he had lodged with the commissioners in England for receiving such claims), to six of his children equally. The other will was in the French language, and by that he gave his manufactory to two sons, being the two not named in the English will; but he directed certain debts and money in France to be paid to his other children, "in order to establish amongst them a perfect equality in conformity to the will, which I have made in the English language and forms:" the French will concluded; "As my will of the 19th of this month has only for its object to provide for a prudent administration and equal distribution of my property and funds which I possess in England, I declare, as far as may be needful, that I make all my children my heirs in equal portions of all my property (except my real property with the appurtenances) acquired by me in France, which it is hereby understood that I dispose of by the present will, subject to the charges and conditions which are contained therein."

Thomas and William, named in the French will, were naturalized French subjects: the other children were not. The executors, in the English will, proved both wills in the Prerogative Court, and a bill was filed in the Court of Chancery in the name of five of the children (minors) named in the English will against the executors and Thomas and William, and also against Charles, the eighth child (alleged to be out of the jurisdiction of the Court), praying an account of the English property, also of the French property, and that the rights of the parties might be declared.

Thomas and William in their answers claimed, as the only children resident and domiciled in France, to be entitled by the laws of France "to become the only heirs of the testator's real property there, either under his will or as being such his heirs." They also stated their belief "that by the laws of France all the personal estate in that country which the testator was possessed of or entitled to at his death—other than the said debt owing to him from the French government—on his death devolved to all his children then living, as well those residing in that kingdom as those residing out of France; and that the plaintiffs and all the other children of the testator did,

[425] In reply. No case has been adduced, and we can find none, where it has been held that a British sub-[426]-ject can so far throw off his British character as to deprive himself of the rights he possessed under it; still less that, under whatever circumstances a British subject might take up his residence in a foreign country, he becomes domiciled so as to render it incompetent for him to dispose of his property according to the forms of the country of his birth. The facts, it is said, shewing an adoption of the Portuguese character, constitute a body of evidence not to be overthrown by any cursory intention: but intention is to govern such a case; and here is proof of an intention of preserving his British character. It is clear from the writers on the law of nations that, in order to constitute a complete change of domicil, there must be not only a primary change, but a wish to fix for ever: that there must be no intention to resort to the former country, but an intention to renounce it for ever. *Bruce* v. *Bruce* is said to establish the contrary; but there the party had abandoned Scotland by going to India expressly to make his fortune: he returned to England and resided there [427] for two years without once visiting Scotland, and he then returned to India, and died. The question in *Bruce's case* was between two British domicils: here the point is whether the deceased threw off his British character and all the rights belonging to it so far as to have adopted the law of the foreign country where he was domiciled. In such a case a more complete abandonment of his forum originis must be established. Had however the evidence of such abandonment been far more decisive, it is admitted that none of the cases cited are exactly in point; none establish that a British subject can so far change his domicil to a foreign country as to deprive himself of the privileges of a British subject, and render his property liable to the laws of the country in which he is domiciled. If such be the law, it is extraordinary that, notwithstanding the extended relations of England with foreign countries, no case can be found to that precise effect: those cited are only used as furnishing analogous principles. In *Marryatt* v. *Wilson* it was held that a British subject might, from a foreign country, trade with the East Indies, which as a British subject resident in England he could not do. All that the case amounts to is, that

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on his death, become entitled to his personal estate in France (other than the debt owing to him from the French government) in equal shares and proportions, and that the testator could not by those laws make any valid bequest of the same from his children, or of only some small portion thereof;" and submitted "that, by virtue of the testator's will, they, together with the testator's other children, became and are entitled in equal shares and proportions, as tenants in common, to his personal estate in England and the debt owing to him by the French government."

The Vice Chancellor referred it to the Master, to inquire whether, by the law of France, the testator could dispose of all, or any, and what part, of his real estate there, by his will, and to whom? and whether by the law of France the testator could dispose of all, or any, and what part, of his personal estate there, by his will, and to whom?

Proceedings were also instituted in France: and, on the 28th of December, 1818, the Civil Tribunal at Dreux (all the children being made parties) made an order, setting forth the two wills, and directing that the accounts, liquidations, settlements, and distribution of the testator's estate should be made as required by the wills and testaments therein before described, in order to establish the equality directed by the testator.

On a petition to the Court of Chancery stating the proceedings in France, and praying that the Master upon the ground of such proceedings might divide the whole of the testator's estate, real and personal, amongst his eight children, a reference to the Master being ordered, he reported, on the 12th of February, 1822, all the proceedings in the French Court; "that it was a court of competent jurisdiction; and that the effect would be to make an equal distribution of the estate and effects, real and personal, of the testator, as well in England as in France, between the eight children of the testator."

It was an amicable suit, and was not argued; but by mutual arrangement Sir Anthony Hart and Mr. Bell, counsel on either side, settled the minutes; and thereupon the Vice Chancellor made a final decree in conformity with the Master's report, "and declared that, regard being had to the laws of England and France, the testator's property, both real and personal, both in England and France, was divisible in equal shares between the children."

while so resident he is not liable to penalties and forfeitures as if he were resident in England. So a British subject may reside in a neutral State and trade in innocent articles with the enemy of this country. No case goes further than this: and this will hardly induce the Court to hold that, even if the domicil were changed, and the deceased had divested himself of the rights of a British subject, a will, not drawn up according to the laws of Portugal, is invalid, the deceased taking upon himself the disposition of his **[428]** property in England by a will not purporting to be made according to such Portuguese law, but good and valid according to the law of England.

Hunter v. *Potts; Sill* v. *Worswick;* and *Philips* v. *Hunter*, are cases of bankruptcy; and argued on special verdicts. *Sill* v. *Worswick* (1 H. Bl. 689) was a transaction in which the bankrupt and the other parties were not only British subjects, but resident in England; the bankrupt having property in St. Christopher's, where the bankrupt laws did not prevail; and Lord Loughborough said "it was a question whether a creditor resident in England, and subject to the laws of England, should avail himself of a proceeding of that law to get possession of a debt from those entitled to it for the benefit of all the creditors, and to hold that possession against those creditors:" he decided that the bankrupt law bound a British subject, and that a creditor was not entitled to hold against the assignees of a bankrupt in such a case. Lord Loughborough also said, "I do not wish it to be understood that it follows as a consequence from the opinion I am now giving—I rather think the contrary would be the consequence of the reasoning I am now using—that a creditor in that country, not subject to the bankrupt laws, nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt." He is here arguing on the case of *Solomons* v. *Ross:* "It by no means follows that a commission of bankruptcy has an operation in another country against the laws of that country." Lord Loughborough does not say that if the law of the foreign country enabled a creditor to obtain his debt there, that the law of **[429]** England would compel him to refund it: "If he had received it in an adverse suit with the assignees he would clearly not be liable; but if the law of that country preferred him to the assignee, I do not think my holding a contrary opinion would revoke the determination of that country." But the argument on the other side would go to the length that there would be jurisdiction here to make even a foreign creditor refund. *Hunter* v. *Potts* is to the same effect: and in *Sill* v. *Worswick* there was no question of domicil. *Brodie* v. *Barry* and the other cases may shew that, to a certain extent, mobilia sequuntur personam, but not that in all cases and under all circumstances, contrary to the express will of the testator, the lex domicilii is to prevail. In *Ryan* v. *Ryan* the question of domicil was not material; for an individual not domiciled in, but merely passing through, a country, and marrying there, is primâ facie, as to such marriage, governed by that law every where: therefore the Danish marriage celebrated there on the dissolution, by a sentence of a Danish Court, of the former marriage, also celebrated there,(*a*)[1] was to be presumed valid for the mere purposes of administration, the Court carefully guarding itself from expressing any opinion that the proofs would have been sufficient in a matrimonial suit. It was also ultimately an unopposed case. To establish the position on the other side, the Court must have held that an English marriage between British subjects could be legally dissolved by a Court in Denmark, the parties having become domiciled there. The cases in 6 Bro. P. C. were only cited as shewing that those cases have been argued on **[430]** principles which would apply to testacy. *Hog* v. *Lashley* is principally relied on; but the Court is in the dark as to the decision in that case. It cannot, then, go the length of saying that the lex domicilii applies to testacy as well as to intestacy: and, unless it holds that such must be the rule in all cases, and under all circumstances, it could not apply to the present case, in opposition to the clear ascertained intentions of the deceased, more especially as it is specially provided by the treaty of commerce and navigation concluded between England and Portugal in 1810 that British subjects resident in Portugal shall be allowed to dispose of their property by testamentary instruments.(*a*)[2]

(*a*)[1] The original papers shew that such was the fact.

(*a*)[2] Sect. 7 of that treaty provides: "That the subjects of each shall have a free and unquestionable right to travel, and reside within the territories and dominions of the other; to occupy houses and warehouses, and to dispose of personal property of every sort and denomination, by sales, donation, exchange, or testament, or in any other manner whatsoever, without the smallest impediment."

As to *Mr. Waddington's case*, it was not contested; there was only one solicitor employed. That case, however, though cited on the other side, is much stronger the other way. The testator's object was to divide his property in England and France, by wills executed according to the forms of those countries respectively, in the same manner as Mr. Stanley has divided his property in Portugal and England.(*b*)

[431] *Judgment—Sir John Nicholl.* This case involves a question of law of considerable importance; but upon the facts there is little, if any, controversy. In order to arrive at the question of law with accuracy it will be convenient to set forth the facts out of which it arises. The case respects the validity of the will and four codicils of John Stanley, or rather of two of the codicils, for it is now admitted that the will and the other two codicils are entitled to probate.

The testator, a native of Ireland, went in 1770 to Lisbon, and there engaged in business as a merchant; soon afterwards he married a lady, a Portuguese by birth, though of Irish parents, and a Roman Catholic. In order to contract that marriage he professed the Roman Catholic religion. In 1798 he obtained letters of naturalization as a Portuguese subject, and in 1808, when the French were in possession of Portugal, it is alleged that he was treated as a Portuguese subject: that is denied; and it is on the other side alleged that he was treated as a British subject. The manner, however, in which the French treated him is not very material to the decision of this case. Before their arrival he had placed a large part of his property in his son's name, who was born in Portugal; but the will recites that it was "a fictitious measure as a security against the French." The testator had four children by his wife, but only the present party survived him. His wife, having become insane, was removed from Portugal to Ireland, where the connections of both resided: she was there **[432]** supported by an allowance paid out of the property of the deceased, placed, as already mentioned, in the possession of the son. The deceased in 1808 removed from Lisbon to Madeira, and continued to reside in that island till his death in 1826: he had a natural son, a legatee in the will and codicil, the other party in this cause. This son was married; and at the time of the deceased's death had five children, whom, as his grand-children, the deceased has benefited by some of the testamentary instruments in question.

This is a brief history of the deceased and his family, so far as it seems necessary to mark out the question to be decided: but it may be proper also here to describe the testamentary acts of the deceased. The will and four codicils are propounded by the natural son as a legatee, the executors having renounced; and they are opposed by the legitimate son, the residuary legatee in the will. The will and first two codicils are executed in the forms required by the Portuguese law; the third and fourth codicils are not in that form.

At first Mr. Stanley opposed all the papers, for it was contended that by the Portuguese law a person marrying and making no settlement, and leaving a widow and issue of the marriage, could only dispose of one sixth of the property he left behind him, as half belonged to the widow and two thirds of the other moiety to the issue; and further, that an attempt either to dispose of more than one sixth, or to dispose of that one sixth, as by this will, in favour of adulterine issue, rendered the whole invalid. It is now admitted that the proof of the Portuguese law to the extent of rendering the papers void in toto has failed, and that the will **[433]** and first two codicils are valid so as to dispose of not more than one sixth of the whole property; and that of them probate must be granted. The opposition is therefore now confined to the third and fourth codicils, which are not executed in the Portuguese forms, though they are sufficiently executed according to the forms required by the law of England for an English will.

The will, dated at Funchal on the 21st June, 1820, gives to the natural son and his children legacies to a considerable amount: the first codicil, dated on the 4th of July, 1820, gives some further legacies to the grand-children, and appoints an additional executor; the second codicil is dated on the 11th of July, 1820, and gives a further legacy to the natural son and the aunt. The factum of these instruments

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(*b*) Argentrie de la Coutume de Bretagne, Art. 449, 499. Dictionnaire de Droit Canonique (par Maillare), tome 2, p. 220. Judgment, &c. in *Odwin* v. *Forbes*, reported by Henry, and Appendix, p. 193. *Marsh* v. *Hutchinson*, 2 B. & P. 226, were cited in addition to the cases and authorities collected in *Munroe* v. *Douglas*, 5 Madd. 379.

being in the Portuguese form is admitted, and their validity, at least as to one sixth of the property, is not denied: they, in the strongest manner, mark the wishes and intentions of the testator, and the grounds on which those wishes and intentions were formed in favour of the natural son and the grand-children.

The two remaining codicils are those which are contested—the third, dated in October, 1820, merely relates to the substitution of some of the executors. The fourth codicil is the material instrument: its object is to make a further provision for the grand-children; it refers to certain donations made to be invested in trust in the British funds for their benefit, and then gives his property in the British funds in their favour. Both these codicils are in the deceased's own hand-writing, and are attested by three witnesses; there is no doubt of the factum nor of the intention, nor is there any doubt that they are valid, if to be con-[434]-sidered with reference to English forms. They dispose of property in the English funds and of no other, and consequently are to operate and be executed in England, but they are not executed in the form required by the Portuguese law for Portuguese testamentary acts; and the question is whether on that account they are utterly invalid so that probate of them ought not to be granted by this Court.

In opposition to their validity it is contended that the deceased was domiciled in Portugal and is to be considered as a Portuguese subject; that domicil is governed by residence; that here was a continued residence for above fifty years confirmed by change of religion, by marriage, and by naturalization; that mobilia sequuntur personam, that not only in case of intestacy is the succession to moveable property governed by the law of the country where the person is domiciled, but that such property can only be disposed of by a will made in the form required by that law—by the lex domicilii.

On the other hand, that the deceased was not at his death a domiciled Portuguese subject; that it is not residence but intention which ascertains domicil; that the domicil of origin continues so long as there is an intention of returning to it; that the deceased reverted to the Protestant religion, sent his wife to England when by her malady the consortium was broken, invested his property in England, intended to return to England, and was only prevented by infirmity and death, desired to be buried in the English burial-ground, and was during his life and at his death considered and treated as a British subject: but secondly, if he were domiciled in Portugal, still he maintained the [435] right of a British subject to dispose of his property by will made in the English form; that the succession to personal property depends upon the intention of the possessor, whether expressed or only implied; that if in cases of intestacy an intention is implied that the property shall go according to the law of the place of residence (though even that is not admitted so far as respects a natural born British subject residing in a foreign country), yet where a different intention is declared by will, that will, if validly made according to the English forms, is valid as to property in England.

Such was the general substance of the arguments on both sides, and in support of each proposition various authorities and cases were referred to.

The law of domicil, and the succession to personal property as affected by it, has been a vexata quæstio. The authorities applying to it are collected in various reports, particularly in 6 Bro. P. C. and in *Lord Somerville's case*, 5th Ves. 750. These authorities were not only referred to, but very elaborately discussed on both sides in the argument in the present case: for that reason, and because it is admitted that no adjudged case comes directly up to the present question, it is unnecessary again to quote and discuss them. I shall therefore content myself with stating the principles which may be deduced from them so far as they may be applicable to the point now brought before me for decision.

The general rule that mobilia sequuntur personam need not be controverted, though that rule, or rather fiction, if without exception, would in some extreme cases lead to absurdity and injustice, more especially in the modern state of so-[436]-ciety, and with reference to the nature and extent in these times of personal property, particularly funded property. The rule took its rise when "mobilia," for the most part, did accompany the person; but still recognising the rule, it is necessary to ascertain the national character of the "persona;" for it would be carrying the fiction into manifest absurdity to hold that the person and his mobilia changed their character with every place which he might enter, or pass through, or move to.

The general and primary rule is that the national character of the person is

acquired from the place of birth, though some exceptions even to that rule have been framed, not by the common law, but by special acts of parliament; as, for instance, in favour of persons born abroad, but of natural born British parents. The different species of character is distinguishable; one is natural, the other local; one is temporary, the other permanent. The native national character is not only the most strongly impressed, but for some purposes cannot be changed: "nemo potest exuere patriam" is a rule of the jus gentium held by most countries, and by none more strictly than by this country. A natural born British subject cannot, at his own will and pleasure, divest himself of his native duties; nor can he be deprived of his native privileges except for crime: he may go into other countries and acquire privileges there, but still his native rights and duties adhere to him. These principles are, I apprehend, correctly laid down by Mr. Justice Blackstone: "It is a principle of universal law that the natural born subject of one prince cannot, by any act of **[437]** his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for his natural allegiance was intrinsic and primitive and antecedent to the other, and cannot be divested without the concurrence of that prince to whom it was first due." "This allegiance is the duty of all the King's subjects . . . their rights are also distinguishable by the same criterions of time and locality, natural born subjects having a great variety of rights, which they can never forfeit by any distance of place or time but only by their own misbehaviour" (1 Bl. Com. 370-1).

For certain purposes a man takes his character, primâ facie, from the place where he is domiciled, and, primâ facie, he is domiciled where he is resident, and the force of residence, as evidence of domicil, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive; for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years, be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities quoted as well as by practice—it depends upon the intention, upon the quo animo; that is the true basis and foundation of domicil; it must be a residence sine animo revertendi, in order to change the domicilium originis: a temporary residence for the purposes of health, or travel, or business has not the effect: it must be a fixed and permanent residence, abandoning finally and for ever the domicil of origin; yet liable still to a subsequent change of intention.

"The third rule I shall extract," said the Master of the Rolls, in the case of *Somerville* (5 Ves. 787), "is that **[438]** the domicil of origin is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil, and taking another as his sole domicil;" and that observation was made even with reference to domicil in different parts of the British dominions, when the choice was perfectly free from any restriction of conflicting duties.

In the present case there is strong evidence of acquiring a new domicil, and an intention of abandoning his former and taking another as his sole domicil (but still, it must be remembered, in a foreign State), declared not merely by long residence, but by marriage, naturalization, and investing himself with all the privileges which a new comer could acquire at his place of residence. But on the other hand here is some evidence to shew a change of intention, and of the animus revertendi, not merely that latent intention which pretty generally exists as a sort of natural feeling of "panting for his native home," but shewn by acts done and by declarations made, by sending his wife to England, by investing property in the English funds, by declaring his adherence to the English Church, by desiring, if he should chance to die at Madeira, to be buried in the English burial-ground, by making these codicils in the English forms, by declarations to several of his friends of his wish and intention to return, and of his fears that he might be prevented by infirmities.

In questions of national character it has been often decided that character acquired by mere residence ceases with the residence, and that the original character reverts and is reacquired much more readily than the change is made from an **[439]** original to an acquired character; the local and temporary character is by circumstances more easily presumed to be abandoned than the natural and more permanent character, which in some respects at least is inalienable: the animus revertendi actually put in motion, though the removal has not been consummated, recovers the original character. Whether the circumstances adverted to would be sufficient to shake off the Portuguese character in the deceased's case, or to exempt his property in Portugal from the opera-

tion of the laws of that country, may not be necessary to be decided: but there are circumstances tending to shew that the deceased neither wished nor intended altogether and for ever to abandon his connexion with his native country, nor to give up the rights and privileges belonging to him as a British subject. Not only in common parlance would he be still described as an Englishman and not a Portuguese, but he himself was in animo and he was in some respects de jure still an Englishman. His intention to retain his right as a British subject of disposing by will of his property in the British funds is quite obvious: and to deprive him of that right the law ought to be clear and unequivocal: and for this reason, because it will operate as a disqualification and a forfeiture of right.

That he retained some rights acquired by birth cannot be doubted: he would succeed to real property—he might purchase real property, notwithstanding all that had taken place in Portugal. Over personalty here, even a foreigner domiciled in his native country might in his life time exercise dominion as freely and as fully as a resident Englishman. So while the deceased survived, his power over and his rights regarding personal property **[440]** here, with some few exceptions perhaps, e.g. in case of bankruptcy, would not, at least in this country, be affected by his domicil abroad, they would be regulated by the laws of England and not by the law of Portugal. He would succeed in distribution of personal property in England as a next of kin, under whatever legal disabilities the law of Portugal might place him; he could transfer or give away personal property without regard to any restrictions which the law of Portugal might impose on such transfers or gifts: he could do this, it should seem, by instruments in the British form: the bank would probably receive no other in order to transfer stock: and he could engage in contracts to be executed in England, though such contracts might be illegal or invalid by the law of Portugal.

It comes then to the question whether a testamentary act of a British born subject, clearly intended and wished to operate upon his personal property in England, and executed according and with direct reference to the forms of the English law, which in this respect coincides with the law of nations—the jus gentium—is by the law of England invalid, solely because the deceased had long resided and was domiciled in Portugal, and because such testamentary act was not executed in the Portuguese forms. The authorities quoted all tend to prove that the jus gentium—the general law of all countries—is favourable, and inclines to give effect to testamentary dispositions. They also establish that intention is the very basis and foundation of the testamentary disposition to which effect is thus to be given. Forms are prescribed only for the sake of rendering more secure the execution of the real intention. The policy **[441]** of some countries may be to impose restrictions on the disposition of real property, or sometimes even on the disposition of personal property, by requiring the whole or a certain portion to descend to the wife and children, for whom every person is under a moral duty to provide: but wherever the power of disposing exists, and to whatever extent it exists, the intention and not the form, more especially as regards personal property, is the governing principle.

Assuming, then, that the deceased was a British subject, yet at the time of his death domiciled in Portugal, and that he had a clear intention to dispose of his property in the British funds by this codicil in his own handwriting, and attested by three witnesses, is it invalid because it was not attested by a notary and five witnesses as the Portuguese law requires, or is it entitled to probate here? Among the numerous authorities quoted it is admitted that there is no adjudged case in which the question has been decided either way: no case in which a will made with reference to, and in accordance with, the English forms by a British subject domiciled in a foreign country has been refused probate: no case in which the property of a British subject dying even intestate in a foreign country has been held distributable according to the law of such foreign country. All the adjudged cases have been of persons dying domiciled in some part of the British dominions, having different rules of distribution. No case has yet gone farther than to adopt the lex domicilii, when the domicil was in some part of the British dominions, and when it was a case as to the distribution of the effects, or the construction of the **[442]** instrument, not as to the right to the representation or the validity of the will.

The question is of too great importance, more especially in modern times and in the present state of society, to be decided on mere obiter dicta, or assumptions in argument. Great numbers of persons particularly of this country reside abroad, some

for sufficient reasons, some perhaps upon less favourable grounds: they have no idea that their property would be distributable according to a foreign law, still less that they are deprived of the privilege of disposing of their property by will made in the same form as if they were resident in England. A person in the decline of life or of health going abroad to a more genial climate in hopes of prolonging life, or at least of rendering its remaining period less painful or more comfortable, without any hope or intention of ever returning, leaving the summa rerum in England—perhaps exclusively in the funds—having merely the dividends remitted to him for his subsistence; knowing that the law of England would distribute this property exactly as he would wish, and on that account, or from mere indolence, making no will, or supposing that a will in his own handwriting would be valid; how alarming would it be to a person thus circumstanced, how injurious to his family, if on establishing himself in the south of France he is to be bound by the law of that country: he may then be recommended to go farther south into Italy, then into Sicily, then perhaps to Madeira, with the intention at each place of fixing himself for the remainder of his life—"of abandoning his former domicil and taking the other as his sole **[443]** domicil"—at each remove a different law may govern not merely the form of the instrument, but the power of disposing—he may retain the jus disponendi over only one sixth part of his property; an undeserving wife or undutiful children may be absolute proprietors of five sixths of the personal property which he had left in England. If this lex domicilii is to be the rule not only in cases of intestacy, where there may be some presumed intention, but even in the case of a will as respects not only the form of the instrument, but even the power of disposing against the manifest and declared intention, it will be going beyond the authority of any case hitherto decided. It is true that there has been found no decision in a contested case that such a will is valid; but there have been instances where probates of such wills have passed sub silentio in common form. The case must surely have frequently happened, and if the probate was not opposed, the inference rather is that the will was supposed to be valid.

What then is the Court called upon by the opposer of the codicil to decide? That the codicil is invalid contrary to the manifest intention of the testator — that intention being expressed in an instrument duly executed according and with reference to the law of this country, in his own handwriting, and attested by three witnesses. The Court is called upon to extend disqualification and to deprive of privilege—to disqualify a British subject, because he is resident in a foreign country, from giving effect to his wishes in the disposition of his property at his death, and to deprive him of his testamentary privilege which is so highly favoured by the general law of this and of most other countries. Without some more direct authority **[444]** than any which has been quoted, or with which this Court is acquainted, I do not feel warranted to proceed to such a length. I am the less disposed so to do, because in one way the decision of the Court of Probate would be conclusive, in the other it would not. If the codicil be pronounced against and probate be refused, the legatee could not resort to any other jurisdiction; if pronounced for, this Court would merely decide on the factum, and the residuary legatee might resort to a Court of Equity to take its decision upon the question of construction.

There has been a recent case, not quoted in the argument, where a Court of Equity has held that in the construction of a will the lex domicilii is to rule, unless there be sufficient to shew a different intention in the testator (*Anstruther* v. *Chalmers*, 2 Simons, 1). The facts of the case were: Miss Anstruther, a native of Scotland, was domiciled in England. On a visit to Edinburgh in 1814 she made a will entirely in the Scotch form, and it was deposited with the writer at Edinburgh: she had personalty in England only, and died in England. Scotland then was the forum originis and forum contractus, but on the other hand England was the forum domicilii and the locus rei sitæ. The question was whether by the legatee's death in the life time of the testatrix a legacy lapsed according to the law of England, or survived to the legatee's representatives according to the law of Scotland. The point put in argument on both sides is the intention—what was the rule of construction the testatrix intended should be applied to the instrument. The Court decided that, being domiciled in England, it was to be presumed that she intended the law of Eng-**[445]**-land to be applied: there was not enough to repel that presumption. In the present case there is sufficient clearly to prove that Mr. Stanley's intention was to make these codicils in the form of the law of England. In *Anstruther* v. *Chalmers*,

it is true, words might have been used which, even according to the law of England, would have prevented a lapse. The case therefore does not infer that intention could have given effect to a bequest forbidden by the law of the domicil; but it shews that in order to determine what law ought to operate on testamentary instruments, all Courts primarily and principally look to the intention of the deceased.

Another case, which has not been reported, was quoted in argument by Mr. Stanley's counsel from instructions furnished him, and a counter statement was afterwards given on the other side. The Court, without in the least doubting the intended correctness of the statements, is always cautious of relying upon an authority of that description; and in this instance the precise grounds of decision are at last left very much in the dark. The case referred to was that of *Mr. Waddington*, a natural-born British subject, long resident and settled in France, and domiciled there at his death: he made two wills, one in the French form, disposing of his property in France, and one in the English form, disposing of his property in England. So far the cases are parallel: there is nothing to shew that the English will was in point of form made also conformably to the French law; the contrary is to be inferred. How does the case operate further as a precedent? It should seem in favour of the validity of these codicils. Both wills receive the **[446]** probate of this Court: as far as that goes it is a precedent in favour of Bernes, the legatee. Both wills are considered in the Court of Chancery, and also in the French Court, and are acted upon as valid wills, for the property passes according to the disposition contained in the two wills taken together—the French will and the English will. The intention of the testator was to divide all his property equally between his children, and both Courts decide so as to give effect to that intention. Again, therefore, it is a precedent in support of the principle that intention is to govern the testamentary disposition; and how is the final decree made? Not upon the ground that the French Court, or the law of France, was on account of the deceased's domicil the sole forum having the right to decide—not excluding the law of England, nor pronouncing against the validity of the English will made in the English form, but the Vice-Chancellor is made to declare, "and declared, that, regard being had to the laws of England and France," the testator's property both real and personal, both in England and France, was divisible in equal shares between the deceased's children. He does not declare that, the deceased having been domiciled in France, the French law was exclusively to govern his will; he does not declare that, the French tribunal having so decided that both wills are valid, a Court of Equity will merely on that ground decree the property to be divided into equal shares, but both wills are proved in England and in France; both are considered valid in both countries—notwithstanding that one was in the French form, the other in the English—and regard being had to the laws of England and of France, the intention **[447]** of the testator, collected out of both the wills combined together, is carried into effect. Whether the Court from these statements rightly understands *Mr. Waddington's case*, may be doubtful; but at all events it serves so far as a precedent that probate was taken of both wills in this Court. That will be the effect of the decree about to be made by the Court, which is, to pronounce for the will and codicils, and to direct probate to be taken of them all.

Costs out of the estate.

An appeal from this decree was interposed to the High Court of Delegates.

The Judges, who sat under the commission, were: Parke, J. (K.B.); Bolland, B.; Bosanquet, J.; Burnaby, LL.D.; Daubeny, LL.D.; Chapman, LL.D.; Curteis, LL.D.

The præsertim of the appeal was: "And more especially from that part of the decree wherein the Judge pronounced for the 3d and 4th codicils, bearing date the 24th of October, 1822, and 29th of October, 1825." Accordingly the proctor for Stanley prayed the Judges to pronounce against the 3d and 4th codicils; the proctor for Bernes—to affirm the decree with costs.

July 14, 1830.—The King's advocate, Dr. Phillimore, and Mr. Alderson for the respondents. The deceased's residence in Portugal was solely as a merchant. The use of his native lan-**[448]**-guage, the niceties of which he had forgotten in the disposition of his property, tends to shew that he did not consider himself a Portuguese subject. Had he so considered himself, he would probably have adopted the language of his domicil. He was as much domiciled in Portugal for the last twenty as for the last six years: could he not during that period have disposed of this property by an English instrument, e.g. a power of attorney for the sale of stock? It does in fact appear from his

will that he did make transfers of his stock, thus clearly exercising dominion over and dealing with it as his own. For these transfers an instrument in the Portuguese form would not have been valid. Why is death to make all the difference? In order to the validity of a testament no form is prescribed nor restraint imposed by the conventional law of Christendom. By the law of nations, intention is the governing principle of a Court of Probate. The doctrine of the law of England is that a testator may dispose of his personal property, quocunque modo velit, quocunque modo possit. The other side must shew that he is deprived of this privilege. From Mr. Veitch's evidence it appears the Portuguese authorities never doubted that these were legal codicils. If Mr. Stanley had executed these codicils in the Portuguese forms, he might be presumed to have intended that the disposition should be according to the Portuguese law; but here he in effect says, "I know it is necessary to adopt the Portuguese forms when disposing of my property in Portugal, but when I come to my English property I know I am a British subject entitled to all the privileges of a British subject, that I am so considered by the Portuguese government, that my will is deposited with the British Consul **[449]** and expressed in my own language, and I shall execute these codicils disposing of my property in England according to the forms of the English law."

The question is not whether the law of Portugal shall ultimately prevail or the law of England, but whether a Court of Probate in England is to look into the document for the purpose of ascertaining what law is to be applied to it—to see what is the intention of the testator, and whether that intention is conformable to the power of the testator under the law of Portugal. The construction of the will, if admitted to probate, belongs to the Court of Chancery, and it may become a question whether it is to be construed by the law of Portugal or of England; but that is a different point from the mode of execution. Cases of intestacy involve both points. Both by the law of England and of Portugal the deceased had the right of making a will: has he made one? The jus gentium refers the form of the instrument to the place where it is to be carried into effect—that is England; but how and where is it to be proved? By the law of the country and in the place where the property lies: and the law of that country is to inquire (if there be proof that the party intended to give the property) whether it is given with certain formalities, these formalities being either those which the law imposes, or which the deceased has imposed on himself. The former, that the will must be in writing, have been complied with: and so, as we contend, have been the latter, because he did not impose on himself the formalities required by the law of Portugal, but an attestation by three witnesses. A different mode of probation may be required in the Portuguese courts and in these courts: the will, if re-**[450]**-quiring probate there, would be admitted to proof according to the mode of probation there required. If by the Portuguese law the deceased could have made no will, the case might be different.

The only question is whether this will can be given in evidence. A similar question arose in *Brodie* v. *Barry*. Sir W. Grant, remarking on the decisions that the question, whether a will should be read against an heir, belonged to the law of real property, says, "Upon that principle, if the domicil were in Scotland and the real estate in England, an English will imperfectly executed ought not to be read in Scotland for the purpose of putting the heir to an election, and upon the same principle, if by the law of Scotland no will could be read against the heir, it would follow that a will of land situated in Scotland ought not to be read in England to put the Scotch heir to an election." He doubts, as well he might, the soundness of the principle, and finally the will was read. Probate has never been refused in such a case. What is the principle on which the probate proceeds? By the law of the land it is vested in the ordinary, and if granted it must be on some act of which testimony can be given. If by the law of the land the ordinary is to grant probate when he is satisfied a will has been made in England, it is strange that he should not do the same upon evidence that a will has been made elsewhere, either according to the law of the country where made or to the law of England. If proof be given that a will has been admitted to probate in the country where made, your Lordships must admit it to probate here; but if it be tendered for proof originally here, you must examine it by the law of England, for you have not the means of ascertaining whether it has or has not been tendered for probate where executed. In *Wad*-**[451]**-*dington's case* the will of an Englishman domiciled in France, made in the English forms and not conformable to the law of France,

was admitted to probate; both wills were held valid, and the intention carried into effect. The circumstances of the present case are new. You have now, as a Court of Probate, for the first time to decide a question where the decision against the validity of the papers must be final so as to preclude the party from going to a Court of construction; while, if you pronounce for the validity, the party may resort to the judgment of a Court of Equity. There must have been hundreds of cases of probates of wills granted under the same circumstances as the present, of wills executed in Portugal where the property was in England, yet not one can be cited in which the testator has been held not to be at liberty to dispose of his personal estate in England by a will conformable to the laws of his own country. The absence of such a case affords a presumption that such a will is not contrary to law. All the cases decided are where it was necessary to determine on the effect of the will: here the question is with what species of evidence the Ecclesiastical Court shall be satisfied; and whether it is to be satisfied on its own rules. We can find no instance where a will capable of proof by the law of England has been refused probate. As this question is only whether the instrument shall be admitted to probate, your Lordships will affirm the judgment, and leave the construction to a Court of Equity.

Dr. Lushington, Dr. Addams, and Mr. Follett for the appellants. Lord Coke's maxim, Co. Litt. 198, Nemo potest exuere patriam, has nothing to do with the case. **[452]** Though a man cannot throw off his allegiance, he may owe a double allegiance, 1 Hale's P. C. 68, and he can acquire a new home. There is no maxim in the English law that an Englishman cannot throw off his domicil of origin and acquire one in any part of the world. There is nothing laid down which confines the change to different parts of the English dominions, for Scotland is as much a foreign country as to its law as France or Portugal: it is only the same country as to its King and legislature. There is no difference then in changing to Scotland or Jersey, or to any foreign country; nor was any such distinction ever adverted to by any Court till thrown out in *Curling* v. *Thornton*, 2 Add. 6. If there had been a constant intention of returning, and if the connexions and family of the deceased had been in England, the domicil of origin might have adhered: but he had done all he could to put off his original character: he set up "his tabernacle" in Portugal. He had no earthly connexions in England. The sole persons interested in this question are Portuguese subjects.

Per Curiam. Mr. John Stanley, the party in the cause, is a British subject: he was born before the act of naturalization.

Argument resumed. Legally he is so, but practically he is a Portuguese. There is no proof that the deceased sent his wife to Ireland: the will only says "she went there." No English witness speaks to his declarations of his intentions to return: if he had such intention, is it not strange that he should not have so expressed himself to his own fellow subjects! But Lord Thurlow, in *Bruce* v. *Bruce*, expressly said "that an intention to return will not do." The will itself proves **[453]** that he doubts his right to dispose of his property as a British subject. In referring to the possibility of his son opposing the will, he does not say, I am not a subject of Portugal, nor does he assert his right as a British subject: he hangs a penalty in terrorem over his son. The will is not confined to Portuguese property, but disposes also of English, American, and other effects.

The fact of the codicils being executed in the English form, whether used as an argument to shew his intention of returning or for their validity, amounts to nothing. It is said it was his intention not to adopt the Portuguese forms: it was his intention to pass his property in England, and the question is, could he do so in the way he has adopted? If intention alone is to have effect there would be no need of any form: but the law of all countries requires that the intention should be expressed so that the law may understand it, and that the personal property may be distributed according to its rules. If it be a clear principle of law that personal property has no locality; that the law of the place is not to be looked to at all, it follows as a necessary deduction that the case of a party dying, leaving a will, must be liable to the same rules as in a case of intestacy. The law which binds the person governs the effects. If, then, the person of the testator was governed by the law of Portugal, so must these instruments; if the property is distributable by the law of Portugal, the instrument should be valid by that law. If intestate, it is conceded that his property, in whatever country, would pass according to the Portuguese law: how, then, are we to find whether he is intestate or not. If the will by the Portuguese law is invalid, he is

intestate in Portugal; for you can **[454]** never say, that because this will is valid in England, it is therefore valid in Portugal. Supposing it to be valid by every other law, but invalid by the law of Portugal, then the property would go according to the Portuguese law, as in a case of intestacy. Suppose a will, giving, without specification, all the testator's property in different places; by the law of what country are you to see that the will is valid? It is necessary to look to that point; for the deceased may be testate in one country, and intestate in another: we contend that, on principle, if it be once established that in cases of intestacy the law of domicil is to prevail, it must follow that in testacy it must also; otherwise you cannot find out whether the party be testate or not. If a foreigner made a will, valid by the law of his own country, and invalid here, disposing of property in this country, could the Court refuse probate? When an instrument is invalid the Court of Probate refuses probate; it does not grant probate and send the paper to the Court of construction: so if the codicils in this case are to be governed by the Portuguese law, you cannot send the instruments to a Court of construction that it may have a construction contrary to the rules of a Court of Probate. The same law must prevail as to the probate and construction, otherwise persons as executors will obtain control over the property to which they have no right, and the probate would be conclusive evidence of their right unless a Court of Equity interfered.

From *Waddington's case* no principle can be extracted; it is not reported; it was arranged by consent of parties; the decree was settled by counsel and confirmed by the Vice Chancellor. The case of *Gordon* v. *Brown*, House of Lords, **[455]** 1st of March, 1830, establishes that a British subject may acquire a foreign domicil in complete derogation of his British, and that then his will must be construed by the law of that domicil.(*a*) **[456]** The Judge of the Prerogative, in speaking of the

(*a*) *Gordon, Trustee of John Brown* v. *Mary Brown.* House of Lords, March 1, 1830.

This was an appeal from certain interlocutors of the Lord Ordinary and First Division of the Court of Session in Scotland. Wm. Brown, by birth a Scotsman but domiciled in Virginia (so described in the Lord Chancellor's judgment), died in 1811 at Richmond in America, having on the 29th of June, 1805, made his will in Virginia, which will was proved by the executors, in the proper Court in Virginia, in February, 1812, and administration with this will annexed was also granted by the Prerogative Court of Canterbury to his father and mother. The will commences, "I William Brown of Lynchburgh, state of Virginia, do make this my last will and testament." After giving to certain persons (all Scotch) legacies "in Virginia Currency and an acre of land at Lynchburgh," it proceeds: "to my father and mother James and Margaret Brown, of Kirkcudbright, N.B., I leave one 4th share of the balance of my estate to them or the survivor of them; to my sister, Jean Muir, of Kirkcudbright, N.B., I leave one 4th share of the balance of my estate, at her death to be equally divided between her children. To my sister Isabella Black, do. To my sister Mary Brown, I leave the remaining one 4th share of the balance of my estate, at her death to be equally divided between her children should she have any." It then appoints three executors, two described as resident in Virginia and one in Scotland, and concludes: "Witness my hand and seal at Lynchburgh this 29th of June 1805."

Test. G. P.—T. M. WILLIAM BROWN (L.S.).

It appears that the testator at the time of his death was in partnership with Mr. Boyd Miller in London, and although by far the greater part of his property was in America, he had also funds in England: but it does not appear that he had either real or personal estate in Scotland.

After the death of the testator a suit was instituted in the Virginia Court of Chancery by Mary Brown (the respondent) and Jean Muir, as residuary legatees in the will, against the executors and legatees. In May, 1816, a decree was pronounced that payment of the shares of Jean Muir and Isabella Black, both having children, ought not to be made unless security be given that at their respective deaths their shares should be divided among their children, as provided by the will; that the executors pay to Mary Brown one 4th of the testator's residuary estate, and to the husband of the other two sisters their respective shares on giving bond in 70,000 dollars that at the death of their wives their legacies shall be divided amongst their children.

In October, 1816, Mary Brown, by power of attorney, authorised John Brown

alarm that persons abroad would feel if the law [457] we contend for prevail, seems to have understood us to argue that the validity of wills was to be deter-[458]-mined according to the law of the place where a person was casually resident, and not where he was [459] domiciled. This we never maintained: but if the doctrine of the lex loci rei sitæ were to prevail, it [460] would go far to deprive parties of the power

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to receive on her account the money that she should be entitled to under the will of the testator; and in conformity with the decree the money was paid to him as her attorney. "It seems, therefore," said Lord Chancellor Lyndhurst, "extremely difficult to say that Mary Brown is not, under these circumstances, entitled to an account against John Brown for the money he has so received under a power of attorney from her, and in pursuance of a decree of a competent Court in America pronounced upon the subject of this will in a suit instituted for that purpose. It is said, however, on the part of the appellants, that Mary Brown was entitled to a life interest in this property; and that she being entitled only to a life interest, the residue was undisposed of and would pass therefore to the father, and from him by virtue of certain deeds to John Brown. For the purpose of establishing that this was the true construction of the will, the opinion of an English lawyer was offered in evidence, but the Court in Scotland justly observed that they had nothing to do with the law of England, and that there was no evidence to shew that the law of Virginia corresponded with the law of England in respect to the rules by which an instrument of that kind was to be construed."

"A petition was presented that the opinions of Virginia lawyers might be taken for the purpose of guiding the consideration of the case. The Court, however, rightly I think under the circumstances, rejected the petition. [See infra.] The Court of Virginia had in effect in 1816 pronounced a judgment on the construction of the will, for they had decreed that Mary Brown was entitled absolutely to this property; they had directed this property to be paid to her, and it was accordingly paid to John Brown as her agent appointed by her to receive that to which she was entitled under the will. It seemed, therefore, under these circumstances, and after so long an interval of time, not right again to postpone the cause for the purpose of taking further evidence as to the real and proper construction of the will. It was urged, however, that John Brown ought not to be bound by that decision; he was a party to that suit, his name was upon the record, but the decree was pronounced during his absence in Scotland. Although sitting here your Lordships cannot be apprised precisely of what the law of America is in this respect, yet it is probable that, the decree having been made in his absence, he might have obtained a rehearing. It is not, however, suggested that he was not apprised of the decree at the time it was pronounced in 1816: he had received from the executor the money under the decree, he had taken no steps from 1816 for ten years to call that decree in question, and therefore I think the Court below rightly judged that they might take that decree as the foundation of this judgment, and decide accordingly." *

Judgment of the Court of Session affirmed.

March, 1824.—The interlocutor of the Lord Ordinary, Lord Eldin, finds, "If the opinion of any foreign lawyer were necessary or useful, the opinion of an American lawyer, as best acquainted with the American law, ought to be taken; that from the nature of William Brown's settlement, which is very simple and clear, the construction put upon it by the respondents is apparently ill founded; and that it has been asserted that the settlement was regularly brought before an American Court which gave judgment in Mary's favour, and that no sufficient answer has been made to that assertion."

Dec. 14, 1824.—The interlocutor of the Lord Ordinary, Lord Alloway, finds, "That by the plain import and meaning of the words of the testament, as well as by the judgment of the competent Court in Virginia, where the testator died, and which stands unchallenged and unaltered, the fee of the legacy is vested in Mary Brown, who, by assent of both parties, is long past the period of having children: that the construction of this American will cannot be affected by the opinion of any English counsel, as it must be judged of solely by the laws of America; that Gordon, &c., as

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* The rest of the case related to subsequent transactions between John and Mary Brown, and had no bearing whatever on the point of domicil.

of making a will of property situate in a different country from that of their domicil. This cannot be the law of any civilized country. We contend that the personal representative must be ascertained by the lex domicilii.

On the question of domicil the appellants cited *The Harmony*, 2 Robinson, 324; *Ann.* 1 Dod. 221; 2 Dyer, 165 b. *Campbell* v. *French*, 3 Ves. 323; *Sawer* v. *Shute*, 1 Anstr. 63; *Scott* v. *Swartz*, 2 Com. 677; *Pipon* v. *Pipon*, Ambler, 25, 799, ed. 1828. *Potter* v. *Brown*, 5 East, 131; *Anstruther* v. *Chalmers*, 2 Sim. 1; *Re Ewing*, 1 Tyrwhitt, 91; 14 and 15 Hen. 8, c. 4.

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representative of Brown, is accountable for sums drawn by him as attorney of Mary in virtue of this American settlement."

Notes of Judgment in the Second Division of the Court of Session.

May 27, 1825.—*Lord Justice Clerk.* Had there been no proceeding in America, the proper course would have been to ascertain what the law of that country was: and as that was the place where the deed was executed, it should be regulated by the law of that country and of that place. As the Courts there had decided in Miss Brown's favour, and the trustees had produced no evidence of a reversal of that decision, I have no difficulty in adhering to the interlocutor of the Lord Ordinary.

Lord Robertson. I agree with Lord Eldin and Lord Alloway, and the pursuer; and indeed all parties agree that the fee of this legacy is vested simply and absolutely in Mary Brown. No satisfactory answer is made to her assertion that the settlement was regularly brought before an American Court, who decided in her favour.

Lord Pitmilly. I think the decree is quite decisive.

Lord Alloway. I agree with your Lordships that this case was decided in the most formal and regular manner in 1816. The decree of this foreign Court is completely established. The judgment was pronounced in 1816, but they never attempted to bring the sentence again under the review of the American Court.

The reasons for the appellants, with reference to the interlocutor of the 14th of December, 1824, state: "They do not know how the meaning of a foreign instrument can be said to be obvious to a Scotch Court, when its meaning is disputed and all foreign evidence upon the subject is excluded. Words may have one meaning when read by the law of one country, and another meaning when read by the law of another country. Accordingly the better practice of the Court of Session has always been to treat the law of a foreign country as a fact, and let it be proved by professional opinions. This was done in the cases of *Robertson*, of *Trotter*, and of *Murray:* all of these questions turned upon the construction which the law of England applied to words used in wills executed in India; and if their mere obviousness in common language had been held sufficient, no inquiry would have been necessary." They then proceeded to deny that there was any legal evidence before the Court of the American decree; that it was made in the absence of John Brown, and the mere fact of decreeing the money to be paid to Mary Brown, who had no children, without security, did not decide that she was entitled to it absolutely.

On the other hand, the printed reasons for the respondents stated: "All inquiry upon the construction of the American will was wholly incompetent and irrelevant, and no defence against this action arose from the terms of that will. The fee of the legacy was clearly vested in Mary Brown. It was indeed maintained in the Court below that however plain the construction might appear to the judges, they were not entitled to form an opinion, because the meaning of the will ought to be determined by the law of the country where it was executed. The question is merely one of intention, and not one depending upon any technicalities of law. If there had been any difficulty in the construction, this would have been only determined by the opinion of American lawyers, as by the argument maintained on the other side, the law of America must form the rule: and an opinion of a Virginia lawyer, in opposition to an English lawyer, was given, that Mary Brown was entitled to the legacy in fee, subject only to the contingency of her having children. It was unnecessary, however, to enter into any discussion as to what the American law might be, as that law was expressly declared by the American Court itself."

In the foregoing case the deceased, though of Scotch birth, had clearly abandoned his forum originis entirely and for ever. It did not appear that he ever visited or contemplated a return to Scotland; his property was all in America or England; he had none either real or personal in Scotland. The will describes him as of Virginia,

The Court mentioned the following cases:—*Bell* v. *Reid*, 1 M. and S. 726; *Adam* v. *Kerr*, 1 B. and P. 360; *Alves* v. *Hodgson*, 7 T. R. 241: and that there were several cases in bankruptcy.(*a*)[1]

[461] In reply.

Feb. 4, 1831.—The King's advocate and Mr. Serjeant Stephen.(*a*)[2] The cases from the Admiralty Reports merely apply to national character as relating to commercial purposes. The case of *Ewing* has reference only to the statute law, and would apply equally to temporary residence as to domicil. *Hog* v. *Lashley* was not relied on in the Court below as a case in point: no facts are set forth; it did not relate to the validity but only to the construction of a will; it is of no weight. None of the other cases cited on the other side bear with any stringency on the point. The law of no country prevails out of its territory unless by comity, Voet, lib. i. t. 4, pars 2, and this comity does not apply universally but partially; not to immoveables nor against a positive law. Huber de conflictu legum, lib. i. t. 3. Therefore it does not apply to this case; for money in the funds has been considered in the nature of im-**[462]**-moveables; thus by 3 G. 4, c. 9, s. 2, the dividends of these funds are secured on the consolidated fund which by 56 G. 3, c. 98, s. 1, includes the land-tax; s. 13, however, provides that parties shall be possessed thereof as of a personal estate devisable as

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and makes no allusion whatever to his connexion with Scotland or any other country than America; except that the parties benefited are all Scotch, it has no reference whatever to Scotland: it was not executed in the Scotch forms, but he had in its execution adopted the formalities required by the law of America. It was executed there—was proved there—was principally to operate on property there. To construe the will therefore by the law of America was to construe it in conformity not only with the presumed or probable, but with the almost certain, intention of the testator, and was to follow that law which the deceased himself had adopted. The validity of the will was not in any way in question, and the decision of a competent court in a suit to which both appellant and respondent were parties had been acquiesced in for ten years. There is no one circumstance, except perhaps the domicil in a foreign country, that can give it any material bearing on *Stanley* v. *Bernes*. In all other respects it is an infinitely weaker case than either that of *Sir Charles Douglas*, or of *Anstruther* v. *Chalmers:* in the former of which cases the death occurred in Scotland, and in the latter the deceased's intention to exclude Mrs. Lashley from her legitim was indisputable. Had a will, executed under such circumstances, and solely with reference to the laws of America, by a person thus domiciled in America, come before the Prerogative Court, it is conceived that Court would at no time have hesitated to follow the decision of an American Court pronouncing for or against the validity of the will. In such cases the Prerogative Court probably acts on the principle that the deceased, having chosen to impose on himself the formalities required by the lex domicilii, must adhere to them, in the same way that if a person by an attestation clause evinces an intention of having witnesses to a will of personalty, such will is primâ facie invalid without them. In both cases the deceased, having imposed them on himself, must adhere to formalities originally unnecessary.

(*a*)[1] See Montagu and Gregg's Bankrupt Laws, ed. 1827, vol. i. pp. 172, 3; 362-4; 427, 8; 503, 4; and the cases therein cited. Also see *Selkrig* v. *Davies and Salt*, 2 Dow (First Series), 230; 2 Rose, 98, 291, S. C. *Bank of Scotland* v. *Cuthbert* (1 Rose, 462)—characterized by Lord Eldon as a report indeed well worth looking at—2 Dow, 245. The principal authorities and cases are there commented upon. *Ex parte Geddes*, 1 Glynn and Jameson, 414. As to legacy duty, see *Attorney-General* v. *Cockerell*, 1 Price, 165. See also *Pottinger* v. *Wightman*, 3 Mer. 67; *Doe* v. *Vardill*, 5 B. and C. 438, and the dicta of Abbott, C. J., Holroyd, J., and Littledale, J., and the authorities cited. See also, relative to the law which governs the succession of personalty, Sir Leoline Jenkins' letter to Lord Arlington, the memorial of the French lawyers, and the reply of Sir L. J. on the conflicting claims to the personal estate of the Queen Mother (Henrietta, widow of Charles I.), who died intestate in France. Life of Sir L. Jenkins, vol. ii. pp. 663, 669: and Kent's Commentaries on American Law, vol. ii. p. 344, 5 (New York, 1827). He says: "Personal property is subject to that law which governs the person of the owner:" and cites Bynkershoek (Quæst. Jur. Priv. l. i. c. 16), adeo recepta hodie sententia est, ut nemo ausit contra hiscere.

(*a*)[2] Mr. Alderson having become a Judge of the Court of Common Pleas.

such: thus giving to all indiscriminately the privilege of devising it by less strict forms: why then should the testator, or even a natural-born Portuguese subject, be deprived of the privileges granted by this positive law? Except to effectuate the intentions of the parties (Voet, l. i. t. 4, pars 2), or to protect creditors, as in the cases in bankruptcy, the lex loci rei sitæ prevails, because there is nothing to counteract it; and there is no comity to a foreign law merely as such. In the case of *Ewing* effects in France were held not liable to the legacy duty. Why? by reason of their locality. In England, even in intestacy it is only the distribution which follows the lex domicilii. The succession, properly so called, that is, the representation, is governed by the lex loci rei sitæ. No notice is taken of foreign probates and administrations: but for any effects here an English representation is necessary. 11 Vin. Ab. tit. Executors, R. 3. *Jauncey* v. *Seeley*, 1 Vern. 397. *Tourton* v. *Flower*, 3 P. Wms. 369. *Pipon* v. *Pipon*, Ambler, 25.

At common law the goods of the intestate passed to the ordinary, and therefore the law of England governed as to the succession; and still that law governs the succession by effect of the statutes. In granting administration to a domiciled Scotsman where the half blood do not succeed, the Court could not exclude a brother by the half blood in favour of an uncle by the **[463]** whole blood: nor could it exclude the mother, who by the law of Scotland cannot succeed to her children, in favour of a brother. This shews that the representation is at all events to be governed by the English law, whether the Court of construction would hold the administrator cum test. ann. a mere trustee for the next of kin or not. It is a fallacy to say that if the next of kin is beneficially entitled by the law of Portugal, therefore of necessity he is entitled to the administration: for if the law of Portugal is to govern in all respects, no administration at all would be necessary; the effects would pass under the authority of the Portuguese law without the exercise of any authority here. It is a fallacy to say that because personal property is to be distributed according to the law of the domicil in cases of intestacy, therefore the validity of a will must be determined according to the same law. The true question is, was not the deceased testate in England? As the law of England must decide whether the property is real or personal (Voet, l. 5, t. 1) it must decide whether the person be testate or intestate. It is a fallacy to say that he cannot be testate in England and intestate in Portugal. It is clear he may be so in the case of immoveable property, and è converso, testate in Portugal and intestate in England. It is a fallacy to say that if the will be proved here, it is holding personal property local or governed by the lex loci rei sitæ: it is not the property that is to be governed, but the character of the instrument by which it is passed; and all the jurists say that that is not to be governed by the lex domicilii, but by the lex loci contractus, save that when executed in reference to another country it is governed by the law of that country. **[464]** Huberi Prælect. tom. 2, l. 1, t. 3, s. 5. *Robinson* v. *Bland*, Burr. 1077. A will is analogous to other alienations. Grotius de Jure Belli, l. 11, c. 6, s. 14. It would be strange if it were otherwise, because the law of execution of instruments is a mere rule of evidence. Heinec. Recitat. l. 11, t. x. s. 492. Voet, l. 28, t. 1, s. 3: or if rather a rule of solemnity, why should the comity of nations apply to exclude the intention of the party? It will apply to effectuate intention. Thus a will executed according to the forms required by the lex domicilii may be valid for the disposal of property in every part of the world: but is the converse necessarily true, that if not executed according to those forms it must be invalid? Is it not more reasonable that the party should have the option of determining whether he shall execute his will according to the lex loci rei sitæ or according to the lex domicilii? The same principle on which the law of domicil is said to prevail in intestacy, viz. presumed intention, would perhaps require that, primâ facie and in the absence of manifest intention on the part of the deceased to adopt the formalities required by the lex loci rei sitæ, the validity of a will should be determined by the lex domicilii: but the principle cannot apply where that presumption is negatived by clear and decisive evidence. If then these codicils had been executed according to the Portuguese forms, but not according to the English, they would have been proveable here; and on the same principle the present codicils should be proveable. The execution of these codicils at Madeira with reference to effects in England is the same as if it had taken place in London: and could it then be contended that they were not valid? It is not **[465]** the same case as if they had been accidentally conformable to English law: but here the intention was to pass English

property in an English form; why is not this sufficient in a will as in the case of other instruments?

On 11th February, 1831, the Judges reversed so much of the decree of the Prerogative Court as pronounced for the third and fourth codicils and the addition to the third codicil, and decreed letters of administration (with the will and first two codicils) to John Stanley, the residuary legatee, and directed the costs to be paid out of the estate.

On a subsequent day it appeared that though all the other executors had renounced, Mr. Gordon—whose appointment under the first codicil, revoked by the third codicil, now revived owing to the invalidity of that third codicil—had not renounced; a decree issued, calling upon him to take or renounce probate, and the same having been served upon his agents in London, and personally upon himself at Madeira, and no appearance being given, the order of the 11th of February, 1831, remains unrescinded: and Mr. Stanley has, accordingly, taken the administration with the will and two codicils annexed.

[466] WYATT *v.* INGRAM. High Court of Delegates, 13th and 17th July, 1828; 7th, 8th, and 9th January, 1829.—Sentence of the Prerogative Court reversed, semble on the ground that the facts disclosed in evidence established capacity, and volition, and sufficiently rebutted the suspicion—arising from the relation of client and attorney subsisting between the testator and the executor and residuary legatee—and from the conduct of the latter.—A commission of review is not grantable, unless the Lord Chancellor be satisfied that the principles of law on which the Court decided were wrong, or that the facts were either misstated or misunderstood.—Where a will is impeached on the ground of fraud, the parties who seek to establish the will must remove or explain and so neutralize the facts out of which the suspicion arose.—The relation of client and attorney between a testator and the person benefited by his will excites suspicion.

[See note in Court below, 1 Hagg. Ecc. 384; 162 E. R. 621.]

From the judgment pronounced in this case in the Prerogative Court (1 Hagg. Ecc. 384) an appeal was prosecuted to the Delegates, where the cause was argued, before Littledale, J., Gaselee, J., Vaughan, B., Burnaby, Daubeny, Gostling, Addams, Blake, LL.D., by Dr. Lushington and Mr. Knight (with whom were Dr. Dodson and Mr. Thessiger), in support of the sentence: by the King's advocate, the Attorney-General (Sir J. Scarlett), Dr. Phillimore, and Mr. Follett contrà.

The Court adjourned till the 20th January, when the cause was again directed to stand over till the 8th July; on which day the Court, being equally divided in opinion, no sentence was pronounced.

12th, 14th, and 15th February, 16th June, 1831.—A commission of adjuncts having issued, the cause again came on for argument before the Judges above named, and before Parke, J. (K.B.), Bolland, B., Bosanquet, J.; and after hearing Dr. Lushington, Dr. Dodson, and Mr. Thessiger in support of the judgment, and counsel (as before) contrà, the Court reversed the sentence of the Court of Prerogative (17th June); decreed probate of the will and codicil to Wyatt, and the costs of the appeal out of the estate.(*a*)[1]

[467] Chancery, 25th, 26th, 27th, 28th and 31st January, 1832.—A petition, afterwards presented for a commission of review, was in the usual course referred to the Lord Chancellor: and the question was argued by Sir Edward Sugden and Dr. Lushington (with whom was Mr. Wakefield) in support of the application, and by the King's advocate and Mr. Follett contrà,(*a*)[2] the Lord Chancellor's judgment, after

(*a*)[1] The following were among the cases cited in support of the judgment:—*Billinghurst* v. *Vickers*, 1 Phill. 187. *Paske* v. *Ollat*, 2 Phill. 323. *Barton* v. *Robins*, 3 Phill. 455, n. *Middleton* v. *Forbes* (cited by the Court, 1 Hagg. Ecc. 395). *Wells* v. *Middleton*, 1 Cox, 112. S. C. 4 Bro. P. C. 245. *Gibson* v. *Jeyes*, 6 Ves. 266. *Eagleton and Coventry* v. *Kingston*, 8 Ves. 438. *Wood* v. *Downes*, 18 Ves. 120. *Walmsley* v. *Booth*, 2 Atk. 27. *Saunderson* v. *Glass*, ib. 297. *Woodhouse* v. *Shipley*, ib. 535. *Webb* v. *Claverden*, ib. 424. *Ward* v. *Hartpool*, 3 Bligh, 471. *Hatch* v. *Hatch*, 9 Ves. 292. *Watt* v. *Grove*, 2 Sch. and Lef. 502. Sheppard's Touchstone, 406.

(*a*)[2] In addition to the cases cited in the Delegates, the following were quoted on the same side:—*Wright* v. *Proud*, 13 Ves. 138. *Pitcher* v. *Rigby*, 9 Price, 79. *Segrave* v. *Kirwan*, 1 Beatty, 157. *Mountain* v. *Bennet*, 1 Cox, 353.

referring to the cases of *Matthews* v. *Warner*, 4 Ves. 186, *Goodwin* v. *Giesler*, ib. 211, n., *Ex parte Fearon*, 5 Ves. 633, and *Eagleton and Coventry* v. *Kingston*, 8 Ves. 438, for the principles on which such applications were to be considered, was in substance as follows:—"Then were there in this case any such questions of law, or had any of the facts been overlooked or misstated, or misunderstood? From the elaborate judgment which had been pronounced by the Judge in the Court below, by whom the case had been first decided, it was obvious that scrupulous attention had been paid to every part of the case. He had found, on examining the facts, that they amounted to a case of suspicion, and he had therefore called for a greater degree of proof on the other side, additional evidence in proportion to such suspicion, in order to clear up or remove the effect of that suspicion. In cases of wills impeached on the ground of [468] fraud it was incumbent on the parties who sought to establish the will to remove or to explain, and so to neutralize, the facts out of which that suspicion arose. The learned Judge in the Court below had acted upon this, and had examined the evidence for the purpose of seeing whether the suspicion which unquestionably existed had been removed. He went through the facts of the case, and they could not be said to carry it further than a case of suspicion; but he thought fit, in the sentence he pronounced, to declare that the will was invalid. The Court of Delegates, pursuing the same course of investigation, were of opinion that, notwithstanding the suspicion, the balance of the testimony was sufficient to support the will, and they accordingly reversed the decree of the first learned Judge. The great admitted fact of suspicion arose from the circumstance that the testator and the person to be benefited by his will stood in the relation of client and attorney towards each other.(*a*) This point the Court of Delegates had considered, and they were in the result satisfied that the other circumstances of the case were strong enough to rebut the presumption which necessarily arose from that relation; and which presumption, if they had not believed it to be rebutted, would have given a contrary turn to their decision. They had considered the proofs which had been given of the state of the testator's mind, his capacity to make a will, [469] the singularity of his conduct, the eccentricity of his habits, and all those other circumstances relating to the testator personally, which were in the main admitted on both sides, although exaggerated by some witnesses, and attempted to be softened by others. They had not overlooked the evidence which went to shew the feelings the testator expressed towards some of the relatives, the little care and interest he evinced respecting his property, and the little knowledge he had as to some part of it, and having well investigated and weighed all these, and all the other facts of the case, the Court of Delegates came to the conclusion that the will in question was the will of the testator, and that it was not, as was alleged on the other side, the will of the Messrs. Wyatt."

The Lord Chancellor then, after stating that the Delegates had all the other facts before them—that unless he could be satisfied that the principles of law on which that Court decided were wrong, or that the facts were misstated, or misunderstood—it was impossible he could recommend the Crown to grant a commission of review; a doubt was not sufficient; he must be convinced that the Judges were clearly wrong; one sentence was the opinion of a single mind; the other of various minds of different professional habits and modes of thinking, proceeded, "If he were to pronounce upon the evidence, to the whole of which he had attended, and which he had weighed with the most scrupulous care, all that he could say of it was that it had in some respects tended to raise doubts in his mind which had not been removed by any thing he had heard; but even with the existence of those doubts, and after giving to the evi-[470]-dence on either side the full value to which it was entitled, he could not bring himself to any other conclusion than this, that if he had been one of the Judges of the Court of Delegates, he should in all probability have nevertheless joined them in the sentence which they had pronounced." His Lordship then adverted to the evidence (and to the observations tending to take off the effect of that evidence) of the factum, particularly that of Mr. Adlington—of declarations in favour of Wyatt, and of the

(*a*) See *Paine* v. *Hall*, 18 Vesey, 475; referring to the case of *Hicks* v. *Parr*, before Buller, J., at Winchester Assizes, 1789, cited by Lord Eldon in *Trimlestown* v. *Lloyd*, 1 Bligh, 449, 458, 476. (S. C. 1 Dow, N. S. 85) and in *Walker* v. *Stephenson*, 3 Esp. 284, and by counsel, 4 Esp. 51, and noticed by Buller, J., in *Revett* v. *Brahan*, 4 T. R. 497.

illness of Wyatt's father to account for his non-production as a witness: and proceeded, "These had, it appeared, all been discussed before the Court of Delegates; the doubts arising from such facts, and the difficulties occasioned by the conflicting evidence on various parts of the case, had all been weighed, and considered, and decided upon by that Court. His Lordship did not therefore feel himself authorized to say that there had been any miscarriage before the Delegates, or that any part of the case had been so overlooked as to render any further inquiry or further deliberation necessary. . . . Looking to the conduct of the parties after the execution of the will, it was perfectly natural and perfectly reasonable to question the circumstances under which the will was executed: but this conduct, as well as all the other facts connected with the case, had their due share of consideration, and formed one of the grounds on which the Court of Delegates had exercised their judgment. For these reasons, then, and acting upon the authority of the cases to which he had adverted, he should feel it to be his duty to tender his advice to his Majesty against granting the commission prayed; and should make his report, adopting, with a few exceptions, the **[471]** language of Lord Eldon's certificate in *Eagleton* v. *Coventry*. It would have been more satisfactory to him if he had ascertained that he had any power to interpose, as to costs, in favour of the parties by whom this application was made. If he should find, upon further examination and inquiry, that he had any power to deal with that question, he should take it into his consideration."

On a subsequent day the Lord Chancellor stated that on investigation he was convinced that he had no authority on the question of costs.

TYRRELL AND HARDING *v.* MARSH. High Court of Delegates, 11th, 12th, 13th, 14th and 15th January, 1830.

This was an appeal from the sentence of the Prerogative Court (see 2 Hagg. Ecc. p. 48), and the cause was argued by the King's advocate and Dr. Addams for Mr. Marsh; by Mr. Campbell, Dr. Lushington, and Mr. Skirrow for Mr. Tyrrell; and by Mr. Brougham, Dr. Phillimore, and Mr. Follett for Mr. Harding.

The Court, consisting of Littledale, J., Parke, J., Bolland, B., and Burnaby, Daubeny, Gostling and Blake, LL.D., gave no sentence.

4th February, 1832.—A commission of adjuncts issued, when the parties having entered into a compromise, the sentence was reversed by consent.

[472] HIGGS *v.* HIGGS. Arches Court, Mich. Term, 2nd Session, 1830.—In an allegation of faculties the amount of capital embarked, or the particulars of partnership concerns, is not to be set forth, but only the income.

This was a suit of divorce, brought by letters of request from Leicester: the present question respected the admission of an allegation as to the husband's faculties to aliment his wife.

The King's advocate in opposition.

Addams contrà.

Judgment—Sir John Nicholl. This is a suit brought by the wife for separation by reason of cruelty and adultery. A libel, charging both, was given in on the first session of Easter Term, 1830: no defensive allegation having been given in, publication passed; and the cause is ready for hearing. An allegation of faculties however has now been brought in, and it is desirable that it should be answered, because a constat of the property may be material if the wife should be ultimately entitled to a sentence.

The first article pleads that Higgs and Smith are partners in a hosiery business, and as lace merchants; that they employ one hundred persons; that their annual returns are 14,000l., and that their income from the business is 1000l., of which Higgs is entitled to one moiety.

[473] The Court is always especially cautious not to require a disclosure of partnership concerns or matters of business and trade; the only material circumstance is the amount of income. The first article therefore, in pleading the number of persons employed and the amount of the annual returns, is objectionable, and may be injurious to the interests of the partner. The wife will take all the benefit to which she is entitled, by stating the income and that the husband is entitled to a moiety. If improper or insufficient answers are given, the wife will have the opportunity of examining the partner; but it is not at all necessary for her to have these details set out.

For the same reasons the second article, which pleads the capital embarked by the partners and that the husband is entitled to a moiety, is objectionable; and it is unnecessary, because the income has been already stated, and it is on that the alimony must be calculated.

The sixth article also, which pleads that she is unable to set forth the stock in trade and the debts due, is objectionable on the same grounds.

It is from forbearance to the partner and not to the husband that the Court requires these articles to be reformed. If the husband shall not fully and fairly disclose his income, then the wife may examine witnesses.

Allegation reformed.

[474] BIRNIE *v.* WELLER AND ELLIOTT. Arches Court, Hilary Term, By-Day, 1831. —Where the person first elected churchwarden had on payment of a fine been excused, a person elected in his place at the same vestry-meeting is bound to serve, unless some exemption be shewn.

This was an appeal from a sentence of the Commissary (*a*) of the Dean and Chapter of St. Paul's, where it was a suit, at the instance of two parishioners, calling on Alexander Birnie to take upon himself the office of churchwarden of the parish of St. Helen, Bishopsgate. At a vestry on the 15th of April, 1830, Mr. Birnie was declared duly elected as junior churchwarden, and was so returned at the visitation; but he declined to take the office on the ground that another person, John Hodgson, had been first chosen and was excused on paying a fine, which Mr. Birnie contended was not legal, and consequently that his subsequent election was invalid. The vestry books were before the Court: and on the 15th April were the entries following:—"1830. In nomination of under churchwarden, J. Hodgson and A. Birnie; and Mr. Hodgson was declared duly elected. Whereupon the vestry clerk having informed the vestry that Mr. Hodgson requested to fine for the office, a motion was made and seconded to that effect, and carried. And in his place A. Birnie and P. Millard were put in nomination, and Mr. Birnie declared duly elected." In support of allowing Mr. Hodgson to exempt himself by paying a fine, such was alleged to have been the custom of the parish, and by the vestry books it appeared that the practice had prevailed at least for 100 years, and the fines were invariably applied in aid of the poor or church rate. A series of instances were adduced; among others that Birnie had, in **[475]** 1818, fined when chosen sidesman. It was admitted on the part of Mr. Birnie that there had been such a custom, but it was alleged that the custom was bad and contrary to law.

The proceedings were by act on petition and affidavits. It did not appear that the fine was regarded as an exemption beyond one year.

Phillimore for the appellant. A pecuniary fine is no legal exemption from serving the office of churchwarden: if admitted it would lead to the office being served by indigent and improper persons. The practice is long subsequent to the time of legal memory.

Addams contrà. The fine does not operate as a legal defeasance: and the usage has never prevailed so as to drive the parish to elect improper persons.

Judgment—Sir John Nicholl. The question is whether the parish could not release Mr. Hodgson from serving. There has been in this parish a custom to excuse for above 100 years, and though the Court may not approve of the practice of fining, for it is liable to abuse, is there any authority to shew that the vestry has not the power to excuse a person once chosen? By mere election the office is not full; for as soon as the election is notified to the person chosen, he may shew that he is in such a state of health as to be unable to discharge the duties of the office, or that he is going abroad, and that it would **[476]** be more convenient to him and advantageous to the parish that he should serve in another year. I know of no authority to the effect that because a vestry first fixes upon one person and subsequently sees some good and reasonable cause, such as ineligibility, poverty, or ill health, to excuse him, it may not rescind that election and proceed to a new election. Nor do I know of any authority that because the vestry has, even for some bad reason, excused the individual first fixed upon, a proper person, subsequently chosen at the same meeting, is not duly elected nor liable to serve.

In the present case the vestry met in order to elect some one as churchwarden;

(*a*) Sir Herbert Jenner—King's advocate.

and they finally elect Mr. Birnie. The question whether if after Mr. Hodgson's election the vestry had been dissolved, and on a subsequent day he had applied to be excused, another vestry meeting would not have been necessary in order to proceed to a new election, is not raised in this case. Nor is it necessary for the Court to go the length of deciding that the payment of a fine is a legal exemption. The practice might lead to many inconveniences. But the acceptance of the fine is discretionary with the vestry; and if any inconvenience arises from the practice, it is in the power of the vestry to stop it. There may, however, be instances where the practice is beneficial; where the vestry may have selected a fit person, but on consideration and on cause shewn may prefer accepting a fine for the advantage of the parish, and so exempt the individual first elected. Such an exemption, however, cannot render a subsequent election of another person void; and in the present instance it is not Mr. Hodgson who comes **[477]** forward to claim an exemption by paying the fine, but it is Mr. Birnie who claims exemption on a denial of the vestry's power to excuse Mr. Hodgson. I wish it should be distinctly understood that I do not determine or say any thing as to the legality of the practice of fining: but without expressing any approbation of the system, it is sufficient for me to decide, that as the vestry has chosen Mr. Birnie, and as no ineligibility nor exemption has been shewn, that he is bound to undertake the office. I must therefore affirm the decree.

On costs being pressed, the Court said the parties instituting the suit are the former churchwardens; and though in the hope of promoting the harmony of the parish the Court might not, on its own motion, feel disposed to give costs, yet if pressed, it is bound to allow the costs of appeal. It is a very different matter in the first and in the second instance.

Decree affirmed, with costs of appeal.

LLOYD AND CLARKE *v.* POOLE. Arches Court, Easter Term, 2nd Session, 1831.—On appeal in a pew cause from condemning churchwardens in costs, held, 1st. That giving or refusing costs is not a matter absolutely unappealable; though such appeals, especially for trifling sums, are much to be discouraged. 2d. That an appeal is perempted by doing any subsequent act in furtherance of the sentence, viz. attending taxation of costs. 3d. That churchwardens were properly condemned in costs where the party proceeded against in substance succeeded, and the suit was rendered necessary by their undue suppression of information.—If a party does acts in furtherance of a sentence, he bars his right of appeal.—To avoid defeating substantial justice the Court will, as far as it properly can, disregard mere form.—Churchwardens are entitled to protection if they proceed fairly; if not, they are peculiarly responsible to the Court.

On appeal.

This was, originally, a pew cause promoted against the churchwardens of the parish of Leominster, by a parishioner of, and owner or occupier of a messuage or tenement in, that parish: and the Judge **[478]** of the Consistorial Court of Hereford having decreed "that the churchwardens had not done their duty in neglecting to seat the complainant, and therefore condemned them in costs," they appealed.

Addams for the appellants.

Dodson for the respondent.

Judgment—Sir John Nicholl. This question comes on in the form of an act on petition extending a protest. The proceedings were originally instituted in the Consistory Court of Hereford in December, 1828, by Mrs. Poole, widow, against Lloyd and Clarke, churchwardens of Leominster, to allot a sufficient number of sittings in the parish church for the accommodation of herself and family. No mention was in the first instance made of her tenants. In the course of the proceedings the churchwardens exhibited the parish books: by those books it appeared that Mrs. Poole was entitled to more seats than she had previously been allowed to occupy. Her proctor declared that she would be satisfied with the accommodation set forth in the books, and discontinued the proceedings; and the Court on the 8th of April, 1830, condemned the churchwardens in the costs to which Mrs. Poole had been put by the proceedings. A bill of costs was accordingly brought in: the proctor for the churchwardens attended the taxation, but afterwards alleged he had previously appealed, having protested of a grievance at the time of the sentence and entered a protocol. The costs were **[479]** taxed at 10l. 17s.; an inhibition has been taken out; an appearance under protest

given, and the facts are now disclosed in an act on petition; and as the matter is so trifling, it was desirable to bring it forward in this simple and summary manner.

It is, I think, clear that the only appeal is from the condemnation in costs, the whole of which amount to 10l. 17s. Yet, trifling as it is, several points may arise. First, whether an appeal lies from costs alone. Secondly, whether the party has not perempted his appeal by his subsequent acts. Thirdly, whether the Judge did wrong in giving costs.

The first point, whether an appeal will or will not lie from costs alone, has been occasionally discussed in these Courts. There are dicta both ways; and perhaps different rules in different jurisdictions: and it is rather to be collected that in the Ecclesiastical Courts at least such matters are not absolutely unappealable: and I can by no means go the length of holding that under no circumstances can there be an appeal either from giving or from withholding costs. The costs of the suit are, in some cases, the only means of enforcing the act to be done, or of correcting the offence committed; as, for instance, the suspension ab ingressu ecclesia would be no correction of a person who had violated the sanctity of the place and disturbed the service of the church. I cannot therefore hold that in no case will an appeal lie from giving costs or from refusing them.

In the case of *Barnes* v. *Jeffe*, Arches, M. T. 1779, the proceedings were similar to the present. The party appeared under protest, alleging, 1st, that there was no appeal from costs; 2dly, that the appeal was perempted. I have only the **[480]** case prepared by the proctor for his counsel, but have no note of the judgment. The Court dismissed the appeal: but whether on the ground that no appeal lay, or that it was perempted, or that the amount was too small, does not appear; therefore I do not rely upon it.

The case of *Collier and Drinkwater* v. *Pearson* (Arches, 4 Sess. T. T. 1798) was a suit against the churchwardens to exhibit their accounts; and was an appeal from the refusal of costs. Sir William Wynne held that an appeal would lie; and having gone through the facts of the case, said "that he thought the parishioners having a right to have the account produced, there was no ground for costs prior to the production of those accounts; but having continued the cause afterwards they were liable to the costs from that time." He therefore reversed the sentence quoad those costs.(*a*) On the other hand, appeals from **[481]** costs alone are much to be discouraged; especially when they are of trifling amount and evidently vexatious. This is the doctrine of Courts of Equity. In *Owen* v. *Griffiths* (1 Ves. sen. 250) the marginal note runs thus: "The rule, that no appeal for costs merely, not to be strictly adhered to, if a sound distinction can be made." And Lord Hardwicke, in the course of his judgment in that case, says, "Yet if it were to be laid open generally, that an appeal might be for costs, it would cause that general inconvenience to which a particular inconvenience ought to give way." In *Wirdman* v. *Kent* (1 Bro. C. C. 141) the case of *Owen* v. *Griffiths* was adverted to and sanctioned, and a further case before Lord Northington is referred to in a note. The result of the cases is that there is no absolute rule; that the question is mixed up with and must depend on the whole circumstances: but that such appeals are much to be discouraged. In general, in these Courts costs are mixed up with some question of the merits, some act decreed to be

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(*a*) In the argument in *Collier* v. *Pearson* a doubt was thrown out whether the Court could entertain an appeal from costs; but no authority nor case was cited to that precise effect. The case from 1 Brown C. C. 141, was referred to, as was also the case of *Colley and Blandon* v. *Clark and Page*, Arches, Hil. T. 1774; but in the latter case the appeal was from the rejection of an allegation as well as from a condemnation in costs. On the other hand, the case of *Luke* v. *Whittaker* was relied on. It was originally a suit promoted in the Archidiaconal Court of Cornwall by Whittaker, a clergyman, against Luke, a parishioner, for going out of church in a disorderly manner during the time of divine service. The Court pronounced the articles proved, and gave costs, which, on a subsequent day, were taxed at 1s. From this taxation Whittaker appealed to the Arches; and Dr. Calvert was of opinion that costs ought to have been given, and that having been given, they should have been taxed as usual; and therefore reversed the sentence and gave full costs. The Delegates (1783) again reversed the sentence of the Arches, not on the ground that costs were not the subject of appeal; but because the suit was frivolous, and that 1s. was sufficient.

done or correction inflicted. Here, however, was no act in the principal cause to be done by the churchwardens: the object of the proceeding was attained, and the whole sum in dispute is 10l. 17s., so that a more frivolous ground of appeal never occurred.

Secondly, whether the appeal was not perempted. Costs were decreed on the 8th of April: the appeal was not entered till the 21st of April, the last day but one on which it could be entered; and it was then merely a protocol brought, it would seem, neither to the notice of the party nor of the Court. The proctor of the appellant in **[482]** May attends the taxation of costs, which is contributing to the carrying of the sentence into effect; and it is held that if a party does acts in furtherance of a sentence he thereby bars his right of appealing, and such act amounts to a desertion of the appeal. It is here, however, said that this attendance was given with an understanding that it was not to prejudice the prosecution of his appeal: but though he might so understand it, it is positively denied that such was the understanding of the other party; and no entry of any such reservation was made on the record.

But thirdly: did the Judge do wrong? Because if substantial justice was likely to be defeated, the Court would, as far as it properly could, disregard mere points of form. The affidavit states that Mrs. Poole applied for further sittings, being only allowed to occupy half a certain pew. It is not alleged that she had sufficient accommodation in that half pew for herself and family; it is not pretended that, in answer to the application by her solicitor, the churchwardens apprized her that by the parish books she was entitled to other sittings. Mrs. Poole, being a female, cannot be presumed to be privy to what passes at vestries. She had therefore no means of enforcing further accommodation than by the institution of these proceedings. At last the churchwardens produce the books, and then for the first time she is apprized of these other sittings: being so apprized, she certifies that she is satisfied and discontinues further proceedings. I am of opinion, therefore, that the Judge did right in ordering the costs to be paid by the churchwardens: they rendered the suit necessary by neglecting sooner to inform Mrs. Poole of this further accommodation. Even if I had any doubt **[483]** as to the propriety of the sentence, I should unwillingly hold that such an appeal for so frivolous a sum was justifiable on the part of the parish officers, who are also the officers of the ordinary; they are entitled to protection if they proceed fairly and candidly: but if unfairly, they are peculiarly responsible to the Court The appeal is vexatious and must be dismissed with costs.

The form of the minute must be that the Court pronounces for the protest; and, on the merits disclosed, affirms the decree with costs.

JAMES AND STANLEY *v.* KEELING. Arches Court, Trinity Term, 4th Session, 1831. —Churchwardens and their predecessors, though constantly acting for a whole township consisting of three districts, were uniformly described as churchwardens of A., the principal place in the township and where the chapel stood. In a suit for subtraction of church-rate, the Court reversed, with costs in both instances, a sentence sustaining a protest that the defendant, occupying lands in the township, but not in the district in which A. was situate, was not legally sued by churchwardens thus described.

This was a cause of church-rate, originally instituted in the Consistorial Court of Lichfield, by the promoters described as "the churchwardens of Bloxwich, within the foreign of Walsall, in the county of Stafford, against Keeling, a farmer within the said foreign." Keeling appeared under protest, alleging "that the parish of Walsall is divided into the borough of Walsall and foreign of Walsall, and the foreign is subdivided into the liberties or districts of Wood-end, Towns-end, and Coldimore; of Great and Little Bloxwich and Harden; and of Shelfield and Walsall-wood; that Keeling was resident within the district of Shelfield and Walsall-wood, and had never owned nor occupied lands or tenements within Great or Little Bloxwich or Harden, and therefore had not been legally cited." For the promoters it was alleged "that the township of the borough and the township of the foreign of Walsall had each two churchwardens, that they (the promoters) were and are churchwardens of the foreign of Walsall **[484]** (within which are the liberties of Shelfield and Walsall-wood), though, like their predecessors, having been sworn in as churchwardens of Bloxwich—the principal place within the foreign and where the parochial chapel is situate —they have been described in the citation as churchwardens of Bloxwich: that their predecessors, although sworn in as churchwardens of Bloxwich, were constantly deemed

churchwardens of the foreign of Walsall; were uniformly so described in all resolutions and vestry-books both of the borough and foreign of Walsall, and have constantly collected rates over the whole borough; and that Keeling, who has for many years past been rated in all respects as in the present year, hitherto invariably paid." In reply it was alleged that the only question was whether Keeling had any rateable property within the liberty of Bloxwich, of which alone the promoters are described as churchwardens; that he, Keeling, was not liable to be proceeded against for non-payment of church-rates, except by the churchwardens of the parish of Walsall in their corporate capacity, or by the churchwardens of that portion of it called the foreign, and that the promoters ought to have been so described in the citation.

The Judge below dismissed the defendant with costs, and the churchwardens thereupon appealed to this Court.

The King's advocate and Phillimore for Keeling.

Addams contrà.

Judgment—Sir John Nicholl. The only question is whether James and Stan-**[485]**-ley are churchwardens of the whole foreign. I am at a loss to understand how they are not, because both they and their predecessors having always acted for the whole foreign, the mere fact that they were sworn in and described as the churchwardens of Bloxwich (where the chapel of the foreign is) cannot restrict their office. I must concur in the remark made by counsel, that the objection is most frivolous, and raised apparently to harass the parish and defeat a lawful demand.

It is said that the party was anxious to try the right, but there is no right to try. The whole defence is an unfounded objection—a mere reliance on the want of a full description, the churchwardens being only described as churchwardens of Bloxwich instead of the foreign of Walsall. The description is quite sufficient in a civil suit, where such extreme formality is not required.(*a*) It is not like the case of a misnomer of a defendant when there may be some just ground for resistance, because in that case there would be no sufficient constat that the party cited was the proper party. I must repeat that the present is altogether a frivolous and vexatious opposition. I reverse the sentence and condemn the respondent in the costs in both Courts.

[486] THE OFFICE OF THE JUDGE PROMOTED BY BLISS *v.* WOODS. Arches Court, Trinity Term, By-Day, 1831.—A clerk cannot, under 7 and 8 G. IV. c. 72, s. 3, officiate, without consent of the incumbent of the parish, in a newly erected chapel, consecrated and endowed as a chapel of ease, unless the right of nomination has, by deed under seal, been previously declared to be in the endower.—Under the general law, the erection of a new public chapel (properly so called) requires the joint consent of patron, incumbent, and ordinary, and (generally) a compensation to future incumbents.—The whole cure of souls, and all the emoluments of a parish, belong, under the original endowment, to the incumbent and his successors, and vest in the existing incumbent by institution and induction.—The earlier church-building acts, 58 G. III. c. 45, 59 G. III. c. 134, 3 G. IV. c. 72, carefully protect the rights and interests of patrons and incumbents, especially existing incumbents, and 5 G. IV. c. 103, only allows a departure from that principle for a limited time, and under very special circumstances. Semble, that the sole object of 7 and 8 G. IV. c. 72, authorizing the church-building commissioners to declare the right of nomination to be in the endower, with lands or money in the funds, of a chapel, without compensation made to the incumbent, was to encourage such endowments, and that such chapel must (save as to the compensation) be built either in conformity to the general law, or under the provisions of the earlier church-building acts.

[Applied, *MacAllister* v. *Bishop of Rochester*, 1880, 5 C. P. D. 204.]

By letters of request.

This was a suit brought by the Rev. George Bliss, incumbent of the parish of Funtington, Sussex, against the Rev. George Woods of Sennicots in the same parish, touching and concerning his soul's health, &c. &c., and more especially "for

(*a*) Even in a penal action, if a parish is styled by its popular and well-known name it is sufficient. *Williams* v. *Burgess*, 3 Taunt. 127. See also *Burbidge* v. *Jakes*, 1 B. and P. 225. *Kirtland* v. *Pounsett*, 1 Taunt. 570. *Steel* v. *Smith*, 1 B. and A. 94, and 9 G. IV. c. 15.

publicly reading prayers, preaching, administering the Holy Sacraments, and performing other ecclesiastical duties and divine ceremonies of the Church of England in a certain building (howsoever consecrated) newly erected, and never before used for the celebration of divine service, situate at Sennicots aforesaid, under colour of a certain licence as pretended from the Bishop of Chichester, by him the said G. Woods unlawfully obtained."

The first article pleaded that by the laws and constitutions ecclesiastical the right of patronage to a chapel of ease is, in default of other lawful patron, in the incumbent of the mother church; and that no minister of the church can lawfully officiate therein without being nominated by such incumbent, or such other person having the right of nomination, to the diocesan for his licence, and without such licence thereupon first duly had; and that a minister officiating within any parish "not being duly licensed thereto by the diocesan, contrary to the injunctions or without the leave [487] and consent of the incumbent of such parish, is liable for so doing to ecclesiastical censures."

2. That Bliss was a minister in holy orders, and having been nominated by the Dean and Chapter of Chichester to the perpetual curacy of Funtington was duly licensed and admitted thereto, and now is incumbent of the perpetual curacy of the said parish.

3. Exhibited his licence.

4. That in 1829 the chapel in question was built and fitted up, and on the 3rd of December, 1829, was (howsoever) consecrated as a chapel of ease to Funtington.

5. That from the time of such consecration, and up to the time of the citation, Woods officiated therein under a pretended licence from the diocesan, "unlawfully obtained, without being nominated thereto by Bliss, or any other person having by law the right of nomination thereto," on all the Sundays in December, 1829, in 1830, and in January and February, 1831, "contrary to the injunctions and without the leave and consent of Bliss."

The 6th, 7th, and 8th were formal articles.

On the 4th Session of Easter Term these articles came on to be debated.

The King's advocate in objection. Though the nomination is primâ facie in the incumbent, yet this chapel was built under 7 and 8 Geo. IV. c. 72. However, the most convenient course would be for the Court to suspend the admission of the articles till a responsive allegation is brought in. The suit is to try a civil right, and [488] that cannot be tried on the admission of the articles, because all the facts are not before the Court.

Per Curiam. How can I suspend the articles? Mr. Woods may immediately give in an allegation loco responsi. There is no additional convenience in going out of the usual course.

The Court finally admitted the articles on the understanding that no witnesses should be examined for the present, and that a responsive allegation should be brought in.

The first article of this responsive allegation pleaded the 7 and 8 Geo. IV. c. 72, s. 3.(*a*)

2. That Mr. Baker, at his own expense and with the sanction and approbation of the bishop, and with the knowledge and privity of Bliss, built the chapel and endowed it to the satisfaction of the commissioners, with a permanent provision; and by the deed of endowment, dated 12th November, 1829 (previously approved by the said commissioners), the chapel, &c., and the stock in the public funds for the endowment,

(*a*) "And be it further enacted, that when any person or persons shall, to the satisfaction of the said commissioners, endow any chapel built or hereafter to be built by such person or persons with some permanent provision in land or monies in the funds exclusively, or in addition to the pew rents or other profits arising from the said chapel, such endowment to be settled as the commissioners shall direct, it shall be lawful for them to declare that the right of nominating a minister to the said chapel shall for ever thereafter be in the person or persons building and endowing the said chapel, his, her, or their heirs and assigns, or in such person or persons as he, she, or they shall appoint, and notwithstanding no compensation or endowment may be made to or for the benefit of the minister of the church of the parish within which such chapel shall be built."

were vested [489] in the Bishop, Dean and Archdeacon of Chichester, and in Baker, his heirs and assigns, on the several trusts, &c. therein mentioned: that on 29th August, 1829, the commissioners, being satisfied with the endowment, through their secretary, intimated their readiness to declare the right of nomination to be in Baker, his heirs, &c., upon certain conditions, which were immediately complied with.

3. That on 3d December the bishop, having previously apprized Bliss of his intention, consecrated the chapel: that on 5th, Baker nominated Woods, and on 19th the bishop granted him his licence; that Bliss offered no objection to such consecration, nomination or licence; that Woods paid over all the sacrament money to Bliss, who received it with a knowledge that it had been collected in the chapel.

4. Exhibited the nomination and licence.

5. That in order formally to declare the right of nomination the commissioners, on 7th January, 1830, transmitted for Baker's approbation a draft deed of declaration, which had been previously prepared under their directions; and the same was returned approved by him: that the commissioners postponed from time to time affixing their common seal to such deed, being desirous that the same should be delayed until an explanatory statute had been obtained: that accordingly a bill was brought in in 10 G. IV., but the dissolution of Parliament stopped further proceedings: that in the first session of 1 W. IV. a bill passed the House of Lords, and Parliament was again dissolved.

6. That since the institution of this suit the commissioners' common seal was affixed to this [490] deed dated 10th May, 1831, and declaring the right of nomination to be in Baker.

7. That subsequent thereto Baker again nominated, and the bishop again (25th May, 1831) licensed, Woods.

8. Exhibited a copy of the deed of nomination and the second licence.

On the third session a further allegation on behalf of Mr. Bliss was brought in: it pleaded:

1. That though the chapel was erected with the privity of Bliss, he from the first at all times expressed his unqualified dissent to its erection and use, unless it should be under the entire control of himself, as incumbent of the parish, who by himself or his curate would officiate therein, and invariably refused that any person should officiate except on his nomination: and it exhibited copies of three letters from Bliss to Baker (marked A, B, C).

2. That though the bishop did apprize Bliss of his intention to consecrate, yet he verbally assured him that he was authorized so to do by the commissioners, by whom it was then asserted that all had been settled relative to the said chapel: that Bliss, thereby misled and erroneously conceiving thereon that his right as incumbent of the parish in respect to the chapel had wholly determined, offered no objection to the consecration nor to Woods' licence on the nomination of Baker; but that as soon as he was more correctly informed that all had not been settled, and that the commissioners had neither in fact declared, nor could by law declare, the right of nomination to be in Baker, the incumbent avowed his determination to seek redress, if not otherwise conceded, in [491] the Ecclesiastical Court; and exhibited a letter (D) from the bishop, and one (E) from the commissioners' secretary.(*a*)

(*a*) The letters referred to in Mr. Bliss' allegation were to the following effect:—

(A) January 2, 1826.—Mr. Bliss to Mr. Baker. Though Baker's communication of yesterday appeared rather an act of courtesy than as reporting the progress of any measures to effect the project he had in view, he lost no time in replying. After regretting that many were at a distance from church, he stated that the proposed remedy was so very partial as not to be put in competition with the evils which might result from its adoption, particularly as the residents of Sennicots had every facility of conveyance: but independent of this, the 5 Geo. IV. c. 103, requiring that twelve householders should certify to the bishop that there was not church accommodation for one-fourth of the parishioners, seemed to militate in letter and spirit against the projected erection, and was so inapplicable to Funtington as to offer a legal impediment: that the legislature seemed not to contemplate the convenience of inhabitants, but aware that an unnecessary division of a parish would be a disruption of that union which ought to subsist between the authorized minister and his people, only provided for cases of absolute necessity, where the want of accommodation in the

3. That Bliss consented to receive the sacra-**[492]**-ment money as alms collected in his parish for the poor; but informed Woods distinctly that such act was no compromise of the incumbent's rights; for that he altogether denied the legality of the nomination and licence.

4. That the whole population of Funtington **[493]** exceeds not 800, of all ages and both sexes: that there is church-room for 600 at one and the same time; and that no part of the parish is four miles from the church.

On the 4th Session of Trinity Term the two allegations came on to be debated.

Addams and Nicholl in objection. The charge laid in the articles is almost admitted by the allegation of the defendant, which denies neither facts nor law. The substance of the 2d and 3d article is, that on the 29th August, 1829, the commissioners intimated their readiness to declare the right of nomination, but, though they did not in fact declare it till after the articles in this case were admitted, on the 3d December, 1829, the bishop consecrated the chapel, and on the 19th licensed Mr. Woods on the nomination of Mr. Baker: and it is averred that both these acts, as well as the erection of the chapel, took place with the knowledge and privity of Bliss. But the correspondence completely proves that Mr. Bliss was always dis-

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parish church was so notorious as to render it a paramount duty to afford more. He wished some remedy could be devised which had not its concomitant evils; as for himself, he declined no labour which his parishioners might choose to impose upon him to meet their spiritual wants. The introduction of a second service on the Sunday had, in some measure, lessened the evil. The letter concluded with a compliment to the liberality of Mr. Baker's project.

(B) April, 1826.—From Mr. Bliss to Mr. Baker. After stating he had called several times upon the bishop by his desire without finding him at home, and his wish to remedy the inconvenience that Mr. Baker's family and others had sustained, he suggested that as one of the services of Funtington was a gratuitous service, and therefore transferable at pleasure to any part of the parish; and as his object in instituting it was the accommodation of his parishioners, there could be no impropriety in adopting that course which would best secure the original design: if, therefore, Baker thought it expedient to proceed in the erection of the projected chapel, he (Bliss) would gladly take the gratuitous discharge of its duties, and serve it alternately with the church: this would prevent the tax of endowment, and only required the concurrence of the patrons to render his voluntary act binding upon his successors.

(C) April, 1826.—From Mr. Bliss to Mr. Baker. To meet Baker's wish not to incommode the parishioners in general by a transfer of the second service, he (Bliss), though he did not think any one would complain, would most gladly embark in a third duty, opening the church on the Sunday evening as was the practice in the neighbouring village. He felt it incumbent upon him to be candid as to any delegation of the ministerial duty of the parish: Providence had allotted to him a sphere of clerical occupation, and he should be doing violence to his conscience by conceding, by any act of his own, the spiritual direction of any part, and thus voluntarily putting such direction out of his own control: he had made himself responsible for the charge, and felt that no dispensation of man could release him from his obligation whilst he had health and strength for the duties connected with them. Could he conscientiously resign any part of the charge to any independent control, he should be truly gratified in complying with Baker's proposition; but as his sense of duty imposed a restraint upon him, he trusted Baker would feel satisfied with the expedient suggested, as it met the object Baker had stated himself to have in view.

(D) 16th March, 1830.—From the bishop to Mr. Bliss. As he wished to avoid all discussion on a matter about which they differed so entirely, viz. the consecration, he declined any further correspondence on the subject: he had acted under the authority of the commissioners, and was perfectly satisfied that in what he had done he was authorized.

(E) From the commissioners' secretary to Mr. Bliss, 20th February, 1830. He had laid before the board a letter from Bliss, and acquainted him that the formal proceedings of the board must be postponed till their powers had been more defined by parliament; but that the board saw no reason to alter the opinion heretofore expressed upon the subject.

senting, though for a time he submitted in silence from an erroneous notion (which he entertained in common with, and in some degree received from, his diocesan) of the powers and of the acts of the commissioners under 7 and 8 Geo. IV. c. 72, passed while the discussion relative to this chapel was going on. Nothing, however, short of absolute consent would in such a case estop Mr. Bliss. Any appearance of acquiescence, proceeding, as it did, from misinformation, would want the essence of all consent —intention. The validity of that consecration and licence must **[494]** depend on the question whether Baker had a legal right to nominate; we impute no blame to the bishop, because if he acted illegally he so acted under a misconception of the law and of his duties.

The 5th, 6th, and 7th articles are singular enough, considering this is a defensive allegation; for they state that the commissioners postponed the execution of the deed of nomination from a doubt as to their powers; that two explanatory acts were brought in, but did not pass, and that since the institution of this suit the seal was affixed, and a new nomination and licence executed, thus virtually admitting that the case is not brought within the provision of 7 and 8 Geo. IV., and that the authorities under which Woods officiated at the times laid in the articles were invalid, inasmuch as, according to their own shewing, it was not till after the institution of this suit that the right of nomination was legally (if ever it was legally) given to Baker. They plead a sort of incipient consent; but even supposing the act of parliament did not require a formal deed, as by implication we contend it does, the commissioners, being a corporation, could only express such intention by an instrument under their common seal. 1 Bl. Com. 475. These three articles, then, amount, in effect, to an affirmative issue; and as far as respects the issue of the present suit, the defendant is out of Court.

But since the 7 and 8 Geo. IV. c. 72 has been pleaded in defence, and since the necessity of another suit may be prevented by the expression of the Court's opinion as to its construction, we will proceed to inquire whether, if the deed had been sealed prior to Woods' officiating, he would have been pro-**[495]**-tected by that statute; or, in other words, whether that statute, saying nothing in extension or limitation of the powers previously existing as to the building of chapels by individuals or otherwise, authorized the commissioners to declare the right of nomination to be in the endower, without consideration of the mode in which the chapel was built; and whether, if they issued such a declaration, the nominee of the endower had a right to officiate therein without consent of the incumbent of the mother church? The title and preamble of 7 and 8 Geo. IV. shew that this statute is to be taken in conjunction with the former acts. What then is necessary to the legal building of a chapel, meaning thereby not merely the construction of the fabric, but the erection of an edifice clothed with all the legal characters of a chapel? The consent of the patron, incumbent, and ordinary, and a compensation for future incumbents under the common law: *Dixon* v. *Kershaw*, 2 Ambler, 231; *Farnworth* v. *Bishop of Chester*, 4 B. & C. 555. Here no consent of the incumbent was given. The chapel then was not legally built under the common law. Do, then, the church-building acts legalize its erection? The first act is 58 Geo. III. c. 45, "for building additional churches in populous places;" the preamble points to and the enacting part, particularly ss. 13 and 15, provide for the same object: the act then enables the commissioners to procure additional accommodation in regard to parishes of 4000 inhabitants, with accommodation for not more than one fourth in the churches or chapels therein, or 1000 resident above four miles from any such church or chapel. The titles and preambles of 59 Geo. III. c. 134, 3 Geo. IV. c. 72, shew that the **[496]** objects of those acts are also limited to such parishes: the provisions then are quite inapplicable to the circumstances of Funtington, where the population is only 800, church-room for three-fourths, and no one resident four miles from the parish church.

The title and preamble of 5 G. IV. c. 103 are to the same effect: but ss. 5 and 9 depart in some degree from the principle; for, without reference to population, by s. 5, if twelve householders certify to the bishop, in writing, that there is not church accommodation for one-fourth of the inhabitants, and that they are willing by private subscription to erect or purchase a chapel, and to provide out of the pew rents a competent stipend; and by s. 9, if any member of the Church of England shall subscribe at least half jointly with the parishioners, who may be willing to raise the rest by rate, the bishop may, if he think fit, consent, after certain particulars are stated

to him as to the number of free seats, a provision out of the pew rents for the preacher, for the other expenses of divine service, and the maintenance of the chapel: but no pew rents shall be taken nor service performed till the chapel is consecrated. These sections still only apply to parishes where there is an extreme want of accommodation, evidenced in one case by the certificate to that effect, and in the other by the inhabitants being willing to contribute part out of the rates.

Still the parish of Funtington does not come within either case provided for by this act. There is not want of accommodation for one-fourth of the inhabitants; nor, on the other hand, was the chapel built partly out of the rates. So that the church-building acts, prior to 7 and 8 Geo. IV. **[497]** c. 72, are not applicable to this chapel. The legality or illegality of the building, of the consecration, nomination, licence, and officiating subsequent to the sealing of the deed depends then on the construction to be put on the 7 and 8 G. IV. But though the previous acts may not apply to this case, they may aid in the construction to be put on 7 and 8 G. IV., by shewing the principles on which, and the spirit in which, the legislature proceeded. All the early church-building acts up to 5 G. IV. c. 103 had been cautious of invading the rights of incumbents, patrons, and ordinaries: they reserve to the existing incumbent the right of nominating in all cases without exception, and to future incumbents, in all cases where there is not an entire division of the cure into two distinct parishes and districts after the existing incumbency; in which latter case the patronage, with one single exception (3 G. IV. c. 72, s. 31), is given to the patron of the mother church. The 5 G. IV. c. 103, ss. 5, et seq. does seem in some degree to relax this principle—though, after giving the bishop a power which he did not before legally possess of consenting to the building, or of consecrating the chapel without other endowments than pew rents, it does not altogether overlook that the consents of the incumbent and patron were previously necessary to the building and consecration of the chapel, since s. 11 provides that the parties when they make application for the bishop's consent are to give notice in writing to the patron and incumbent, and the bishop shall not signify his consent within three months of the time that such notice has been given. After it has been so strongly held by different courts, and the former statutes have so **[498]** carefully maintained the principle inviolate, that the patron and incumbent must be consenting parties to all arrangements which interfere with their rights, some doubt may be entertained whether the legislature, by these general words, meant to dispense with the necessity of such consents, or only to provide that if, within three months, the parties did not express their dissent, they should be held to have consented. However, assuming that it is meant hereby to give the bishop the right, after hearing any objections from the patron and incumbent, to determine whether he shall notwithstanding proceed, it is only under very special circumstances, which do not apply to the present case, that the bishop after this notice has the power to declare the right of nomination for two turns to be in the individuals so purchasing or building: but by s. 9, if the chapel is built partly by rates, the incumbent of the parish shall have the right of nomination from the commencement, except if it be made a distinct church the original patron shall have that right.

These rights of patrons and incumbents having been thus carefully preserved, can the 7 and 8 G. IV. c. 72 intend at once to destroy them? The enactment to work such an effect must, we contend, be so clear as to admit of no other construction. Is such the case? We contend not; but that the object of that statute was two-fold. 1st. Upon a composition between the patron, bishop, and incumbent to legalize in any parish the consecration of a chapel with an endowment not in land, such endowments not before being legal save in particular parishes under the special provisions of 5 G. IV. c. 103, ss. 5, et seq. **[499]** 2dly. When the chapel was legally built, either with the consents required by the general law or under 5 G. IV. c. 103, and thus endowed, to permit the perpetual nomination to be given to a person other than the incumbent of the mother church without compensation to future incumbents; that is, when the chapel was permanently endowed with lands or money in the funds, and not merely with pew rents, to the satisfaction of the church-commissioners, they are allowed, in conjunction with the bishop, patron, and incumbent to do, without compensation for future incumbents, what those three individuals might have done with that compensation; or in the cases provided for by 5 G. IV., the commissioners might do perpetually what the bishop could have only done for two turns; but it does not give any additional power to individuals to build. As in this case the chapel was not

legally built under the statutes, its legality must depend solely on the alteration made in the general law by 7 and 8 G. IV., which, dispensing in word with the necessity of a compensation to future incumbents, must be held to ratify and confirm the necessity of the joint consents. "Expressio unius exclusio est alterius," it in fact substitutes the approval of the commissioners for that compensation; but it leaves the matter of the consents required as it stood at common law. But, supposing that the church building commissioners had, without any previous enquiry, authority to declare the right of nomination to be in the endower, does it follow that the nominee has the right to officiate without the consent of the incumbent of the mother church? The incumbent having, by the general law, the exclusive cure of souls in the parish, [500] no minister of the Church of England, licensed or unlicensed, can, in a consecrated or unconsecrated chapel open for public worship, officiate without the incumbent's consent, *Carr* v. *Marsh*, 2 Phill. 198. *Farnworth* v. *Bishop of Chester*, 4 B. and C. 569. *Duke of Portland* v. *Bingham* (on final admission of articles before the Delegates), 1 Hagg. Con. 169, in notis. This consent, then, is independent of the right of nomination, for in the last case the chapel was proprietary, and the right of nomination was never pretended to be in the Duke of Portland or the perpetual curate. The incumbent has the right to refuse his pulpit to lecturers, endowed or unendowed, where the right of election is in the vestry or in trustees. *Turton* v. *Reignolds*, 12 Mod. 433. *King* v. *Bishop of Exeter*, 2 East, 462. There can be no difference between the use of a pulpit in a church and of a chapel; for the principle is that the whole cure of souls, being in the incumbent, he has a right to see that no improper doctrine is preached in his parish, per Bayley, J., 4 B. and C. 570. There appears no distinction between an endowed lectureship and a newly endowed chapel; if in one case the will of the founder gives the nomination to one set of persons, and the law the right of consent to another, there seems to be no reason why in the other case, the right of nomination being taken from the incumbent by statute, his right of consent should not remain. Might not, under a composition, the right of nomination be given expressly subject to the consent of the incumbent for the time being to every new appointment? and would not this be the effect of a statute affirmatively placing the right of nomination elsewhere? The statute in short does not allow duty [501] to be performed in the parish without the incumbent's consent, any more than it does in the diocese without the bishop's licence.

The mischiefs to be let in by the construction for which Mr. Woods must contend are manifest. The commissioners would be bound, without further inquiry than as to the sufficiency of the endowment, to declare the right of nomination: the incumbent would still have the cure of souls of the whole parish, and of every part of it (for the commissioners have no power to carve out for the minister of this new chapel a particular district); while doctrines at variance with those inculcated by the regular pastor might be delivered in this chapel without his control. Schisms, heart-burnings, and animosities would be the result, and infinite mischief accrue to the interests of the church and of religion. If, then, the construction of this act admits of any doubt, if, by interpreting it one way, such a sweeping change in the discipline of the church, hitherto carefully preserved, will be effected, while by another, at least equally obvious, a more limited and reasonable operation can be given, the Court will lean to that construction which, by supporting the general policy of the law, preserves to the incumbent the exclusive control of the spiritual concerns of his parish.

The King's advocate contrà. There is no admission of the charges of the articles in the allegation of the defendant: the case is brought forward to obtain a knowledge of the law, not to punish Woods if he has acted illegally.

Per Curiam. Will the opinion of the Court in this case de-[502]-cide that question, or can the Court be called upon to pronounce an opinion on the law, unless the facts in the case raise it? Here are matters alleged after the offence charged was committed, and is the Court to enter upon the consideration of them on this ex post facto declaration and licence? I do not hold myself bound to decide upon the construction of the act of parliament, which is admitted to be doubtful, and to explain which a bill was brought in and passed one branch of the Legislature, and will probably be reintroduced. The Court may explain the act one way, and the Legislature another: I will hear the whole argument; but do not thereby bind myself to express any opinion of the act.

Argument resumed.

The 7 and 8 G. IV. c. 72 reviewed the 5 G. IV. c. 103, and extended the remedy to cases not within that act. I admit the general law that the exclusive right to officiate is in the incumbent; but the question is whether under 7 and 8 G. IV. the general law is not varied. *Dixon* v. *Kershaw* is not confirmed to its full extent by *Farnworth* v. *Bishop of Chester;* for in the latter case Lord Tenterden seems to be of opinion that Lord Northington had pushed the demand of a compensation for future incumbents beyond its proper limits. The Legislature certainly meant to provide against the difficulties thrown in the way of building chapels by the necessity for that compensation: but, as we contend, it also proposed to go much further; and looking to the increased demand for church accommodation; to the inadequacy of the means hitherto furnished by Parliament to provide that accommodation, and **[503]** to the great evils thence resulting to the interests both of religion and of the Established Church, they were of opinion that it was necessary to afford much increased encouragement to the building and perpetual endowment of chapels, and therefore to make what had hitherto been considered by the general law as the rights of the patron and incumbent, to yield to the urgent and paramount calls for increased church-room. The Court must remember that Parliament had granted large sums to effect this purpose; that these acts are therefore to be considered remedial, and that, in the construction of them, the Court must look to the advancement of the remedy and the abatement of the evil. In the present case this consideration would lead precisely to the same construction as the wording of the 7 and 8 G. IV. c. 72, s. 3, almost necessarily demands: the language of it does not require assistance to be thus drawn from looking to the object and spirit of the legislature: it declares in the clearest terms that, provided only the chapel be sufficiently endowed, the commissioners may without further inquiry declare the right of nomination to be in the endower.

Per Curiam. "Built or hereafter built." Can that mean, built in any way; or must it not be legally built? That is properly put as the gist of the case.

The King's advocate. I should certainly be prepared to argue that the statute applies to all chapels whatever and however built: but since the Court seems strongly of opinion that, as far as the present suit is affected, the statute cannot **[504]** protect Mr. Woods, it is needless to press the argument further. Yet the construction put by the commissioners upon this statute must be taken into consideration in his justification; and they have expressed an opinion that they had the power of declaring the nomination to officiate in this chapel.

Per Curiam. Who is the patron?

Addams. The Dean and Chapter of Chichester.

King's advocate. The question hereafter may be, who is the incumbent? for it is a perpetual curacy.(*a*) I admit that if the construction we **[505]** contend for is upheld, the statute will make a great alteration in the powers and rights of incumbents.

(*a*) See *The Duke of Portland* v. *Bingham*, 1 Hagg. Con. 163, 167, as to appropriations pleno et utroque jure, and who in such cases is the incumbent, and has the cure of souls. In the second citation extracted in the Consistory Court, and in the articles afterwards given in, and admitted in the Delegates, the Duke of Portland is described as "incumbent." The heading of the articles was "for officiating under colour of a certain licence by him (Dr. Bingham), &c., illegally obtained, &c., from the Bishop of London, at the promotion of the Duke of Portland, patron, &c., incumbent, &c." The point whether the Duke of Portland was incumbent, and had the cure of souls, never received a judicial decision: the point was not raised in the protest; and that being overruled in the Consistory, Arches, and Delegates, the articles were, on the 16th of November, 1797, admitted without opposition. The protest, in substance, alleged, "that however competent it might be for the Duke of Portland or any other person voluntarily to proceed by articles against Dr. Bingham, for having publicly read prayers, &c., in the chapel without any licence or authority whatsoever, at least sufficient in law, were such the fact (the effect of which proceeding would be to correct and restrain him by judicial censure from continuing so to read, &c. for the future), yet that the Duke of Portland in a criminal suit, under any title or qualification soever, cannot agreeably to law call upon Dr. Bingham to bring into and leave in the registry of the Court the licence described in the citation; nor is it competent for him to put Bingham on the proof of the legality thereof, wherefore he prayed to be dismissed."

[506] Per Curiam. And of patrons too.

Judgment—Sir John Nicholl. This is a suit brought by the incumbent of Funtington against Mr. Woods for performing **[507]** without lawful authority divine service in a chapel newly erected at Sennicots in that parish. The articles state the facts that in 1829 a parishioner built this chapel, and the Bishop of Chichester consecrated it as a chapel of ease to Funtington; that in 1829, 1830, and January and February, 1831, Mr. Woods performed service therein contrary to the injunctions and against the consent of the incumbent, and without any legal authority. The defensive allegation, after reciting the 7 and 8 Geo. IV. c. 72, for amending the church-building acts, pleaded that Mr. Baker, with the sanction and approbation of the Bishop of Chichester and with the privity of Mr. Bliss, built the chapel and endowed it to the satisfaction of the church-building commissioners, by deed **[508]** dated on the 12th of November, 1829; that the commissioners, by their secretary, intimated their readiness to declare the right of nomination of the minister to be in Mr. Baker and his heirs for ever, upon certain conditions, which he immediately assented to and complied with; that on the 3d of December, 1829, the bishop with the privity of the incumbent consecrated the chapel by the name of St. Mary's Chapel; that on the 5th Baker nominated Mr. Woods; on the 19th the bishop granted him his licence, and Mr. Woods has done the duty there ever since. In the 5th article the allegation proceeds to plead "that, in order formally to declare the right of nomination, the commissioners, on the 7th of January, 1830, directed a deed to be prepared, the execution of which they delayed until an explanatory act had been obtained—that a bill was brought into Parliament, but that owing to the demise of the Crown it did not pass—that since the institution of the suit the seal of the commissioners has been affixed to the deed bearing date the 10th of May, 1831, declaring the right of nomination to be in Mr. Baker, and that

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In reply: "That the Duke of Portland, patron, &c., incumbent, &c., of Marylebone hath, according to law, and as the promoter of the office, a right to call on Dr. Bingham to receive articles for publicly reading, &c., and that it is not imported by the citation that the licence shall be brought into the registry until the articles, intended to be given, shall have been admitted, at which time the licence, according to justice, should be brought in;" and it was further stated "that the citation does not allege that the Duke of Portland is under any title, except as promoter of the office, about to call upon Dr. Bingham to bring in the said licence, nor to put him upon proof of the legality thereof, admitting that the Duke of Portland has no right in the present suit, under any title or qualification, to proceed civilly for that purpose."

The editor is not in possession of any note of the argument or judgment in the Consistory overruling the protest; but from a note of what took place in the Arches, it appears that Sir W. Wynne thought that that part of the citation which called upon Dr. Bingham to bring in the licence was inaccurate and irregular, there being certainly a confusion of a civil and criminal suit; yet that it would not vitiate the citation if no prejudice arose to the party; that there was everything essential to a criminal proceeding, viz. the name of the judge, of the promoter, and the cause for which it was instituted; though it superfluously went further: and that the order of the Court below to give an absolute appearance did not enjoin Dr. Bingham to bring in the licence, and if it should thereafter be ordered, he would be at liberty to object: and that if the words objected to had been omitted, still the promoter might thereafter apply to have the licence brought in: so that the determination by the decree could not materially injure the defendant.

This decree was affirmed in the Delegates: and the articles, therein admitted, pleaded:

1. That by the laws, &c., ecclesiastical, no person can officiate without the leave and licence of the Ordinary.

2. That on a vacancy in 1787, the Duke of Portland, who was and is the sole patron, rector, &c., incumbent, &c., appointed Sir Richard Kaye to be curate of Marylebone.

3. That Dr. Bingham, aware of the premises and of the duke's right, several times applied to obtain his consent to open the aforesaid building (in Quebec Street) as a chapel, in which, on obtaining the bishop's licence, he might officiate; that the duke always refused his consent.

4. That notwithstanding, Dr. B., concealing that the duke had refused, on the 4th

he has since again nominated Mr. Woods, and that the bishop has again licensed him by an instrument bearing date on the 25th of May, 1831."

In reply to this, Mr. Bliss gave in a further allegation averring that he has at all times unequivocally expressed his dissent from the erection of this chapel, unless the curate should be under the entire control of the incumbent, and that he has invariably refused his consent to any other nomination. It exhibits certain correspondence, and finally states that the population of the parish **[509]** does not exceed 800; that there is church-room for 600, and that no part of the parish is distant four miles from the church.

Upon the facts of the case there seems little or no controversy or dispute; and though the suit is brought in the form of a criminal proceeding, yet it is admitted to be intended for the purpose of trying a civil right, not for the purpose of punishment.

The question then is, whether at the time the suit was brought the defendant was legally authorized to officiate in this chapel: for in my judgment what has been done since the suit commenced cannot legalize an act which was previously illegal. The chapel is newly erected, and is alleged to be consecrated as a chapel of ease to the parish of Funtington. In the deed, declaratory of the right of nomination, issued since the commencement of the suit, it is thus described, "that the trustees, their heirs and assigns should use their best endeavours to procure the chapel to be consecrated, and a licence for its being for ever thereafter used as a place for the celebration of divine service according to the rites of the United Church of England and Ireland, and to be devoted to ecclesiastical purposes, but not to interfere in any respect with the parochial and other privileges, immunities, or rights of the parish church of Funtington or the minister thereof." I have some difficulty in understanding how that is to be effected. That a chapel with an officiating minister is not to interfere with the rights of the incumbent, seems a condition not very easy to be complied with.

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of January, 1791, obtained the bishop's licence; that such licence was illegally obtained, and that the said building is newly erected, and has never been used for divine service.

5 and 6. That notice was served upon Dr. B. before the opening of the chapel that it would be opened against his grace's consent.

7. That notwithstanding, Dr. B. officiated therein on the 13th of January, and in the other months of 1791, and till May, 1792, under colour of the licence so illegally obtained without the consent of the duke, patron, &c., incumbent, &c.; and without the consent of Sir R. Kaye, then in possession of the office of curate of the parish, and without any legal authority.

8. That since the citation he continued to do so.

*** In *The Duke of Portland* v. *Bingham* Lord Stowell's remarks on *Herbert* v. *The Dean and Chapter of Westminster* (1 Hagg. Con. 168, 9) seem to afford a satisfactory explanation of the discrepancy supposed to exist between that case and *Dixon* v. *Kershaw* (see *Farnworth* v. *The Bishop of Chester*, 4 B. and C. 569), by shewing that the dean and chapter were the actual incumbents of St. Margaret's—as such had the cure of souls—and were in that character (not as mere patrons or impropriate rectors with a vicarage endowed) entitled to nominate to that chapel. Being also a royal peculiar, the dean and chapter in their corporate capacity are clothed with the characters of ordinary, patron, and incumbent: and till about a century ago they deputed one of the prebendaries and a minor-canon to officiate as curates of St. Margaret's. Since that period, however, by an instrument under their common seal, they "do nominate, constitute, and appoint" a prebendary "their curate and chaplain of the parish of St. Margaret to reside and personally to officiate therein, and faithfully to do and perform all the customary duties of the said cure, and for his pains and support allot him an annual pension of 13l. 6s. 8d., and all oblations, emoluments, and profits arising from marriages, christenings, burials, &c., for his life, on condition that if he is absent more than four months in any year the cure shall be void, as if he were naturally dead." By a separate instrument they give him a lease of the tithes. The curate is not licensed; but since 57 G. III. c. 99, ss. 73, 74, the assistant curate has been licensed by the Bishop of London. Sed quære, whether royal peculiars, not being specially named, are included?

By 58 G. III. c. 45, s. 25, and 1 and 2 Will. IV. c. 38, s. 12, certain churches and chapels built under these acts shall be deemed perpetual curacies, and the spiritual person serving the same, the incumbent thereof.

I conceive that by the general law and the constitutions of the Church of England no person **[510]** has a right to erect a new public chapel, forming part of the ecclesiastical establishment of the Church of England,(*a*) whether as a chapel of ease or otherwise, without the concurrent consent of incumbent, patron, and ordinary,(*b*) and **[511]** without a provision for the indemnity or compensation of the future incumbent,

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(*a*) Unless rights were granted to this building by competent authority and with all the necessary consents, it would become a mere proprietary chapel—a perfect anomaly unknown to the constitution of our Church, and in our ecclesiastical establishment. See *Moysey* v. *Hillcoat*, 2 Hagg. Ecc. 46. Still, in such a chapel, even after the licence of the bishop is obtained, the consent of the incumbent would be necessary to legalize the performance of divine service therein. See *Duke of Portland* v. *Bingham*, 1 Hagg. Con. 161; *Carr* v. *Marsh*, 2 Phill. 198.

(*b*) In *The Duke of Portland* v. *Bingham* (1 Hagg. Con. 161) Lord Stowell says, "It is generally true that the consent of the incumbent to the erection and use of a chapel is requisite." Kennett, in his Parochial Antiquities, vol. ii. p. 261 (ed. 1818), states to this effect: The inhabitants of Piddington, within the parish of Ambrosden, had procured a chapel to be erected within their own village, with a mansion-house allotted for a capellane to be provided and maintained by the successive vicars: this had occasioned some difference between the inhabitants and vicar, which was now composed by the joint consent of the patron, vicar, and the people, with confirmation of the diocesan, by virtue of an agreement, entitled "Dotatio capellæ S. Nicholai in villulâ de Piddington," and from this deed, dated the 14th of October, 1428, it appears that Piddington was divided from Ambrosden, and invested with distinct parochial rights: that the inhabitants were to provide, at their own cost and expense, and to have the nomination of a resident capellane, who was to receive all and singular the fruits, tithes, mortuaries, and emoluments within the chapelry, and hitherto paid to the vicar; and to occupy the mansion-house: he was to pay due obedience to each successive vicar; and the vicar released all tithes excepting the reserve of 20s. in money, and one quarter of wheat to be yearly paid to him and his successors: and the repairs of the chapel, chancel, and manse were for the future to be on the inhabitants and in no wise on the vicar, patron, or the successors, with a provision that if the chapel was void for a year, the tithes, &c. should be paid to the vicar. This was not a newly erected chapel; for Kennett says, p. 298-9, "I have met with no records nor tradition that assign the time when this chapel was erected. . . . Whenever it was first built, I believe it was not consecrated till ten years before this composition in 1418; . . ." which seems to be clearly implied by this expression in the present instrument, "in eâdem capellâ et ejus cœmeterio jam tandem de novo ritè dedicatis."

Remarking on this deed of composition, Kennett, p. 268-9, says, "Here is the triple league or joint consent of the diocesan, patron, and incumbent, whose suffrages were all required, if the church were full, to authorize an alteration of this kind. In a synod at London, convened by Anselm, Archbishop of Canterbury, in 3 Hen. I., the 15th constitution provides, Ne nova capella fiat sine consensu episcopi. So when an oratory or chapel was allowed at the grange of the Abbey of Waverley, in the parish of Aultun, com. Southampt., A.D. 1250, it was done by the permission and consent of the Bishop of Winchester, diocesan, and patron, and the rector of Aultun. So when the chapel of St. James, in the parish of Oakley, was constituted, A.D. 1418, the ordination of it was by authority of the Bishop of Lincoln, diocesan, de consensu et assensu prioris et conventus, &c., the proprietors and patrons, cum voluntate et assensu vicarii. And if the lord of any manor or inhabitants presumed to erect a chapel without such due permission and assent, such act was neither just nor valid. Therefore, when a chapel was founded within the parish of Watlington, com. Oxon., by the lord of that manor, for the greater conveniency of his family and tenants, the abbot and canons of Osency, patrons of the parish church, entered a protest against it; and in 1182 appealed to Richard, Archbishop of Canterbury, and from him, soon after, to Pope Urban the Third, who sent over a commission to the abbots of Abingdon and Missenden, and the prior of Kenelworth, who, upon inquiry and judicial process, dissolved the said chapel, because illegally built, without consent of the parties concerned."

perhaps in all cases—certainly if his pecuniary rights and interests are to be in any manner affected. The cure of souls of every parish or parochial district belongs to, and all its emoluments are by the original founder and endower set apart for the maintenance of, the incumbent and his successors, and become vested in the existing incumbent by his **[512]** institution and induction. The principles on which the consent of all these parties is required are obvious. The consent of the ordinary is necessary, as the general guardian of the interests and order of the church, and as the conservator of its constituted establishment. The patron is a party because the rights and value of his patronage may be affected. The incumbent himself is still more immediately affected, both in his pastoral duties and his pecuniary rights, both of which are committed to him when instituted and inducted. If chapels can be erected and ministers be placed in them at the nomination of others, not only will it deprive the incumbent of the means of directing the spiritual instruction of his parishioners which has been entrusted to him and which he has solemnly undertaken—not only will it produce schisms and dissentions, and thereby exert an injurious influence upon the religious principles of the parish, but it must almost necessarily affect in some degree the emoluments of the benefice as well as the pastoral duties of the incumbent. Such I apprehend to be the general law upon the subject, and the principles on which the law is founded.

In a question (as to the right of nomination to such a chapel) the law, as I have above stated it, is accurately laid down by a decision proceeding from high authority; a decision of the more value because not being made in this Court it could not be founded on the prejudices which might be suggested to belong to an ecclesiastical lawyer, but proceeding from a Lord High Chancellor of England—I mean Lord Northington, in the case of *Dixon* v. *Kershaw* (2 Ambler, 528. 2 Eden, 360). That case is **[513]** infinitely stronger than the present, supposing the church-building acts out of the question. This doctrine has since received the equally high sanction of the deliberate opinion of the Court of King's Bench in the case of *Farnworth* v. *The Bishop of Chester* (4 B. & C. 569), qualified merely by the expression of a doubt, on the part of the Chief Justice, as to the necessity of a compensation to future incumbents, where nothing is taken from the income of the incumbent. Perhaps the principle on which the compensation is required is that the incumbent, patron, and ordinary cannot bind the successors to their prejudice, or compromise what was originally, by the endower, intended to be attached to the incumbent, either as temporal rights or spiritual obligations. Nor is it very easy to suppose a case where even the mere erection of a chapel will not almost necessarily, in some degree, affect the income of the benefice. Under these authorities it appears clear that by the general law the consent of the patron and incumbent is necessary as well as that of the ordinary.

Such being the general law protecting the rights of the incumbent and of the patron, it follows that under the facts stated these rights have been invaded, and that Mr. Bliss would be entitled to obtain a sentence against the defendant unless the latter should be protected by the act of parliament referred to. The question then resolves itself into this, whether this general law is so altered by the church-building acts, and particularly by that of 7 and 8 Geo. IV. c. 72, as to give Mr. Baker a right to erect the chapel and to render the licence of the ordinary sufficient to protect the defendant **[514]** from any penal consequences for officiating there. In order so to protect him, the statute must have been strictly complied with, for general rights are not to be taken away without clear and direct authority.

It is necessary in the first place to see how the matter stood at the commencement of this suit, and when the articles were admitted. Here had been a new chapel built, it had been consecrated, and a licence had been granted to Mr. Woods, but here is no consent given by the incumbent, nor by the patron; and surely to the surrender of such rights a formal and regular consent would be necessary—not mere privity and acquiescence. Now it is quite clear that the incumbent was extremely averse from the erection of this chapel, unless he were to have the direction of the duty to be performed in it: here are his letters in 1826 in which he takes a very correct view of the subject, and makes very liberal offers for the performance of the duty and for the satisfaction of the parishioners; and if after that he did not, against the supposed sanction of his diocesan and of the church-building commissioners, protest at every step, but remained silent, his consent is not thence to be inferred; nor is such conduct to bind him. There might possibly be some understanding between Mr. Baker, the

diocesan, and the church-building commissioners, but an understanding is not sufficient. It is possible they were desirous that additional church-room should be provided in this parish: but the Court cannot enter into these considerations. It can only pronounce on the legal right: and to establish that, the act and deed of the commissioners in an authentic form was at least necessary. Suppose nothing further de-[515]-claratory of the right of nomination had ever been done than had been done before the commencement of the suit, could it be contended that the incumbent had lost the right of nomination to this chapel? In my judgment, at the commencement of the suit, Mr. Woods was officiating in this chapel without legal authority, and Mr. Bliss would have been entitled to a sentence prohibiting him in future. What was the answer of the commissioners in February, 1830? "That the formal proceedings of the board with respect to the chapel must be postponed till their powers had been more defined by Parliament." They doubted therefore even of their own powers at that time, and issued no declaration giving the right of nomination to Mr. Baker, and depriving the incumbent of his authority over this chapel. What occurs afterwards? A bill is brought into Parliament but does not pass, and another bill which is not yet passed; and so the matter rests till the suit is commenced; and then, after the articles are given in, a formal deed declaratory of the right of nomination issues, and a new licence is granted. The very circumstance of obtaining this deed and this new licence shews that the defendant was aware that his title was imperfect until the authority of the commissioners was obtained in a regular form under their corporate seal.

In this view of the case it may hardly be necessary to consider the construction of the 7 and 8 Geo. IV. c. 72, in order to decide that, when the articles were given in, Mr. Woods was doing duty in this chapel without a legal nomination, for at that time no deed had been executed purporting to convey the right of nomination to any other [516] person than the incumbent: and the Court is not bound in this suit to decide whether, if the formal deed of nomination and licence had issued in December, 1829, instead of May, 1831, Mr. Baker would have possessed the right of nomination, and Mr. Woods would have been legally licensed and qualified to officiate without the consent of the incumbent. The Court can make no decision on that point in the present suit, and therefore is not regularly called upon to express any opinion on the construction of the statute, except so far as it may tend to confirm its judgment that until a declaration by a formal deed purporting to transfer the right of nomination to Mr. Baker was made, the licence to Mr. Woods was invalid, and consequently that Mr. Bliss is entitled to a sentence on the articles given in in this suit. At the same time, as the examination and consideration of this act of Parliament may be satisfactory, the Court will not shrink from stating its present view of the construction of the statute.

To take that view it is necessary to refer to the several acts for building new churches, and to see how far the general law relating to the rights of patrons and incumbents respecting chapels has been continued or altered.

The general law has been already stated, viz. that the erection of a new chapel requires the concurrent consent of ordinary, patron, and incumbent, and also (under certain circumstances at least) a compensation to the incumbent. The 7 and 8 Geo. IV. c. 72, referred to for the defendant, is expressly entitled, "To amend the acts for building and promoting the building of additional churches in populous places;" it must [517] therefore be construed with reference to, and in conjunction with, those former acts. Parliament granted first 1,000,000l., and afterwards 500,000l. in addition, for the purpose of building new churches, and appointed commissioners to carry that purpose into effect. The object is declared in 58 Geo. III. c. 45, entitled, "An act for building and promoting the building of additional churches in populous parishes." What are considered to be populous parishes, s. 13 defines: "Only where the population is not less than 4000, and there is not accommodation for more than one fourth." S. 75 provides that a certain proportion shall be "free seats" for the use of the poor. To furnish additional church-room in populous places, and to give accommodation to the poorer classes of society, were then the primary objects. In furtherance of these objects Parliament, in this first act, and in all the subsequent acts, has shewn particular attention to protect the rights and interests both of patrons and incumbents, and especially of existing incumbents. S. 16 provides, if parishes are divided, the consent of the patron under his hand and seal is to be had, and the division is not to take place till after an avoidance by the existing incumbent. S. 18. The new

church is to remain a chapel of ease, and to be served by a curate appointed by the incumbent until an avoidance. S. 21. Commissioners may build additional chapels to be served by curates nominated and appointed by the incumbent of the parish: and there are various clauses tending to shew how careful the Legislature was to protect inviolate the rights both of patrons and existing incumbents, and to preserve the constitution of the church as established under the general law. S. 67. If the new churches are **[518]** made distinct churches, and not separate parishes, the right of presentation shall belong to the patron of the parish. S. 68. If the chapel is built in the whole by rates, still the nomination of the minister shall be in the incumbent of the parish, not in the parishioners who build. Again, the commissioners in the first instance are to settle the pew rents; and these, by s. 78, the churchwardens may afterwards alter. But how? With the consent in writing of the incumbent, patron, and bishop. So that throughout the whole of this first act the Legislature is particularly cautious to have the concurrent approbation and consent, and in an authentic form, of all these parties whose rights can be affected, or who can even remotely have an interest in the new built church or chapel; thus anxiously preserving the general law in these respects.

The same principle will be found to run through the 59 G. III. c. 134. "To amend and render more effectual an act passed in the last session for building and promoting the building of additional churches in populous places." In this act, by s. 12, new churches are to become distinct benefices, but are to be served during the existing incumbency by stipendiary curates to be nominated by the existing incumbent of the parish. So again, by s. 16, where there are new chapels, the commissioners may allot districts to any chapel of ease or parochial chapel already existing, but the curate shall be nominated by the incumbent of the parish church, except where the right of nomination shall already be legally vested in any other person or persons; expressly therefore recognizing and protecting the existing rights of the incumbent as vested in him under the general law.

[519] In the next act, 3 G. IV. c. 72, to "amend and render more effectual" the two preceding acts, the same principle is still observed. By s. 16 the commissioners may convert a district chapelry into a district parish, "with the consent of the ordinary, patron, and existing incumbent;" but if the incumbent refuses, then it may be done at the next avoidance. How careful again here is the Legislature to maintain vested rights, which it will not allow to be infringed without consent.

In the 5 G. IV. c. 103, which passed on the granting of the additional 500,000l., and is entitled, "to make further provision and to amend and render more effectual" the three preceding acts, the same general principle is recognized; but there is something of an exception and departure from it under special circumstances, carefully, however, set forth and guarded, and only for a limited time (see ss. 5-13 inclusive). It can only be done where there is not accommodation for one fourth of the inhabitants: it must be on a certificate of that fact to the bishop by twelve substantial householders of the parish, and that they are desirous to build or purchase a chapel and out of the pew rents provide a competent stipend for the minister, and other expenses; then the bishop may signify his consent if he thinks fit. The subscribers must then elect three trustees, and supply a vacancy in the trust occasioned by death or resignation, by electing a new trustee or trustees, "being members of the Church of England;" or the chapel may be built in part by a subscriber and the rest by rates, "if the bishop thinks fit" to consent, and the same portion of free seats shall **[520]** be set apart as under the church-building acts; but notice in writing of the application to the bishop must be given to the patron and incumbent, so as to afford each of them an opportunity of laying their objections before the bishop. Then, under all these circumstances, the trustees shall have the right of nomination for two turns, or forty years; but if the chapel is built, even in part, by the rates, the nomination of the minister shall be in the incumbent of the parish. Under all these special circumstances—great want of additional church-room—not sufficient accommodation for one fourth of the inhabitants, and where private subscribers engage to furnish this additional church-room—here is, to encourage so good a work, a breaking in upon the rights of the incumbent and patron for two turns, unless they shall satisfy the bishop that the measure would be injurious; for it is still left in the full discretion of the bishop: so that under all these strong circumstances, after two presentations, the right reverts; and the right of the person entitled by the general law is only ousted

for two turns. It is impossible to look at all these separate acts without seeing how anxious the Legislature was to preserve the rights of all parties, and only under very special circumstances to allow an invasion of them.

In the present case it is quite clear, if Mr. Bliss' allegation be correct, that the building of a chapel at Sennicots does not come by any means within the 5 G. IV. c. 103. Funtington is not a populous parish; it has only 800 inhabitants of all ages and descriptions; and instead of there being only church-room for one-fourth, there is church-room for three-fourths, which, including **[521]** all ages and sexes, is more than ever would attend divine service at one and the same time.

Having thus remarked on the general law, and observed how sparingly it is broken in upon by the church-building acts, I come to the consideration of the act referred to in the defendant's allegation—the 7 and 8 G. IV. c. 72.

It is, as I have said, entitled "an act to amend the acts for building and promoting the building of additional churches in populous parishes," and therefore must be construed in conjunction with them. It is a very short act passed at the very end of the session of Parliament, having received the royal assent on the second of July, 1827; and Parliament was prorogued on that day. The bill, it is said, was brought into the House of Commons on the 15th of June, and was passed in fifteen days. I mention these circumstances to shew that it was a hasty measure, and that the construction of it is not, in derogation of the general law, to be carried beyond the strict letter. It has only three clauses; the first two, at all events, are for no very complicated or difficult objects. The first act passed in 1818, and its operation being confined to ten years, it would expire in 1828. The first clause of the new act is to continue the power of the commissioners for ten years longer. By s. 2 the commissioners may divide parishes into ecclesiastical districts as provided by the 58 G. III.; and if there shall not be burial ground within the new district, the interments may (till burial ground be provided) take place in the cemetery of the parish church; and for this purpose a legislative provision was hardly required. The burial in the original churchyard was a matter of necessity; and at all events the provision was of a **[522]** very insignificant nature. The third section is that relied on; and the object of it is obviously to encourage the permanent endowment of chapels with land, or money in the funds, exclusive of or in addition to pew rents; and from its wording this section is confined to that object. It has no explanatory preamble pointing out and suggesting any other object, or that it was expedient to make any further alteration in former acts, or that the law as it stood before required amendment; but if any person would give a liberal endowment in land, it secured to him the right of nomination in perpetuity. This was going a great length, even if restricted to chapels legally built according to the law as it stood before, that is, either under the general law and with the joint consent of patron, ordinary, and incumbent, or under the law as modified and varied by the church-building acts. The nomination is to be to the endower and his heirs, not even restricted by requiring that they shall be members of the Church of England: the words are general, and the section is so loosely and carelessly penned that it bears every appearance of having been hastily drawn. Looking to the general law, and to all the former acts which this act is to amend, it seems extremely difficult to suppose that the Legislature here intended to subvert all the general law and all the careful provisions of the former acts by this short sweeping clause thus expressed; and that any person, erecting a building and calling it a chapel in any parish—without any regard to its population or want of church-room, without any regard to the doctrines he may wish to introduce into the parish, without any regard to the duties entrusted to the parochial incumbent and the sacred trusts which he has un-**[523]**-dertaken, without any regard to the situation of the building, possibly close adjoining to the parish church, and so far particularly injurious and offensive to the incumbent —has only, when he has built his chapel, to state to the commissioners that he has amply endowed it, and then claims to be entitled, he and his heirs, to nominate a minister to officiate in that chapel and to propagate his own doctrines there. This would be an extreme construction to put on the words, and which I cannot conceive would give effect to the intention of the Legislature.

The true intent and meaning of the act are of immense importance, not merely in this individual case, but to the whole constitution of the Established Church, its patrons and ministers. If the endowment be ample and the right of nomination claimed, can the commissioners refuse to declare that the endowment is to their satisfaction? The

words of the act are, "When any person shall to the satisfaction of the commissioners endow" (not build and endow) "a chapel built or hereafter to be built by such person or persons." Still the chapel so endowed must have been legally built either under the general law or according to the former acts; for, in that particular, this section does not purport to make any alteration in the law; the commissioners' functions under it are limited to deciding on the sufficiency of the endowment. Here is no preamble to the clause expressive of any other object, or of an intention to enlarge or extend the powers of the commissioners in any other respect; here are no words authorizing them to make any conditions which they in their discretion shall think proper—no such extensive powers are entrusted or delegated **[524]** to them by the Legislature. If the construction contended for by Mr. Woods be the true one, they could make no conditions at all; and if the other construction be the true one, the only conditions, the compliance with which they could require, are those imposed either by the general law or by the former acts, particularly the 5 G. IV. c. 103, taken in conjunction with this, thus offering, in consideration of an endowment either in lands or money in the funds, extended encouragement—viz. the perpetual nomination instead of the nomination for two turns or 40 years, and without compensation for the benefit of the incumbent of the parish, which the general law required, in addition to the consent of the patron, incumbent, and ordinary. Upon Mr. Baker's application the commissioners could only answer—"either get the consent of the bishop, patron, and incumbent, or bring your chapel within the clause of 5 G. IV., and then when you have endowed it to our satisfaction you will be entitled to obtain the right of nomination." If "built or hereafter to be built" precludes all enquiry—how built? by what authority built? whether necessary? whether useful? whether not injurious? injurious to the patron? violating the rights and interfering with the duties of the incumbent? then it may be possible that, as soon as the right of nomination was formally declared, Mr. Woods might be properly licensed or would be guilty of no offence subsequent to that time: but if the words "built or hereafter to be built" mean built according to law, either with the consent of the bishop, patron, and incumbent, or under former church-building acts, particularly the 5 G. IV., upon a certificate that three-fourths of the inhabitants had not church-**[525]**-room, and that room was wanted, then the clause becomes intelligible, though still going very far. Then the object of the act is only to encourage the endowment of chapels already existing, or which may hereafter be built either under the general law or by the commissioners, or under the clauses of 5 G. IV. In that construction the principles of the general law will be preserved: then the provisions of the act, passed only two years before, will be secured, and yet the plain and obvious object of encouraging the endowment of regular chapels will be obtained.

But if, as I have said, the construction contended for on behalf of Mr. Woods be correct, and if any person building a chapel in any parish without the consent of incumbent, patron, or ordinary, where the population does not require it, has only amply to endow it so that the commissioners cannot in conscience refuse to say that it is endowed to their satisfaction (for that is the sole question confided to the consideration of the commissioners as far as this clause goes)—if that be the true construction of the clause, then will all the general law respecting the rights of patrons and incumbents, which in all the former church-building acts have been so fully recognized and so carefully protected, be entirely swept away—then will even those guards, provided by the 5 G. IV. for supplying chapels in populous parishes, become quite useless, and an entirely new system, tending materially to produce divisions and religious contention in parishes, be introduced into the practice of the church.

In the present cause the Court is not called upon to decide or to express any decided opinion upon the true construction of this clause, respect-**[526]**-ing which it is evident, and in no degree extraordinary, that doubts have been entertained: no act has yet passed defining the powers of the commissioners in this respect: but whatever may be the true legal construction of the act, now that a deed of declaration has been executed, it seems clear that at the time of bringing in the articles, no deed of nomination being then in existence, Mr. Baker had no valid authority to nominate; and as the present allegation does not shew that Mr. Woods had the incumbent's consent to officiate, it forms no sufficient defence to the charge laid in the articles. I must therefore reject both allegations.

On the 2d Session of Mich. Term (Mr. Bliss having declared he proceeded no

further), Addams applied for his costs on the ground that the decision of the Court had ascertained that Mr. Woods had transgressed the law, and that, if the case had proceeded, Mr. Bliss would have been entitled to its sentence: but that it was now useless to continue the suit, since the ex post facto provision of 1 and 2 W. IV. c. 38, s. 20, had declared that, in this and similar cases, the chapel shall be deemed to have been legally built, and the deed to have been valid from the date thereof.(*a*)[1]

The Court, under all the circumstances, declined to give costs.

[527] FULLECK *v.* ALLINSON. Prerogative Court, Mich. Term, 1st Session, 1830.—A testamentary paper cannot be set aside on the ground of monomania (the deceased's belief of an attempt to poison him), except there be the most decisive evidence that at the time of the factum of the paper the belief amounted to insane delusion. Semble, that a will, of personalty only, agreeable to long entertained intentions, prepared two months before, and execution merely delayed for want of witnesses, would be valid as an unexecuted paper, even though the execution finally took place during supervening insanity.

[Applied, *Fairtlough* v. *Fairtlough*, 1839, Milw. 36. Referred to, *Davies* v. *Gregory*, 1873, L. R. 3 P. & D. 32.]

This was a cause of proving the last will, with three papers (as codicils or additions thereto), of the Rev. John Monkhouse, promoted by John Fulleck, Esq., one of the executors, against Barbara Allinson, widow, the sister and only next of kin. The deceased died on the 15th of October, 1828, aged 70. His will was as follows:—"I, John Monkhouse, late Fellow of Queen's College in Oxford, and now rector of Bramshot in the county of Southampton, and residing there, do make my last will and testament as follows, first expressing my belief in one God only, and in a future state of retribution as declared by Jesus Christ his authorized messenger." Debts and funeral expences to be paid; 1850l. to the Provost and Fellows of Queen's College, Oxford, and their successors, in trust, to invest the same at interest on such securities as the law will allow; the interest to be applied in "teaching all the children from six years old and upwards (and who shall be desirous of taking the benefit thereof) of all persons residing within the parish of Bramshot, whatever their religious persuasion be, in reading English, in writing, and in arithmetic; excepting such children as are bastards, or any children of persons given to whoring, thieving, cheating, tricking, biting, overreaching or extorting; and I most earnestly desire that this exception may ever be attended to, which from the regard that persons ought to have for the welfare of their offspring will supply the best means I can leave behind me for counteracting the extreme dishonesty and great unchastity of the parish, and for promoting the probity **[528]** and virtue of its inhabitants." Plan of teaching to be Bell or Lancaster: suggests to the trustees the propriety of requesting the rector of Headley, the vicar of Selborne, and the rector of Bramshot for the time being to superintend, &c. To the said provost, &c. 100l. for the repairs of their building. To the same 100l. "on trust, to pay the same to the treasurer for the time being of a voluntary society known by the name of the Unitarian Society for promoting Christian Knowledge and the practice of virtue by distributing books, the same to be applied to the purposes of that society." To the provost, &c. all his books for the use of the library of the Tabordars of the said college; also 20l. to be paid by the provost, &c. "in equal proportions, to ten poor families of the best general character in Bramshot." "To those who poisoned my faithful dog, my companion by day and my guardian by night, one shilling as a memorial." Residue to the provost, &c. on the same trusts as respects the 1850l.

Henry Budd, Esq., John Fulleck, Esq., Charles Butler, Esq.,(*a*)[2] Rev. Robert Dickinson, rector of Headley, Rev. William Cobbold, vicar of Selborne, Henry

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(*a*)[1] 1 and 2 W. IV. c. 38, s. 1, repeals 7 and 8 G. IV. c. 72, s. 3: and several subsequent sections make new provisions, but under many limitations and restrictions, for declaring the right of nomination to be in the endowers.

(*a*)[2] It appeared that the deceased was offended at Mr. Butler for his conduct while investigating, and his disbelief of, the attempt to poison the deceased's well; and therefore erased his name as an executor: the deceased also mentioned, two days before his death, a similar intention as to Budd's name, and for the same reasons.

Marshall of Godalming (to each 5l. for their care herein), "executors in trust of this my will which relates to my personal estate solely."

Dated 19th April, 1827. JOHN MONKHOUSE (L.S.).

Attesting witnesses—John Parson,(*b*) Samuel Charles Locke.(*c*)

[529] 1st Codicil, (No. 1). To H. Budd, Esq., J., Fulleck, Esq., C. Butler, Esq., and H. Marshall, all his real estate at Bramshot on trust to sell, and to apply the produce of the purchase money to the Provost, &c. of Queen's, upon the trusts expressed in his will: "and I bequeath to the executors of my will one pound to be applied in providing good wholesome milk, if it may be had, to be given to the children of the parish of Bramshot in the manner they shall think fit."

Dated 24th April, 1827. JOHN MONKHOUSE (L.S.).

Attesting witnesses:—Charles Mellersh, James Limbell, clerks to Mellersh and Marshall, solicitors, Godalming, Sarah Loveland, servant to Mr. Marshall.

The will and this codicil were both in the writing of the testator upon one sheet of paper, enclosed in an envelope and endorsed, "My will to be opened on my decease and not before." JOHN MONKHOUSE.

June 24, 1827.

"The executors are—Mr. Fulleck, Mr. Henry Marshall, Mr. Budd, Mr. Dickinson, and Mr. Cobbold." (*a*)

No. 2 and 3 were labels in the deceased's writing—one inscribed "for Ann Anker, my housekeeper;" the other "for Hannah Harrison;" and each dated February 20, 1827; and attached to two canvass bags (found in the deceased's iron chest), the one containing 49l. 2s., and the other 49l. 3s., in silver.

[530] These testamentary papers were opposed by the next of kin in an allegation setting up that the deceased was always odd and eccentric, particularly latterly; that William Harrison, who had married the deceased's niece (Mrs. Allinson's daughter), had, in 1817, come from Cumberland at the deceased's desire to farm his glebe—at first resided with the deceased, then removed to a house a mile distant, leaving his daughter, then four years old, with the deceased; that until April, 1827, W. Harrison and the deceased continued to be on good terms together: that Harrison managed the deceased's tithes for him, and that the deceased constantly appointed him churchwarden of Bramshot, and on his influence that he was appointed guardian of the poor: that he (W. H.) was appointed churchwarden and guardian of the poor on Easter Monday, 16th of April, 1827, for the year ensuing. That in a day or two after such appointments had been made the deceased, under a delusion of mind, declared that the well belonging to his house had been poisoned by an infusion therein of mercury, or of arsenic, or other poisonous matter, and expressed a belief that the same had been done by Mr. Harrison or some of his family: that the well was about ninety feet deep and five in diameter at the top, and from twelve to fifteen at the bottom. That the deceased, in consequence of this delusion, would not permit the water from the well to be used: and from such time the water for his house was brought from the well of John Cover, a labourer in his employ; to whom he sent directions to have the lid of his well fastened by a chain and padlock, and which was done: that the deceased, upon examination being dissatisfied with them, Cover, by his direction, fastened the lid with an iron bar and a new padlock; **[531]** and kept the well locked: that in the summer of 1827 the deceased was angry because there were chinks in the lid, and helped to fill them up with chips. That there was no poison in the deceased's well, and that his apprehensions were the effect of delusion and derangement; that he subsequently thought the water spouts, tank of rain water, the eggs, butter, and milk from W. Harrison were poisoned. That this belief continued to his death. It further pleaded vain attempts of his friends to remove this belief in respect to it, and to other matters, and his belief that his dog was poisoned in 1826: that the papers, pleaded as the will and codicils, were prepared and executed subsequent to the time when the deceased was impressed with the belief of the poison, and while he was of unsound mind and under mental delusion. It also pleaded

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(*b*) Curate of Headley.

(*c*) Curate of Bramshot.

(*a*) The deceased had transcribed, in the register book of burials at Bramshot, certain parts of his will; and also an abstract of the codicil (No. 1). This transcript and copy were signed by him and dated May 1, 1827.

affection for his sister, and that he was accustomed to afford her pecuniary assistance unsolicited.(*a*)

[532] The allegation in reply pleaded circumstances to shew that the belief that his well had been poisoned was not an insane delusion; but was founded on rational though possibly on insufficient grounds; and that his conduct, conversation, and letters on this subject were rational and sensible: the plea exhibited a number of letters upon this subject, and others on matters of business, and a correspondence published in the *Gentleman's Magazine* proving that, as early as 1814, he had entertained Unitarian notions. It also pleaded that he had given instructions, in 1819, for a will of the same purport. The 43d article denied that the papers were prepared after he had taken up this belief of poison; for that some time before, in a conversation with one of the witnesses, he spoke of the will as being ready to be executed, and proposed, for the sake of privacy, to execute it at the **[533]** witness' house; and that such intention was only postponed in consequence of the non-arrival of the witness' friend, who was then intended to be the second attesting witness. The 44th pleaded; that his belief in the attempts to poison him produced no change in his affection for his sister; for that he made to her the same small remittances which he had been accustomed to do before; that the day but one before his death, in a conversation with his solicitor, he expressed his adherence to the will. It also pleaded that he had for some time disliked Harrison; that such dislike gradually increased; that he never confessed that Mrs. Harrison or the children were his relations; and that he never intended either of them to be objects of his testamentary bounty, but intended to give a small freehold to Harrison, for the title deeds of which he wrote to his solicitors on the 16th of February, 1827, declaring that he meant to deliver them to Harrison in his life-time.

As the circumstances pleaded in the allegations on either side were established,

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(*a*) This allegation was brought in on 7th May, 1829; and on the 14th, four papers were brought in annexed to an affidavit by Mr. Marshall, the deceased's solicitor. No. 1. The draft of a will in the handwriting of the deceased, delivered to M. by the deceased shortly previous to November, 1819. No. 2. Draft of a will prepared therefrom by M. No. 3. Copy of a letter from M. to deceased, sent with such draft. No. 4. Instructions for the codicil as to the real estate, delivered to M. about the time the codicil was executed.

No. 1 was the will of 1819, the heading of which corresponded with the last will, except the words "his authorized messenger" were omitted. He left 3000l. stock to the rector of Headley, vicar of Selborne and rector of Bramshot—to pay the yearly interest to a schoolmaster; and after payment of such legacies as shall be hereafter mentioned, and of all just demands on him, all the rest and residue of his personalty to the same, in trust to build a school and master's house.

The clause as to the exclusion of certain children, and his object in this exclusion, were the same as in the latter will.

Legacies, printed books to his successors, 100l. to the Provost of Queen's College towards the repairs of their buildings; 100l. to the treasurer for the time being of a voluntary society [its name or designation to be inserted here] for promoting, &c., as in latter will. Residue to the three trustees of personalty, to the rector of Headley, &c., to be applied to the repair of the school and dwelling-house.

Executors—the three trustees.

Date in blank. Signed, but not sealed: attestation clause, but no witnesses.

No. 2 exactly agreed with the last will, except in the omission of the words "his authorized messenger;" and of the description of the society; and that the books were bequeathed to ——— on trust to deliver to his successor. There was also a blank clause for legacies, and there was no clause respecting his dog. The appointment of executors was also left in blank.

No. 3 explained that these variations from No. 2 arose from legal difficulties in effecting the deceased's intentions in the mode that he proposed.

No. 4. "My house and gardens at Passfield in the parish of Bramshot to be sold, and the interest of the money to be applied partly to the purposes expressed in my will, and partly in providing good wholesome milk (if it may be had) to be given to the children as opportunity serves."

with very slight exceptions, the question was whether the belief which the deceased entertained was a sane or insane belief.

The King's advocate and Nicholl in support of the will and codicils.

Lushington and Dodson contrà.

[534] *Judgment—Sir John Nicholl.* The statement and observations necessary to be made in this case, as the reasons of the sentence the Court is about to give, need in no degree be proportioned to the bulk of the evidence which has been introduced into the cause. The material facts lie in a narrow compass.

The will, codicil, and two other papers propounded are all in the handwriting of the deceased, and the will and codicil are regularly executed and attested. There is no question of the factum, nor of the intention, provided the deceased was of sound mind. The instruments are opposed on the ground of insanity.

The history of the deceased and of the parties connected with the cause is pretty accurately detailed in the allegation given in opposition to the will, and the circumstances therein stated will lead to some of those prominent points which are more precisely to be considered.

The deceased, the Reverend John Monkhouse, was the son of a Cumberland farmer, became a fellow of Queen's College, Oxford, and was for the last twenty years of his life rector of Bramshot, Hants, a college living. He was always odd and eccentric in his habits; he resided in the rectory house, and was latterly very retired. His sister had two daughters, one married Harrison, then a farmer near Penrith, the other married Moffat and resided with her mother. The allegation pleads affection for this sister, and that the deceased occasionally afforded her pecuniary assistance. In 1817 Harrison and his family, by the deceased's invitation, came to Bramshot to rent the glebe and manage the tithes, **[535]** having previously sold off his own stock in Cumberland. For about two years he resided at the deceased's house, and then removed to a house about a mile distant, leaving one of his daughters, Hannah, about four years old, to reside with the deceased. After their removal the deceased continued on good terms with Harrison and his family. Harrison collected his tithes, was appointed his churchwarden, and, on his interest, guardian of the poor up to the 16th of April, 1827. The 6th article lays the origin and commencement of insanity—that it took place after the 16th of April, 1827; and between that time and the 19th of April the deceased was seized with the delusion of mind which led to the execution of the will; the will being executed on the 19th of April, the codicil on the 24th.

A great number of the following articles state circumstances taking place in May, June, and afterwards, all tending to confirm that this impression respecting the poison was a delusion of mind; and the 26th article sums up the averment and fixes the insanity to this impression: it pleads that the instruments propounded as the will and codicils of the deceased "were prepared and executed subsequent to the time when he first became impressed with the idea that W. Harrison and his family had made an attempt to poison him, and whilst he, the deceased, was of unsound mind, and under mental delusion."

The great mass of the evidence and the principal bearing of the arguments are to shew delusion in May and June, 1827; but the precise question is whether at the time this will and codicil were prepared the deceased was become insane. The fact may bear differently on the will and codicil: **[536]** they are of different dates; there is an interval between the execution of them, and a much greater interval between the times of their respective preparations. They are subject to different rules of law; for the will applies solely to personal property, the codicil exclusively to real—except a legacy of one pound introduced rather to record an opinion than as an operative bequest.

The deceased was undoubtedly a very eccentric man; but actual insanity is not alleged before Easter, 1827: he kept large sums of money in his house, which was rather retired; he carried arms; he kept Newfoundland dogs both as guards and companions, and was very much attached to them. In 1824 one of these favorite Newfoundland dogs, called Carbo, died. The deceased thought she had been poisoned; he had her buried, and wrote some verses on Carbo: but thinking she had been poisoned was no delusion; others from the symptoms and appearance of the dog thought so too, particularly Moore, the farrier who attended her. The deceased could not fix on the person who had poisoned her, but he had his suspicions.

His parish was not of a very moral character—particularly in regard to the virtue of chastity—there were many illegitimate children. The deceased (whatever might be

the heterodoxy of his religious opinions) seems to have been a strictly moral man, and to have had strong moral feelings. Whenever any of these illegitimate children were christened he recorded the circumstance and the character of the mother in the parish register, extracts from which to the end of 1827 have been exhibited.(*a*)

[537] This may be eccentric, odd, irregular, and improper; for all such irregularities in a clergyman are improper: but it is not insanity. If it be insanity, he was insane for the last 15 or 16 years, or perhaps all his life; but it is impossible to maintain that such conduct would render invalid any and all acts respecting his property.

It comes then to the consideration whether at the time these testamentary acts were done the deceased was intestable, so as to vitiate and render invalid the instruments propounded. The will, as I have said, is all in the handwriting of the deceased; it is remarkably well written, without alteration or erasure at the time of the execution; it bears no appearance of excitement or hurry—the date was filled in at the time of the execution—it is signed and sealed—there is a full attestation clause—and it is attested by two witnesses—both clergymen—one his curate—the other the minister of an adjoining parish—both intimately acquainted with the deceased. Not only is it to be presumed that these two clergymen would not have attested the act unless satisfied of the sanity of the testator; but they do both in the most unhesitating manner depose to their full belief that the deceased was of perfect sound mind; and they thus depose notwithstanding at the time of their examination they [538] were aware of all the deceased's subsequent opinions respecting the poisoning.

Next, as to the contents of the will. That he was an Unitarian, however much to be lamented in a beneficed clergyman, does not render him intestable. Unitarian opinions he appears long to have held. It appears that he made the college trustees by the advice of his solicitor, to avoid the statutes of mortmain; but the passage relating to the poisoning of his dog is that on which reliance has been placed as manifesting the existence of insanity. That clause is certainly odd and eccentric; it does not however record a delusion, but an opinion which he held in common with others, and for which there were rational grounds of belief, or at least of suspicion; and this opinion was recorded to prick and sting the conscience of the perpetrator whoever he might be. This clause will not then, as evidence of defective capacity, vitiate the will.

If this disposition had been a departure from the long course and current of his affections and testamentary declarations towards his family, it might have furnished some marks of that capricious malice and change which often accompanies insanity; but the fact is the reverse: whatever little patrimony he had he seems to have left with his sister, but he kept up no direct intercourse—he had not been in Cumberland since 1800—instead of large and constant pecuniary remittances, he sent three times, on the solicitation of a friend, 5l., and part of that donation he, on one occasion, desired to be applied to the use of a school, shewing, as the will itself does, that he was interested in the education of the poor. The disposition therefore [539] is not a change from affection to his relations, for even Harrison and his wife, the niece of the deceased, were hardly acknowledged by him, and their daughter Hannah was brought up, not as a favoured relation, but as a servant: while, on the other hand, the disposition is in principle the same as the deceased had intended during the last ten years of his life: this is manifest from the testamentary instrument prepared by the deceased himself in 1819; which is all in his own handwriting, is carefully drawn up, is fairly written; he carries it to his solicitor, but as it gave the property in trust to his successors at Bramshot, the bequest could not have been carried into execution. The deceased and his solicitor correspond on the subject; the latter prepares a draft making the college trustees, and sends it to the deceased accompanied by an explanatory letter.

(*a*) In addition to these entries applying to particular individuals, there was at the close of the book of baptisms ending 1812 a memorandum in the deceased's handwriting: "The want of honesty and chastity are the prevailing defects here; I would give ten of my parishioners for one honest man, till the whole population was renewed." Again, in the book of baptisms for 1821-2, "Of seventy-two marriages in the last ten years, not less than sixty-nine females have been unchaste before marriage. Those who gain husbands are more fortunate than those who bear bastards; but not more virtuous." (Signed) J. MONKHOUSE.

So far then as the disposition is concerned, here were precisely the same intentions in 1819, and expressed nearly in the same terms. At that time his soundness of mind is unquestioned, however peculiar some of his opinions might be. Whether the deceased ever executed a will to that effect does not appear, but the intention continued—at least it was existing long before the suspicion respecting the poison arose.

It does not exactly appear when the instrument propounded was first written—it was after the death of his dog Carbo in 1824; for that event, as has been already mentioned, is recorded in it. It was written and ready for execution in February, 1827, as appears from the evidence of Mr. Parson; it was probably written about the same time as the labels (annexed to the two bags of [540] money) propounded as testamentary; they are dated the 20th of February, 1827. This mode of bequeathing these sums was probably adopted to evade the legacy duty: whether that effect will be produced is not the question; but the bequests will be good as evidence of a clear intention to convey those benefits at his death to the persons named.

As to the will, the account given by the Rev. Mr. Parson, confirmed as it is by the other evidence in the cause, is quite decisive. "On the 16th of February the deceased asked him if he expected any friend to stay, as he had an instrument, and that indeed it was then in his pocket, to which he wished deponent and some friend to be a witness." He answered, "He expected a friend from the neighbourhood of Basingstoke, and would let deceased know when he came." Here then is the instrument prepared, and here is the intention to execute, and that intention only deferred, because he waited for witnesses whom he chose to select for that purpose. On the 7th of March the deceased repeated the inquiry; again, on the 30th of March, just the same conversation took place, and on the 9th of April a similar inquiry was made. Parsons says "he remembers the conversation, for he wrote it in his journal." Having made these four several inquiries in order to get Mr. Parson and some friend to attest the instrument, and finding that Mr. Parson's friend was no longer expected, the deceased on the 19th of April invites his own curate, Mr. Locke, to meet Mr. Parson at his house; and the will is, on that occasion, executed and attested by these gentlemen.

[541] Here, then, for two months, from the 16th of February to the 19th of April, the instrument was ready prepared; the deceased was anxious to execute, and finally did execute, it on the 19th. Suppose then, on Easter Monday (for the insanity is not averred till after that day, and every witness on both sides says that on that day they would without hesitation have witnessed his will), or on any previous day, the deceased had, by the visitation of Providence, been suddenly struck either with death or with violent frenzy, which had continued till his death, would that have affected the validity of the will, which disposes only of personalty? Here was an intention existing ten years before as to the disposition, the instrument ready for execution in February, all in the deceased's own handwriting, the formal execution merely delayed to get such attesting witnesses as he wished, in order that the matter might not become known in the parish. If the intention continued, execution would not have been necessary under the circumstances I have supposed in order to give legal effect to the instrument, that instrument merely disposing of personalty. Assuming then, as pleaded, "that a day or two after Easter the deceased became under a delusion as to the poisoning," it could not affect this will merely of personal property.

This short view of the case seems to put an end to the question as to the validity of the will, for the will was valid at the time the delusion is alleged to have taken place, even supposing such a delusion to have arisen as from that moment rendered the deceased intestable.

The codicil may by possibility stand upon dif-[542]-ferent grounds. That instrument contains a disposition of real property, though of no great value. The law respecting real property looks to the fact of execution—it is essential: if the deceased was of unsound mind when he executed the instrument, it would not be valid in law. The same effects would follow as if the deceased had died between the preparation and execution of a will of real property. The validity of this codicil seems scarcely a fit subject for the decision of this Court. The legacy of 1l. to provide milk can hardly be carried into effect, and the sentence of this Court will not of course bind the heiress at law. The Court will therefore not enter into any detail of reasons respecting the codicil. The disposition of it is the same as of the will, viz. that the property should go to the same trusts.

Now the presumption of law is in favour of sanity till insanity be clearly established. The alleged delusion in no degree respects the sister, who is the heiress at law of the real property and the sole person entitled to the personalty under an intestacy. At all events it was a monomania; for upon every other subject, from the time in question to his death, the deceased acts as a person of sound mind, memory, and understanding, as much as he had ever been: he manages his house, he manages his property and his farm, grants leases, receives tithes, keeps accounts, recognizes his will, holds rational conversation, and does church duty. A monomania to affect such an instrument, under such circumstances, should be clear in point of existence and decided in character beyond all doubt. That the deceased thought and believed that an attempt had been made to poison him seems **[543]** to be a fact established; but is it established that his opinion in that respect was a mere morbid insane delusion rendering him intestable? The question is not whether the attempt to poison was really made, but whether he had grounds for suspecting it; or whether, as pleaded, "the deceased had no rational grounds whatever for his belief."

What then are the facts?

It seems pretty clearly established that he and his two servants were all taken ill together, with a complaint in the bowels and vomiting. The natural inference from this is, that something in their food had disagreed with each of them: it did not follow that it was poison, still less that it was poison purposely and maliciously introduced: but the coincidence was singular, and might naturally excite some alarm and suspicion. Another fact is that there was some conversation between the two Harrisons—the boy and the girl, William and Hannah—about poisoning. Whether in consequence of this sickness something may have been said about poison, and repeated by the girl to the boy; or something said at Harrison's which the boy repeated to the girl, or how it happened is not very material, but this conversation being repeated either to the deceased's housekeeper, or to the deceased, and coupled with the sickness, might increase suspicion. The deceased was old, he was nervous, he was suspicious, he thought his dog had been poisoned, he suspected young Harrison; these circumstances together might create suspicion without a mere deluded imagination. To a suspicious mind "trifles light as air are confirmations strong."

How does he act? As any rational person having the slightest suspicion of such an attempt would act: **[544]** he goes to Godalming, consults a medical man, Mr. Balchin; he relates all the particulars; Balchin, neither from his relation nor from his deportment, thinks it mere morbid imagination; he advises him how to act—to take precautions—to use neither the milk nor the water. The deceased relates the same account to his solicitors; they have the same impressions and give the same advice; he is there two days—he has this codicil prepared, he copies it on his will and he executes it. His solicitors and the witnesses have full opportunities of judging of his deportment; and there was neither in the facts which he stated, nor in his behaviour, any thing to induce them to doubt his sanity. They at least thought he had rational grounds at that time for his suspicions. Can, then, the Court venture to say that this suspicion, founded on these circumstances, was insanity—such decided insanity as rendered him at that time intestable and vitiated any civil act he could do?

Under this suspicion of an attempt to poison his milk he has a clause inserted in the codicil to give 1l. to provide wholesome milk. This records that he had the suspicion, but it goes no farther; it does not prove that the suspicion was an insane delusion: the fact might be true or false, but he had the grounds for entertaining the suspicion already stated: he inserts in his will the same sort of record in respect to his dog at least two months previously—before he is suspected of insanity; and there the fact was probably true, for at least in the opinion of others the dog had been poisoned.

The time of this visit to Godalming when the codicil was made is the most important period; but there are various subsequent investigations for the purpose of ascertaining whether any attempt **[545]** to poison the deceased had been really made: or rather the enquiry is, whether there was any ground to charge Harrison and to take legal proceedings against him. The gentlemen who conduct these several investigations are satisfied that no attempt was made; that there was no sufficient evidence of the fact; and they probably come to a right conclusion that no attempt whatever had been made; that no poison had been infused either into the milk, or into the bucket, or into the well: but the deceased adheres to his own suspicion; they

cannot convince him; it does not follow that he was at first insane; he was not believing impossibilities—he was not believing that trees could walk, nor that statues could nod, nor any thing naturally impossible—of the falsehood of which reason must at once convince him. An opinion against rational probability is not necessarily an insane opinion; it is not drawing right conclusions from manifestly false premises, but erroneous inferences from premises which may be true. The deceased and his two servants had been simultaneously sick and ill. Some conversation about poison had taken place between the boy and girl. His dog had a strong appearance of having been poisoned three years before—he consults a medical man, relates all the circumstances and symptoms both to him and to his solicitors—they advise precautions—he carries some milk to his medical man, Balchin—Balchin cannot analyse, but he compares it with some milk of his own and they are different. "It had," says Balchin, "a hot, brackish taste, and imparted the same sensation to his tongue as if there had been corrosive sublimate put into it: he was of opinion that the **[546]** milk contained corrosive sublimate, and told the deceased there was something wrong in the milk." Here there is ground for the suspicion: here is a medical opinion confirming the deceased's opinion: that opinion might be erroneous—the taste might arise from some accidental cause—there might have been something infused into this milk, though not by Harrison. Certainly the deceased appears to have been sincere in his opinion that poisoning had been attempted—he adheres to that opinion—the gentlemen who investigate the matter cannot convince him that he is wrong in his opinion and that they are right. Even if all these investigations had made the impression deeper and his conviction stronger, till what was originally no more than suspicion at length grew into insanity, becoming a morbid delusion, which no proof nor reasoning could remove, still, that ex post facto delusion would not affect the validity even of the codicil. His whole conduct and deportment on the 23d and 24th of April were those of perfect sanity, supposing him to have any grounds of suspicion. The whole of his subsequent conduct is quite consistent with it—he retains his opinion founded on the circumstances referred to: but he manages his property, he occupies his glebe, he settles for his tithes; he keeps his accounts, he in some degree recovers his health and spirits. If insanity did exist, it is monomania in the strictest sense and to a singular degree. When such circumstances arose to excite the original suspicion, the Court is not prepared to say that monomania did exist when the codicil was executed.

To invalidate an instrument in the handwriting of the deceased, prepared from his instructions, **[547]** the solicitors, the medical person, the attesting witnesses all concurring in opinion, and judging from the conduct and deportment that he was of perfect sound mind, the existence of insanity at that time ought to be clear beyond all doubt, in order to affect even the codicil; still less could this suspicion affect the will regarding personalty only, containing a disposition intended ten years, and, as appears, during the whole of ten years, prepared two months before, and the execution merely delayed to get witnesses.

In this view it is proper to pronounce for the will and the other two papers; and, as far as the Court has jurisdiction, for the codicil also.

Lushington asked for costs out of the estate. The only next of kin was excluded.

The King's advocate. The executor cannot consent but does not oppose.

Per Curiam. I am extremely disinclined to allow the costs out of the estate: but, considering the great extent of the property, I shall direct costs on both sides out of the estate to form part of the decree. It is under the very particular circumstances of this case that I grant them; but I am almost deterred from so doing by the great bulk of evidence introduced into the cause.

[548] ROBERTS *v.* ROUND AND OTHERS. Prerogative Court, Dec. 8th, 1830.—Testatrix having (without destroying the seal or signature) partially mutilated a duplicate will, but retained in her own possession, and carefully preserved entire, the other duplicate, such mutilation is neither a total nor partial revocation. On evidence of uninterrupted affection for the parties benefited, will pronounced for. Costs out estate.

This was a cause of proving the will of Diana Caswall; and was promoted by the sole executor and residuary legatee against the next of kin.

The allegation pleaded that Miss Caswall died on the 23d of April, 1830, leaving Susan Constantia (wife of J. Round, Esq.), Maria (wife of J. C. Bourchier, Esq.), Mary

(wife of J. G. Wilkinson, Esq.), and Ann (wife of J. Rolt, Esq.), her nieces, only next of kin, and the only persons in distribution: that her personal and real estate was each of the value of 30,000l.

2. The execution, in duplicate, of the will, on the 11th of April, 1814.

3. That when she gave instructions for her will she shewed to Mr. Dance, the solicitor, a previous will, whereby she had devised her four estates to the eldest four of the five daughters of her brother; and which provided that if either of the four died, the estate left to that one should go to the next youngest sister; that Dance then pointed out "that in that case her brother's youngest daughter would not be entitled to any estate except in the event of the death of the fourth daughter, and suggested that as the several estates were very unequal in value, a provision for her youngest niece might be made by a charge upon one of the larger estates;" to which she replied "that she would not divide an estate;" that Dance then suggested "that she might treat her leasehold house in Davies Street as a fifth estate, so as to give a property to each niece;" **[549]** that she replied, "No, the Davies Street house must be for my eldest niece:" that Dance then said "that in case of the death of either of her nieces she must reconsider the will she was about to make, and adapt it accordingly;" that after the death in 1815 of the third daughter (one of the legatees), Dance reminded the deceased as to the effect of her will; to which she replied "she would consider of it:" that upon his again, shortly afterwards, mentioning the subject, she replied "that she felt a difficulty about it; that she did not like to make another will without naming her brother an executor, which she should not do."

4. That the will was kept by the deceased; that the duplicate was immediately after the execution sealed up in an envelope, and left with Dance, who so retained possession of it till October, 1827, when he delivered it to her, at her request; that she did not afterwards ever allude to her will, or to the duplicate, or to her testamentary intentions to Dance (though she saw and consulted him on legal business several times during her last illness, and for the last time on the 7th of April, 1830), or to any other person, save that in November, 1829, she enquired of Dance "how her property would go if she died without a will;" when he informed her. That the duplicate was, when delivered to the deceased, sealed up in its original envelope, and was in the same condition as when executed, and that it remained in her possession to her death.

5. That, on the day next following the deceased's death, the will and duplicate were found by Mr. Dance, Mr. and Mrs. Round, and Mr. and Mrs. Bourchier, in the deceased's portfolio, which was on her bed to the time of her death; **[550]** and was at her request taken to her by her nurse in the presence of Mathews, her confidential servant, on the evening next preceding her death, that she might see if it was locked; and that it so remained locked (the key being kept by the deceased), and was, very shortly after her death, delivered by Mathews to Mr. Dance, Mr. and Mrs. Round, and Mr. and Mrs. Bourchier. That the will, found in the portfolio, was enclosed in an envelope endorsed, in the deceased's hand-writing, "My will, dated the 11th of April, 1814:" that on the duplicate being found in the portfolio, the first sheet was discovered to have been mutilated or cut as the same now appears.(*a*) That the de-**[551]**-ceased was confined to her bed-room by her last illness for about two months, during which time the portfolio was never removed from her bed-room, and, previous to her illness, it was usually taken to her bed-room at night; that it was left sometimes in the sitting-room all night, and was so left, with the key in it, one night in November or December, 1829.

(*a*) "I give and devise all those my freehold messuages, &c., in, &c., unto and to the use of my *niece Susan Constantia Caswall, eldest daughter of my brother, George Caswall, of Sacomb Park, in the county of Herts, Esquire,** her heirs and assigns for ever. I also give and devise all those my freehold messuages, &c., in, &c., to the use of my *niece Maria Caswall, second daughter of, &c.*, her heirs and assigns for ever. I give and bequeath all those my leasehold messuages, &c., in, &c., unto my *niece, Eliza Caswall, third daughter of, &c.*, her executors, administrators, and assigns. I give and devise all my copyhold or customary messuages, &c., in, &c., to the use of my *niece, Mary Caswall, fourth daughter of, &c.*, her heirs and assigns for ever. I bequeath all that my leasehold messuage, No. 33, Davies Street, &c., *from and after the expiration of one*

* The parts in italic were cut out.

6. That one evening, in or about November, 1829, the housemaid found on the carpet in the dining-room a paper writing, alleged to have been part of, and cut from, the first sheet of the duplicate; that the housemaid put it between the leaves of a book then in the parlour, but during the deceased's life never mentioned her having so done; that after the deceased's death the paper was found in the book by Mr. Round, and that it is now in the same condition as when put into the book. [No other testamentary paper and no other part of the mutilated duplicate could be found.]

7. Pleaded the endorsement on the envelope and also the word "mine," written with pencil on the outer sheet of the will, to be in the deceased's hand-writing.

8. Pleaded uninterrupted affection and regard for her nieces: that they constantly visited the deceased when they were in London: that either Mrs. John Round or Mrs. Bourchier visited her **[552]** daily during her last illness (the two other nieces being out of England), and were by her directions admitted to her bed-room; and the deceased told Mathews "that she wished Mrs. J. Round to come daily."

9. Pleaded undiminished friendship for Miss Roberts, the sole executrix and residuary legatee; that the deceased corresponded with her, and sent her presents of money and other tokens of regard; that Miss Roberts, for several years prior to and till August, 1817, resided with the deceased, and afterwards visited her for a few weeks in each year.

The evidence entirely sustained the allegation.

Phillimore and Lushington for the executrix.

The King's advocate and Dodson for Mrs. J. Round and Mrs. Bourchier.

Addams and Haggard for Mrs. Green Wilkinson and Mrs. Rolt, cited *Pemberton* v. *Pemberton*, 13 Ves. 310 (see *Colvin* v. *Fraser*, 2 Hagg. Ecc. 266).

Judgment—Sir J. Nicholl. What upon the face of the instrument are the sound legal construction and presumptions? Suppose that the mutilated instrument alone had been found and that no duplicate had ever existed. This mutilation of the first sheet, leaving the signature untouched, would not be a total revocation: it would be a revocation of those particular devises only (*Larkins* v. *Larkins*, 3 B. and P. 16); but there being two **[553]** papers both in the deceased's possession, the presumption of law would be that by the preservation of one duplicate entire she did not intend a revocation of these particular devises, otherwise she would have mutilated both duplicates. The construction then to be put upon this act of mutilation (for it clearly appears to have been her own act) is, that at most, it was a preparation for a projected alteration, to which she had not finally made up her mind, or which she had abandoned; and therefore she preserved entire the duplicate which she had always retained in her own possession and on which she had written the word "mine."

If upon the face of the paper any doubt could arise, the extrinsic circumstances detailed in the evidence concur in establishing this conclusion. She did not mean to revoke altogether, for she continued to the end of her life on the most affectionate and confidential terms with Miss Roberts, the executrix and residuary legatee. Many of her letters for years past are exhibited, some a few days only before her death. She did not mean to revoke the devises to all her nieces, for those who were living continued to her death on the most affectionate terms with her, the two in town going daily or twice a day to sit with her during her last illness. At the time of the preparation and execution of the paper she was very firm in her intention, and resisted

calendar month after my decease, unto my niece, the said S. C. Caswall, her executors, administrators, and assigns; and in case any of them, my said nieces, shall happen to die in my lifetime, or after my decease, and without lawful issue, then I bequeath the estate and premises hereinbefore devised or bequeathed unto her or them respectively, unto the next younger sister of her so dying as aforesaid, and to the heirs, &c., of such next younger sister, according to the nature and quality of the estate." The will then gave two leasehold houses, and 500l. Bank Long Annuities to Miss Roberts, and contained this clause; "I give unto my niece S. C. Caswall all my household goods, furniture, &c. &c., and all other effects and things which shall be in my house at my decease, except monies or securities for money, and except such articles as are herein otherwise bequeathed." The deceased further gave various legacies, and minutely specified the proportions in which her nieces should take her trinkets, furs, and lace, bequeathing "her beads of different colours to be equally divided between her nieces Mary and Ann."

the applications of Mr. Dance to vary the disposition. The mutilation therefore, done in this fanciful mode, could only have been some thoughtless experiment of a projected alteration, which probably did not involve an alteration of all these devises, but only of the wording and description of the nieces, rendered **[554]** desirable by the death of one of them, and the marriage of the others subsequent to the execution of the will: but whatever the object was, she seems to have abandoned it and to have abided by the original duplicate instrument, the possession of which she retained.

Upon the whole I pronounce for the will: but as the act of the deceased made it necessary to take the judgment of the Court, the parties are entitled to their costs out of the estate.(*a*)[1]

DEAN *v.* DAVIDSON. Prerogative Court, Hilary Term, 1st Session, 1831.—After the case had stood over some time for further information, the Court, on securities justifying, granted to a residuary legatee administration (with a will of 1801 annexed), on affidavits that the party went to Demerara in 1802, and had not been heard of since 1804, that his mother, who died in 1826, believed him to have died many years before, a bachelor, and without a later will, and that diligent inquiries had been lately made at Demerara, but without obtaining conclusive evidence of his death.

On motion.

James Davidson, the sole executor in the will of Thomas Dean, having been cited by William Dean, a first cousin of the testator and one of the residuary legatees, to accept or refuse probate, or shew cause why administration, with the will annexed, should not be granted, appeared to the decree, and on the 2d Session of Hilary Term, 1829, set forth his petition; that the testator formerly resided in Paternoster Row, but in December, 1803, sailed for Demerara, and left his will, dated the 17th of July, 1801, in his possession: that from the time he left England he, Davidson, had not had any communication with, nor received any information respecting, him, save that in 1828 William Dean had shewed to him a letter written by the testator, and dated Demerara, 1804; that he, Davidson, has no sufficient means **[555]** of forming a belief whether Thomas Dean be living or dead, and therefore submits whether he ought legally to be called upon according to the decree.

To meet this petition an affidavit was brought in by Mr. Bundy, stating that he had married the mother of Thomas Dean; that since 1804 no letter nor communication had, to his knowledge, been received from him; that a report had reached England of his death, but that his mother did not make any inquiries respecting him, and that she died in 1826, and believed her son to have died a bachelor, and without having left a will of a later date than that of 1801, executed about the time of his coming of age. Two affidavits were filed by William Dean, one stating that in 1828 he caused inquiries to be made in that part of Demerara where the deceased had last been heard of, and that some documents and information of the death of a Mr. Dean had been received in 1829; but as they did not effectually establish the identity, a further letter had been sent for more particulars, which, up to April, 1830, had not been furnished. The other affidavit stated that a bill in Chancery had been filed by certain parties claiming under the will of Thomas Dean, that the deponent was made a defendant, that Davidson had appeared to the bill, and that a reference would be made to the Master to report as to whether the said Dean was dead or alive: and that to obtain affirmative evidence of his death the deponent had used the greatest diligence.

The cause stood over from time to time upon the exhibition of these affidavits; the Court having intimated that, if no further evidence could be procured, it should presume the testator to be **[556]** dead;(*a*)[2] when on this day, the death of Davidson being alleged, the administration, with the will annexed, was granted to William Dean: but as the testator might possibly not be dead, the Court directed the securities to justify.

An application was then made by Lushington for the costs incurred on behalf of Davidson; which was opposed by the King's advocate.

(*a*)[1] See *Lambell* v. *Lambell*, infra, 568.

(*a*)[2] See *Doe* v. *Griffin*, 15 East, 293. See also *Doe* v. *Jesson*, 6 East, 85. 3 Bac. Abridg. 369. *Doe* v. *Deakin*, 4 B. and A. 433. 1 Jac. I. c. 11, s. 2, as to bigamy. 19 Car. II. c. 6, as to leases for lives.

The Court, after ascertaining that the costs did not exceed 10l., allowed 5l. nomine expensarum.

CONYERS *v.* KITSON. Prerogative Court, Hilary Term, 1st Session, 1831.—On a petition respecting the grant of administration, the asserted widow having married, during the deceased's lifetime, another man (since convicted of felony), had a daughter by him, and continuing to cohabit with him, the Court granted administration to the sister, and condemned the widow in costs.

This question respected a grant of administration between a party asserting herself to be the deceased's widow and the sister and admitted next of kin. There were also five nephews and nieces, infants, who were entitled in distribution: they were not before the Court. The interest of Charlotte as the lawful relict of the deceased was confessed by the proctor for the sister in an act of Court. The property did not exceed 2500l., and was invested in the funds. The cause was argued on petition and affidavits.

Lushington and Addams for the sister.

Burnaby and Dodson contrà.

Subsequent marriage is no bar. *Webb* v. *Needham*, 1 Add. 494.

[557] *Judgment—Sir John Nicholl.* Laurence Conyers died on the 10th of April, 1829, intestate, and the question is, to whom administration of his effects shall be granted, whether to Charlotte Conyers, otherwise Moorey, claiming to be his widow, or to Anne Kitson, admitted to be his sister.

The statute (21 Hen. VIII. c. 5) directs administration to be granted to the "widow or next of kin;" leaving it therefore open to the ordinary to grant it to either: and though usually a preference is given to the widow, yet it has always been held and repeatedly been decided that the widow may be set aside and administration, at the discretion of the Court, be granted to the next of kin.(*a*)[1] This discretion however (like all other cases of judicial discretion) is not to be exercised arbitrarily and capriciously, but on reasonable considerations—it is the boni viri arbitrium.

In the present case some doubt is raised whether the asserted widow ever was legally married to the deceased—whether, at the time of the marriage, she had not another husband living: but as there was a fact of marriage, the Court would primâ facie be disposed to regard her as the lawful widow. Her original name was Perfect; she was first married to a person of the name of Thompson, and supposing or asserting him to be **[558]** dead, she was in March, 1815, married by banns at Leeds to the deceased, then an apprentice and a minor: but she was described as Charlotte Thompson, spinster—not widow.

Conyers did not long continue to cohabit with her, but enlisted as a soldier, went to Canada, and there remained till his death in 1829. Charlotte—whether Perfect, or Thompson, or Conyers—did not long continue without a husband or asserted husband; for on the 11th of November, 1817, she was married to Thomas Moorey, by the name and description of Charlotte Perfect, spinster. Her identity is not called into question. With Moorey she has ever since cohabited; and they keep a public house called the Black Bull, at Pontefract, and have a daughter residing with them, who is about seven or eight years old, and is acknowledged as their child. This Moorey had the misfortune to be convicted of felony in April last, and to have suffered six months' imprisonment: (*a*)[2] yet the Court is asked to place the property in such hands.

These facts, then, which are not disputed, are quite sufficient to govern the discretion of the Court. Without entering into the validity of her marriage with the deceased—into her previous character, or subsequent conduct—into what were the

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(*a*)[1] In *Sayer* v. *Sayer* administration was granted by the Prerogative Court to the son—acting by his guardian: the administration was prayed by the widow. She appealed. 3 Sept. T. T., 1713, the Court of Delegates held that the ordinary had discretionary power in granting the administration, either to the widow or next of kin; and that a minor, acting by his guardian, is within the statute, and equal to a major. See also supra, 217, note (*b*), and *Lambell* v. *Lambell*, infra, 570.

(*a*)[2] In the act on petition it was stated, on behalf of Mrs. Conyers, that Moorey was convicted on having unsuspectingly purchased a small quantity of oats which were afterwards proved to have been stolen.

deceased's grounds of withdrawing from her—what reasons she had to suppose him dead when she married Moorey—what her subsequent character or conduct has been —what is the good repute or ill fame of the Black Bull public house—[559] without these considerations, her marriage to, or connection with, this now convicted felon—be that marriage valid or that connection only adulterous—is quite sufficent to justify the Court in exercising its discretion of setting aside her claims to the administration as widow, and in preferring those of Mrs. Kitson as the sister. Against Mrs. Kitson's character nothing is said in the act on petition, but one single affidavit (and that a strange one) is offered to impugn it: while there are several affidavits exhibited in support of her fitness and respectability. To her, therefore, the administration must be granted, but she must give justifying security.

There have been a great number of affidavits exhibited, apparently prepared in the country; some of which are quite irrelevant, and might well have been spared. This woman's application to be entrusted, as a fit and proper person, with the administration in the character of the deceased's widow, even supposing her to be legally entitled to that character, was, considering her de facto marriage to, and connection with, Moorey, a bold and rash attempt. Her claim to share in the effects must be established in a different mode; with that the Court at present has nothing to do: this is merely a question who shall have the administration, and does not involve an enquiry into the validity of the marriage. But, being of opinion that her perseverance in pressing her claim to the administration was perfectly unwarrantable, I am bound to condemn her in the costs of the present petition.

[560] IN THE GOODS OF FREDERICK STABLES. Prerogative Court, Hilary Term, 4th Session, 1831.—When, after the death of a brother administrator, administration had been revoked, because the mother had not formally renounced, that revocation rescinded on the mother's affidavit that she was aware of her son's application for the administration, and had under it received her distributive share.

On motion.

Frederick Stables died in 1815, a bachelor, and intestate, leaving a mother, and several brothers and sisters. On the 26th of August in that year letters of administration of his effects were granted by this Court to his brother Henry, described in the administration "as the natural and lawful brother, and one of the next of kin of the deceased." At the time this administration was taken there was no formal proxy of renunciation by the mother; she however was perfectly aware of her son's application for the letters of administration, and from time to time received her proportion of the intestate's effects.

Upon the death of Henry Stables, the administrator, it was proposed that the two surviving sisters should take out an administration de bonis non, and, the mother having executed a proxy of renunciation, as well in respect to the original administration as to the de bonis non, the sisters in December last applied for the grant, when the original administration was revoked before a surrogate, on the ground that the mother had not formally renounced previous to the issuing of that grant. To obviate the necessity of administering again to the full amount of the deceased's (F. Stables') property, Haggard, on the above circumstances, and upon the affidavit of the mother, moved the Court to rescind the revocation of the [561] administration, and to decree a de bonis grant to the surviving sisters.

Per Curiam. As the mother was cognizant of and virtually renounced the original grant, I think the former revocation was unnecessary: let it be rescinded, and a grant de bonis pass as required.

IN THE GOODS OF ELIZABETH DARLING. Prerogative Court, Hilary Term, 4th Session, 1831.—The Court being bound to satisfy itself that the applicant for an administration is entitled to the grant, great delay in applying, by raising suspicion, justifies it in calling for explanation.

Per Curiam. A circumstance occurred two days ago which the Court feels bound to notice, because it is connected with a subject important both to the profession and to the public at large. Important to the profession, because it relates to the rules according to which the passing of common form business is regulated; and the profession will better understand and more readily give effect to those rules if the

reasons for which they were made are explained: important to the public, because it much concerns them—1st, that every facility should exist in obtaining grants, and 2ndly, that such caution and guards should be interposed as afford security against improper grants. It is the object of the Court to provide for both these results; but the difficulty consists in combining them.

Representations have frequently been made as well by public bodies—the bank, the South Sea Company—as by private individuals, in respect to the facility with which grants are obtained—that a party has only to come forward and swear that **[562]** an individual is dead, and that he is the next of kin, and thereupon immediately obtains the administration. They have accordingly urged the necessity of making some regulations to restrain this facility: nor is it extraordinary, where hundreds of millions pass under the grants of this Court that the necessity of caution should be strongly felt.(*a*) Proposals at different times have been made that the death and that the party claiming was next of kin should be proved, first by affidavit, and secondly, of the one fact by certificate of burial, and of the other by certificates of marriages and baptisms. Various other modes of providing against frauds have also been suggested. To require, however, in every case proofs of this sort, would be productive of such an inconvenience and expense to the public, and such an interruption to the passing of probates and administrations in common form, as would far more than counterbalance the advantage to be thence derived in the additional security against fraudulent grants, which bear an extremely small proportion to the total number of grants issuing under the seal of this Court: at the same time the Court has always said, "Shew exactly the evil to be guarded against, and a remedy which will not, by imposing extraordinary inconvenience on the public, be an evil greater than that sought to be avoided, and the Court will readily adopt such remedy:" and I will now state that if any rule made by the Court should in practice be **[563]** found inconvenient, or any other regulation more convenient or effectual could be suggested either by a single practitioner or by any body of practitioners, and subsequently be laid before the registrars to be submitted to the Court, every attention and consideration will be given to such suggestion.

On the principle of combining facility with security, the Court has made some regulations. For example, the time of the death is required to form part of the oath, and to be inserted in the margin of the probate or administration. The reason for this is, that if the time of the death has long past, it becomes reasonable that some enquiry should be made why the grant was not sooner taken out; the delay raises something of a suspicion requiring explanation. By noting the time of the death on the margin, debtors to the estate, whether public bodies, as the bank, or private individuals, have their attention directly drawn to it and are enabled more easily to ascertain that payment is made to the right person. This regulation produces little or no inconvenience, and has given great satisfaction: the effect of it having, as represented to me, been found by the Bank of England and South Sea House to be extremely beneficial. The Court has also publicly mentioned, and desired it to be understood in the registry and in the profession, that it looks for precaution both to the practitioners and to the public office.

On application to any proctor to extract a grant it is his duty, if there be any matter requiring explanation, to obtain that explanation of the party, in order to satisfy his own conscience and the inquiries of the public officer why, for instance, if there has been a considerable lapse of time, the grant was not earlier applied for. It **[564]** is the duty of the clerk of the seat, before he forwards the business, to require that explanation of the proctor, in order that he may be enabled to state it to the registrar. It is the duty of the registrar, when the grant comes before him for signature, if he sees anything requiring explanation, to refer to the clerk of the seat, and to ascertain whether the difficulty has been removed: and thus, and by inquiry of the proctor (if necessary), to satisfy himself that the grant may properly issue. If the explanation be not satisfactory to the registrar, he is either to stop the business on his own discretion, or to apply to the Judge for his directions. Thus, if

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(*a*) The probates and administrations, issuing out of the registry of the Prerogative Court of Canterbury, during the years 1828, 1829, and 1830, were—

Total number of grants	30,543.
Total amount of effects	£128,723,362.

each party discharges his duty, it is almost impossible that any improper grant should pass; nor should any trouble be considered too great that leads to the efficient discharge of a public duty. It is quite obvious that these precautions are necessary, and (a statement of the principles on which the regulations on this subject are founded having, as satisfactory to the practitioners, to the clerks of the seats, to the registrars, and to the public at large, been thus publicly made) the Court feels confident that every respectable and intelligent member of the profession will readily and strictly pursue the directions of the Court.

I will now state the case that has given rise to these observations. An administration was brought for the registrar's signature; the party applying was described as the natural and lawful son and one of the next of kin; the deceased had been dead eleven years, a widow with more than one child, in a remote part of the kingdom (Bankhead, Durham), and left property in value exceeding £450 and under £600, and yet no administration [565] had been taken out for eleven years. This was exactly the sort of case in which enquiry ought to be made, and as the party himself was on the spot there could be no difficulty in obtaining the necessary information. The case might be perfectly fair, and, if so, the explanation could be easily furnished: or it might be false and fraudulent, and might originate in one of those circular letters which have been sent all over the kingdom. Again, the person applying, the son, might be just come of age, and might without the knowledge of the other children or of their guardians be endeavouring clandestinely to get possession of this money.

It is true, in a case of recent death, if a party swears that he is one of the next of kin, the grant would issue without enquiry as to the knowledge of the other next of kin. But there is this distinction between the two cases: where a death has recently occurred the attention of all the parties entitled to the representation would naturally be alive; they would either take out the grant themselves; or, expecting such a grant to be applied for by others, would, if they thought it needful, take measures to protect their own interests; ex. gr. if a next of kin whom they deemed unfit for the trust applied, they might shew cause why the Court ought in its discretion to prefer one of the other next of kin, or might take care that the sureties were substantial. So if a fraudulent grant were applied for, speedy detection must almost certainly result from the attention which at such time is specially directed to the deceased's affairs. On the other hand, where a long interval has occurred between the death and application for a representation, the parties interested have frequently no reason to suppose that any such grant is in [566] contemplation, and their vigilance, therefore, is not roused. In such cases surprise is as possible and as much to be guarded against as immediately on the death, when the law provides against it by directing that no administration shall issue within fourteen days from the decease.

In the case now under consideration, the registrar, observing the nature of the grant, asked for some information. When, however, the solicitors were applied to, they sent to the proctor a letter, bearing date on the same day, complaining strongly of the prejudice to which their party was exposed by the unwarrantable delay thus interposed, declining to account for the circumstances why the administration had not before been required, and intimating that, as the statute was imperative on the Court to grant administration to the next of kin without regard to lapse of time, and as their client had come up 300 miles, they should apply to the Court of King's Bench for a mandamus. I have no reason to doubt that these gentlemen are respectable solicitors, and thought they were acting according to their duty to their client, nor do I presume to express an opinion as to what that duty might be.

The statute of administrations, it is true, directs that administration should be granted to the next of kin, but it does not prescribe the mode by which the Court is to satisfy itself that the party applying is the next of kin, and is really entitled to the grant: the Court must be governed by circumstances, as to the measures it shall take for that purpose: but no one can doubt that, in order to afford protection to parties really entitled, and to guard against fraud, it is bound to obtain that satisfaction. The Court will not be deterred from dis-[567]-charging this duty by any threats of applying for a mandamus; and I feel fully confident that, if such application were made, the Court of King's Bench would not only reject it, but would highly approve of the course that has been taken. The Court can have no wish but to do its duty, and the registrar would not, under the directions he has received, have done

his duty if he had passed the administration without explanation. Undoubtedly, less delay would have been incurred if the solicitors had at once afforded that explanation, than has already been occasioned by their refusal to furnish it in the first instance. Any inconvenience that may have resulted to their party from the delay is mainly attributable to that refusal.

An explanation, however, was yesterday offered: the proctor, in a letter to the registrar, from which it appears that he knew nothing of his client, enclosed a letter to this effect, that there had been heretofore no occasion to take out this administration, inasmuch as the property of which the deceased was possessed, and for which this administration was applied for, consisted of a reversionary interest not payable till the death of a Mrs. Anderson, and that she died only a short time since.

Who the writer of this letter may be (for he is not one of the solicitors' firm) the Court is not aware. The reason assigned, if properly verified, would be satisfactory; and probably, if offered in the first instance to the registrar, would have been accepted without further verification: but the objection originally shewn to giving the explanation increases the difficulty; I think now that this letter ought to be verified by affidavit, and that the Court would not act with due caution **[568]** if it accepted as sufficient a note of an unknown person. I feel quite confident that the solicitors, after due consideration of the extreme caution necessary to be observed in granting probates and administrations—which furnish the handle to millions of property—will see the advantage of the regulations established, and of the necessity of the care and precaution used in the registry. The danger is, and the complaints are, on account of the too great facilities afforded, and not of any unnecessary obstructions interposed in the passing of grants.

LAMBELL *v.* LAMBELL. Prerogative Court, Hilary Term, By-Day, 1831.—A will found in the deceased's repositories with the seal cut off is to be presumed to be cancelled by himself animo cancellandi, and can only be revived by some further act. Costs out of estate. Administration to the widow refused.

[Referred to, *Price* v. *Powell*, 1858, 3 H. & N. 350; *Bell* v. *Fothergill*, 1870, L. R. 2 P. & D. 150.]

This was a cause of granting administration promoted by the widow against the deceased's brother William, sole executor and residuary legatee named in a will, formally made and bearing date on the 10th of January, 1820.

The allegation, for the brother, pleaded Lambell's death on the 14th of November, 1830; that his property was about 700l.; and that he left a widow, a sister, and two brothers: that in 1822 he went to reside in a lodging in Guernsey, where he died suddenly. That in 1816, suspecting his wife of dishonesty and infidelity, he separated from her, after which she lived in London; that his dislike to her (to be proved by declarations, and a memorandum in his handwriting, annexed to the allegation) continued till his death. That he was under particular obligations to, and had a great affection for, his brother William, and in July and August, 1830, declared he had made his will, and left him the bulk of his property: that on the **[569]** day after Lambell's death his papers and goods were taken possession of by the Crown officers of the island and sealed up; but that between the death and such possession the papers were accessible to his landlady and to a lodger, who suggested that the deceased had, by word of mouth, given them his property: that on the 26th of November the will was found, by the Crown officers, in a tin case, of which the lid was loose, deposited in a private drawer of the deceased's bureau: that the seal of the will was cut off; and that some words, at the foot of the will, in pencil, were in the deceased's handwriting; but that none of the deceased's friends know to what they referred, or when or by whom the excision took place.

The King's advocate opposed the allegation.

Addams contrà.

Judgment—Sir John Nicholl. The will propounded has on its face the seal torn off. The attestation clause declares that it was signed and sealed, and the seal is cut off. The will was found in the deceased's repositories; it is in ink; but, at the foot of it, are written in pencil, admitted to be in the deceased's handwriting, the following words, which confirm the presumption that the cancellation was his own act: "Your dishonesty to me have caused me to do this.—J. L." It is said that this memorandum may apply to his wife, who is "cut off with a shilling." At all events, however,

the will being in the possession of the deceased, and found after his death in his repositories, the presumption is that the cancellation was the act of the deceased [570] animo cancellandi, and that, by that act, he intended to render the will null and void. It is said he might have torn off the name and done some act more effectual: but this is the common mode of revoking.(*a*)

Having revoked the will by this act it can only be revived by some other act: the circumstances pleaded can at the most raise suspicions and conjectures: it would be extremely dangerous to trust to declarations: besides, he might have subsequently cancelled the will under some mistaken offence against his brother. The property is small; and the Court cannot suffer the parties to expend the whole in fruitless litigation. I shall reject the allegation, and allow the costs out of the estate.(*b*)

Upon the application of the King's advocate for administration to pass to the widow, the Court said: The grant is discretionary; and as the widow lived separate, I decree it to the brother.(*c*)

SHADBOLT *v.* WAUGH AND OTHERS.(*d*) Prerogative Court, Easter Term, 3rd Session, 1831.—The presumption being that a will when executed contains the deceased's final intentions, to authorize an alteration on the ground of mistake there must be 1st, an ambiguity in the paper; 2dly, clear proof of the omission.—Allegation pleading omissa rejected.

J. Crowder died on 30th November, 1830. His will, contained in six sheets of paper, was regularly executed and attested, and dated on the 14th of February, 1830. Of this will he appointed his brother, who survived him only two days, residuary legatee, and Mr. Shadbolt and two other [571] gentlemen executors. The present allegation was offered with a view to furnish evidence to the Court that certain bequests (one of a leasehold house in Woburn Place to Mrs. Waugh) had by oversight been omitted by the testator in giving instructions for his will. The bequests were in a paper of memoranda or instructions (registered No. 3) from which he had dictated, but declined to shew to the solicitor who drew, his will. The will itself was prepared without a previous draft. Declarations subsequent to the execution of the will, that he had disposed of his property in conformity with the paper of instructions, were pleaded; and it was also alleged that the testator gave the paper itself to his housekeeper to keep in order that she might know how he had disposed of his property.

Addams in opposition to the allegation, cited *Lady Bath's case*, 3 Phill. 434.

The King's advocate contrà, referred to the case of *Mr. Baron Wood's Will*, 3 Add. 232.

Judgment—Sir John Nicholl. The question in this case is in some degree a question of law. There are instructions or rather memoranda for the deceased's own use, and containing certain bequests which are not inserted in the will; and the question is whether the Court can pronounce that the bequests omitted form part of the will. To admit this allegation would be to go much beyond all former principle and precedent, and would be extremely dangerous. The necessary presumption is, that at the time of [572] the execution the paper contained the deceased's final intentions.

The deceased is pleaded to have had one side affected by paralysis, but that otherwise his health remained good till the last year of his life. In February, when his will was prepared, he was ill; and it is alleged that his eyesight was "extremely defective:" but the papers written by the deceased after the execution of the will shew that this statement is not warranted; and No. 3, the document from which he dictated his will, is written in a very small hand; so that if he at that time suffered under such a defect of sight as is alleged, he could not have read it. To admit, then, such alleged omissions to proof, requires some clear evidence in the deceased's handwriting, as, for instance, in *Mr. Baron Wood's case*. There the omission was palpable, and the instrument was in his own handwriting: the subsequent calculations, also in his own writing, proved the intention to demonstration; and the clause was in that case inserted. Here the evidence would only amount to something whereon to found a

(*a*) See *Boughey* v. *Moreton*, supra, 191, in notis.

(*b*) See *Roberts* v. *Round*, supra, 548.

(*c*) See *Conyers* v. *Kitson*, supra, 556.

(*d*) One of the parties claiming as a legatee was a feme covert, living apart from her husband on her separate property. The Court, on security for costs being given, accepted her sole proxy.

conjecture; and there is, as the will stands at present, a residuary clause under which the property in question would pass.

The will, regularly executed and attested, was written in the testator's presence and from his dictation, clause by clause, from memoranda previously prepared by himself; and yet, because his sight was defective, and one side had been affected by a paralytic stroke, it is to be supposed that he omitted by oversight the whole of these bequests. After the preparation the will was read over to him and was subsequently executed. If the Court were to interfere with such a will, what testa-**[573]**-mentary disposition would be safe? But the matter does not rest here; the deceased keeps the paper by him four or five months; it is then opened; he has an abstract made; he compares the first and second sheets with the abstract, and the rest is read over to him by another person; he talks of making alterations, and he does write some further memoranda for instructions; but these do not apply to the alleged omissions.

Now an attempt is made to introduce the clauses in the paper of memoranda, under a suggestion that they were omitted by oversight. Whether it was by oversight or from intention is bare conjecture and mere probability: it may not be improbable that they were overlooked in dictating the will; it may be possible that the non-insertion escaped his observation when the will was read over; but that is not sufficient. It would be dangerous in the extreme to allow alterations in an instrument, so executed, on parol evidence and declarations. In the cases that have taken place the evidence has been quite demonstrative; and it has always been required, 1st, that there should be some ambiguity in the instrument itself; next, that the proofs of the omission, or fraudulent suppression, should be clear beyond all doubt.(*a*) Here the utmost to which the plea brings the case is, that a mistake is not improbable. The Court must shut the door against such an attempt; and, upholding the principles hitherto acted upon, I shall reject the allegation.

The Court allowed the costs out of the estate.

[574] WHEELER AND BATSFORD *v.* ALDERSON. Prerogative Court, Trinity Term, 2nd Session, 1831.—The will (executed eight years before death) of a woman who, though guilty of excessive drinking and great extravagances, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, and was not shewn to be under any delusion, cannot be set aside on the ground of insanity; and though such will—in total exclusion of distant next of kin (with whom she had quarrelled)—be in the handwriting of, and executed at the office of, her attorney (one of the executors and residuary legatees to a great amount, he and his family having also very large legacies) and the attesting witnesses speak to a bare execution; documents in her own handwriting, shewing both capacity and knowledge of contents, though not mentioning the residue, will supply the additional proof required by such circumstance.—In a case of perfectly sound mind, and free from any suspicion of imposition, evidence of bare execution is sufficient: but where the deceased's attorney is the drawer of the will, and the person principally benefited, the jealousy of the Court is excited, and demands more than proof of bare execution.—Delusion has been generally laid down as an essential constituent of derangement. Semble, that insanity has never been held to be established in any case where delusion has at no time prevailed.—Semble, that a lucid interval then exists when the mind is apparently rational on all subjects, and no symptom of delusion can be called forth.—Where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question: and even subsequent decidedly insane acts may reflect back on acts otherwise equivocal; but when no decided acts, prior or subsequent, are proved equivocal acts, however numerous, will not establish insanity.—Intoxication is temporary insanity, ceasing with the exciting cause.—Witnesses speaking to transactions and conduct spread over many years, and not to specic facts fixed by time, place, and circumstances, are apt honestly to describe occasional extravagances as constant and perpetual habits.—Where no fixed and settled delusion is shewn, and consequently no decided actual insanity, and extravagant acts are accounted for by the excitement of liquor,

(*a*) See *Draper* v. *Hitch*, 1 Hagg. Ecc. 678. *Harrison* v. *Stone*, 2 Hagg. Ecc. 537.

while at times the mind was sound; in order to avoid a will it must be proved that the deceased was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to such act.

Elizabeth Morice, late of Gainsford Street, Horsleydown, died on the 10th of March, 1830, a widow aged 65 years, leaving a will dated 2d July, 1822, of which Henry Wheeler and Charles Batsford were executors and residuary legatees. This will was opposed by Mr. Alderson, second cousin and one of the next of kin, and was propounded by the executors.

An allegation pleaded on the part of the executors that in 1820 the deceased requested Batsford, her solicitor, to make her will and to be one of her executors; a few days afterwards she brought to his office instructions (A), dated 25 April, 1820, all in her own writing; that on Batsford reading them over to her she suggested various alterations, of which he made memoranda (B); that on 7th May, 1820, she wrote him a note (C); that a draft of a will (D) settled by counsel was read to her; previous to which Batsford abstracted the names of the legatees and the amount of the legacy to each on the back of B; that the deceased having stated the amount of her property in the funds, which at the then price was upwards of 30,000l., and the specific legacies amounting only to 22,300l., she directed the legacy of 2000l. to Francis Daniel, since deceased, to be made 5000l.; Batsford made the alteration in the draft, and interlined the memorandum in paper B; that a will engrossed from such draft was afterwards executed, and remained in her possession till she de-[575]-stroyed it on the execution of the will propounded. That in 1822 the deceased delivered to Batsford E, as part instructions, and also verbal instructions as to alterations in the will of 1820, declaring that she meant to leave to Batsford 20,000l.; and to Wheeler 10,000l., and to give them the residue; on Batsford's objecting to the inequality of these legacies, she acquiesced in leaving 10,000l. to each; she also directed other alterations, and Batsford in her presence made a memorandum of the legacies to him and Wheeler, and of the other alterations. That F was a letter from Mrs. Morice to Batsford. That a draft will (G) was drawn up; on being read over to or by the deceased she directed Sutton's legacy to be contingent on his being in her service; a legacy of 500l. each to be given to Woolley, her butcher, and Watts, her cheesemonger; and her jewellery to Mrs. Batsford; the preparation and execution of the will on the 22d July, and capacity: that soon after, Batsford at her request delivered to her a copy of her will (H), which on the 22d of April she gave to Wheeler, having previously herself made therefrom an abstract of the legatees and legacies (I), which she kept, and was found the day after her death, in her pocket-book.

The nature of the case set up in opposition to the will, and of that set up in the rejoining allegation, may be gathered sufficiently from the judgment.

The testamentary papers referred to in the executors' plea were as follows:—(*a*)

(*a*) The following additional testamentary papers were in the course of the proceedings brought into the registry:—

A paper of the 29th of March, 1820 (which had been torn to pieces), all in the deceased's writing, agreed with paper A, except that it omitted the legacy to Davis, and gave 1000l. each to his two sisters: it omitted the legacy to Brickenden, but gave to Watts 500l., and appointed Daniel sole executor: there was no residuary legatee.

An unexecuted will of January, 1817, five guineas to Davis; legacy to Harris in blank; to Knoller in blank: Brickenden and Mr. Ching five guineas each: Miss Daniel 5000l., her diamonds, plate, &c.: her three servants 25l. per annum if in service: Daniel sole executor and residuary legatee.

In the draft of this will (dated December, 1816) the legacy to Harris was first 200l. per annum, then changed to 5000l., and to Knoller first 200l. per annum, then 1000l.

These two papers were drawn up by a lawyer. The alterations in the draft being in Dr. Daniel's writing.

A will of the 27th of September, 1816, Sarah Cook 50l. per annum, Mrs. Aldridge 2000l., Harris 5000l.: Miss Daniel residuary legatee, Daniel and Aldridge joint executors, with 5000l. each.

With this will was brought in the following note:—

[576] A—In deceased's writing.

This is the last will and testament of me Elizabeth Morice of Gainsford Street in the parish of **[577]** Saint Johns in the county of Surry widow being of sound mind and good understanding bodily health **[578]** do hereby revoke all other wills codicils whatever in the name of God Amen—I first resign my soul to Almighty God who

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September 16, 1816.

Dear Sir,—I will give you a call on Wednesday next in the morning, as I wish you to git two witnesses to sign a paper which I shall bring with me. With best respects to Mrs. Aldridge from your sincere friend. ELIZABETH MORICE.

I will make you smile at a trick I was plyd on the day of the funeral, which I found out by chance.

(Superscribed) THOMAS ALDRIDGE, ESQ., Howard Street, Strand.

A will of the 31st of July, 1815, Mrs. Lockhart 50l. per annum, Harris 200l. per annum, Knoller 100l. Dyne, sole executor and residuary legatee.

A codicil (not in the deceased's writing) dated the 31st of August, 1816 (the day of Dyne's funeral), substituted Miss Dyne for her father.

A will of the 22d of February, 1813, Mrs. Lockhart 500l. stock, Davis 500l., Wilson and Mrs. Wilson—her servants—100l. each, if in service; Harris 200l. per annum; Dyne—sole executor, residuary legatee, and devisee.

A will of the 24th of April, 1810, Mrs. Lockhart 1000l. after her father's death, Mrs. Brocklesby 500l. do., Mr. Gideon Fournier, her father, universal devisee and legatee for life, and Dyne sole executor and substituted residuary devisee and legatee.

A will of the 6th of September, 1809, Mrs. Lockhart 500l. after her father's death: her father universal devisee and legatee for life; and Humphry, her attorney, and Davis, joint executors and substituted residuary devisees and legatees.

* The wills of March 29, 1820, and of September, 1816, were of the deceased's writing: and both as to the style of expression, and form of the clause of attestation, coincided with A: the former, like A, was signed, but not attested: the other was signed and attested. The other executed wills were not in the deceased's writing, but they were formally drawn up and executed; and did not refer, but the will of 1817 and its draft did refer, to her connexion with the Newton family, and to her burial at Grantham.

Letter No. 1, 4th March, 1830.—Mrs. Morice's respects to Mr. Jackson, much obliged to him for the milk, but as he is so short of milk and eggs, she will not trouble him for more at present, but she longs for the jar of new honey he promised her a fortnight ago. She is as bad as she can be to be alive: but if he can call early on Friday morning, as she has received so many favours, she requests him to accept of a legacy of one thousand pounds of money after my decease, and the pictures. Come early, I wish much to see you. MORICE.

(Addressed) John Jackson, Esq.

No 2.—Mrs. Morice Best Respects to Mr. Jackson and begs his acceptance of the enclosed for past favors.

*** The note (on stamp) enclosed was as follows:—

1000l. Gainsford Street London March 1830.

On demand I promise to pay Mr. John Jackson one thousand pounds For value Reced—after my decease. Mrs. E. MORICE.

to Mrs. E. Morice (Endorsed) JOHN JACKSON.

Gainsford Street Horslydown.

A deed, executed by the deceased, of the 24th of May, 1813, transferred to Aldridge and another as trustees 1000l. bank stock, and 13,000l. five per cent. to pay the interest to her for life, and on her death the principal to Dyne, if he survived her; if not, the interest to Mrs. Dyne for life, and after her death the principal to her daughter.

The deed recited that "a friendly intercourse had long subsisted between the deceased and Dyne, during which period he had rendered such important services as had in a great measure secured the fortune and promoted the happiness and comfort of Mrs. Morice, who had not any relations then living, but such as were of a very distant degree."

The wills in favour of Dyne contained nearly the same recital.

gave it—secondly it is my wish and desire to be kept one month in my Frunt parlor Thirdly tis my wish and desire to be buried by no one but Mr Thomas Burton in the church at Grantham in Lincolnshire with Doctor Newton's family Relict of Sir Isick Newton Fourthly I give to Francis Daniel Esq of Grove Cottage Mile End Green the sum of Two thousand pounds and I also give to Batsford Esq of Horslydown two thousand pounds—and I also give to Mr Thomas Burton one thousand pounds—I also give to Mr Brickenden Surgeon the sum of one thousand pounds I also give to Mr Daniel Harice an officer at Union Hall three thousand and then to his wife after his death—Next I give to my present servants Sarah Cook John Sutton and his present wife if liveing with me at my Death one hundred pounds each for mourning to be paid them within one month and I also give them one hundred each a year for there life and to continue in my house as long as they live Furnished as it is now and all the taxes to be paid by my executors **[579]** with all my common close to be divided between Sarah Cook and Mrs Sutton my best close to Mrs Harris I also give to Ann Rowland Daniel of Mile End Green five thousand pounds with my plate and Dimonds. And I also hearby constitute and nominate and appoint the said Francis Daniel Esq and the said Batsford Esq executors to this my last will and testament Hereby revoke all former wills made by me at any time and declare this to be my last will and testament of me Elizabeth Morice April 25 1820 Signed sealed published and declared by me the said Elizabeth Morice as and for herself will and testament in the presents of us who in her presents and at her request and in the presents of each other subscribe our names as witnesses Elizabeth Morice

in a former will I left a Mr. Aldridge Five thousand pounds and his Wife two for her own use but now I exclude them both Haveing amply provided for them both in my lifetime all my legacys to be paid within three months after my death

Mr Thomas Burton is to be paid all my funeral expences and to have the one thousand pounds clear of any duty whatever and all the rest which I have to left any thing to

one thousand pounds to St Johns Charity School My fathers grave at Saint Johns to be kept in Repair and to be painted every year—and a monument is to be put up for me in the church of Grantham Lincolnshire

and one thousand pounds to Mr John Davice of Paradise Row Rotherhithe and after his death to be devided between is two sisters Mrs Anderson and Mrs Colson

B—In Batsford's writing.

[580] Sutton and his wife to be allowed to live in the house free of rent and taxes till their death

Mr. Daniel's legacy to be £5000 instead of two. [This was interlined.]

The annies to the servants to be paid to them for their life only after their decease the stock to be divided bet· the residuary legatees

The pictures to be divided bet· the executors

The furniture to be divided bet· the 3 servants at the discretion of the exors

The division of the cloaths to be at the discretion of the exors.

A pair of diamond ear rings to Mrs Batsford—the rest of the jewellery of all descriptions and the plate to Ann Rowland Daniel—except as follows

The silver tankard formerly belonging to Sir Isaac Newton to Mr Batsford

The interest of £50 4 per cents to be applied in keeping Mr Fourniers monument in repair and in painting the same once a year

Residuary legatees to be the two executors (*a*)

C—In deceased's writing, and superscribed

Charles Batsford Esq May 7 1820

"Mrs Morices respects to Mr Batsford, Saying they had both forgot Mr Truscotts bill which was taken up of 23 : 19 : 11 therefore he cannot owe her Much if Mrs Batsford Will not be offended you May put down in the Will that money Which I have in the bank Stock in my Name for herself for Pocket Money for her."

D—A draft will of 1820 settled by counsel

[581] E—In the deceased's writing, except the part in brackets, which was interlined.

"I appoint Mr Henry Whealer [Hercules Court Threadneedle Street] stock broker

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(*a*) On the back of this paper were calculations in Batsford's writing of the amount of legacies in A, of the deceased's money in the funds, and of her bank stock.

of Surry Square Kent Road my executor with Charles Batsford Esq (*a*) Mr Daniel Harris five thousand pounds (*b*) at his death to his wife and at her death to be devided between his two sons Daniel and William 'Harris—to Mr. Sutton two thousand pounds at his death to his Wife and at her Death to her Daughter Ann Cook if living with me (*c*)

This legacy was struck through.

to Charles Batsford Esq my house and all that is in it"

F—In the deceased's writing, and superscribed

"Charles Batsford Esq" June 24 1822

"Mrs Morices respects to Mr Batsford and as he will Nott Sett himself down More than the other executor She desires and begs he Will Sett Mrs Batsford down Five thousand pounds for her own use and Two thousand pounds for Each of his Daughters—he May only mention Mr Harris for if he Dies before Mrs Morice then She Can mention Mrs Harris in a Codicil to her Will"

G—Draft will of 1822—in Batsford's writing.

H—Copy (in Batsford's writing) of will of 1822, delivered to Wheeler.

I—Abstract of legacies in deceased's writing :—

"Henry Wheeler Ten Thousand pounds to **[582]** Charles Batsford Ten Thousand pounds to Susanner Batsford the wife of the said Charles Batsford Five thousand pounds to Susannah Batsford and Fanny Batsford the two Daughters of Charles Batsford two thousand pounds to Thomas Brickenden one thousand pounds to Thomas Burton one thousand pounds to Daniel Harris Police Officer five thousand pounds to John Sutton my servent two thousand pounds provided he shall be in my Service at the time of my Deceise to John Davis of Rotherhithe one thousand pounds to the Treasurers of the time being of Saint Johns Female Charity School at Horslydown one thousand pounds to John Woolley of Gainsford St. Butcher and James Watts of Gainsford St. Cheesemonger Five hundred pounds each."

The will of 2d July, 1822, gave the pecuniary legacies as paper I. In addition it gave to Mr. Batsford her dwelling house with every thing in it: to Mrs. Batsford her jewels and 600l. bank stock; to the churchwardens of St. John's, Southwark, 5l. per annum, to keep in repair and paint annually her father's monument. It appointed Wheeler and Batsford executors and residuary legatees. It contained the same directions as to her burial, funeral, &c. as paper A.

Lushington and Dodson in support of the will.

The King's advocate and Nicholl contrà.

Judgment—Sir John Nicholl. Elizabeth Morice, widow, died on the 10th of March, 1830, at the age of 65 years, at her residence in Horsleydown, leaving personalty of the **[583]** value of 70,000l. Thomas Alderson and his two married sisters, the deceased's second cousins, were her nearest relations.

Her will, propounded by the executors and residuary legatees, and opposed by one of the next of kin, is dated on the 2d of July, 1822, nearly eight years before her death, and gives various legacies; among others, 10,000l. to each of the executors, 5000l. to Mrs. Batsford, 2000l. each to the two Misses Batsford, several considerable sums to her friends and tradesmen, and the residue jointly to the executors. At the time the will was executed the residue did not exceed 1000l. or 2000l., but the property afterwards greatly increased. The will is in the handwriting of Batsford, the deceased's solicitor at the time it was made, and is attested by two witnesses, neighbours of the solicitor, casually called in; they were not privy to the instructions, preparation, or reading over, but merely saw the deceased subscribe, and had no reason to doubt her capacity.

Under such circumstances the advisers of the executors, thinking it necessary to plead more than the mere factum, have in the allegation propounding the will referred back to a will made in 1820, to instructions in her own handwriting for that will, to alterations made by her in 1822, and to various other documents also in her handwriting. On this first plea were examined the two attesting witnesses, and one other witness who speaks to the finding of paper I, one of these documents. The handwriting was admitted in acts of Court.

(*a*) Ten thousand pounds to C. B. and H. Wheeler.

(*b*) Instead of the three given him in the will to the trustees.

(*c*) Two thousand pounds to John Sutton.

These memoranda were written by Batsford on the fly-leaf of E, opposite to the corresponding clauses.

On the part of Alderson a long allegation sets up, first, a case of weak capacity, and secondly, insanity: on the first head, suggesting fraud and **[584]** imposition, and, on the other, legal incapacity. The second article contains the general description of the deceased—"That she was from her youth a person of weak capacity and of deranged mind and intellect; that the general wildness of her countenance and the expression thereof, and her general appearance, manners, conduct, and deportment, were such as to denote that she was a person of weak and deranged mind and intellect; and as such and as an insane or crazy person, and as one who did not know what she was about, and was not in her right senses, and as incapable of doing any act requiring thought, judgment, and reflection, she was at all times considered and spoken of and treated by medical men and by her family, relations, friends, and acquaintance, and that she was frequently called 'mad Miss Fournier,' 'mad Mrs. Morice,' or 'mad mother Morice.'"

The twelve following articles proceed to describe her general habits (at all periods —from her earliest life to the day of her death) of extravagance and irrationality in her mode of dress, in her immodest behaviour, in her profaneness, in carrying loaded pistols, in playing with toys, in fondness for her cat, in exposing her person, in continual intoxication, and in various other acts which it is impossible to enumerate without reading the whole of this part of the allegation.(*a*)[1] Of these acts, no particular time or place are specified; they are laid as occurring at all times and during her whole life. It was impossible therefore to negative, contradict, or explain any individual acts.

[585] The allegation then pleaded some specific acts; that at her own marriage in 1795 she conducted herself as an insane person; that at the marriage of her servant, Mitchell, her behaviour was irrational; that in 1816 she offered marriage to a low man—Knoller; that for some years she associated in a strange manner with a Dr. Daniel and his daughter; that in 1823, having broken her arm, she was guilty of some violent and irrational conduct; and it also pleaded one or two acts subsequent to the execution of the will: and the 27th article averred that she was subject to various delusions, which it specified.(*a*)[2] The plea further alleged that in respect to the documents in her handwriting, they were written either from dictation or from drafts which she was made to copy; and as an instance of this an exhibit, No. 5, is annexed, and is pleaded to have been written by Batsford, as a draft from which the deceased might copy a legacy to her servant named Sutton. So that the deceased was not only insane, but the will was obtained by fraud; and no inference of her capacity is to be drawn from these documents, which were mere contrivances to give colour and effect to the fraud. On this allegation no less than sixty-nine witnesses have been examined.

In reply it was pleaded that the deceased throughout her life was sane, was treated by her family and friends as sane, was in the uncontrolled management of her property, and in such manage-**[586]**-ment displayed judgment and prudence; that at various periods of her life she was engaged in acts of business which she conducted without the suspicion of derangement: the plea also alleged facts to shew the probability of the disposition in respect to the legatees; and explained some of the specific acts, and exhibited a number of her letters written at different periods. In support of this allegation thirty-four witnesses have been examined.

This being the shape and substance of the case, it will be necessary to inquire:

First, whether there is satisfactory proof that the will contained the mind and intention of the deceased at the time it was executed.

Secondly, whether that mind was sane or insane, capable or incapable of giving effect to such a will.

The deceased on the morning of the execution being at Mr. Batsford's office, the

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(*a*)[1] The 13th pleaded, and it was proved, that on the floor of one of her drawing-rooms there were at her death fifty-two bushels of coals, which she had from time to time carried there herself.

(*a*)[2] That she believed imps were dancing about her; that her cat, Mungo, had been poisoned; that she had poisoned her husband; that Dyne and others had attempted to poison her; that she was afraid of being carried off; and that in June, 1822, she pointed out a small hole in the wainscoat, by which she declared thieves had entered and stolen all her wine.

latter called in Mr. Greenwood, a surgeon, and Hughes, his shopman, who lived close by. On their arrival the deceased subscribed and they attested the will: they believe the deceased was of sound mind; they saw nothing to excite suspicion, or to impeach her capacity or sanity. The transaction happened eight years before their examination: they have no recollection that the will was read over in their presence; nor is it very probable that such was the fact: they know nothing of its preparation nor of the instructions for preparing it. The whole effect of their evidence is that the execution passed as a mere ordinary transaction of business: if, on the one hand, there was nothing to probe the mind of the deceased, nothing to ascertain how far it went with the act, and was free from any imposition or delusion, so **[587]** neither, on the other hand, was there any appearance to excite their suspicion either of fraud or insanity.

In a case of perfectly sound mind, and free from any suspicion of imposition, this evidence of bare execution would be sufficient: the law would infer the rest: it would infer that the contents were known and approved, and that the party intended to give them effect. Neither fraud nor the absence of sound mind is to be presumed: but in this case there are circumstances which excite the jealousy and awaken the vigilance of the Court—which demand something more than proof of a bare execution. The will was prepared by, and is in the handwriting of, Mr. Batsford: he was the solicitor of the deceased; she was alone at his office; he takes a very important benefit; he is joint executor; joint residuary legatee; there are large legacies to himself and to his family: there were therefore inducements to take advantage either of a weak mind or of an insane mind, and to abuse confidence.(*a*) The Court would therefore look for evidence that the deceased knew and approved the contents, before it entered more particularly upon the question of sanity. That evidence may, however, be fully supplied by the documents in her own handwriting —for that they are her handwriting is admitted. **[588]** An attempt, indeed, and considering the number and nature of the scripts, rather a strange and desperate attempt, has been made to shew that these documents did not come spontaneously from the deceased; but were either copied by her from drafts or written by her under dictation; and to establish that averment an exhibit (No. 5)—found in the possession of the deceased, or at least among her papers—is annexed to Mr. Alderson's allegation. "To my servant, John Sutton, the legacy or sum of 2000l., provided he shall be in my service at my decease."

This paper is averred to be in Batsford's handwriting: on the other side, however, it had in the first plea been alleged that the deceased in 1823 delivered to Wheeler, the other executor, a copy of the will, which (script H) was brought in by Mr. Wheeler, annexed to his affidavit of scripts, before Alderson's plea was given: and in the executors' second allegation it was further stated that, on Sutton's leaving the deceased's service in 1824, Wheeler, by desire of the deceased, sent her a copy of the clause containing Sutton's legacy; that No. 5 was such copy and was in Wheeler's handwriting. Which account is true? The answer to this question will furnish a test by which to try the charge of imposition. There is not a tittle of evidence that the exhibit was prepared as Alderson's plea avers: but the averment is falsified; it is proved that No. 5 is not Batsford's, but that it is Wheeler's writing. Mary Morrill, the first witness on the condidit, proves that, immediately upon the deceased's death, Wheeler produced a copy of the will. Sutton too, it is proved, left the deceased's service in 1824: but what is almost conclusive of the truth **[589]** of the executors' account is that this exhibit is a verbatim transcript of the clause in the will, and is not a verbatim transcript of any document in the deceased's handwriting. This disproves Alderson's averment that it was a draft given to the deceased from which to copy the abstract, paper I; and goes far to confirm the truth of the averment (and that averment is not unimportant) that the deceased had been

(*a*) "Where a deed is prepared by the person himself who seeks the benefit of it, without the intervention of any other person, that circumstance alone is sufficient to raise a suspicion of fraud: and the instrument is to be viewed with the greatest jealousy, because the person with whom he deals is thus deprived of the opportunity of any disinterested testimony on the subject, and for this reason instruments obtained by attorneys from their clients are always viewed with extraordinary jealousy." Per Lord Redesdale, 2 Sch. and Lef. 502-3.

in possession of, and had delivered a copy of, the will to Wheeler in 1823: and also that she obtained this transcript from him in the manner alleged: otherwise, how could this transcript in Wheeler's handwriting have been found in the repositories of the deceased; and he be in possession of the copy of the will? This tends strongly to negative any practice of fraud and imposition, and to establish that a copy of the will was really left in the deceased's custody; which copy she afterwards delivered to Wheeler. That fact is further confirmed by the abstract of the legacies in her own handwriting (to which I shall presently advert); for unless she had for a time the copy of the will in her possession, how could she make that abstract?

Previous to a more particular notice of that abstract, I will examine what other documents there are to shew that this will was the act and intention of the deceased.

The plea lays, as the origin and substratum of the present will, that the deceased in 1820 executed a will giving legacies to Batsford and also to Daniel, and appointing them joint executors and residuary legatees, and also giving several legacies to the same persons as are benefited by the present will: that in 1822 she departed from that disposition; and excluding Daniel and adopt-**[590]**-ing Wheeler executed the present and destroyed the former will. It is unnecessary to detail all the other particulars of the transaction alleged in the executors' first plea.

The papers in the deceased's handwriting, and so admitted to be, are—first, those which relate to the will of 1820. Paper A, a sort of draft will dated 25th April, 1820, with subsequent additions in the deceased's handwriting, was the paper of instructions taken to Mr. Batsford wherefrom to prepare the will in question. The deceased had executed several former wills at different times: though this paper contains no express bequest of the residue, looking to her other acts, no doubt she intended it for her executors.

The next paper, B, is in the handwriting of Batsford, it contains further instructions; and both at the beginning and at the end of it mention is made of the residue. The exact day when the instructions were given does not appear: it was probably early in May, for though A is dated on the 25th of April, yet the deceased made several additions after the date was inserted. The probability then is that it was not carried to Batsford till the beginning of May, more especially as the next document, C, bears date on the 7th of May. C is in the deceased's handwriting. It refers to a matter of account with Truscott, against whom Batsford at that time was employed to take legal proceedings on her behalf, and it further offers to Mrs. Batsford, as a small honorary legacy, some bank stock, of which it appears the deceased was possessed. D is the draft will of 1820, prepared after C was written: the only material observation that arises on it is that it was laid before an eminent counsel in the Temple, whose endorsement **[591]** of approval is dated on the 11th of May, 1820; evidence to some extent that the deceased was not imposed upon by Batsford, and that there was no fraudulent contrivance, for there was no clandestinity nor extraordinary haste. The executed will is not produced, but that would naturally be destroyed when the new will in 1822 was made; and it is alleged that such was the fact.

Such in 1820 were the deceased's mind and intention. Daniel and his daughter were not at that time discarded, though the deceased, having become acquainted with Batsford as her professional man in 1819, adopted him in the will of 1820 as a partaker in her bounty. It is not necessary to inquire whether the deceased was wise or capricious or hasty in this change of disposition, though, looking at her history, it is difficult to say that it was unwise or irrational, or unnatural or improbable; but it is sufficient at present to shew that it was the act and mind of the deceased; and there is nothing in these papers in her handwriting to satisfy me that either imposition or insanity taints the will of 1820.

In 1822 the deceased proceeds to make the will propounded, by which the Daniels are altogether discarded and Wheeler is adopted as the object of her bounty in conjunction with Batsford. The other legatees, all old friends, are nearly the same: but, in addition, two tradesmen—her butcher and cheesemonger—are given legacies.

Between 1820 and 1822 it would seem that the deceased had grounds for excluding the Daniels: they had borrowed money of her and could not repay it—at least the father could not: the deceased had only obtained his note of hand, and had had recourse to legal measures in order to re-**[592]**-cover the debt. Considering her history with the Daniels (to which I shall hereafter advert) it is not surprising that she should have discovered their views: the fact, however, that she broke off all con-

nection with them is rather a mark of her sanity and her strength of mind. Nevertheless she did not transfer the whole benefit to Mr. Batsford: she introduced as the participator in her testamentary bounty her stock-broker, Mr. Wheeler, who with his brother, as well as his father before them, had been employed for many years in managing her property; so far at least as to invest what she did not want: for she always went to the bank and received her own dividends.

There is no reason to suppose that Batsford suggested this substitution of Mr. Wheeler for Daniel; they were not acquainted with each other, nor is there any trace of a conspiracy between them: but Mr. Batsford appears to have acted fairly and liberally in declining to take a larger legacy than his co-executor and co-residuary legatee; and that Mr. Batsford's family take in addition large legacies is the deceased's own act.

This brings me to the documentary evidence relating to the transaction of the will propounded. It begins with paper E. [The Court here read E.]

The new disposition, then, and the new executor come from the deceased herself. The legacy to Harris is increased from 3000l. to 5000l., and Batsford takes an increased benefit—"the house and all that is in it." On the back, in the handwriting of Batsford, is "10,000l. to C. B. and H. Wheeler." There is no proof of the instructions for this clause or how it came to be inserted, except as it is explained in the next paper, F. That paper, in the deceased's handwriting, and **[593]** dated 24th June, 1822, is a very important document. It affords full evidence of mind and intention: she assigns her reasons and is not to be diverted from her purpose: she also assigns reasons in respect to the bequest to Harris, shewing that she fully understood the nature of a testamentary act, and the safest mode of carrying her wishes into effect.

These papers not only repel any appearance of fraud and circumvention practised on an understanding too weak to resist,(*a*) but they furnish **[594]** such proof of sound

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(*a*) In *Bates* v. *Graves*, 2 Ves. jun. 288, Lord Chancellor Loughborough says: "The issue devisavit vel non always implies in it, where the execution is not the point of the issue, a question of the capacity of the testator; that is, either his absolute capacity, or his relative capacity, where it is supposed the particular instrument was the effect of that undue influence, which necessarily implies a degree of weakness at the time, and quoad that instrument, making it not an instrument arising from the fair bias of his own mind, but from the exercise of that improper influence." See the case passim, particularly pp. 289, 292-3.

In the Treatise of Equity, 5th ed., by Fonblanque, vol. i. p. 68, et seq., is this passage: "Although there is no direct proof that a man is non compos, or delirious, yet if he is of a weak understanding and is harassed and uneasy at the time; or if the deed be executed in extremis; or by a paralytic; it cannot be supposed he had a mind adequate to the business he was about, and might more easily be imposed upon (*Filmer* v. *Gott*, 7 Bro. P. C. 70. *Fane* v. *Duke of Devonshire*, 6 Bro. P. C. 137); especially the provision in the deed being something extraordinary, or the conveyance without any consideration.. And the rule of the common law itself, in case of wills, is very favourable; although it can hardly perhaps be extended to deeds without circumstances of fraud or imposition. For a memory which the law holds there to be a sound memory is, when the testator hath understanding to dispose of his estate with judgment and discretion, which is to be collected from his words, actions, and behaviour at the time, and not from his giving a plain answer to a common question." (*Marquis of Winchester's case*, 6 Rep. 23.)

Mr. Fonblanque, in a note on the earlier part of this extract, says: "In *James* v. *Graves*, 2 P. Wms. 270, Lord Commissioner Jekyll seems to lay some stress upon the circumstance of a deed not being revocable as a will, and therefore liable to be set aside, if gained from a weak man by misrepresentation, and without any valuable consideration. But it appears from the case of *Fane* v. *Duke of Devonshire* that though a deed obtained in extremis, and by imposition, do contain a clause of revocation, the principles upon which courts of equity proceed will equally attach and entitle the party prejudiced to be relieved against it." In *Fane's case*, however (see 6 Bro. P. C. 140), one at least of these revocable deeds (for there were two of the same date) was not to operate during the life of the grantor: and would therefore seem to stand exactly on the same grounds as a will—except as to the Court in which relief was to be sought.

mind that nothing short of decisive, disqualifying insanity could defeat the testamentary effect of a disposition proceeding from such a mind and intention.

If more were necessary, there is still another paper in her own handwriting of no inconsiderable importance, Paper I, the abstract of the pecuniary legacies made by the deceased herself. It is quite correct, and exact in order and amount. It is alleged by Alderson that the deceased was not in possession of the will after she had executed it: but H, the duplicate produced by Wheeler, the latter asserts on oath was delivered to him by the deceased in 1823, and No. 5, in Wheeler's handwriting, was found in the deceased's possession—in her pocket book—at her death. How the deceased could have made the abstract I, except by having H in her possession as alleged by Batsford, no explanation has been attempted in plea or argument. The strong presumption and probability are that it was an abstract taken from the will or copy: but be that as it may, the very circumstance of the deceased making the abstract, whenever made and however abstracted, **[595]** is strong proof of mind, memory, and understanding; that she fully knew the contents of the will and perfectly approved of the disposition thereby made. It is true that neither this abstract nor any other paper in the deceased's handwriting expressly makes a disposition of the residue, but I cannot entertain the slightest doubt that she fully intended the executors to have it, and it is given to the executors in some of the former wills.

The legacies themselves strongly tend to shew that the will was the deceased's own act; and that neither were these legacies introduced to give colour to the main disposition: nor did the deceased fluctuate in regard to them. She had, as I have said, reason from the conduct of the Daniels to alter the disposition of 1820 in their favour—but she had none to depart from her intentions of benefiting the legatees. Brickenden had been her medical attendant many years, and had recently (1819) retired from business and removed out of the neighbourhood. Burton was an old acquaintance, a builder and carpenter; and she had always intended that he should bury her. There are letters from the deceased to him written both before and after the will, which not only render the legacy to him probable, but which shew that the deceased was not a person of that habitual and uniform incapacity mentioned in Alderson's plea. I will read one of these letters:—

March 4, 1820

Dear Sir,—I wrote you in my last I was going to Mile End for a few days but have been prevented by Truscotts business Mr Batsford can do nothing without seeing you be so kind to see him on Monday he wants to ask you many questions and tell him all you know on the business I find Sir William Abdy **[596]** must have a fine of six pounds in the first place and the stamps will be high and Truscott has gone from his word about paying all above ten pounds which was the Bargon My Lawyear thinks I can turn Truscott out I wish I could. Call on me when you have seen Mr Batsford you will oblige me by asking Mr Batsford what the expences will amount to all together that I may know what I am about—tell him what you told me that Sir William Abdy you thought need not be consulted—from your sincere friend

MORICE

I shall see you on Monday evening

(Superscribed) Mr Burton Flint Street Wallworth.

This letter, on a matter of business just before the will of 1820, is as rational as possible, and it is proved by other evidence that at that time a lawsuit was pending between the deceased and Truscott. It is impossible to say that the writer of this letter was not then competent. There is another letter, also to Burton, about eight months after the date of the will propounded. It is in these words:—

February 6, 1823

Dear Sir,—Pardon my long silence in not thanking you for your kind present of the birds. I have not been able to put pen to paper before this day. I have kept my bed room almost ever since I came from the North which was on the 2^{d} of November. I am happy to know where you live and hope you will always inform me as I hope no one will bury me when I am dead but you it was you know always my wish and I have left you handsome besides. Since I saw you I have had nothing but illness and did not think I should have lived till now I often have talked to Mr Batsford of Horse-**[597]**-lydown Lane about you When I am better and get down

stairs I shall be glad to see you I conclude with wishing you health from your sincere friend MORICE

(Superscribed) Mr Thomas Burton No 34 Edmond Street Southampton Street Camberwell.

This is an express recognition of the will in which she not only directs that Burton shall bury her, but also gives him 1000l. and desires that it shall be independent of the expence of her funeral. It shews too her intercourse with and confidence in Batsford. It is impossible to conceive a more rational, quiet, letter; it recognizes the will and contains nothing sounding to folly: yet Alderson's case is, and his witnesses attempt to support it, that this woman was at all times insane. Harris (a police officer appointed by her father, who was a police magistrate) and his wife kept up a continued intimacy with the deceased, and occasionally transacted matters of business for her. Letters to Harris and his wife of the same tendency as those to Burton are exhibited. Sutton lived eleven years in her service, he and his two wives in succession; the wives as servants on board wages; Sutton himself as a sort of guard and protector: but as they might quit her service, as Sutton in fact did in 1824, she made his legacy conditional, "in case he should be in her service at her death." Mr. Davis was a very old and confidential friend of the family; he used to call on the deceased every Monday to receive her directions as to any business she might wish him to transact for her. All these legacies were in the will of 1820; she was quite steady in respect to them—in 1822 she adds legacies to two of her tradesmen, both persons she had long dealt with [598] and who were attentive in supplying her. The legacy to St. John's School, though it is pleaded that the deceased never gave away any money in charity, was not colourably suggested by Batsford; for it appears in both wills—it is in the deceased's handwriting in A, and the evidence of one of the witnesses, who applied to the deceased to subscribe to the school in her lifetime, proves that she declined so to do, at the same time declaring she would not forget the school at her death. The whole disposition then strongly confirms the presumption of law that the act emanated from the testatrix, and further, that it was the emanation of a rational mind.

It will be necessary, however, to examine with more minuteness into the latter fact—her sanity; for though in considering the evidence, in order to see whether the factum of the will and her knowledge and approbation of the contents were proved, I have not altogether omitted noticing some of the circumstances which also bear upon the question of sanity, yet the Court is not warranted in concluding at once that there exists no possibility of proving insanity: but it must be proved: the rule of law being well established that sanity is presumed till insanity be proved. The burthen of proof lies upon the party who undertakes, upon that ground, to defeat an instrument—be it will or be it deed.

It may be difficult and perhaps would be dangerous to attempt to define what is the essence of insanity. Delusion has been generally laid down as essential: that is, the fancying things to exist which can have no existence, and which fancy no proof or reasoning will remove. Others may have said that insanity may exist though no delusion pre-[599]-vail: whether this means that it may exist where no delusion ever has prevailed, or only where you cannot call it forth upon the particular occasion, is not so clear. No case has ever come under my notice where insanity has been held to be established without any delusion ever having prevailed, nor am I able exactly to understand what is meant by "a lucid interval," if it does not take place when no symptom of delusion can be called forth at the time. How, but by the manifestation of the delusion, is the insanity proved to exist at any one time? The disorder may not be permanently and altogether eradicated—it may only intermit—it may be liable to return; but if the mind is apparently rational upon all subjects, and no symptom of delusion can be called forth on any subject, the disorder is for that time absent; there is then an interval, if there be any such thing as a lucid interval. It may often be difficult to prove a lucid interval, because it is difficult to ascertain the total absence of all delusion.

Where clear, decided, and undoubted insanity has been established to have once existed before the contested transaction, acts otherwise of a doubtful character may become of more force in proof of its existence at the time in question. Even acts decidedly of an insane character occurring after the transaction may reflect back upon acts, otherwise equivocal, about the time of the transaction itself, or on the general

deportment of the party: but where there are no decided acts proved ever to have taken place; when all the acts are equivocal; when they may be attributed to other causes, to violent passion, to intoxication operating upon a mind naturally excitable, I am not aware that in any case such equivocal acts, [600] however numerous, have been held to establish insanity.

The sort of case set up in this suit has been already in some degree described. Before adverting to the nature of the evidence adduced in support of it, I will briefly refer to the history and character of the deceased.

The deceased was born about the year 1765. She was the daughter and only child of Gideon Fournier, a police magistrate at Union Hall, who resided many years in Gainsford Street, Horsleydown, where the deceased died. The character of the neighbourhood of that part of the town is pretty well known. Her mother was fond of dress, and neither father nor mother seems to have been very severe in their restraint of the daughter: she was a girl of rather a truant disposition; she liked to go to tea-gardens and such places of public amusement, and was not much controuled by her parents; nor was Horsleydown likely to produce society calculated to engage a young girl of strong feelings in a circle of mere domestic visits. In 1795 the deceased, then of the age of thirty, having about three years before declined the offer of a Mr. Bryant, was married to Morice—he was engaged as a clerk in a brewery; and though at first the connection appears to have obtained the sanction of the father, yet his consent having been subsequently withdrawn, the marriage was clandestine. A reconciliation, however, shortly afterwards took place, and the deceased and her husband went to reside next door to her parents. In 1805 Morice died; and the deceased in this cause from that time continued a widow. In 1812 the father (then a widower, for his wife died a year or two before) died; and after his death the [601] deceased threw his house and her own into one, and continued ever afterwards to occupy both.

In 1808 the deceased had, under the will of her aunt, Mrs. Perrot, become possessed of certain property, some articles of which were in the hands of the Alderson family; she brought an action to recover that property, and obtained a verdict subject to a reference. In the course of that transaction the deceased made an affidavit, on account of which the Aldersons indicted her for perjury, and she was convicted. Upon the interposition of friends, particularly of a friend named Dyne, they were, with some difficulty, prevailed upon not to bring the deceased up for judgment: but this transaction produced such an alienation that no intercourse ever afterwards took place between the deceased and the Aldersons. It is not denied that it was highly improbable that if she made any will the Aldersons would be benefited. Any will made by the deceased in her senses would be adverse to the Aldersons—they stand not upon the deceased having any sane intention to benefit them, but upon their legal rights as next of kin, as they undoubtedly are entitled to do. They must, however, prove the deceased insane as they have alleged and undertaken to prove.

I have already said that the deceased was of a truant temper, of strong passions, and was never much controuled. It appears not merely by the depositions of witnesses, but by a memorandum-book in her own handwriting, that her mind was extremely vicious; her constitution highly lascivious and corrupt—not restrained by the modesty of her sex, nor brought into subjection by religious or moral principles. After the death of her parents, having a considerable property at her [602] own command and disposal—living at Horsleydown—nearly fifty years of age—having no near relations (for the Aldersons, her second cousins, were the nearest)—having no respectable society nor connexions—convicted of perjury—she gave way to her natural profligate propensities, and to the vices belonging to her passions, and among other things indulged in the frequent and excessive use of spirituous liquors.

The question then is whether she became actually insane in the legal and correct meaning of the term insanity; or whether she was only guilty of those extravagances of which a person of such a character and so excited would occasionally, or even frequently, be guilty. There is produced a cloud of witnesses—that is every witness examined on Alderson's plea—who give unhesitating opinions that the deceased was mad: but their opinions are of little weight. A drunken woman in the streets excited by spirituous liquors forgets the modesty of her sex, is guilty of every sort of extravagance, talks irrationally, is hooted and pursued and pulled about by boys, so that every person who sees her says, "She is a mad woman," or, "she must be either

drunk or mad." There is hardly an act of which an insane person can be guilty which may not arise from intoxication. Intoxication is in truth temporary insanity (see Treatise on Equity, c. ii. s. 3, p. 67, 5th ed.): the brain is incapable of discharging its proper functions; there is temporary mania—but that species of derangement, when the exciting cause is removed, ceases; sobriety brings with it a return of reason.

Now the case set up is, that the deceased at all times and from her earliest life was deranged, was **[603]** of unsound mind. Is that the truth of the case? Notwithstanding there is this cloud of witnesses to opinion and to certain acts, is the case set up reconcileable even with the documents in the deceased's handwriting already referred to? It is proper to consider how these witnesses are got together. I have already stated that the plea lays that all the acts enumerated occurred throughout her whole life and at all times. At the head of the sixty-nine witnesses is Miss Daniel, who, after stating that she knew the deceased intimately from 1814 to 1822, thus deposes: "During the whole of my aquaintance with her she was unquestionably of unsound mind and deranged: in speaking of her capacity I should not merely call it weak and slender, but distorted and vicious; her countenance was generally if not always marked by an extraordinary wildness of expression, her manners, conduct, behaviour, and deportment were uniformly strange and eccentric—extremely so; and that indicated a deranged and unsound mind and intellect: they were such as to make me at all times and under all circumstances consider her as insane and crazy. I can safely and conscientiously say that I never for one single hour during my acquaintance with her believed that she knew what she was about or that she was in her right senses or capable of doing any act which required thought, judgment, or reflection. I considered her more than insane—a decided maniac: she was always treated and spoken of by every person with whom I ever saw her, or by whom I ever heard her spoken of, as an insane and mad woman, and as having been out of her senses: the servants used to call her 'mad Mrs. Morice,' they used to say, 'Here comes mad Mrs. Morice,' and I **[604]** have heard people in the streets point her out and call her 'mad mother Morice.'"

This is the general account given by this witness; and on subsequent articles in support of these opinions she deposes to a multitude of acts so profane, so filthy, so obscene, so disgusting—many of them taking place not only in her presence, but in that of the witness' own father also—that no general words can describe them, and the particulars of them are quite unfit to be stated. But what does the witness admit? That for seven years she, a young unmarried woman of 25 or 26 years of age, and her own father were the constant associates of this insane disgusting person, borrowing money of her, she, the witness, repaying her, her father acknowledging by note a debt of 1900*l.*, though now his daughter describes the deceased as so mad that she was incapable of any rational act. To describe the deposition of this witness is impossible, and if possible it would be unfit; it occupies sixty sides of paper. The Court forbears to express more strongly its opinion of her evidence. It seems highly probable that Mr. Alderson was induced to frame his allegation principally from the account he received from this woman.

I must next consider the course followed to get together the host of witnesses to prove this allegation. A room is taken at "The Ship in Distress"—a tavern at Horsleydown: there the witnesses attend and are entertained; they talk the matter over, a long bill is incurred, the landlord and landlady are two of the witnesses—Mr. Alderson goes there frequently, and carries his own claret there. How is the Court to estimate the degree of reliance to be placed on witnesses **[605]** so got together and so brought forward? In the next place, even if there was no such cause to deduct from the credit of the witnesses, still the very nature of the plea forms a considerable deduction—they are not brought to speak to specific facts fixed by time, place, and circumstances, but to transactions and conduct spread over many years and which they describe as if constant and continuous habits. The will is made eight years before her death. If the deceased had been seen a few times guilty of extravagances or indecencies in the streets, a witness would club them together in his mind without even meaning to depose untruly, and would describe the conduct as a constant and perpetual habit. It is only in this view that it is possible to reconcile the depositions of the witnesses not only with the adverse witnesses, but with the written exhibits. Many of the witnesses, from the tenor and tone of their depositions and from the

inconsistency of their own conduct at the time with the account they now relate, convince me that they have given a very inflamed and exaggerated statement of the conduct of the deceased. Many others convince me that they have inferred and deduced a general habit from a few particular facts—some from merely conversing with each other on the conduct of the deceased. It is impracticable to wade through this mass of evidence so as to assign reasons applying to each particular witness or to the facts which he relates, and to select a few would hardly afford more satisfaction. I will only notice one or two; I will take for instance the second witness—whose evidence immediately follows that of Miss Daniel—John Sutton, who lived in the deceased's house for eleven years—from 1813 to 1824: his two wives **[606]** acting as her servants; his first wife died in her service, and on marrying again his second wife in like manner became her servant; she did not take alarm at the deceased for four years, for she remained there till 1824, two years after the will was made: Sutton says on the second article:

"I lived in Mrs. Morice's house near upon eleven years, I went there as nigh as I can guess in 1813 and quitted in 1824. I was no servant of hers, and never had any thing from her: my wives—both of them—were her housekeepers; and I was allowed to live in the house with them. When my first wife died Mrs. Morice told me to look out for a good honest woman, such as I could recommend to be her housekeeper, and a neighbour of mine, whom I had known twenty years, I married in 1820, and we were obliged to leave Mrs. Morice in 1824: the deceased was not a clever woman at all, and I believe she was deranged during the whole time I lived in her house; she was not a raving mad woman, but I can say that she was positively mad—not in her right senses for one single moment during the whole time I lived with her. I could tell such things of her as are scarcely to be believed: I always thought her a very strange looking woman, and I knew her by sight many years before I lived with her: it was not so much the wildness of her looks as her general appearance, her manners, her conduct (in doors and out, drunk and sober, and she was very much attached to liquor—but drunk or sober it was all one, she was always mad) were so strange that it was clear to any person who saw her that she was quite mad crazy: I always considered her a lunatic altogether, and treated her as one: my present wife was obliged to leave her **[607]** because she was quite afraid of her; and for that reason we left. She was spoken of as 'mad Morice' in the whole neighbourhood: the boys used to call after her 'mad Morice,' and no wonder, seeing that as she walked about in the streets she stopped and talked to fishwomen and prostitutes: they were the only fit company for her: no body respectable could have any thing to say to her."

Such is his inflamed and exaggerated account: but he is a disappointed witness, for he expected a legacy, and I quite agree with him that he tells such things of her as can scarcely be believed—it so happens that above twenty of Mrs. Morice's letters, written to Mr. and Mrs. Dyne during four years of this very period—from 1810 to 1816—are quite rational letters touching upon the ordinary topics which would naturally occur, and are quite irreconcileable with the account given by Sutton "that the deceased was at all times, drunk or sober, insane."

I have already said that it is in vain to select particular witnesses or to attempt to discuss each deposition. I am obliged to content myself with stating the impression left on my mind by the general result. The Court therefore can only declare generally that the evidence, so far as it is credible at all, does not in its judgment make out decided actual insanity; for no act is proved by credible witnesses which cannot be accounted for by the excitement of liquor. Even the acts which may have been produced by that excitement were not constant and habitual; those exhibits in her own handwriting, to which reference has been already made, shewing that at the times when they were written she was in a sound state of mind; and, **[608]** above all, no fixed and settled state of delusion is proved by which the Court is enabled to say that at any one time or on any one subject the deceased was actually and essentially insane, so as to be legally incapacitated from disposing of her property either in her life-time or after her death.

Unless, then, it could be shewn that at the particular time when the will was made the deceased was so excited by liquor, or so conducted herself in doing the particular act as to be legally disqualified at the moment from giving effect to such act, the case

of the next of kin fails; (*a*) still more does their evidence fail to establish satisfactorily that the deceased was at all times, or generally, a person of unsound mind.

But when the Court looks further, and examines the evidence produced by the executors, it has still less difficulty in arriving at the same conclusion. The Court has before it the whole history of the deceased's life: her various acts respecting her property—her various testamentary acts—the manner in which she was considered and treated by her family and friends—the manner in which she conducted herself when away from Horsleydown—at the bank—on excursions into the country—with her tradesmen—all this corroborated by her correspondence at various periods of her life, and by an accurate private account in her own handwriting of the dividends she received during the very last year of her life. **[609]** In 1792 Mr. Bryant pays his addresses to her—he receives a polite answer from her father, not declining the offer because he disapproves of the connexion, not because his daughter is unfit to contract marriage, but because she is not willing to accept it—because Mr. Bryant is not his daughter's choice. In 1795 she marries Mr. Morice—they live together eight or nine years; and there is a letter from him, written while he was at Paris, in 1802, bearing every mark of being addressed to a wife who conducted herself with propriety, and signed "her loving and affectionate husband." Her uncle, Mr. Newton, and her aunt, Mrs. Perrot, leave her very considerable property, and she becomes their legal representative. If they had considered her insane they would surely have taken a different course for her protection. In 1809 her nearest relations, the Messrs. Alderson, indict her for perjury; no great proof that they thought her insane. She takes every precaution to guard against the consequences of conviction, by assigning over her property and making preparations for emigrating to America. She disposes of several parts of her real estate. Mr. Mason, a highly respectable witness, has frequent and long interviews with her upon different transactions of business at that time; he speaks to her perfect sanity; so that it is not merely the formal acts of business themselves, but her conduct, deportment, and understanding accompanying those acts to which he deposes. In 1809 she makes a will, giving her property to her father for life, and then to Davis and Humphries, her solicitor. This will was made with reference to the prosecution for perjury.

During that prosecution Mr. Dyne had ren-**[610]**-dered her very essential service; she consequently makes a will giving every thing to her father for life and then to the Dynes. She also secures to Dyne a considerable sum by transfer of stock, she was however to enjoy the income for life. This was just after the death of her father, who (it should have been mentioned) died intestate, and consequently he, a man of business, must have thought her competent to the management and enjoyment of his property. The will in favour of Dyne was adhered to till after his death in 1816. There are exhibited a number of letters to Mr. and Mrs. Dyne from 1810 to 1816 proving sanity and capacity beyond all dispute: the first is dated November 21, 1810, and is as follows:—

My D. Madam,—I am to thank you most kindly for the privations I have occasioned you by Mr. Dynes continual absence from his home on my concerns. Allow me to express my gratitude both to him and you for services the extent of which I cannot express, and to assure you both that I shall always keep in mind both your interests considering them as my own I have taken the liberty of sending trinkett by Mr. Dynes for your Harriott as a memorial of my friendship and wish her health to enjoy it, and which though intended for her I beg may be at your disposal till you think it proper time to give it. With my father's best compliments—I am very sincerely yours, ELIZABETH MORICE.

I am happy to say that by Mr. Dynes exertion I am now in possession of all my property.

(Superscribed) Mrs. Dyne, Ash, Farnham Surry.

This is just after she gets rid of the indictment **[611]** for perjury; and there are above twenty letters equally sane, written at intervals during a period of six years

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(*a*) In *Cory* v. *Cory*, 1 Ves. 19, Lord Hardwicke was of opinion that the drunkenness of one of the parties was not sufficient to set aside a reasonable agreement to settle disputes in a family, unless some unfair advantage were taken. But in *Cole* v. *Robins*, per Holt, Bull. N. P. p. 172, the defendant may give in evidence that they made him sign the bond when he was so drunk he did not know what he did.

even till after his death. It is in vain to say that it was not wise to give so much to Dyne, that it was over-estimating his services, that it was a wasteful disposal of her property: she had been rescued from the effects of this indictment, from the supposed necessity of being an exile from her country, and her gratitude for that rescue absorbed her sense of all other services, and induced her to give the Dynes her whole property. Surely this offers no proof of insanity, nor raises any inference of fraud and imposition.

About the time of Dyne's death, if Knoller and Walker are to be believed, the deceased indulged in a good deal of profligacy. Knoller had rescued her from an assault of her servant, Wilson: Wilson was turned away, and in the will of 1815 Knoller has a legacy of 100l.—not a very extravagant reward for the service he had rendered her.

Comparing the evidence of these two witnesses, no very great reliance can be placed on either: for though Walker has not been a frequenter of "The Ship in Distress," there are some circumstances relating to her conduct not quite reconcileable with the account she has given of the deceased. It is not of sufficient importance to discuss it minutely.

On the death of Dyne—on the very day of the funeral—the deceased makes a codicil giving every thing to his daughter, but for some reason, or by some representation made to her, she in a very short time made a will favourable to the Aldridges and Daniels. During the period that will was in force, viz. from 1816 to 1820, it is not improbable that the deceased was encouraged **[612]** in her vicious propensities, and that advantage was taken of her habit of intoxication. A more profligate course of conduct than was pursued by Dr. Daniel and his daughter, as related by Miss Daniel herself, cannot well be imagined: but at length the deceased became sensible of their views; she employed Batsford in some matters of business the latter end of 1819 and beginning of 1820; she then gave the Daniels a smaller benefit, and she soon after made the will in question discarding them altogether.

To that will made in 1822, and propounded in this cause, the deceased adhered down to her death, that is for eight years. If there were any trace that Mr. Batsford had been conducting himself towards the deceased, either in procuring this will or in inducing her to adhere to it, in the same manner that Ann Daniel describes that her father and herself acted towards the deceased for six or seven years, the Court would be warranted in imputing fraud and imposition to Mr. Batsford; but there is nothing of the sort: Mr. Batsford has no further intercourse with the deceased than became him and was necessary as her solicitor.

The deceased, from the execution of the will to her death, continues to conduct her own affairs; she goes to the bank and receives her dividends; and the clerks at the bank, and Mr. Wheeler, the brother of the executor, are examined, and give a full account of her conduct and behaviour, clearly evincing soundness of mind. It is hardly doing justice to the case to omit stating their evidence in detail, but I shall venture to forbear. It was her habit to make excursions into the country, either merely spending the day, or passing some **[613]** months during the summer, at different watering places or making tours. She might at setting off from, or returning to, Horsleydown, choose to make a display before her neighbours, and have four or even, on one occasion, six horses, and be finely dressed, and lean forward in her carriage to display herself; she was a vain woman, and she held her neighbours in great contempt and liked to make an exhibition before them: but that does not amount to insanity. The landlord at the Tiger's Head, at Southend, proves the manner of her coming to his house to spend the day, and that she conducted herself with great propriety: and this, not upon one occasion, but for several years together, and several times in each year. The period spoken to by this witness includes the time when the will was made. Again, a lady at Margate, who lets out lodgings, which the deceased occupied for a month, and would have occupied a second time had they not been previously engaged, states: "During a month in July or August, 1820, a lady had lodgings (a bedroom and parlour) in my house at Margate: I knew her to be the deceased; for she invited me to call upon her in Gainsford Street, spoke of Mr. Batsford, her attorney, of her mother's name being Newton, and of herself being a descendant of Sir Isaac Newton: she came first and looked at my lodgings, agreed on the terms for a month certain, and staid the exact time to a day: she came as a stranger, accompanied by her female servant. During that month I saw the deceased

continually several times a day, and seldom a day passed that we did not spend an hour or two together: she would send for me to sit half an hour with her **[614]** after dinner; and we frequently walked together in the fields: she was a very conversable and pleasant companion, never conducted herself otherwise than rationally and sensibly, seemed a clever well-informed woman, always managed the housekeeping herself, marketed herself, and gave directions how she would have the things cooked; put down the expenses in a book, and at the end of the month came to me of her accord, said she had agreed with me for so much, and paid me the exact amount according to agreement. About six years ago (that is about 1824) she again came to Margate, drove to my house, and much wished to have my lodgings; but they were full, and she took another lodging: she staid there two or three weeks; she came for a month, but as she said she did not like her lodgings, she left before the time. During this period I saw a good deal of her; she would call in occasionally every two or three days for a few minutes' chat, and at other times would stop more than an hour with me: two or three times my daughter and I visited her at her lodgings; she always appeared a sensible woman, one that I should call a sharp woman, not to be deceived, and who looked after her own interest. On both her visits to Margate I had much conversation on different subjects with her, but I never knew her talk otherwise than perfectly rationally and sensibly, and she conducted herself like any other gentlewoman." As these visits were in 1820 and 1824 the witness was quite competent to speak to her capacity about the time of her will.

These are witnesses entirely aloof from all connection with the parties or the neighbourhood. **[615]** It was not necessary, and it might have been difficult, to produce much evidence of this description, because if the deceased conducted herself properly at inns and lodging-houses she would not be remembered and could not be identified. It is not denied that the deceased did almost every summer make excursions to different watering places and different parts of the country entirely under her own guidance and management, and if she had been insane, and on these occasions acted as Mr. Alderson's witnesses state she did act at Horsleydown, she might have been recollected; but Mr. Alderson has not produced any evidence of any conduct of that description at any of those places, except from a servant picked up at Horsleydown, and not alone entitled to implicit credit. There is no evidence that she omitted to pay her taxes or to receive her dividends. Here are a multitude of notes—above twenty—written by her after the will was made and to the last year of her life to different persons; yet no attempt has been made to shew a word "sounding to folly" in any of them, and here is her account in her own handwriting with entries of the dividends received by her during the last year of her life not denied to be perfectly correct.

With this body of evidence tending to corroborate the general sanity of the deceased; her testamentary acts, her correspondence at various times and with various persons, her transactions of business spoken to by Mason, by the bank clerks, and by these other witnesses, confirmed as they are by letters and exhibits, how is it possible that the deceased could be in that state of continual insane excitement imputed to her by Mr. **[616]** Alderson's witnesses? And, further, reverting to the evidence of the factum and to the scripts in her own handwriting, the will is in my judgment proved to be the act of a free and capable testatrix; and must be accordingly pronounced for.

Will established.

ANTROBUS AND ASHHURST *v.* LEGGATT. Prerogative Court, Trinity Term, 3rd Session, 1831.—A party entering a caveat, and alleging himself to be an executor in the last will of the deceased, without inserting the date, has a right to call for an affidavit of scripts, without swearing as to his belief that he is an executor in some paper left by the deceased: and semble, without being liable to costs.

Frederick Booth, by his will dated the 28th of March, 1831, appointed Sir Edmund Antrobus, Bart., and William Henry Ashhurst, Esq., executors: they prayed probate, when an appearance was given for Horatio Leggatt, Esq. (for whom a caveat had been entered), alleging him to be an executor named in the last will of the deceased, dated , with certain codicils. These papers were asserted to be in Mr. Ashhurst's possession. Both proctors were then assigned to exhibit proxies and affidavits as to scripts. Mr. Ashhurst and his co-executor alleging they had not possession nor knowledge of any testamentary paper, under which Leggatt was either executor or

legatee, applied to the Court to direct him to exhibit an affidavit as to his belief that he was an executor in some testamentary paper left by the deceased, before an affidavit as to scripts was brought in by the executors.

Dodson and Addams for the executors. The original minute was informal, the date of the alleged will not being inserted; and if it had not **[617]** been for an assurance on the part of Mr. Leggatt as to the existence of a will in which he had an interest, the minute would not have been consented to.

The King's advocate contrà. The assignation is quite in the usual form, and there is no instance of the enforcement of it being overruled. The practice is uniform.

Per Curiam. Let the practice be followed.

By-Day.—The affidavits as to scripts were exchanged. No testamentary paper was annexed to Leggatt's affidavit, and it not appearing that he was either an executor or legatee, the Court was on this day moved to decree probate to pass, as prayed, and to condemn Leggatt in costs.

Per Curiam. The Court decreed probate; but gave no costs.

[618] BRAMWELL *v.* BRAMWELL. Consistory Court of Rochester, 26th January, 1831.—Sentence of separation by reason of adultery and cruelty pronounced on proof of undue familiarities, clandestine communication, with frequent opportunities of guilt, and concealed correspondence by letters denoting great ardour of passion, if not allusions to actual guilt (but no credible proof of a fact of adultery), united with great violence of conduct and language, and an attempted blow.—On a suit for restitution the defendant must be compelled to return, unless it be proved that the plaintiff's inherent right is forfeited; but semble, less strict proof of cruelty or adultery is necessary, in answer to such a suit, than where the party making these charges is the original complainant.—Condonation is a conditional forgiveness, on a full knowledge of all antecedent guilt.—Less cruelty is necessary to revive condoned adultery than to found an original suit.

[Discussed, *Dempster* v. *Dempster*, 1861, 2 Sw. & Tr. 438. Referred to, *Bernstein* v. *Bernstein*, [1893] P. 301.]

This was a suit for restitution of conjugal rights brought by the husband: the citation issued on the 5th of August, 1828, but was not served until the 10th of March, 1829. A libel in the usual form having been admitted, a defensive allegation, with exhibits, on the part of the wife, pleading adultery and cruelty, and praying a sentence of separation, was debated and admitted. A responsive allegation, setting up condonation, and exhibiting two letters from the wife, and also a second allegation on behalf of the wife, explanatory of the date of one of the letters annexed to the responsive allegation, were admitted without opposition.

The substance of these pleas, and the evidence in support of them, are detailed in the judgment.

The King's advocate and Haggard for the wife.

Addams for the husband.

Judgment—Dr. Lushington. This case involves several questions:—

I. Whether there is any proof of adultery.

II. If adultery be proved, whether it has been condoned.

[619] III. Whether, if condonation be proved, it applies to all the adultery preceding such condonation.

IV. If condonation be proved, whether the previous adultery has been revived by subsequent adultery.

V. Whether the cruelty proved be sufficient to found a sentence of divorce per se, or to revive former adultery.

It is to be remembered that the husband in this case commences the suit, praying that his wife may be compelled to return to cohabitation: and certainly he is entitled to the assistance of the Court, unless it can be shewn that he has forfeited the right originally inherent in him. Where the wife is acting on the defensive, she is not relieved from the proof of necessary facts, yet under such circumstances the inferences arising from facts when established may be stronger than where she is the original complainant; thus where a suit for the restitution of conjugal rights is promoted by the husband, the wife is not, according to the practice and doctrine of these Courts, held precisely to the same strictness of proof.

The general circumstances of this case are shortly these: marriage in 1806; birth

of one child—a daughter: and cohabitation for nearly twenty-two years: that in 1809 Elizabeth Jeffery—then about eighteen years of age—came into Mr. and Mrs. Bramwell's service as nursery girl; in 1816 accompanied her mistress to Tunbridge Wells, where Mr. Bramwell was under medical advice in consequence of a wound in his face; in 1817 was placed at Tunbridge Wells in the care of a house till it could be let; and in 1821 was fixed in the Castle Inn at that place—part of the property at Tunbridge Wells to which Mr. Bramwell was en-[620]-titled in right of his wife, who was possessed of a considerable fortune. These are admitted facts: and it is not denied that an improper attachment had sprung up between Mr. Bramwell and Jeffery, nor that a clandestine correspondence, carried on between them, was detected by the wife in May, 1826; but it was correctly argued that the question still remained whether this attachment had ever been consummated by adultery. It may then be necessary to inquire whether adultery is proved in any particular instance: or whether, though the particular time and place cannot be fixed, there is sufficient to satisfy the mind of the Court that adultery has been committed.

I. The charges commence in 1816, when Mr. Bramwell was recovering from his wound. The proof of guilt at this time depends entirely on the credit of one witness; the circumstances to which he deposes are not in themselves altogether incredible; and the story receives some confirmation from the subsequent intimacy of these parties, which necessarily reflects back on conduct of an earlier date. Still, antecedent to the transaction of which this witness speaks no familiarity nor attention—nor any thing that can be regarded as the usual precursor of adultery—is established by distinct evidence, laying a foundation for this particular charge. The occasion when, as it is said, this act of adultery took place is not in my opinion very probable. Looking then to this absence of probability, to the interval of time that has elapsed, to the manner in which this witness has deposed, to his acknowledgment of a quarrel with Bramwell, and to his charge that Bramwell had ill used him, I come to this conclusion —that the evidence of this witness is, in the absence of all confirmation, much too questionable to be relied on, though I [621] do not go to the extent of imputing wilful perjury; he may, in words, have spoken truly, but in substance his evidence is such as I cannot reconcile with admitted facts. I therefore proceed to the consideration of the next charge.

It is alleged that in the spring of 1817, while Jeffery had charge of the house at Tunbridge Wells, Mr. Bramwell passed a night at the Castle Inn, and that on that night only she had a bed at this tavern in a room nearly adjoining the one set apart from Bramwell, and opening into the same passage; that by his order the door of his bedroom was left open; and that on the night in question they slept together in her room. This is the substance of this charge, and it is proved that on the occasion referred to Jeffery drank tea with Bramwell, and, instead of returning to the house of which she had the care, remained during that night at the inn; and on the following morning her bed retained the impressions of two persons. These facts, together with the situation of the respective rooms, certainly lay a case of extremely strong suspicion—that on that night Bramwell and Jeffery slept together in her room. It certainly is very difficult for the Court not to arrive at that conclusion; and if the letters, on which I shall presently comment, had borne distinct reference to this particular period, and had been coupled with previous familiarities, I should not have hesitated in so doing: but this charge is coupled with no previous distinct familiarity; and, from its remoteness, subsequent familiarities cannot operate upon it retrospectively with any great force. However strongly, therefore, I might be inclined, as an individual, to draw from these facts an inference of guilt, I hardly feel justified in my judicial ca-[622]-pacity to pronounce that adultery was committed on this particular night.

No other specific act is charged till 1824. What, however, took place in the interval is extremely suspicious. The first circumstance powerfully affecting my mind is, that Elizabeth Jeffery—the nurse in Mr. Bramwell's family, a young unmarried woman, not in the slightest degree educated for such an occupation—is put by Mr. Bramwell into the Castle Inn, as mistress, in the year 1821: and in this and the two following years he frequently went to Tunbridge Wells, passed several days at this inn, and associated with Jeffery. The visits and intercourse are admitted; but it is said they were the necessary result of business at Tunbridge Wells; and that before Jeffery left Mr. and Mrs. Bramwell's service she was treated by them as a companion.

Such are the excuses offered for the intimacy; but improper familiarities cannot be justified by any supposed necessity for frequent intercourse; and if the guilty inclination be proved, undoubtedly there was ample opportunity for gratifying a criminal passion. That such familiarities did pass between Jeffery and her landlord are fully established upon the testimony of three witnesses. Carpenter, then a servant at the inn, proves that he frequently saw them standing by the fire in the bar, Mr. Bramwell's arm round her waist; that on witness entering they moved away and were confused; that he has seen their faces close together as if they were kissing; and in passing by Jeffery's bed room has heard Bramwell's voice in the room, speaking loud and scolding her; and on two occasions, in the morning, he speaks to seeing them both in his mistress' bed room, but dressed.

[623] Mary Earl deposes nearly to the same effect, though perhaps a little stronger: she speaks to endearing expressions, and to kisses. Martha Wiles states that she has seen Bramwell in her mistress' bed room; but that, she adds, was on an occasion of her being ill: she also speaks to a kiss.

Unquestionably this is evidence of improper familiarity: and the witnesses depose to other circumstances which demonstrate a guilty attachment. I do not, however, entirely rely on their evidence, although nothing has been, or indeed can well be, urged to affect the credit of Carpenter and Wiles: but this undue and guilty familiarity between these parties is manifest from, and confirmed to its full extent by, the letters annexed to Mrs. Bramwell's allegation: they therefore require, before I state my impression of the whole case, a particular attention.

The first exhibit, to which I shall refer, is an unfinished letter, the discovery of which appears to have first raised a suspicion in Mrs. Bramwell's mind of her husband's infidelity. It is now admitted that this exhibit is in Bramwell's writing, and that the person addressed is Elizabeth Jeffery.

"My dearest Betsey, dearest of all women,—Notwithstanding all y^{r} promises y^{r} heavenly and delightful promises I cannot submit to a partner a participator with me in those heavenly and lawful pleasures I have so long treasured up in store. Oh! my dearest Betsey, think me not selfish, or that I do not feel for your situation, what you have gone through for me makes me feel selfishness to such a degree that to know or indeed even think that you should be embraced by another." . . .

[624] This paper is found on the 2d of May, 1826, in Mr. Bramwell's room, and communicated to his wife, who immediately informs him of it by letter, which he thus answers:

"Borough, Wed^{y} evening.

"My dear Wife,—Y^{r} letter I have just rec^{d} and read, its contents does not in the least surprize as I have long seen by your conduct that your confidence in me pourtrays any thing but confidence. Yet I had hoped you had entertained a much nobler opinion of me than I see you do. Am I indeed so fallen to be such deceitful wretch as I must be to have pen'd much less sent such a letter to any one? But I must to the point. Whilst me and George [his servant] was coming out of the Castle yard, Monday evening, George picked up a small wrapper of paper upon which I asked to look at: they appeared scrap of papers; on taking to the light I found something about 'My dearest Betsey' which name being familiar to me I was determined to take a copy of which I did and ret^{d} the scrip again to George who can furnish you with them as I told him to keep 'em. When you have seen them you will then see how unjust you have been with me and how sincere I have been with you. If you had only paused for a moment my seeing Betsey that evening—what could I want to write to her I will take an oath I have not written to her this 12 mths or more I hope to be with you to-morrow when further satisfaction shall be given Besides to Betsey I can no more with kind love remain your affect. but injured husband "WILLIAM"

Is there one single syllable of truth in this **[625]** letter? The counsel for Mr. Bramwell has avowed that the excuse for writing that paper is not founded in truth: nor was it without indignation that the Court observed Mr. Bramwell, in its presence and hearing, endeavour to induce his counsel (who most properly rejected the suggestion) to persist in this falsehood. What, then, are the inferences from this conduct? Where there is falsehood there is a strong probability of guilt concealed. The denial therefore that this letter was addressed to Jeffery shews that the expressions contained in it are not entitled to a favourable construction, but are proof of a guilty intention.

Some discussion took place on the meaning of the word "lawful;" and it was urged for the husband that the expression referred to a promise of marriage at a future time: but the Court may omit this part of the case: it is not bound to find a sensible interpretation of any rhapsody this person may choose to write. I shall not then attempt to construe nor fix any definite meaning upon this expression "lawful pleasures:" but when I consider that this language is adopted by a married man professing an ardent attachment to a young woman, who had been the nurse of his child, the Court is at a loss to conceive what pleasures can, under such circumstances, properly be denominated lawful. I must then take this document as evidence of criminal attachment and intention though not of absolute guilt. The letter to Mrs. Bramwell, which the Court has also just read, shews the base hypocrisy of the writer, and to what falsehoods he would resort for the purpose of deceiving his wife: he avers that he has not written to Jeffery for more than a year, and yet the very next letter, annexed to the wife's **[626]** allegation, and addressed to Jeffery, must just have been written by him.

"Borough, 3d May, 1826.

"My dearest my only love,—Since I parted with you, I have done nothing but think of you. Oh how affec^ty^ I love you, every past recollection endears you stronger to me, and I now feel that we are as one, not even death could separate us, for to the grave would I cling to thee. when I think of your candid glorious and most true hearted explanation of Monday I could wet this sheet with my grateful tears. Oh every thing bespeaks that our long attachment has been cherished and cultivated by each other, and has emanated from the hearts core. It has nearly arrived to its height, when we shall soon see it bursting forth and see and feel the delights of sincere and genuine love. Could I but see you now methinks my ardour would scarcely allow me utterance of speech. You told me you thought indeed was assured I love you. Indeed you may and assure yourself this that from the first moment I felt to love you from that moment I felt to respect and to feel that sort of regard that I had never felt so for any other female, or indeed for any one on earth. And yet notwithstanding all this I know I have been and shewn unkindness to you. But rely on this my dear girl, after having shewn it it has immediately fled, and my whole soul and body wrapped up in the most tender and parental affection. Yes my dear Betsey believe me when I tell you that in the midst of all my unkindness that you might have thought me guilty of, the cause has been through my great selfish and ardent affection I have ever felt for you. After the beautiful explanation you **[627]** have given to me I shall now endeavour to dispossess myself of self and substitute for it a treble gratitude with an increased (if possible) confidence as well as an increase of love and affection. My heart you have had for years, Indeed you have had it almost from the first time I saw you. But when I first press'd my lips to yours then I felt I was alive and you were then in complete possession, fond heart! It now appears and I have not the smallest doubt of it that our hearts are dedicated to each other and no earthly being can dissolve them. Be assured my dear love of this that I shall ever prize the possession of such a heart as yours. I will not only treat it nobly kind and affectionate but will and must ever think of it with tears of gratitude." After a few sentences on business, the letter proceeded: "I forgot to ask you my love about your cold—I hope it is much better and now nearly gone: pray write and let me know y^r^ health is to me every thing my life my joy. I hope to be with you on Saturday. Should I not be able I will write, but pray write me if its only a line address Queens Head Borough. And now my dearest Betsey hav^s^ nearly finished my letter I must conclude with my very best love and prayers for y^r^ health. May we ever have the highest confidence in each other always assuring ourselves that no one ever can rival us in our love the wish and prayer of y^r^ sincere friend warmly attached —Most affect^y^ yours "W^m^ BRAMWELL."

(Superscribed) Mrs. Jeffery Castle Tavern Tunbridge Wells.

Similar observations apply to this letter as those **[628]** which I have already had occasion to make in commenting upon the first letter. This letter also comes into Mrs. Bramwell's possession: her husband ascertains this, and demands it with much violence; she refuses to deliver it up, hands it over finally to her daughter, who conveys it out of the room, and thus secures it. Mr. Bramwell shortly afterwards succeeds in allaying the suspicions of his wife, and to induce her forgiveness and reconciliation writes the following document:—

"My dearest and beloved wife In the presence of Almighty God I here most solemnly swear and protest that I will never directly or indirectly have any connection or marriage with Elizabeth Jeffery late of the Castle Tavern Tunbridge Wells. Should the word 'connexion' not comprize every thing my dear wife wishes, I further add that I will not see the said Elizabeth again if possible neither will I ever carry on the least correspondence with her. "W^m^ BRAMWELL.

"Sunday 7^th^ May 1826."

The expression "connexion" here used must have one of two meanings—either a criminal connexion, and then the letter would be an admission of adultery; or an innocent connexion, and then it would imply no condonation by the wife.

Taking, then, these documents in conjunction with the familiarities proved (not the familiarities of long acquaintance, nor such as by any means correspond with what in the second letter to Jeffery are termed marks of "parental affection," but such as are the admitted consequences of a guilty attachment), and in conjunction with the fact that there were opportunities without end, are the ambiguous expressions referred to to counter-**[629]**-balance all these other circumstances, especially when one of the defences is condonation—not a denial of adultery? If the evidence be liable to any doubt, by what rule am I to decide? By the existing probabilities—by coming to that conclusion on doubtful points which is in conformity with clear and established facts.

It is then in evidence that not merely was there a criminal attachment, but also that this attachment was not rejected; that Jeffery admitted his familiarity—received his correspondence—that opportunities were constant: and there is nothing to shew on her part resistance, nor repudiation, nor that she at all discountenanced his passion. To doubt from such circumstances that the consummation followed would be to presume that the effect was not consequent on the natural cause; and that this was a case of extraordinary exception and singular innocence. But the safer rule is to come to a decision in unison with the rest of the evidence: and I can entertain no reasonable doubt that adultery had been committed. To arrive at that conclusion it is not necessary to consider the evidence on the 9th article: the examination of that disgusting testimony may be spared; for I do not found any part of my sentence on Earl's evidence; though I do not say it is wholly discredited.

II. III. Condonation, however, has been set up: but this condonation is not only conditional in the eye of the law, as all condonations are, but it is specially so: and a question might arise, as in the case of *Durant* v. *Durant* (1 Hagg. Ecc. 733), whether at the time Mrs. Bramwell forgave the offences of her husband against her the whole of them were known to her, **[630]** for it was, in that case, laid down by the highest authority that condonation only takes effect upon a full knowledge of all the guilt. That Mrs. Bramwell knew of the adultery, at least to the extent proved, seems highly improbable. If it were necessary, I think there could be little difficulty in shewing that she was not aware of the whole, nor indeed of any part, of it. Her letter of the 10th of May, 1826 (annexed to the responsive allegation), makes it manifest to my mind that she was not then acquainted with her husband's guilt.(*a*)

It is not, however, in my view of the case, **[631]** necessary to inquire whether any part of this early adultery has been condoned; still less whether the condonation applied to all that adultery.

IV. For assuming that the condonation was complete, and extended to all the previous adultery, under what circumstances and on what conditions was it given, and

(*a*) This letter was from Tunbridge Wells.

"V. Royal, May 10, 1826.

"My dearest Husband,—It is now past nine o'clock and I have only just this moment rec'd your letter. I cannot tell you how my heart droop'd when I open'd the parcel and found no letter, or how it revived in about ten minutes after when John came up and presented me with one: ten thousand thanks for it, it has relieved my mind from a great weight. I have been but very so so since you left, not having enjoyed either sleep or appetite. Our dear child is indeed a comfort, and a dear good child to her mother. I shall sleep better to-night, I make no doubt, now I have heard from you. This is indeed a memorable day: this time twenty years I was a bride—your first and only love. That you will ever cease loving me I am not afraid of, or that an artful woman will succeed in robbing me either of your love or good

what was the duty of the husband and what was his conduct afterwards? He solemnly engaged to separate himself entirely from this woman, and if possible not to carry on the least correspondence with her: yet shortly after this Mr. and Mrs. Bramwell go to Epsom; and he clandestinely returns with Jeffery to Tunbridge Wells.

An attempt has been made to prove that Mrs. Bramwell's letter of 23rd of June to Jeffery was written, as alleged by the husband, in 1826.(*a*) Taken alone and not in conjunction with other cir-**[632]**-cumstances, expressions may be selected which may have that tendency. I have not the least doubt, however, that it was written in 1825, when I look at the contents of the letter of the 10th of May, 1826—in regard to which there is no doubt; when I compare that letter with this of the 23rd of June, it is incredible that Mrs. Bramwell could have so expressed herself—"I am not afraid that an artful woman will succeed in robbing me either of your love or good opinion. Oh! had I known or had an idea of the arts she has been practising against an open hearted grateful man, I would, reckless of all pecuniary consequences, have routed her out of the Castle long ago: but enough of the hated subject." With feelings thus expressed, it is, in my opinion, next to impossible that she could have written this letter of the 23d of June—five or six weeks only after an indignant charge against this very woman of an attempt to alienate her husband's affection, and wound her peace of mind.

But how stands the evidence as to the date? Of Mr. Bramwell's allegation—that the letter was written in 1826—there is no proof: Mrs. Bramwell in her answers denies that it was written at that time: and Mrs. Bockett, the parties' daughter, in her evidence goes far to disprove it. When also I consider the secrecy with which Jeffery returned to the Castle in May or June, 1826, the improbability that this invitation was written in that year is increased. Nor does that date tally with the facts: the Castle Inn was not disposed of till August, 1826; and there is nothing to impeach the testimony of Mrs. Bockett, which almost amounts to conclusive proof that the letter must have been written in 1825, while a treaty was pending for the sale of the inn.

[633] What was the conduct of Bramwell after his solemn declaration of the 7th of May, 1826? It has been properly admitted that Wiles (who had become the superintendent of the inn after Jeffery had quitted it) is a candid and fair witness: she states "that, not long after her appointment, she was informed of Jeffery's return to the inn; that Jeffery remained there for nearly a fortnight, confining herself almost

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opinion. Oh! had I known, or had an idea of the arts she has been practising against an open hearted grateful man, I would, reckless of all pecuniary consequences, have routed her out of the Castle long ago: but enough of the hated subject."

The rest of this long letter was unimportant, except in a few passages: e.g. "I trust you are doing all you can to get somebody to put in the Castle; for I cannot bear that girl *[1] should remain in it. . . . I trust after I have recovered from the effects of the shock and agitation I have gone through I shall regain my spirits. . . . I want you to remain here quiet for a little time; for quiet you will be now you have got rid of your tyrannical firebrand. . . . I hope you will give me and the dear child the pleasure of seeing you on Saturday. Believe me, my dear husband, your sincerely attached and most truly affectionate wife, "FANNY BRAMWELL."

(Superscribed) "Mr. Bramwell, Queen's Head Inn, Borough."

(*a*) "My dearest Betsey,—Will you come and sleep here to-morrow night? I understand from Mr. B. you leave the Castle to-morrow, and intend sleeping from it: if so I can only say here is a bed quite disengaged, and quite at your service, and I shall be happy for you to occupy it, and to talk things over as well as to arrange things as to your future comfort. If you think I wish you otherwise than well (or ever have done) you wrong me, and do not yet know me: now the Castle is disposed of, there is little doubt but you will find me a firm friend, at any rate I shall expect to see you some time to-morrow, and in the mean time believe me your sincere friend,

"FANNY B."

(Superscribed) "Miss Jeffery, June 23, 18 "*[2]

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*[1] A younger sister of Jeffery's, who had since died.

*[2] The remainder of the date was torn off.

exclusively to her bed-room and a small adjoining sitting-room, and that both Bramwell and Jeffery desired the deponent that her (Jeffery's) being there might be kept a secret from Mrs. Bramwell; that while Jeffery so remained secretly at the Castle Bramwell often came to see her, and used to remain up stairs for a considerable time—sometimes as late as eleven at night." Can it be contended that this was conduct in conformity with Bramwell's solemn engagement? Here was not a solitary meeting, but meetings frequent, for a length of time, and purposely concealed from his wife. Is the Court to believe from the ingenious suggestions of counsel, or from the asseverations of the party, that these meetings were merely to settle accounts? It is true Wiles states that she did see them engaged about accounts; but was it not Mr. Bramwell's duty to have been specially cautious that such interviews should not occur without information to Mrs. Bramwell, and should take place only in the presence of a third party? It is too much to ask of the credulity of the Court not to infer from this conduct a criminal attachment.

Wiles further states that "about a fortnight or three weeks after Jeffery had quitted the Castle (after secretly remaining there as deposed) Bramwell arrived there in his phaeton on a Sunday night at about eleven. Afterwards, on that night, **[634]** she was informed by Fanny Jeffery that her sister was upstairs; she did not go to see her; but knew that from that time meals were regularly carried upstairs for some one—not a customer—by Fanny Jeffery until the Friday week following, when Elizabeth Jeffery, about two o'clock, came into the bar and staid there till eight, after which the witness did not see her, and she believes she quitted the Castle: during the period aforesaid Bramwell was backwards and forwards at the tavern." What inference, then, can be drawn from this? And when it is likewise in evidence that Mr. Bramwell's servant, George (who was also enjoined to secrecy), drives Jeffery, one night, from Tunbridge Wells to the village of Hertford; and that by these contrivances Mrs. Bramwell's inquiries as to Jeffery's return to Tunbridge Wells were rendered futile; I can arrive at no other conclusion than that this fraud and concealment are proofs of the husband's guilt.

Mrs. Bramwell, it appears, remained for some time with her sister; and was not reconciled to her husband till Biggs, a friend of Bramwell's, after an investigation declared that there was no ground for her suspicions. Biggs, therefore, was not more successful in his inquiries than Mrs. Bramwell had been, and probably from the same reason—the studied concealment of the husband. If it be true that adultery was committed, then the former condonation, if such there was, does not cover it: and this reconciliation by Biggs is no condonation, because it takes place on the husband's averment of his innocence. I am satisfied that adultery did take place prior to the 3rd of May, 1826; and also subsequently; and that the effect of it has not been taken off by the wife's conduct.

[635] V. I will briefly advert to the charge of cruelty. I take it to be acknowledged law, as laid down by the learned Dean of the Arches in *Durant* v. *Durant*, that cruelty—to revive condoned adultery—may be less violent in degree and less stringent in proof than when it forms the original charge. In my judgment that principle is quite consistent with reason: I subscribe to it not only from deference to the superior Court, but because I feel it to be most consonant to justice. I am bound to consider this conduct in reference to the husband's prayer that his wife may be compelled to return home, and with reference to the consequences of a non-compliance with a decree of the Court made in conformity with such prayer, viz. excommunication and imprisonment.

Is, then, the cruelty, coupled with the proofs respecting adultery, such as will entitle the wife to her sentence? Undoubtedly the evidence of the cruelty is not so satisfactory as it might have been: but if the witnesses lay a sufficient ground for the Court to conclude that the wife's return to cohabitation would be attended with a reasonable apprehension, or a probable danger, of personal violence, the Court will release her from the duty of such return. It is no answer to say that witnesses, who have not been produced, might have been examined; for if the account before the Court be untrue, the husband might have called those other witnesses to refute the wife's case.

The averments in the 14th article require no very particular comment: they relate to Bramwell's conduct in May, 1826, when, with vehemence of language and force of manner, he attempted to wrest away from Mrs. Bramwell his **[636]** long letter to

Jeffery: but this article is not of such importance as the 21st and 22d articles. Upon the 21st Mrs. Bockett deposes to this effect: "That in June, 1827, while she was residing in Euston Place with her father and mother, the latter was informed that Bramwell and Jeffery had been seen walking together, and that Jeffery was living near to them: her mother mentioned this communication to Bramwell, adding that she did not believe it after his solemn promises not to see Jeffery again: that Bramwell flew into a violent passion, stamped upon the floor, broke the bell-rope, dashed a chair against the drawing-room wall, knocked off the top of the witness' harp, used dreadful oaths, continued in a passion for a couple of hours, and caused both mother and daughter great alarm." On the 22d article she says, "In the afternoon of the 26th of January, 1828, while they were living in Tavistock Place, her father asked her mother for 50l.: she refused, saying 'that he had had sufficient already, and she must have something for house expenses.' He was very indignant, and a violent scene ensued: deponent having observed that her mother ought not to give the cheque, he directed his rage against her, struck her a blow as she was sitting, and used most abusive laguage [which is detailed] to both: deponent and her mother prepared to leave the house; he swore that neither should; tore off his daughter's bonnet, nearly strangled her with the strings, and crushed it to pieces: she attempted to leave the room; he forcibly held her back, and struck her several times: the people of the house come up stairs; he orders the street door to be locked, continues to swear violently at deponent, and to **[637]** call her by opprobrious epithets. Mrs. Bramwell gets into the next house by the balcony, returns with two gentlemen; they, in vain, endeavour to reason with Bramwell; he aims another blow, which is warded off; and the witness finally escapes to her aunt's in Mecklenburg Square, where she is followed in two or three days by her mother, and they go down to the aunt's house at Epsom—Mrs. Bramwell's health being much affected." This is the substance of Mrs. Bockett's evidence on this part of the case; and, on the 22d article, her account is amply corroborated by the servant Carpenter, who, on hearing a loud scream, goes up stairs with the landlord and landlady of the house, and speaks to what occurred afterwards.

The only provocation here was a recommendation that the cheque should not be given; and it cannot gravely and seriously be argued that this would justify a husband and a father striking a wife and a daughter; this is direct cruelty: and can it be said that such conduct to the daughter is not cruelty to the mother? No such principle is to be found in the cases. Here is a wife who has discharged all the duties that belonged to a wife with kindness, fidelity, and perseverance. After she was apprized of her husband's criminal attachment, she yet follows him to two prisons, and what is the return she meets with?—treatment both to herself and to her daughter quite unjustifiable. I am then to look whether I can pronounce that the wife could return to her husband in safety: that is the primary consideration in all cases of cruelty. I do not say that the cruelty is such as would entitle the wife to a separation on **[638]** an original suit; but, coupled with the evidence of adultery, it is quite ample.

I have not adverted to the evidence of the two Emerys on Bramwell's allegation, because I do not give any credit to it; nor to that of Cross, because it does not interfere with the sentence of the Court—that the wife is entitled to a separation from her husband by reason of his cruelty and adultery; and I accompany this sentence with a condemnation of the husband in all the costs.

Separation pronounced for.

[639] CONWAY OTHERWISE BEAZLEY *v.* BEAZLEY. Consistory Court of London, Easter Term, 4th Session, 1831.—The lex loci contractus as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicil; and therefore a second marriage, had in Scotland on a Scotch divorce (à vinculo) from an English marriage between parties domiciled in England at the times of such marriages and divorce is null.—Quære, whether such divorce would be invalid if the parties were then bonâ fide domiciled in Scotland: still more, if the first marriage took place during a mere casual visit to England, both parties being at all times domiciled in Scotland?—In the absence of proof that registers of episcopal chapels at Edinburgh are by the law of Scotland documents of an authentic and public nature, copies thereof rejected as inadmissible by the law of England.

[Referred to, *Shaw* v. *Gould*, 1868, L. R. 3 H. L. 71; *Niboyet* v. *Niboyet*, 1878, 4 P. D. 16; *Harvey* v. *Farnie*, 1880, 6 P. D. 44.]

This was a cause of nullity of marriage promoted by Emily Frances Conway against Samuel Beazley by reason of a former marriage by him contracted. The libel, after pleading the marriage by banns of Beazley and Miss Richardson at Kensington on the 20th of May, 1810, cohabitation and consummation, alleged "that, in consequence of disagreements, Beazley, in 1813, withdrew from his wife's society, and on the 29th of August, 1823, a pretended divorce by reason of adultery having been obtained by Mrs. Beazley in the Commissary Court of Edinburgh, Beazley was on the 26th of July, 1824, married by banns in the presence of witnesses to Miss Conway, in St. Paul's Chapel, Edinburgh, according to the ceremonies of the Church of England;" (*a*)[1] and exhibited a copy of the entry of such marriage "faithfully extracted from the register book of marriages kept by Mr. Marshall of Edinburgh, treasurer to the said chapel."(*b*)[1] It then pleaded cohabitation in Soho Square, Middlesex, and that Mrs. B. (formerly Richardson) was alive on the 26th of July, 1824; **[640]** passed by the name of Moggridge,(*a*)[2] and after having resided at Reading, died and was buried there in December, 1830.

Addams in objection to the libel. A contract must be construed by the law of the country where it was made. *Holman* v. *Johnson*, Cowp. 341. *Robinson* v. *Bland*, 1 Black. Rep. 256. There is no exception in favour of a contract of marriage. *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. 58. Erskine's Law of Scotland, b. 1, t. 6, s. 23. But it will be said that by the law of England marriage is indissoluble, and therefore that the sentence of divorce in Scotland is void. *Lolley's case* will be relied on; (*b*)[2] the effect however of that decision is, as I apprehend, that if in the present case the second marriage had been contracted in England, it would be invalid: but in fact the second marriage was in Scotland.

The lex loci is valid except when it produces injustice, or is contra bonos mores: but can it be contended that a divorce, on proof of adultery, and a subsequent marriage are unjust or contra bonos mores? Such divorces and marriages are by the divine law allowed and sanctioned. By the older canon law divorce à vinculo was admitted; the Council of Trent however altered that law; but the authority of that council is not admitted here. Till *Foljambe's case* (Moor, 683; 3 Salk. 138; 2 Burn, Ecc. Law, 503), in the Star Chamber **[641]** before Archbishop Bancroft, temp. Q. Eliz., divorce for adultery was à vinculo matrimonii: and in all acts of parliament on this matter the language is uniform—that the party has by his or her behaviour dissolved the marriage. No deceit nor fraud is charged: both parties acted upon the divorce and married again. The second marriage being then a Scotch contract, the whole question is to be determined by the law of Scotland.

The King's advocate and Phillimore contrà. The argument has proceeded on the assumption that this is a question of Scotch contract: but the argument is ill timed, for the Court has no knowledge of the effect of a Scotch divorce—a matter of foreign law and not before it. The indissolubility of the English marriage contracted between parties domiciled in England has not been sufficiently considered; and the whole point turns upon that. In *Dalrymple* v. *Dalrymple* there was no previous contract to be dissolved: it was singly and absolutely a question of Scotch contract.

By the jus gentium the law of the country where the contract is entered into is to regulate: though the Scotch lawyers hold that in a contract of marriage the law of Scotland has nothing to do with the lex loci contractûs: "the mere fact of the marriage having been celebrated in England—whether between English or Scotch parties—is not per se a defence against an action of divorce for adultery committed in Scotland." Fergusson's Reports, p. 116, n. *Tovey* v. *Lindsay*, 1 Dow, 117, was sent back to Scotland with an intimation that the decision should be revised: but nothing

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(*a*)[1] It appeared in evidence that they had some days previously signed the civil contract before the magistrate, and been married according to a Scotch form.

(*b*)[1] The exhibit was as follows:—"Samuel Beazley, Esq., and Miss Emily Frances Conway were married by certificate of banns from St. Andrew's parish, this 26th day of July, 1824, by the Rev. Mr. Morehead."

(*a*)[2] It was in evidence that after the divorce she had married a gentleman of that name.

(*b*)[2] 1 Russ. and Ry. Cr. Cases, 236. See also notices of the same case in *Tovey* v. *Lindsay*, 1 Dow, 124, et seq.; and a note of the proceedings for divorce in the Scotch Courts, in Fergusson's Rep. Appendix, 269.

further was done, as the lady died. The observations of Lord **[642]** Eldon and Lord Redesdale in that case pretty strongly express their opinions that a Scottish divorce will not dissolve an English marriage. There have been three subsequent decisions in the Scotch Courts on English marriages—*Duntze* v. *Levett*, Dec. 21, 1816. *Edmonstone* v. *Lockhart*, March, 1816, and *Kibblewhite* v. *Rowland*, February, 1817. In these cases, as well as in *Butler* v. *Forbes*, March, 1817, where the marriage was celebrated in Scotland between parties domiciled in Ireland; and in *Utterton* v. *Teuch*, Oct., 1811, where the marriage was in England (all reported in Fergusson), the Commissary Court rejected the conclusion for divorce à vinculo matrimonii: the superior Court, however, reversed these decisions in all these cases; and no appeal has been taken to the House of Peers. But the decisions of the superior Scotch Court are directly at variance with *Lolley's case*, with *M'Carthy* v. *De Caix*,(*a*) and the intimation of the House of Lords in *Tovey* v. *Lindsay*.

Per Curiam. Dr. Lushington. The question raised upon the admissibility of this libel is one of extreme importance, and which **[643]** might have been expected to have arisen at a much earlier period.

On the 20th of May, 1810, Mr. Beazley, one of the parties in this cause, married a Miss Richardson at Kensington, Middlesex: on the 29th of August, 1823, they were divorced by sentence of the Commissary Court at Edinburgh, and in 1824 Mr. Beazley contracted a second marriage at Edinburgh with Emily Conway, the other party in this cause. The first wife did not die till 1830, and the second wife now prays to have her marriage annulled on the ground that when that marriage was solemnized Mr. Beazley had a wife alive.

It has been said that the Court is bound to admit this libel, though questions of great moment may hereafter arise, and that the divorce at Edinburgh was only pleaded because it was deemed improper to keep the Court in ignorance of that circumstance. If a fact of such magnitude had been suppressed, I am of opinion that any sentence pronounced by the Court would have very little availed the parties—that it would not have been finally binding, but would have been open to re-examination—that such suppression would, in short, have rendered all the proceedings liable to impeachment. An endeavour to obtain a sentence when any such material information was withheld would be unfair towards the Court, and prejudicial to the due administration of justice.

Even with my present imperfect information, I must consider both what is the law of England and what the law of Scotland. Cases have been cited in which it is alleged that a final decision has been pronounced by very high authority upon the operation of a Scotch divorce on an English **[644]** marriage—that it has been determined that a marriage celebrated in England cannot be dissolved by the sentence of a Scotch tribunal—that the contract remains for ever indissoluble. The authorities principally relied upon for establishing that position are the decisions of the twelve judges in *Lolley's case*, and the decision of the present Lord Chancellor on a very recent occasion. If those authorities sustained to its full extent the doctrine contended for, the Court would feel implicitly bound to adopt it; but I must consider whether in *Lolley's case* it was the intention of those very learned persons to decide a principle of universal operation absolutely and without reference to circumstances, or whether they must not almost of necessity be presumed to have confined themselves to the particular circumstances that were then under their consideration. *Lolley's case* is very briefly reported: none of the authorities cited on the one side or on the other are referred to, nor are the opinions of the learned judges given at any length; all that we have is the decision. It is much to be regretted that some more extended report of the very learned arguments which I well remember were urged upon that occasion, and the multitude of authorities quoted have not been communicated to the profession and to the public.

(*a*) The following note of *M'Carthy* v. *De Caix*, Chancery, 1831, May 10th (2 Russ. & M. 614), was read in the course of the argument.

Mr. Tuke having married in England was divorced in Denmark: the wife came to England and died: the husband took out letters of administration in England to his wife, and upon his death there was a suit in Chancery between his executors and the next of kin of his wife relative to her property.

Brougham, Lord Chancellor, decreed in favour of the executors, observing that the English marriage could not be annulled by the Danish law.

In that case the indictment stated that on the 18th of July Lolley was married at Liverpool to Ann Levaia, and afterwards to Helen Hunter, his former wife being then living. It was proved that both marriages were duly solemnized at Liverpool, that the first wife was alive a week before the assizes, and that the second wife agreed to marry the prisoner if he could obtain a **[645]** divorce. The jury did not find that any fraud had been committed; but there does not appear to have been any discussion upon the very important question of domicil. A case in which all the parties are domiciled in England and resort is had to Scotland (with which neither of them have any connexion) for no other purpose than to obtain a divorce à vinculo, may possibly be decided on principles which would not altogether apply to a case differently circumstanced; as where, prior to the cause arising on account of which a divorce was sought, the parties had been bonâ fide domiciled in Scotland. Unless I am satisfied that every view of this question had been taken, the Court cannot, from the case referred to, assume it to have been established as an universal rule that a marriage had in England, and originally valid by the law of England, cannot under any possible circumstances be dissolved by the decree of a foreign Court.

Before I could give my assent to such a doctrine (not meaning to deny that it may be true) I must have a decision after argument upon such a case as I will now suppose, viz., a marriage in England—the parties resorting to a foreign country, becoming actually, bonâ fide, domiciled in that country, and then separated by a sentence of divorce pronounced by the competent tribunal of that country. If a case of that description had occurred and had received the decision of the twelve judges, or the other high authority to which allusion has been made, then indeed it might have set this important matter at rest: but I am not aware that that point has ever been distinctly raised, and I think I may say with certainty that it never has received any express decision.

[646] The Court enters upon a consideration of the law of Scotland with great reluctance and much diffidence, from a fear of being led into error upon a question of foreign law. At the same time, this matter has been so frequently discussed, and there are so many reported cases upon the subject, that it cannot be treated as a matter completely hidden in the abstruse recesses of a law entirely foreign to us. I believe the course of decision in Scotland up to the present hour has been to consider that the Scotch Courts have a right to entertain jurisdiction with respect to marriages had in England, after the parties had been resident for a certain period in Scotland, though that period had been infinitely too short to constitute what we should call a legal domicil: and that those Courts have proceeded in such cases to divorce à vinculo. At one time the Commissary Court in Scotland was much inclined in such cases to modify that remedy by substituting for the divorce à vinculo separation a mensâ et toro: but the Court of Session—the Court of Appeal—overruled the decisions of the Commissary Court refusing the divorce à vinculo, and directed that Court to proceed in the accustomed and ordinary way. None of those cases, I believe, have received the sanction of the House of Lords.

It is obvious that many most important differences may arise in cases of this description. Two Scotch persons married in England may afterwards go to reside in Scotland. Again, one of the contracting parties may be English, the other Scotch. If the law of Scotland continue such as their Courts have hitherto held it to be, and if the decision in *Lolley's case* be of universal application, the issue of the second marriage may **[647]** be legitimate in Scotland and illegitimate in England. The son may take the real estate in Scotland and not the real estate in England; he might possibly even be a Scotch peer and lose his English title and with it the English estates, the only support of his Scotch peerage. It is impossible, therefore, to exaggerate the importance of this case; nor can the Court be too guarded against laying down any principle which might affect any other case than the present.

It has been argued that I must decide by the lex loci contractûs, that this being a Scotch marriage must be determined by the law of Scotland alone, and by reference to what would be the decision of Scotch courts. I can entertain very little doubt but that the second marriage would be held valid in Scotland, unless some judgment of the House of Lords, in opposition to the repeated decisions of the Court of Session, should ascertain that the law of Scotland is not what those decisions have pronounced it to be.

But there is a preliminary consideration—the capability of the parties to contract

marriage—and the true question is whether that capability is to be determined by the law of Scotland or the law of England: the former would say that the parties are capable; the latter, supposing *Lolley's case* to govern the present, would say they are incapable.

I regret that the libel contains no averment of the domicil of the parties in England at the period of the first marriage: and that it merely pleads that a pretended divorce took place, without stating when or for what purposes the parties went into Scotland, how long they had resided there, or at what period this suit was commenced. **[648]** These omissions undoubtedly involve the Court in considerable difficulty. If this case, in these respects, prove similar to *Lolley's case*, I unquestionably should consider that authority to be binding upon me; but if it should be distinguished by other circumstances, such as by the permanent domicil of the parties in Scotland prior to the time when the divorce took place, I must reserve my opinion upon the question until I have heard it argued, and until all the facts and circumstances are fully before me.

I shall therefore admit this libel: but it certainly would be a great satisfaction to me if it could be reformed by pleading the domicil of the parties at the times of the marriages and of the divorce, and the circumstances relative to the divorce: because (though it may rest upon the party maintaining the validity of the marriage to plead the facts upon which he relies for that purpose) in cases of nullity of marriage all the circumstances should appear distinctly upon the face of the libel, in order that no doubt could be entertained of the principles upon which the sentence of the Court is founded.

The King's advocate. Undoubtedly further information would have been supplied if it had been supposed that the case would rest upon the libel only: we conceived that the other party would plead before the Court was called upon for its decision. However, as far as I am instructed, the second wife is not in possession of the facts and circumstances connected with the residence of the parties at the periods in question. Such information as we can obtain shall be laid before the Court in an additional article: but we shall not be **[649]** in a condition to plead those further facts till we receive information from Scotland.

Per Curiam. The Court might be placed in an extremely inconvenient position if the other party should not plead, and it had to pronounce its decision upon a doubtful state of circumstances.

Libel admitted.

An additional article (admitted without opposition) pleaded: "That Beazley's first wife was the daughter of Richardson, of the parish St. James, Westminster, where she had resided from her childhood, and that at the time of her marriage with Beazley, and during their subsequent cohabitation, they were respectively domiciled in England. That from their separation Beazley continued to reside in England till the beginning of 1823, when he went to Scotland on business as an architect, meaning to return to England as soon as it was concluded: that in April, 1823, when Mrs. Beazley instituted proceedings in Scotland against her husband, she was not residing nor had ever resided in Scotland, but was living in London." (*a*)

The libel and additional article were fully **[650]** proved by seven witnesses. Mr. Beazley's sister, who was in Edinburgh and was present at the second marriage, gave evidence of that fact.

23rd July.—The King's advocate and Phillimore. *Lolley's case* has determined this case: the legal domicil of both parties was England. The second marriage being had in Scotland is the only distinction between this case and that of *Lolley*.

Addams contrà. A marriage is good or bad according to the lex loci contractûs, unless that law is contra bonos mores. The English marriage was good when the

(*a*) Mrs. Beazley's sister deposed: "On the occasion of the proceedings instituted by my sister to obtain a divorce, she went to Scotland and remained there from two to three months: she never resided in Scotland but upon that occasion. I cannot say whether my sister went to Scotland for the purpose of instituting the proceedings, or whether her attendance there was required in the course of them; but I know that she never resided in Scotland before those proceedings, and that her home, though she went to Scotland for the occasion, was my father's house in London or Epsom, and at no time in Scotland."

English law, the Scotch marriage when, by the removal into Scotland, the Scotch law, governed the contracting parties.

Judgment—Dr. Lushington. I feel very deeply the responsibility of deciding this case; it behoves me to proceed with the most cautious and wary steps: there is no doubt of the proof and of the validity of the first marriage in 1810; of the separation of the parties in 1813, and of the divorce in Scotland in 1823, at the instance of Mrs. Beazley; and of the domicil of both parties in England. The Court did not require that it should be alleged that the effect of a Scotch divorce was to leave the parties at liberty to enter into another marriage, because it would have put them to the expence of proving that which was perfectly notorious. There is no doubt by the Scotch law of the validity, as to form, of the second marriage; but that is not the important point. However, in supply of proof of that mar-**[651]**-riage a copy of the register of the Episcopal Chapel at Edinburgh has been exhibited. I am not aware that such registers are, according to the law of Scotland, documents of an authentic and public nature: nor that a copy of an unauthentic register is by that law admitted as evidence. But according to the law of this country, as I believe it has been practised in the Courts of Westminster Hall, I think I should act more safely by rejecting it. I consider it to be of the highest importance that this Court should adhere to the same rules of evidence as prevail elsewhere: indeed, I should entertain some doubts whether ecclesiastical sentences could be received in the Courts of Westminster Hall as conclusive, if it were known that they were founded on evidence altogether inadmissible by the rules of those tribunals; but however this might be, it is certainly wiser to adhere to the same principles wherever practicable. It would therefore only be after great consideration and hesitation, or after being bound by an express decision of the superior Court, that I could consent to admit such an exhibit; and I reject it, the more readily, as the establishment of such a precedent in this case would be perfectly gratuitous, since the marriage is proved by a witness who was present at the ceremony: and since, in point of fact, a Scotch marriage by banns is not more valid than a less formal marriage.

One only distinction exists between this case and that of *Lolley*, viz., that here the second marriage took place in Scotland: in neither case is there any proof of collusion in resorting to Scotland; and in neither case is there any domicil in Scotland; and, as in my judgment the question of domicil might form a most important and distinguishing feature, the due effect of a Scotch **[652]** domicil on the decision of these cases would demand a very careful consideration. That, however, does not arise in the present case.

It has been urged that this second marriage was to be decided solely with reference to the lex loci contractûs: undoubtedly, questions of marriage are primâ facie to be judged of by the law of the country where they are solemnized; but I am of opinion that, before considering the second marriage, I must ascertain the capability of the parties to contract. If both the parties, being at the respective times of the first marriage and of the divorce domiciled English subjects, were by the law of England prohibited by a personal incapacity from entering into such a contract, I must apply the rule of that law. Thus in *Doe* v. *Vardill* (5 B. and C. 438) it was decided, on the statute of Merton, that a person born ante justas nuptias of parents domiciled in Scotland and subsequently intermarrying there, was under a personal disability to inherit landed property in England, though the Judges carefully abstained from giving any opinion against his legitimacy: but had his parents been domiciled in England at the time of his birth and subsequently intermarried, he would have been prevented by a personal disability from becoming legitimate by that subsequent marriage, and from deriving in Scotland the benefits to which, but for that personal disability, he would upon such marriage be entitled by the law of Scotland.(*b*)

It is useless, however, to reason from principles or analogy. I am bound by authority: for since **[653]** it now appears that neither of the parties to the first marriage were at any time bonâ fide domiciled in Scotland, no sound distinction exists between the present case and that of *Lolley*. I therefore pronounce the second marriage null and void. My judgment, however, must not be construed to go one step beyond the present case: nor in any manner to touch the case of a divorce

(*b*) See *Sheddon* v. *Patrick*, and the case of *The Strathmore Peerage*, cited, arguendo, by Tindal, 5 B. and C. 444, and *Rose* v. *Drummond*, House of Lords, 1831.

à vinculo pronounced in Scotland between parties who, though married when domiciled in England, were at the time of such divorce bonâ fide domiciled in Scotland; still less between parties who were only on a casual visit in England at the time of their marriage, but were both then and at the time of the divorce bonâ fide domiciled in Scotland.

Sentence of nullity signed.

[655] ORDER OF COURT. Hilary Term, 4th Session, 1832.

Whereas, the commencement of the Law Terms in His Majesty's Courts at Westminster has been altered by the 1st Wm. IV. c. 70: and whereas it will be convenient to the public that the business of the Courts at Doctors' Commons should continue, as heretofore, to commence at or about the same time that it commences in the Courts of Common Law:

I, the undersigned Official Principal of the Court of Arches, having taken the premises into consideration, and having conferred thereon with the Judge of the High Court of Admiralty, the Chancellor of the Diocese of London, and others, do hereby order and direct that in future the first day of each term in the Court of Arches shall be the day on which such term commences in the Courts of Common Law; and that the subsequent sessions and court days in each term shall be appointed in the same manner as they are at present appointed.

(Signed) JOHN NICHOLL.

[657] MYTTON *v.* MYTTON. Arches Court, Mich. Term, 3rd Session, 1831.—After sentence of separation by reason of gross cruelty and adultery on the part of the husband, the real estate being 6000l. a year, subject, as alleged by the husband, to large incumbrances, the mother's jointure having been 1000l., and the wife's pin-money 500l. a year, the Court allotted 1000l. a year permanent alimony, allowing the husband to deduct from that sum any payment on account of pin-money above 200l. a year—the sum agreed to be paid to the wife for the maintenance of the children.

This was a suit of separation by reason of the husband's cruelty and adultery. A libel of forty-four articles, with eight letters from the husband, had been admitted without opposition: it pleaded the marriage on the 29th of October, 1821, the birth of five children, and cohabitation until the 16th of October, 1830. The witnesses upon this libel having been examined, an allegation for the husband was admitted after debate. The answers of the wife, which negatived all the material averments, were taken upon this allegation, but no witnesses were examined upon it, nor did any counsel appear for the husband at the hearing of the cause; and on this day the Court signed the sentence of separation.

The alimony pending suit had been fixed at 300l. per annum, in addition to 500l. per annum settled as pin-money, and to 200l. promised by the husband as an allowance to his wife for the maintenance of the children, and to be computed from the return of the citation. The present question related to permanent alimony.

Lushington and Dodson for Mrs. Mytton. Mr. Mytton has voluntarily offered to allow to Mrs. Mytton 200l. a year for the maintenance of the children now, and to increase it as they grow older; but he has not paid it, nor have we any means of recovering it. Under the directions of **[658]** the Court of Chancery the children are to remain with their mother, and to be placed under guardians. His property is large, and the deductions he claims are for the most part the effect of his own follies.

Judgment—Sir John Nicholl. In this suit the sentence already pronounced has decreed separation à mensâ et toro, at the wife's prayer, on account of the husband's cruelty and adultery; and certainly it is one of the grossest cases of misconduct in both particulars that ever came under the notice of the Court. The allegation of the husband is too offensive and disgusting to detail, but on it no witnesses have been produced: the wife has in her answers negatived all the imputations attempted to be cast upon her. She therefore stands perfectly untainted by his averments.

The present question is what is the proper allowance to be made to the wife while living separate and apart from her husband. The husband by his own account has very large estates, but the answers claim very large deductions. The gross amount of the real estates is stated to be 6000l. per annum, but he claims to subtract 4350l. for incumbrances, and the interest of debts which he has incurred. It is impossible

for the wife to go into evidence to ascertain the amount of the net income; nor would the Court be disposed to allow the full deductions claimed on account of outgoings, occasioned by his own extravagance and profligacy. It would look rather to other facts, in order to judge what should be the wife's allowance. The jointure of the mother is 1000l. per annum—that was not considered too large an **[659]** allowance for his father's widow, and this unfortunate lady is in a worse situation. Again, her pin-money was fixed at 500l. per annum. A husband who has such a fortune as to give that sum as pin-money should make an ample allowance for his wife while living separately on account of his misconduct. The husband, it is stated, has voluntarily undertaken to pay to his wife 200l. a year for the maintenance of the children. That arrangement, however, it is not within the authority of this Court to enforce; but I shall allot 1000l. a year permanent alimony, allowing the husband to deduct from that sum any payments exceeding 200l. a year, which he may actually make on account of pin-money. The wife will thus have the aid of the power of this Court for the payment of the whole 1000l.; and in addition will have a collateral remedy to secure from her pin-money the payment of 200l. a year for the children.

THE OFFICE OF THE JUDGE PROMOTED BY WHISH AND WOOLLATT *v.* HESSE, Clerk. Arches Court, Mich. Term, 4th Session, 1831.—Simony, on the part of a presentee to a living, being in law a very odious offence, and the consequences of conviction thereof highly penal, the law, even if a simoniacal agreement is established, requires the strictest proof of the presentee's privity thereto before induction, or of his confirmation thereof after; so, in proof that a clerk is simoniacè promotus, a corrupt agreement must be no less conclusively shewn. In a criminal suit against a clerk for simony, and for being simoniacally promoted, the Court holding, 1st, that neither his privity to, nor confirmation of, any simoniacal contract was proved; 2dly, that no criminal contract was established, dismissed him from the suit, and condemned the promoters in costs.—Semble, that when a clerk is simoniacè promotus without his privity or subsequent confirmation, the Ecclesiastical Court cannot proceed to a sentence of deprivation in a criminal suit.—A party cannot except to a witness by contradicting answers to interrogatories which go to incidental, collateral matter, and are not relevant to the issue.—Quære, whether acts subsequent to induction in confirmation of a simoniacal agreement made without his knowledge amount to simony on the part of the presentee.

[Referred to, *Lee* v. *Flack*, [1896] P. 145.]

This was a criminal suit brought by the churchwardens of the parish of Knebworth, in the county of Hertford, against the Reverend James Legrew Hesse, the incumbent of the parish, for simony. The citation and præsertim of the articles were "more particularly for having corruptly and simoniacally procured or caused to be procured the **[660]** presentation to the rectory and parish church of Knebworth aforesaid, and for having accepted the said rectory and parish church; you being privy and consenting to a corrupt and simoniacal procurement of the same, and for having been corruptly and simoniacally presented to the rectory and parish church aforesaid."

The articles set forth:

1. "That by the laws, canons and constitutions ecclesiastical of this realm, if a clerk in holy orders be simoniacally promoted to any benefice or living ecclesiastical, he is deprivable of the same by reason of such simony, on due examination and proof thereof; and that if such clerk shall have been a party or privy to such simony, he is also thereby for ever disabled to take or accept of the same or of any other benefice or living ecclesiastical."

2. The vacancy of the living of Knebworth.

3. (Amongst other things) "That by a decree, pronounced in a cause depending in the Court of Chancery, between the Rev. M. Price, plaintiff (the late rector), and Elizabeth Barbara Bulwer Lytton (the patroness), and other defendants, the defendants, having failed to establish a modus (to wit, of 26l. per annum for lands, the property of Mrs. Lytton, and whereof the tithe was 210l. per annum), it was on the 5th of March, 1829, ordered that the said M. Price, as the rector and incumbent of Knebworth, was lawfully entitled to the full annual tithe of the lands alleged to be covered by the said modus; and that he thenceforward, and during his incumbency, did receive the full tithe of the said lands."

4. Pleaded the intention of appointing Mr. Hesse to the living.

5. "That the intention of Mrs. Bulwer Lytton **[661]** to present you (Mr. Hesse) to the rectory of Knebworth was by her desire, on the 12th of October, 1830, communicated to your father, Obadiah Hesse, by Kelly, who, at the same time, by the desire of Mrs. Lytton, informed O. Hesse that the living was to be accepted by you subject to the aforesaid alleged modus, which had been the occasion of the litigation between Mrs. Bulwer Lytton and Mr. Price, thereby meaning that you were to be presented to the said rectory by Mrs. Lytton, on condition that you would acknowledge the sum of 26l. per annum to be a lawful consideration, and that you would accept the same as a payment in full, for the tithe of the said lands, which had been, as alleged, covered by the alleged modus; and the lawful tithe of which lands was and is of the annual value of 210l., and which meaning was then and there fully understood by O. Hesse, who in reply told Kelly that he, O. Hesse, was fully aware of the circumstances relating to the alleged modus, and the failure of Mrs. Bulwer Lytton in establishing the same against Price, for that she had consulted him, O. Hesse, in the business; that Kelly then and there, in further explanation of the conditions upon which the said presentation of you was to be made, delivered to O. Hesse a schedule or statement in writing (paper (A)), containing the names of the occupiers of titheable lands in Knebworth; also the quantities and descriptions of the lands, together with the rated annual value of the tithe thereof per acre. That the schedule also contained the estimated annual value of the entire tithes of such lands, and also set forth such of the lands from which an exemption from tithe was claimed in virtue of the illegal modus, and for which same lands it was **[662]** intended and understood that the annual sum of 26l. per annum should be accepted by you in full discharge of tithe. That the statement also set forth the full estimated annual value of the tithes and glebe of the benefice, and the diminished value of the same if accepted on the condition of receiving 26l. per annum in discharge of the tithes on the lands for which the alleged modus was theretofore claimed. That O. Hesse, referring to the aforesaid offer made by Kelly, of causing you to be presented to the rectory of Knebworth, on the conditions already mentioned, and referring also to the schedule, replied, 'that of course you, or any one, would jump at such a living, upon such terms.' And O. Hesse did also at the same time request Kelly to leave with him the schedule, that he might forward the same to you. That the schedule was accordingly left by Kelly in the possession of O. Hesse, for the purpose aforesaid."

6. Exhibited the schedule, or paper (A).

7. "That on the 12th of October, 1830, Kelly did, on the part and behalf of Mrs. Lytton, inform O. Hesse, that in consideration of the intended presentation of you to the rectory of Knebworth, you would be required to lease to, or exchange with, Mrs. Lytton, certain parts of the glebe convenient for her occupation; and of which portion of the glebe the cow-pasture meadow is part. That O. Hesse did in reply to Kelly, and for you and in your name and on your part and behalf, and in consideration of the intended presentation of you to the rectory of Knebworth, undertake and agree that you would grant a lease to Mrs. Lytton of such parts of the glebe as she might require, or exchange the same with her."

8. "That the conditions of the presentation were **[663]** communicated to, and a copy of the schedule was perused by, you, J. Hesse, prior to October 16th."

9. "That on or about the 16th of October, 1830, and previous to the signing and execution of the presentation, O. Hesse, for you and in your name, and on your behalf, and by and with your privity and consent, did contract and agree with Lake, then acting in the name and on the part and behalf of Mrs. Bulwer Lytton, that you would, in consideration of being presented by her to the said rectory, demise for ninety-nine years, if you should so long live and continue rector of the said rectory, to Mrs. Lytton, her executors, &c. &c., all tithes, both great and small, within the said rectory, in consideration of an annual rent, to be computed according to the rate contained in the schedule, and in part of such rent accept the annual rent of 26l. in full of the tithe of the lands in the schedule named as being protected by such payment in the way of modus."

10. "That with your consent O. Hesse procured a form of presentation, and attended at the execution thereof on the 16th of October.'

11. Exhibited a copy of the presentation.

12. "That at the time of the execution O. Hesse, by and with your authority and in your behalf, declared to Mrs. Lytton, and for you undertook, that you would grant to her, her executors, &c., a lease of the tenor agreed upon on your behalf with Lake; and that O. Hesse, on the same occasion, being asked by Kelly for the schedule, replied that he had it not with him, but that it should be shortly returned."

13. "That O. Hesse, under your authority, pro-[664]-cured the mandate of induction; and that on the 23d of October you were inducted."

14. Exhibited copies of the mandate and certificate of induction.

15. "That on the 25th of October, you, O. Hesse, G. B. Hesse, and Kelly being at the parsonage, O. Hesse, in your presence, and with your consent, delivered the keys of the house to Kelly, and pointed out the improvements he should make."

16. "That on the 25th of October, you, O. Hesse, Mrs. Lytton and Kelly being together, O. Hesse, in your hearing, and with your authority, proposed to arrange with Kelly as to a lease of glebe to Mrs. Lytton, and letting the rest; that he said he had arranged with a tenant as to the parts Mrs. Lytton did not require, and recommended O. Hesse to settle with Lake as to the leases of the glebe and tithes; that in your hearing O. Hesse replied 'that you must not be too precipitate in granting a lease of the tithes, but that in the mean time every thing should be done to Mrs. Lytton's satisfaction.'"

17. "That on the 25th of October you, accompanied by O. Hesse (in part performance of the agreement in consideration whereof you were presented), went to two cottages belonging to the glebe, and gave notice to the tenants immediately to quit, and give the keys to Kelly, as the agent to Mrs. Lytton, who was then present; that from thence you went to the cow-pasture meadow, when, in your hearing, O. Hesse said to Kelly, 'This is the field Mrs. Lytton wants:' that you, fearing such simoniacal agreement should be overheard, pointed to the cottages and to O. Hesse, and said, 'Hush, governor,' and Kelly [665] then, on behalf of Mrs. Lytton, in your hearing, said, 'The cow-pasture was a part of the glebe of which Mrs. Lytton required a lease.'"

18. "That with your consent, and in anticipation of the lease, Kelly, on the 28th of October, took possession of the said pasture and underlet it."

19. "That on the 27th of October O. Hesse, acting for you, addressed Kelly, at Lake's chambers, thus, 'I know what you are come about, it is the lease,' and that O. Hesse then, by your authority, gave Lake verbal instructions to draw a lease of the Knebworth tithes to Mrs. Lytton, her executors, &c."

20. "That since the agreements for such lease, woods of Mrs. Lytton liable to tithe, but heretofore claimed to be exempt, have been cut, and no tithe demanded nor received."

21. "That in the premises O. Hesse has acted as your agent, and under your authority."

22. "That by reason of the premises you have corruptly and simoniacally procured or accepted the rectory of Knebworth, and that the same hath, with your privity and consent, been corruptly and simoniacally procured or obtained for you and accepted by you, and that you have been corruptly and simoniacally presented to the said rectory, and that you ought to be canonically corrected and punished according to the exigency of the law." And the articles concluded by praying that the defendant should be so punished and corrected.

An allegation, on the part of the defendant, first, generally denied and contradicted the charges; and then pleaded: That on the 12th of October, 1830, Kelly called upon O. Hesse, who generally resided in Somersetshire, but was then [666] in London, at the chambers of his son, G. B. Hesse, a conveyancer residing in the Temple. That Kelly then, in the presence of G. B. Hesse, delivered to O. Hesse a sealed letter from Mrs. Lytton, dated the 9th October, 1830, and addressed to O. Hesse, and inclosing an unsealed letter from Mrs. Lytton to Mrs. Hesse, the wife of O. Hesse. These letters related to the presentation. That O. Hesse, having perused both letters, expressed himself in terms of acknowledgment and obligation to Mrs. Lytton for the preferment she proposed to bestow on his son: that during this interview Kelly stated that he had, as near as he was able, ascertained the value of the living, and then delivered to O. Hesse a paper, which Kelly declared contained the quantity and description of titheable lands in the parish, and the annual value of the entire tithes. That upon the paper being so delivered to O. Hesse he, in a slight and cursory manner, glanced over the same; that the paper was left by Kelly voluntarily, and of

his own accord, in the possession of O. Hesse, and not at his request. That the paper remained in the possession of O. Hesse until the forenoon of the 16th of October, when, in pursuance of the directions of Mrs. Lytton, he delivered it to Lake, her solicitor. That during the time the paper remained in the possession of O. Hesse he did not peruse the same, nor transcribe, nor make, nor cause to be transcribed or made, a copy of the same, nor transmit, or cause to be transmitted, either the original paper, or a copy thereof; nor in any manner communicate, or cause to be communicated, the contents or substance thereof, to the Rev. J. L. Hesse; and that until the articles given in this cause were perused by the Rev. J. L. Hesse, he never saw **[667]** the original exhibit marked A, nor any copy or transcript thereof: that during the aforesaid interview, and at a time when O. Hesse was reading to himself a part of one of the letters, Kelly observed, "There are moduses to which the living is subject, of course Mrs. Lytton gives the living subject to them;" and added, "She has had a great deal of trouble about them;" that O. Hesse (who at that time knew nothing of the said modus or moduses, and was then engaged in reading one of the letters) did not in any manner reply thereto, or make any observation thereon; but the same was heard by G. Hesse, who remarked, "That he was sure his brother would not be disposed to give Mrs. Lytton any trouble or vexation." That O. Hesse, upon being informed by Kelly that Mrs. Lytton would be in town at twelve o'clock on the 14th of October, requested Kelly to present his compliments, and inform her that he would at that time call upon her: that Kelly thereupon took his leave, having on that occasion been not more than ten minutes with O. Hesse and G. Hesse. That this interview on the 12th of October was the only interview O. Hesse had with Kelly on the subject of the presentation; and that upon that occasion no stipulation was made, or even suggested, either by Kelly or O. Hesse, nor any undertaking or agreement entered upon, engaged for, or contemplated by O. Hesse, for leasing to or exchanging with Mrs. Lytton any piece of land; and that no allusion was made to such a lease or exchange; and that nothing passed between Kelly and O. Hesse, either directly or indirectly, in reference to such a matter; and that neither O. nor G. Hesse, who was present during the whole of the interview, was at the time, or upon the **[668]** occasion aforesaid, informed of, or acquainted with, the failure of Mrs. Lytton to establish the modus or moduses. That Mrs. Lytton had not at any time consulted O. Hesse upon any dispute or litigation between her and the Rev. Mr. Price. That until the articles in this cause were given in, O. Hesse had not received and was not in possession of any information that a decree or order touching the said moduses had been made. That no conversation other than what is hereinbefore set forth passed on the said occasion between O. Hesse and Kelly in reference to the living, or the presentation thereto, or the tithes thereof, or the modus or moduses alleged to belong to the rectory.

3. Exhibited the letters A and B.(*a*)

[669] 4. That on the 16th of October, when O. Hesse, by Mrs. Lytton's direction, delivered to Lake the paper left by Kelly, Lake said, "The moduses are, I have no doubt, perfectly good: the quantity of glebe shews them to be so:" and added, "Richardson, a former agent of Mrs. Lytton's, had persuaded her to ask a lease of all the tithes; but this (Lake said) would bring all engaged in such a lease to a state of law in less than twelvemonths:" that O. Hesse replied, "Such a lease might be attended with difficulties, that he had no power to accede to it;" and added, "It must

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(*a*) The letters were in the terms following:—

(A)

"My dear Sir,—I have inclosed you a letter, open, to my esteemed friend, Mrs. Hesse, which I hope you will approve. This letter I should have sent a few days ago, but have been every day expecting to come to town: but finding that impracticable before the time you think of leaving, I will no longer defer making the communication expressed in Mrs. Hesse's letter, in writing. Any particulars you may wish to know, relative to it, the bearer, my steward, can inform you.

"Oct. 9th, 1830."

(B)

"My dear Mrs. Hesse,—That I have ever been grateful for the sentiments of kindness and affection I have experienced from you, and that I have ever been desirous of an opportunity of shewing how sensibly I have felt the same, I am rejoiced

indeed be understood that I can undertake nothing of the sort for my son," to which Lake answered, "I told Mrs. Lytton so when she mentioned what Richardson had advised."

5. That on the 14th of October O. Hesse had an interview with Mrs. Lytton, when she fixed the 16th to execute the presentation: that after it was executed, Kelly said to O. Hesse, "It would be a convenience to Mrs. Lytton to rent a field of the glebe to let with a house of her own; and also that she wished to get rid of two old women, tenants of cottages belonging to the rectory, as they were offensive to her:" that O. Hesse replied that he had no doubt his son would do what he could to accommodate Mrs. Lytton.

6. That on the 12th of October, 1830, the defendant was rector of Rowbarrow, Somersetshire; and was then, and had been for several preceding **[670]** weeks, resident at Burrington, close adjoining thereto: that Mrs. Hesse received on the 13th, at Burrington, Mrs. Lytton's letter (B); and that she immediately communicated it to the Rev. J. L. Hesse, who previously thereto had no knowledge whatever respecting the presentation, and did not communicate, either directly or indirectly, with any person as to the same till the 19th, when, in London, he received the presentation.

7. That on the 25th, while looking at the glebe, the Rev. J. L. Hesse, being informed by Kelly that the then tenant wished to continue the arable, replied that he would consent for that year; and then expressing his intention of holding himself all the pasture, requested Kelly, as his agent, to make the most of it till the pastures were shut up for hay; and that nothing else then passed in reference to the same.

8. That on the 25th of October Mrs. Lytton informed the Rev. J. L. Hesse and G. B. Hesse that two of the rector's cottagers were infamous women, and had perjured themselves against her, and on that account she wished them dismissed: and on the same day the Rev. J. L. Hesse and O. Hesse went to the cottages, and finding the said women very old, deaf, and infirm, and that they had been tenants of the cottages for many years, wished to impress upon Kelly (who was with them) the injustice of turning them out; that while O. Hesse was speaking on the subject in an elevated voice the Rev. J. L. Hesse said, "Hush, governor:" and in reference to the continued solicitations of Kelly, added, "I have a conscience:" and that, save that the Rev. J. L. Hesse informed the women that he should want the cottages for his own occupation while the parsonage was **[671]** under repair, he did not then, nor at any other time, give them notice to quit; that without his knowledge and contrary to his intention they were in his absence turned out.

9. That on the 27th, Lake, at his chambers, having informed O. Hesse "that Kelly had come to ask for a lease of the tithes for Mrs. Lytton," O. Hesse, greatly surprised, exclaimed, "A lease of the tithes!" that Kelly then entered the room, and upon his expressing Mrs. Lytton's great anxiety to have the lease, and that to keep her in good humour a lease should, subject to future consideration, be drawn out, O. Hesse, for the purpose of preventing any untimely disagreement with her, finally acquiesced that a draft should be prepared, and stated, "That every thing that was for the comfort and convenience of Mrs. Lytton that was proper would be done, but that was all he could do or say:" that no further or other communication or interview passed in which O. Hesse was a party in respect to the lease until the 4th of November, when Lake forwarded to him the draft, which the Rev. J. L. Hesse refused to execute. That at no time either before or after the execution of the presentation was O. Hesse authorized by the Rev. J. L. Hesse to act as his agent.

I have now a proof in my power to give, and which I hope you will consider as a testimony of the respect I have long entertained for your character, while at the same time, I trust I shall be gratifying myself by the acquisition of having, as a near neighbour, a friend I so truly regard. Mr. Price, the rector of Knebworth, is lately dead, by which circumstance the presentation of that living devolves on me. Need I say, after this, how happy it will make me if it should meet your views and wishes respecting your son, Mr. James Hesse, whose amiable character and sincere attention to the sacred duties of his profession, will, I flatter myself, prove a happy contrast to the conduct which both myself and the parish have had to lament of the late incumbent. And believe me, with every good wish to yourself and family, my dear Mrs. Hesse, &c.

"Oct. 9th, 1830."

10. Pleaded payment of rent on 15th of May, 1831, to the Rev. J. L. Hesse for all the pasture glebe; his acts of ownership therein, and payment by him of poor rate for the same.

11. Exhibited a statement of rent signed on the part of the tenant by his son, and a receipt for poor rates.

12. Trespass on the 1st of June, 1831, by Kelly, **[672]** as Mrs. Lytton's agent, in the cow-pasture; action, and service of notice.

13. That the Rev. J. L. Hesse's first communication with Mrs. Lytton, or any person on her behalf, was at Knebworth on the 23d of October; and that he had no interview with her or Kelly, unless in the presence of O. Hesse and G. B. Hesse, who heard every conversation that passed.

14. That the suit was the suit of Mrs. Lytton, and not of the churchwardens, her tenants.

Upon the publication of the evidence on these pleas an allegation exceptive to the testimony of O. Hesse was given in by the promoters; it pleaded in exception to his answers on the 12th, 21st, 30th, 22d, 23d, 24th interrogatories; to his deposition on the 9th article and 19th and 20th interrogatories.

"I swear that I did not previous to nor at the time of my son's induction to Knebworth declare that it was my intention to reside with my wife at Knebworth rectory: I did not point out the alterations I intended to make or cause to be made in the rectory house and grounds: I pointed out such alterations as I thought it required."

"That on the 25th of October O. Hesse informed Briggs at Knebworth that he (O. Hesse) intended to alter the rectory house by changing the back into a front, asked Briggs' advice as to laying a ploughed field at the back of the rectory down in grass, the probable expence thereof, and as to the proper season; and said it was his intention to remove a hedge which divided the field from the garden."

[673] "I did on the 25th of October say to the interrogate, Thompson, that he held more offices than he ought; and that it was incompatible to hold the offices of churchwarden, parish clerk, and constable; but I did not make use of such terms as 'Aye, I shall have all these things altered; I will have no person holding more offices than one, and I must have this set right in vestry:' I used no words to that effect."

"That on the 25th [in the presence of the Rev. J. Hesse, Kelly, and Briggs] O. Hesse said to Thompson, 'It is very improper to have you holding so many offices: I shall have all these things corrected: no person shall hold more offices than one in this parish, and I shall speak to the bishop's secretary on the subject.'"

"I did not at any time authorize Kelly to make a new road across Knebworth Park to the church; and I certainly did not say to Kelly, 'Let it be done by all means, and say nothing about it, it will be an acquisition to the church:' I said nothing to Kelly to that effect. On the day on which I went with Kelly to see the intended new church-path my sons were within three or four yards of us; but I did not give directions to have that path made, for I referred Kelly to my son James, and turned round to my son to answer for himself."

"That immediately after O. Hesse had addressed himself to Thompson, as in the next preceding article, he, O. Hesse, the Rev. J. L. Hesse, Kelly, Thompson, and Briggs were walking towards the rectory; Kelly said to Rev. J. Hesse, 'Now, as Briggs is here, who is to make the new road to the church, we will point it out and hear your opinion of it;' to which Rev. J. L. Hesse **[674]** made no reply, but went on to the rectory. That O. Hesse then said to Kelly, 'Let us go and look at it;' and that while looking at it O. Hesse said, 'Let it be done by all means, and say nothing about it; it will be much better for the church:' that G. B. Hesse was not present nor in sight on these occasions."

"I did in October, after my son's induction, apply to the former rector's son upon the subject of dilapidations: my son, who was leaving town, asked me to write a note. I have no recollection of the name of Jackson, nor that I applied to any such person on the subject of the furniture and fixtures belonging to the former rector. A Mr. Jackson may have written me a letter and I may have returned him an answer, but I have no recollection of the circumstance, or of having refused to correspond with any such person on the ground that there was no legal personal representative of the late rector." "I did not apply to Kelly, but in October, or thereabouts, Kelly wrote to me to inform me that some person had been to the rectory about the fixtures and that he

had refused to part with the keys, and I answered that he had done very right: I forget the terms of the notes, but I gave no order in the matter: I have no recollection of having made any complaint that my hands were tied, and that I could not proceed in adjusting the amount due to my son, because I could not obtain an answer from Mr. Price."

Pleaded and exhibited two letters (1 and 2).(*a*)[1]

[675] "I did not authorize Kelly to purchase a stack of hay standing on the rectory premises for the use of my son, the producent, nor for my own use: I never authorized him to do any thing of the kind. Mr. Sherrington wrote to me to say that Kelly had told him I should want the hay: my answer was, that I had supposed I should pay my son a visit at Knebworth and that I might want the hay, but things had so turned out that I did not want it, that I had never given Kelly any authority on the subject, but if there was any misunderstanding about it, I would give Sherrington 2l. sooner than he should lose through it: I **[676]** told him he might sell the hay or do what he liked with it. I never desired to know what quantity of hay there was, that I recollect; but what I said was in writing, and it may be produced to shew what I did say. I do not remember the date of my letter to Sherrington, and I have no recollection of having said in it that as there was no personal representative of the late rector of Knebworth, the hay could not be legally sold, but I may have said so."

The above answer was contradicted at length and with minuteness, detailing interviews, conversations, and negotiations at Knebworth on the 23rd of October between O. Hesse, Kelly, and Sherrington, in respect to the stack of hay, and exhibited two letters (3 and 4).(*a*)[2]

"I looked upon the preparation of the lease as a measure merely to pacify Mrs.

(*a*)[1] No. 1.

"Mr. Hesse's compliments to Mr. Kelly, begs to acquaint him that he has searched the office in Doctors' Commons, where as yet Mr. Price's will has not been brought. . . . This prevents Mr. H. doing any thing about the dilapidations, though he has consulted Mr. Harrison, the surveyor, . . . who will be in readiness to come the moment Mr. H. can find out from the Commons the representative of Mr. Price. Mr. H. begs Mr. K. to make his best compliments to Mrs. B. Lytton.

"5 Fig Tree Court, Temple, 29th Oct. 1830."

No. 2.

"Mr. Hesse presents his compliments to Mr. Kelly, returns his thanks for Mr. Jackson's letter, but according to what he understands, few if any of the articles mentioned are fixtures which Mr. Price can sell or take away from the rectory; but Mr. K. will be surprised to hear, that after writing to Mr. P. upon the subject of the dilapidations, and waiting a fortnight, Mr. P. has not condescended to give any answer, nor has he proved a will or taken out administration, which entirely ties up Mr. H.'s hands. Mr. H. has therefore written to Mr. Jackson, that whenever a personal representative appears, he will be ready to enter into the question mentioned in Mr. J.'s letter, as well as any other, so as to come to an amicable and final arrangement, but that nothing must be removed from the premises. Mr. H. will therefore be obliged to Mr. K. not to give the key of the house to any one. Mr. H. begs Mr. K. to present his respectful compliments to Mrs. B. Lytton, and tell her how ill Mr. P. is behaving. I am not sure if there are not some potatoes in the rectory garden: if there are, may I beg the favour of you to give them to the most deserving of the poor who will dig them up: it would be a pity to let them be wasted.

"Temple, 11th November. "L. H."

(*a*)[2] No. 3.

"Mr. Hesse has received Mr. Sherrington's letter, and begs to say that things have turned out so as to make it unlikely he will want the hay; if therefore he can sell it to any body else, Mr. H. will be much obliged to him. Mr. H. does not know from Mr. Sherrington's letter the quantity of hay, or how it is reckoned.

"Temple, 12th January, 1831."

No. 4.

"5 Fig Tree Court, 22d January, 1831.

"Mr. Hesse is very sorry for any misunderstanding about the hay, but he never authorized Mr. Kelly to give 28l. or any other sum for it, and when he came to understand that there was no representative of Mr. Price, and that therefore no

Lytton at the [677] time, and not as a measure which was ever to be carried into effect." "When I informed my son, who was with me at Burrington, of the draft lease, he refused to execute it: he said he would never put his hand to it, nor to any thing."

"I do not imagine that Mr. Lake expected that such a lease would be executed: from what passed between him and me I do not believe that he expected that such a lease would be executed." "This skeleton of a lease was first submitted to the producent for his approval on or about the 26th of November, and he refused at once, the moment he had read it, to put his hand to any thing of the kind: and soon after (perhaps a week) I wrote to Lake to tell him that my son would not put his hand to the lease." "I am not sure that I went on to say that it could not be expected that my son should stir in the business. If I did say so, I meant that he could not be expected to execute the lease, for it was in the same letter (and the letter, if produced, will speak for itself) in which I communicated to Lake my son's refusal to execute the lease."

That O. Hesse never wrote to or informed Lake that the producent had refused to sign a lease of the purport or effect of the draft lease: and recited a letter from Lake to O. Hesse, and exhibited two letters (Nos. 5 and 6) from O. Hesse to Lake.(*a*)

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person could sell the hay, he gave up the idea of purchasing it; and Mr. Hesse will not authorize Mr. Sherrington to sell it on his account, as it never was his, and Mr. Sherrington himself has no title to it, nor the auctioneer to sell it: rather than give Mr. Sherrington any trouble unnecessarily about it, Mr. H. will give him 2l., as there has been a misunderstanding about it, but he cannot admit that he ever purchased the hay."

(*a*) No. 5.

"Burrington, 4th Dec. 1830.

"Dear Sir,"—[After acknowledging the receipt of his letter of the 24th ult. and stating he was sure his son would do any thing for Mrs. Lytton's "convenience or comfort that was not against his own character and against propriety;"] "my son has taken most precise and strong oaths, which sit heavy upon him, and make him so cautious of moving that I fear he will not be prevailed upon to put his hand to any thing: he has been cautioned, has taken advice, and will take much more upon the subject. I have well considered the subject, and I am quite satisfied that in no case would it be proper to execute the deed you have submitted. . . . Nothing must be done that would bear the semblance or colour of shift and contrivance, as the law expresses it, to make it of advantage to the patron. Though the penalty is more fatal to the one party, it is equally bearing upon both. . . . I am perfectly aware of all that has passed, and it makes the matter more difficult, with the best intentions in the world, but precipitancy is what on all sides must be prevented. My son has neither seen your letter nor the deed, nor has he seen or known, nor will he ever, as I thoroughly believe, hear of the contents of this letter to you.

"When I last saw you and Mr. Kelly, it was promised that the terriers should be sent. I believe that they belong to the incumbent, and as my son cannot stir without the knowledge they contain, I shall be greatly obliged to you for them.—Dear sir, yours very faithfully, "L. HESSE."

In a postscript he referred to certain reports (then current in the neighbourhood of Burrington) that though his son had got Knebworth it was only nominal, and added, "These rumours so much alarm my son and all his family, that it cannot be expected he will stir in the business."

"December 8.

"Dear Sir,—I cannot help expressing great surprise at the contents of your letter of the 4th instant, after every thing having been settled and agreed upon relative to the lease of the tithes, except the amount of rent, which I understood you were to have ascertained ere this with Kelly's assistance: I therefore request the return of the draft lease, with your observations thereon. The rumours alluded to in your letter are in my opinion to be altogether disregarded."

No. 6.

"Burrington, 12 Dec. 1830.

"Dear Sir,—I beg to say, in answer to your letter of the 8th, that the second time I saw you, when I produced the book with one of the oaths in it, I told you no promise

[678] Lushington and Haggard in opposition to the exceptive allegation. The question is whether the exceptions are [679] pertinent to the issue. We fully admit the importance of the witness excepted to; but almost the whole of this allegation has not the slightest reference to the issue which the Court is about to try. We deny that the matter is even collateral, because, were it collateral, that would be to admit in some degree that it was connected with the cause. The principles on which exceptive allegations are usually admitted are well known. 1st. The alleged contradiction must import wilful and corrupt perjury. 2dly. The matters alleged must be such as neither have been nor could have been pleaded before. 3dly. They must be important and have a bearing on the issue in the cause. The rule at common law is the same in this latter respect, even though the witness to contradict is producible at the time (*Spencely* v. *De Willott*, 7 East, 108). All these ob-[680]-jections apply to different parts of this exceptive allegation. Besides, the contradictions are in themselves trifling, and, if proved, could not affect the credit of the witness.

The King's advocate and Addams contrà. The witness has given a colouring to his evidence: the question is whether, looking to his evidence, this allegation is pertinent? The main issue is whether there was a corrupt presentation through the agency of O. Hesse: whatever, then, tends to connect him as agent is pertinent. He must have seen that the drift of the interrogatories was to affirm his agency: his own acts and letters are in contradiction to his evidence. The question will ultimately depend on the relative credit of the witnesses on either side: if the contents of the exceptive allegation are sufficient to detract from this witness, the allegation must be received. Some of the exceptions certainly are not of the most stringent character; but much depends on the accuracy of the witness' memory, and, so far at least, the exceptive allegation is relevant, because it shews great infirmity of memory on his part.

Judgment—Sir John Nicholl [after stating the general history of the parties, the substance of the articles, and of the defensive allegation]. What is the true issue in the cause? The suit is for simony, or simoniacal promotion: it is a criminal suit, to be strictly proceeded in. The issue is whether the defendant, either by himself or by [681] any other person, made any contract or promise to procure the presentation. If any promise were made with his privity, he would be guilty of simony; if any promise were made without his privity, he would be simoniacally promoted. The private intention of the patroness before the presentation, to get this lease after, would not, unaccompanied by any antecedent promise, either by or on behalf of the presentee, affect the validity of his possession. The true issue is, what was done before the presentation; for unless some simoniacal promise at that time is proved, no conviction can take place in this suit. What passed after presentation, institution, and induction, may tend to shew that there was a previous corrupt bargain; but, in order to have weight, these subsequent facts must bear that inference strongly. The point now attempted to be raised is whether the father of the defendant has answered truly such questions as were properly put to him; for I apprehend that if irrelevant questions have been put, the party cannot go into contradictions to such evidence, in order to discredit this single witness. It is true he is a material witness; this, however, must be remembered, that neither the defendant has been afraid to subject the father to, nor has the father shrunk from undergoing, a searching cross-examination.

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whatever could be made by me for my son, to which you answered, 'certainly not, but that I could represent to him:' and I wish this to be kept in remembrance. When I saw you last, I admit a lease was to be drawn for consideration, and that I said 'every thing that was for Mrs. Bulwer's comfort and convenience that was proper would be done.' This was all I meant to do, and all I did do, even if it had been for myself; but for another, and that other never having heard one syllable of the subject, it was all I could do; and be it remembered that my son is not in leading-strings and will think for himself: but as yet I have not made up my mind that the thing proposed is proper to be done, and I know one thing which passed at our last meeting which was a condemnation of precipitancy in a case like the delicate one this is. It will be necessary for me to have an account shewing the name of each farm or property on which tithes are paid, name of the landlord, name of the tenant, computed number of acres, rent, tithes paid for the last three years, before I can proceed further in the business, with a proposal of the sum at which Mrs. Bulwer wishes to have the rent of the tithes settled.—I am yours obediently, "L. HESSE."

The 9th, 10th, and 11th articles, of which I will first dispose, are directed to prove that Mr. O. Hesse has deposed untruly in stating that the lease was not intended, and that Mr. Lake did not expect it to take effect, but that it was only prepared in order to quiet Mrs. Lytton. A statement, however, to the effect of Mr. Hesse's evidence had [682] appeared in the defensive allegation, and this contradiction, therefore, if important, should have been made before publication. Besides, exclusive of the letters, how is it possible to prove what were Mr. Hesse's intentions, or what Mr. Lake expected? The letters are not admissible in exception to the witness' credit, but may be brought in as the best evidence of the facts to which the cross-examination refers.

The first eight articles relate to the conduct of the father after the presentation and induction, which does not bear upon the issue: the facts, too, are perfectly equivocal. Suppose the father had admitted all of them as pleaded; they would not tend to shew that a simoniacal contract had been entered into on the part of the father or on the part of the son. The interrogatories go to collateral, incidental, and equivocal matter. The rule is, that you cannot cross-examine to matter not bearing on the issue, and then contradict it by other evidence in order to discredit the witness (*Spencely* v. *De Willott*, 7 East, 108): nor, if a witness answers such irrelevant question before it is disallowed or withdrawn, can evidence afterwards be admitted to contradict his testimony on the collateral matter.(*b*) "In the application of this rule of cross-examination," says Mr. Phillipps, "the principal thing to be considered will be, whether the question is irrelevant to the points in issue between the parties." Thus, "to inquire of a witness on cross-examination whether he had not attempted to dissuade another witness from being present at the trial, has been held to be so [683] far immaterial to the issue, that if the witness answer in the negative, evidence to contradict him would not be admissible" (1 Phillipps on Evid. 259. *Harris* v. *Tippet*, 2 Camp. 637).

It is a loose and dangerous practice to introduce masses of interrogatories not relevant to the point at issue. The Court cannot stop the practice in any individual case, for it does not see the interrogatories till after the evidence has been taken; but it can prevent attempts to discredit a witness by means of exceptive allegations contradicting answers to such irrelevant questions. If this exceptive allegation were admitted, six or seven new issues would be introduced, and this in a criminal suit. I am bound in justice to reject this allegation; but if the parties desire it, they are entitled to bring in all the letters referred to in the 9th, 10th, and 11th articles; the witness having in his evidence referred to their contents.

Allegation rejected.

By-Day.—The letters were brought in, and the cause came on for argument on the next session.

The King's advocate and Addams for the promoters. It depends on the credit of Kelly and Lake on the one side, and of Obadiah and George Hesse on the other, whether it is established that O. Hesse, the father of the defendant, agreed, previous to the presentation, to accept the living, subject to the modus and lease of the tithes: it therefore is a question of credit, and subsequent acts are explanatory of the previous understand-[684]-ing. Though we are not prepared to say that the privity of the son is made out, yet on proof of a simoniacal contract the Court must pronounce that the defendant has been simoniacally promoted, and that the presentation is void. The proceedings in their present form are regular; for since the passing of the 31 Eliz. c. 6, the criminal jurisdiction of the Ecclesiastical Court is alone preserved by the statute. Watson (Clergyman's Law, p. 46), after reciting sec. 9 of the statute, says, "Therefore the Ecclesiastical Court may proceed against a simonist, pro salute animæ, and deprive him for that cause (*Smith* v. *Shelbourn*, Cro. Eliz. 685), though he was not privy to the contract, because there be not any accessories in simony." *Baker* v. *Rogers*, Cro. Eliz. 789. The st. 1 W. and M. c. 16 speaks of a person simoniacally promoted being convicted of such an offence in an Ecclesiastical Court.

Per Curiam. Does that hold, whether the incumbent was privy or not? As it is not contended that privity is in this case established, what is the incumbent's offence? The living may be void, but there is no reason why the innocent presentee should be punished. The Crown, in order to present to a void living, requires no declaratory sentence. How does it appear that before the statute of Eliz. the Ecclesiastical Court

(*b*) *Harris* v. *Tippet*, 2 Camp. 638. *Rex* v. *Watson*, 2 Starkie's Cases, 151, et seq.

could proceed criminally against a party simoniacè promotus? It may not, however, be necessary to determine the point of law, as possibly there may be no proof of a simoniacal contract, even without the defendant's privity.

[685] Lushington and Haggard contrà. Our absolute proposition is that an incumbent cannot be prosecuted by articles by reason of being simoniacally promoted. A proceeding by articles is a criminal suit: the sentence prayed is a punishment on the individual, though coincident with the protection of the public interest by preventing the repetition of the offence. The proceeding is for "his soul's health and the lawful correction of his manners;" and the prayer is, "that he ought to be canonically corrected and punished." Simoniacal promotion, however, is ex vi termini a disavowal of guilt in the incumbent; a transaction which precludes the possibility of guilt on his part; for it denotes a corrupt transaction in which the incumbent is not concurrent, and of which he had no knowledge, and is a term used in direct opposition to simoniacus. It is contrary to every principle of justice to proceed criminally against a man when he is innocent of all crime.

But the case is not without its remedy: there is a power vested in the Crown. In the case of the living of Hilgay, in Norfolk, a simoniacè promotus was, a few years since, ousted on a quare impedit brought on behalf of a person subsequently presented by the Crown. Perhaps the question might be raised here by the Crown, or, possibly, even by a churchwarden praying a declaratory sentence. No instance of such a proceeding as the present can at any time be found. Even where absolute simony is charged, the jurisdiction is almost obsolete. An authority from Watson has been cited; but the reason there given, "that there are no accessories in simony," does not justify the conclusion; it cannot make [686] an innocent man a principal, it only makes all who are guilty principals. The writer, Mr. Place, was not a civilian, and very possibly confounded the course of proceeding.

Per Curiam. In *Baker* v. *Rogers*, one of the cases cited in Watson, the party was found a simonist. How can there be accessories in simony? If the presentee is cognizant of the simony when presented, or subsequently does any act in furtherance of the simoniacal contract, is he not a principal? If he be not cognizant when presented, nor subsequently adopts the contract, can he be an accessory? Suppose a previous contract, but without the previous knowledge of the presentee; suppose after induction he is informed of and executes that contract, would not that be simony per se?

Argument resumed.

That, we apprehend, would depend on what was done after the induction: but in the absence of all credible evidence to shew that, if any agreement was at any time made, the defendant ever adopted, ratified, or acted upon it, he clearly cannot be considered as a principal, nor indeed as an accessory; for Blackstone (vol. iv. pp. 35, 6, 7) speaks of accessories as persons who being cognizant of the offence do something in furtherance of it: and in East's P. C. p. 35, tit. "Simony," there is nothing to induce a belief that simony is, in this respect, distinguished from other offences. It is therefore utterly impossible to make the defendant, either as principal or accessory, liable to penalties or to ecclesiastical censures. If this objection is sound, then it is fatal to the whole suit.

[687] As to the proof of the charge. Kelly is in fact the only witness, yet, in Mrs. Lytton's scheme for obtaining a corrupt advantage from this presentation, Kelly was an accomplice, and has been guilty of something like an attempt at subornation of perjury. If he had induced the defendant to sign the contract he would have induced him to commit perjury.(*a*) To what credit, then, is Kelly entitled? His moral guilt is as great as if the contract had been signed and sealed. Conviction of subornation of perjury, or of other offences which involve the charge of falsehood and affect the public administration of justice, renders a witness incompetent. 1 Phillipps on Evid. 27.

The King's advocate and Addams in reply. The legal objection is, at the least, taken at an inconvenient time. The law was set forth in our first article: the objection should have been taken at the admission of the articles.

Lushington. We were not bound to take the objection at an earlier period: it is often advisable for a defendant, both in a criminal and a civil suit, to allow the other party to take his own course. Even after a conviction at common law a prisoner

(*a*) See canon 40, cited 4 Burn, Ecc. Law, tit. Simony.

may offer any exceptions to the indictment in arrest of judgment, and if the objection is valid, the whole proceeding is set aside. 4 Bl. Com. 375.

Continuation of reply. The defendant in his allegation has pro tanto admitted the law to be as we have laid it, because [688] in answer to our first article he does not allege that if simoniacally promoted he is not deprivable under this form of proceeding, but that, in fact, he has not been simoniacally promoted.

It is not denied that before the statute the Court might proceed to deprive either criminally or civilly. The statute reserves the criminal jurisdiction. It has been acted upon in *Dobie* v. *Masters*, 3 Phill. 171; and Oughton, t. 4, s. 9, says a party may be proceeded against either criminally or civilly: but no instance is mentioned of a suit in a civil form. In *Baker* v. *Rogers*, Cro. Eliz. 788, there was no privity. The proceedings, as stated in Watson, were pro salute animæ, though the party was simoniacè promotus: and the doctrine in Watson may be true, though the reason assigned be incorrect. Gibson, p. 801, says that by the civil and canon law simoniacè promotus may be deprived, though not (as simoniacus) disabled to take another benefice: and that under the statute he is not disabled from being presented again to the same benefice.(*a*)[1] But he speaks of the ancient ecclesiastical laws against simony and of the powers of the Spiritual Court as remaining entire notwithstanding the statute. Degge (p. 50), and all the authorities cited by him, are in accordance with the statute, treating the clerk as guilty of an offence. In 12 Rep. p. 101, Lord Coke says, "The law intendeth to inflict punishment upon the patron and upon the incumbent, although he never knew of the corrupt contract." The statute 1 W. and M. c. 16, which also recognizes the ecclesias-[689]-tical jurisdiction, speaks of simony as a "crime," "an offence," and the parties as "guilty of a crime."

Per Curiam. It speaks of the joint act of the patron and incumbent as a crime; but does it speak of a simoniacè promotus as a criminal or an offender?

Argument resumed.

The oath taken at the time of institution necessarily calls for caution; and the absence of caution in neglecting to make inquiry under circumstances like the present constitutes an offence. Even not resigning is a crime, as soon as the presentee is informed or suspects that there has been a simoniacal agreement.

Per Curiam. The oath does not require the incumbent to resign.

Argument resumed.

This, like many other criminal proceedings in the Ecclesiastical Court, is only criminal in form. The suit in *Bliss* v. *Woods* (supra, 486) was substantially a civil proceeding; and the Court in that case considered the words "for the soul's health and the lawful correction of his manners" as mere form.

Hilary Term, 1st Session.—*Judgment—Sir John Nicholl.* This is a criminal suit brought by the churchwardens of Knebworth against the incumbent of that parish for simony.

The case having been argued at the latter end of [690] last term, a considerable interval has since elapsed; the suit is of an unusual nature; the Court is not assisted by precedents in the adjudication of it; a question of great importance, at least to the character and interests of the defendant, is involved: all these circumstances impose on the Court the duty of stating its opinion more fully than is its ordinary practice.

In the citation, and also in the præsertim of the articles, the words "for having been corruptly and simoniacally presented" are thrown in,(*a*)[2] but apparently rather as completing the averment of "being privy to a corrupt and simoniacal procurement" than as a distinct and substantive charge; so that it is hardly discoverable from the præsertim that the party proceeded against is accused of being guilty of two separate offences, viz., of simony and of being simoniacally presented without his privity and knowledge. That point will require further consideration in the course of my judgment.

The articles allege a variety of facts, and throughout aver the defendant's privity. It will be necessary to state the leading and most important articles. [The Court

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(*a*)[1] See the citation and præsertim, supra, 659.

(*a*)[2] In *Booth* v. *Potter*, Cro. Jac. 533, it is holden that the party so simoniacally promoted could never be presented to the same benefice again. So per Dodderidge and Cook in *Rex* v. *Bp. of Norwich*, 1 Roll. Rep. 237. S. C. Cro. Jac. 385, where the dictum is omitted.

here read the substance of the first nine articles, vide supra, p. 660—and proceeded.] That is what is stated to have passed on the 12th and 16th of October. The articles then detail subsequent circumstances not immediately connected with the charge of simony, such as the preparation of the instruments of presentation and the like, and the twenty-second article is to the following effect:—"That by reason of the premises, you have corruptly and simoniacally procured or **[691]** accepted the rectory of Knebworth, and that the same hath, with your privity and consent, been corruptly and simoniacally procured or obtained for you and accepted by you, and that you have been corruptly and simoniacally presented to the said rectory, and that you ought to be canonically corrected and punished according to the exigency of the law;" and the concluding article prays that the defendant should be so punished and corrected.

Here, then, in these several articles is a complete charge of simony, both against the patroness and against the incumbent. The patroness, by her agent, proposes a simoniacal agreement; the father of the incumbent, acting as his agent and with his privity, consents first, on the 12th of October, to accept the living on that condition; the agreement is confirmed and renewed on the 16th, before the presentation to the living is signed; and for this conduct, if the charge is proved, the defendant is liable, as prayed, to be canonically punished.

An allegation on the part of the defendant first generally denies and contradicts the charges; and secondly, gives a very different representation of the interviews of the 12th and the 16th of October, before the presentation. The first article contains the general denial. The second shews the nature of the defence.

[The Court here read the second article of the defensive allegation. Vide supra, pp. 665-8.]

This, then, is the defence set up. A conversation passes concerning the intention of Mrs. Lytton to present to the living. George Hesse, the brother of the defendant, was also present at this interview. Kelly delivers a paper merely setting forth the value of the living, Mr. Obadiah **[692]** Hesse looks at it cursorily; he had no knowledge of any decree respecting the modus; there was no stipulation whatever to take the presentation on the condition of recognizing the modus, as charged in the articles; and there was no mention of any modus, so far at least as Obadiah Hesse heard; the article, in short, denies and contradicts the whole of the important particulars stated to have passed on the 12th of October: it denies that any agreement was entered into by Obadiah Hesse, and of course therefore Mr. James Hesse's privity to or knowledge of any such agreement.

[The Court then, in contradiction to what was alleged in the articles to have passed on the 16th of October, read the fourth article of the defensive allegation, supra, p. 669: and stated that it was further pleaded that the defendant was at Burrington on the 12th and 16th of October; that he did not come to town till the 19th, and that on the 23rd he was inducted into the living.]

Though there are some other subordinate circumstances, this statement of the articles, and of the allegation in contradiction to them, furnishes a general outline of the charges and the defence, and the Court will now proceed to consider, first, whether the charge of simony against the defendant is proved, viz. a corrupt promise with his privity; secondly, whether any simoniacal promise or agreement was made without his knowledge, in consideration of which he was presented to the living, that is, whether he was simoniacally promoted; and thirdly, whether, if he was so simoniacally promoted without his privity or knowledge, a sentence of deprivation can be engrafted on this criminal suit.

[693] As to the first point, whether the defendant has been proved guilty of simony, there seems to be no difficulty. It is hardly possible that the Court can avoid pronouncing that the proof has totally failed in this respect; it can scarcely be considered that any proof whatever of privity has been offered: and yet it is a sort of case on which the proof should be clear—in which there should be no doubt. In the first place, it is a criminal proceeding, and in all criminal proceedings the presumption is in favour of innocence, and the evidence of guilt should be clear, or, in the words of Blackstone, "Where there is a possibility of a transaction being fair, the law will not suppose it iniquitous without proof" (2 Bl. Com. 280). In the next place, it is a crime of no light character; not only by the ecclesiastical law, but by the common law, it is held to be a crime most highly odious, and especially in a clergyman, since, as Lord Coke observes, it involves the crime of perjury. "Simony is odious in

the eye of the common law." "It is the more odious because it is ever accompanied by perjury, for the presentee is sworn to commit no simony" (3 Inst. 156). "Simony hath always by the law of God and of the land been accounted a great offence" (Cro. Car. 353). And it is very well known that every clergyman takes a solemn oath before his diocesan that there has been nothing promised to be done or undertaken by or for him, and that he will not perform any such promise made without his knowledge. Such is the magnitude of the offence charged. The consequences of simony are also very serious under the statute of Elizabeth. The living is void; the presentation **[694]** devolves to the Crown; and the guilty presentee is incapacitated, and liable to a penalty of two years' full value of the living.

Thus stands the offence charged and its consequences, in case there has been any simoniacal promise made by or with the privity of the defendant. The crime however must be proved against him. What, then, is the evidence to prove it? To what passed on the 12th October, Kelly is the only witness. To what took place on the 16th October Lake is the only witness. At the interview on the 12th, Obadiah Hesse, the father of the defendant, and George Hesse, the brother, were both present; and at that of the 16th, Lake and Obadiah Hesse were alone present. The proof, therefore, on the first point—the charge of simony against the defendant—as well as on the second point, will depend upon the result of the evidence of these persons. The whole of the transaction itself (not gainsaid on either side) goes strongly to acquit the defendant of privity, and therefore of actual simony.

Mrs. Lytton's letters, announcing her intention to present James Hesse to the living, are dated on the 9th October, and delivered to Obadiah Hesse, at his son's chambers, on the morning of the 12th. It is not suggested that James Hesse, or Obadiah Hesse, or any of the family, had any idea or expectation of this presentation, or that any application had been previously made to Mrs. Lytton. The defendant was on the 12th at Burrington, 12 or 14 miles below Bristol. The letter to Mrs. Hesse was not forwarded till the evening of the 12th, and was not received at Burrington till the 13th or 14th. Frederick Hesse, another son of Obadiah Hesse, has been examined: he was, at **[695]** the time the letter arrived, undergoing a surgical operation at Burrington, and he deposes:

"My mother was then residing at Burrington, and I remember her receiving a letter from Mrs. Lytton at that time, but I cannot say whether it was the 13th, 14th, or 15th day of the month, but it was about that time. I was at Burrington and underwent an operation on the very day the letter was received. I read the letter on the day it was received. The letter, marked B, produced to me, is that letter, and I believe the first communication my brother had of the contents of it was in my bed room, and almost at the very instant the operation I underwent was about to be performed, when my sister came into the room and said, 'James you have got another living.' Until that I never heard the subject mentioned by any person, and I am convinced that until then my brother had no idea of his having been presented to Knebworth, or that there was a prospect of his being presented to it. I do not recollect the precise day afterwards on which my brother went to London, but I believe it was on the following Monday." The following Monday was the 18th; and it appears that James Hesse arrived in town on the 19th.

Then, according to this statement, the presentee could not, by possibility, be privy to what passed on the 12th, and scarcely on the 16th. There is no trace of it nor any reason to suspect it. The mandate is dated the 21st October; he carries the presentation to the bishop the same day, and on the 23d he is inducted to the living, and then his legal possession was complete. On these facts and on this evidence it is impossible for the Court to pronounce the defendant guilty of the crime of **[696]** simony, and to subject him to all the consequences of such a conviction. If he had subsequently done any act confirmatory of a simoniacal promotion, I will not say whether it would not have amounted to simony: it certainly would have been a violation of his oath, by which he had sworn not to satisfy or perform any promise made without his knowledge: but here the fact fails; the defendant has not executed any lease, or acquiesced in any modus, or let or exchanged the cow-pasture meadow with Mrs. Lytton; a circumstance to which I shall hereafter advert. Much pains have been taken to prove that his father was his agent: but in what way? He was not authorized to this act, not even by implication, and a person cannot commit a crime by an unauthorized agent. If he had employed his father to solicit and procure

this living, engaging beforehand to ratify whatever his father might do or agree to do, then there might be some colour for the charge, and it might be simony: but he was perfectly ignorant of the whole transaction, whatever it may be. On the first point then, whether Mr. James Hesse is guilty of simony, I am of opinion that the defendant is fully acquitted, and that if nothing comes out to affect him on the other point, he is entitled to be dismissed, and with his costs.

I proceed now to consider the second point, whether the defendant has been proved to have been simoniacally promoted without his knowledge and privity. The proof upon this point should be no less clear than on the other; for though it might not affect in the same serious manner the moral character of the defendant, it would operate with great severity on his pecuniary interests, [697] as the living would be void under the statute, and the Crown would acquire the right to present. Whether this jurisdiction in this suit could proceed to deprivation is the third point for the Court to consider. At present I am only considering whether there is evidence that the defendant has been simoniacè promotus; whether the arrangement charged to have taken place between Kelly and Obadiah Hesse, on the 12th and on the 16th October, is or is not proved. The proof depends principally on the evidence of Kelly on the fifth article, opposed to the evidence of the two Hesses; and on the evidence of Lake on the ninth article, opposed to the evidence of Obadiah Hesse. The credit of the witnesses on both sides has been much commented upon in the argument; and undoubtedly this is one of those unpleasant causes, in which the Court must examine, and in some degree pronounce, on the credit due to the respective witnesses; for it seems scarcely possible to reconcile (which the Court is always anxious to do, if it can) the testimony of the defendant's with those of the promoters' witnesses. It is necessary, therefore, to consider the credit of the witnesses; the burden of proof, however, rests with the promoters—if the truth remains doubtful, they fail.

The promoters' first and principal witness is Kelly: a single witness to the most important part of the case, the interview on the 12th of October. Kelly's history of himself is, that he was formerly a writing clerk in the office of Lake, and, as such, had the management of Mrs. Lytton's suit with the late incumbent of Knebworth. In March, 1829, whilst he was at Mr. Lake's office, a decision of the Court of Chancery against the [698] modus set up by Mrs. Lytton was given. About that period Kelly became the steward and agent of Mrs. Lytton. He had then some knowledge of law, and was intimately acquainted with the concerns of Mrs. Lytton. He knew well the value of the tithes attempted to be covered by the modus, and the invalidity of that modus. Perhaps, also, it may be presumed that he was not altogether ignorant of the statute of Elizabeth, and the law of simony. He admits that he has advised and suggested and recommended this suit; that he has furnished the information and facts of the case; that Mrs. Lytton is answerable for the costs of the suit; that the promoters, the churchwardens, are her tenants, and that he, as her steward, requested them to permit their names to be used in the suit. He deposes in these terms in answer to the fifth interrogatory:

"I (Kelly) cannot say I have not suggested this suit, because I have recommended it, and I have taken a part in it by giving information of the different facts and circumstances within my knowledge. I do not know it, but I should believe that Mrs. Lytton, of whom I have deposed, is responsible for the expenses of this suit. The promoters are her tenants; but they have not instituted these proceedings at the request, or the suggestion, or by the desire of Mrs. Lytton. I have had numerous conversations with Mrs. Lytton on the subject of these proceedings, but no meeting expressly with her respecting them. I am her agent and steward, and I have taken an active part in promoting this cause, and I requested the aforesaid John Whish and Samuel Woollatt to permit their names to be used therein. Counsel having advised that the proceedings should be [699] in their names, I applied to them accordingly. I have had, previous to the institution of this suit, many communications with Mrs. Lytton with respect to the proceedings to be taken against the Rev. James Hesse, and counsel have been consulted in respect thereto; and under their advice, and with her sanction and privity, the present suit has been commenced, but not in pursuance of what I have settled and arranged with her: we have acted under the advice and direction of counsel."

From this account, then, of the part that Kelly has taken in the suit, it is hardly possible to conceive a more biassed witness, or one coming nearer to being a party in

the cause, nor one whose evidence could be less safely relied on. He deposes: "I was the bearer of the letter in which Mrs. Lytton communicated her intention to present James Hesse to the rectory of Knebworth. Mrs. Lytton communicated the contents of it to me, as well as of another letter inclosed in it; the one was directed to Obadiah Hesse, the father; and the other to Mrs. Hesse, the mother. I delivered them to Obadiah Hesse on the 12th of October, 1830. I made a minute of the day afterwards from entries made in my accounts on the same day. I had some conversation with Obadiah Hesse at the time on the subject of the presentation, and the terms on which it was to be made."

It is proper here to see what are the contents of the letters, and what were the terms held out by Mrs. Lytton, for they are the origin and foundation of the whole transaction and interview. [The Court here read the letters A and B, see supra, 668 (*a*).]

The letter to Mrs. Hesse is important: a more **[700]** kind warm-hearted letter can hardly be imagined, or more fit considerations for the presentation. She expresses for the mother grateful sentiments of kindness and affection, rejoicing that she has an opportunity to shew how sensibly those sentiments were felt on her part—she offers the living as a testimony of the respect she has long entertained for her character; and as to her son, she dwells on his "amiable character, and sincere atttachment to the sacred duties of his profession:" in short, if sincere, nothing could be more proper, or more to Mrs. Lytton's credit, than the contents of this letter.

It is really difficult, on the single testimony of Kelly, to attribute to Mrs. Lytton the baseness and fraudulent contrivance with which this letter must have been written if Kelly tells the truth. It is the more difficult to suppose these letters insincere, because their truth seems conformable with the history of the parties. Lake has heard Mrs. Lytton speak of Mrs. Hesse as an old acquaintance.

Mr. and Mrs. Hesse lived, some years ago, at Bishop Wearmouth; the defendant was curate of that parish, and resided with his family. The rector of Bishop Wearmouth became subsequently Bishop of Bristol, and soon after gave Mr. Hesse the small living of Rowbarrow, and his family then removed to Burrington, the adjoining parish to Rowbarrow, and Mr. Hesse resided with his family at Burrington, the parsonage house at Rowbarrow being dilapidated and unfit for habitation, and the bishop tells Mr. Hesse, the father, that it is worth from 120l. to 130l. a year. The fact that the bishop brought the defendant, his curate, from Wearmouth, and gave him this small preferment in Somersetshire, is no slight testimony in **[701]** his favour, and tends rather strongly to shew that Mrs. Lytton, in speaking of "his amiable character," and "his attention to the sacred duties of his profession," was not insincere, for he was entitled to that praise. But what says Kelly? That Mrs. Lytton communicated to him the contents of the letters; and committing to him the delivery, by his own hand, of this apparently friendly and generous letter, she desires him to tempt and seduce the father of the presentee, in the moment of overflowing gratitude to the benefactress of his son, into an odious, corrupt, illegal engagement, by which she was, in lieu of tithes of the value of 210l., to pay only a modus of 26l. a year; that is, to carve out for herself from this living nearly 200l. a year, to which she knew by the authority of a decree of the Court of Chancery she could establish no legal right.

It was said, as Mrs. Lytton's apology, that she might be ignorant of the law. She might, indeed, not be aware that the presentation would be void, that it would devolve upon the Crown, that she would be liable to a penalty of two years' full value, that this young man, whose "amiable character," whose "attention to the sacred duties of his profession" she so properly describes, would involve himself not only in simony but in perjury; all this might by possibility be so; but she was at least aware of the invalidity of this modus, for that had been recently ascertained by the decision of a court of justice. If she did not write this letter in sincerity and truth, according to the professions it contains; if this proposal (which Kelly swears he made) was made (if made at all) by the desire of Mrs. Lytton, and was not a volunteer act on his part, without the knowledge and privity of **[702]** Mrs. Lytton, it is difficult to find expressions which are fit for the Court to use, and which would at the same time sufficiently characterize the base contrivance (for it must have been deliberately contrived) to send such a letter in order to entrap a father into such a promise. It cannot be doing Kelly any injustice to suppose that the proposal was rather suggested by him to Mrs. Lytton upon seeing these letters; that he offered to ask Obadiah Hesse if he would consent to granting the lease of the tithes; and that Mrs. Lytton might have

inadvertently assented to it, than that she, ignorant of business, should have deliberately been a joint contriver of the plot. It is no injustice, I say, to Mr. Kelly to suppose this, for he admits himself to have been the corrupt agent in endeavouring to procure this odious and simoniacal agreement, by which the incumbent was to be fraudulently robbed of two fifths of the value of the living, under a pretended modus, which Kelly knew she had failed to establish a year and a half before, in consequence of which failure the late incumbent had, from that time till his death, received the full value of the tithes. He might, in order to make some amends for the expenses to which she had been put by the suit in Chancery, have suggested that this proposal should be made to the father of Mr. Hesse, as he has proposed and recommended the present suit, thus publicly disclosing the odious intentions at least of his mistress, and his own readiness to be her agent and witness in the odious transaction. Surely, then, it is necessary for the Court to look at his evidence with great suspicion—he is far from being a witness omni exceptione major: yet, if he is to be credited, a simoniacal bargain was made, after a full ex-[703]-planation of all the circumstances; for his account goes the full length of all the material articles, the charges of which he admits were furnished by him. It is unnecessary, therefore, for the Court to state his evidence; it would only be to repeat what has been read from the articles.

It has been admitted that if the case rested on this witness alone, the Court could not venture to pronounce that the charge was proved: for if a single witness, and such a witness, setting up a mere conversation with a third party, without any documentary proofs leading to a presumption of the concurrence of the party, were sufficient to avoid a presentation, who would be safe in the possession of a living? But it is said that the evidence offered in contradiction is so falsified that it confirms his testimony in the same way that a criminal who fails in an attempt to prove an alibi convicts himself, by procuring, from the falsehood of the defence which he sets up, credit for testimony which was before doubtful. It is necessary, therefore, for the Court to consider who are the witnesses whose evidence is opposed to Kelly's representations. They are the father and the brother of the presentee. It is not, therefore, a case of witness against witness, but of two witnesses against one witness. It is rather singular that neither in the articles, nor in the deposition of Kelly, is any mention made of the presence of George Hesse at the interview; though in answer to an interrogatory it is not denied by Kelly. The father is charged in the articles to have been the agent of, and to have made this corrupt agreement with the privity and by the authority of, the defendant. The defendant has fearlessly produced his father, so that every opportunity has [704] been afforded to cross-examine him, which opportunity has not been sparingly exercised.

Against the general character of Obadiah Hesse nothing is alleged, except that he is the father of the defendant. It appears, too, that he is an affectionate and a liberal father. The account of himself—extorted by interrogatories, going into a degree of inquiry not very usual, and, of course, furnished by Kelly, the instructor of the case—contains nothing in his history to his disadvantage. He is a barrister of very long standing, and describes himself "Captain of the Hall of the Inner Temple, when he dines there." He was called to the bar in 1797, went for some years the Western Circuit; in 1811 quitted the bar, obtained the secretaryship of and another situation under Government connected with the Lotteries, held these appointments many years, is entitled to a pension of 400l. a year: and, in addition, is possessed of considerable private property. He is a person therefore, from his grade in society, his profession and property, primâ facie entitled to credit. There is nothing in his history which reflects upon his moral character, or shews to his disadvantage. He has brought up a family, consisting of three sons and a daughter, in respectable stations. One of the sons, a witness in the cause, is at the bar, a conveyancer; another, James, is the defendant; and Frederick, who is also a witness, and the sister reside at Burrington with their parents. James, as I before said, when he had the curacy of Bishop Wearmouth, resided with his family; and when he came to the living of Rowbarrow his father removed to the adjoining parish of Burrington, and again afforded his son the benefit of residing with his own family. The father has rebuilt the par-[705]-sonage house of Rowbarrow at his own expense, and now resides in it; and, in order still to be near his son, he states that he is in treaty for the purchase of considerable property in Hertfordshire. All these circumstances are extorted by interrogatories; but I discover nothing to the disadvantage of Mr. Hesse: he has shewn great kindness

as a father to different parts of his family, and great liberality in building a house on the precarious tenure of the Rowbarrow living, of which that living will have the benefit. As to George Hesse, except that he is the brother of the defendant, there is nothing to object to him. His refusal to answer the 35th interrogatory is not to his discredit: it is offensive to him, and he declines to answer it, apparently rather to assert his right of refusal, than for the sake of any concealment, because he immediately afterwards states facts which sufficiently negative the suggestion. He is a barrister and a conveyancer, and must have been in practice some time, for he is thirty-one years of age: at this time he had just returned to town from Burrington, and then it is that the letters are delivered at his chambers to Obadiah Hesse, and the interview takes place.

Respecting these witnesses, the father and brother, they may have a considerable bias; but though strong kindness and mutual attachment seem to prevail among the members of this family, yet these circumstances are not sufficient to induce the Court to suppose that, for the sake of their relative, they would come forward to depose, on their solemn oaths, any thing contrary to what is the real fact. Attacks have been made on the character of Obadiah Hesse, out of his deposition, chiefly upon the ground of the improbability of [706] some of the circumstances. But it seems hardly possible, on the mere improbability of a statement, to discredit the evidence of a witness of good general character, deposing firmly and solemnly: there must be something amounting to incredibility, something incapable of explanation—not merely that it was improbable that under such circumstances persons in general would have so acted; that is matter of opinion. Different persons act differently in similar circumstances. In the first place, it is said that it is extremely improbable that he should not have asked his son the value of the living of Rowbarrow. The bishop however told him it was 110l. or 120l. a year, and therefore there was no urgent inducement on his part to inquire minutely into the income of his son, to see if he got a few pounds less or more than the bishop told him. Another improbability is that there was no letter of thanks to Mrs. Lytton for the living. But the father sent his thanks to Mrs. Lytton by Kelly, and he called upon her on the 14th; and the son, coming up to town in a few days, waited an opportunity of returning his thanks personally.

Again, it is said how improbable it is that Obadiah Hesse should not have read the paper respecting the tithes beyond a hasty glance at it, and that he should have sent no copy of it to his son. But a hasty glance was sufficient. It is headed, "A General Statement of the Tithes paid to the Late Incumbent of Knebworth Parish." There are the different items alleged to be covered by the modus, and at the bottom of the paper is the value of the living stated at 345l., and it is drawn up in a manner that he who runs may read. There was sufficient to induce Mr. Oba-[707]-diah Hesse to conclude that the value of the living was from 300l. to 400l. a year—sufficient to persuade him that his son would thankfully accept it, and nothing therefore to induce the father to enter into a critical examination, and to scan the value of the living more accurately and more exactly; and if he had done so, there was nothing to shew that the modus was not good: on the contrary, the statement—"all these lands covered by the modus"—would have led him to infer from it that it was a good and valid modus, though Mrs. Lytton might have had great "trouble and vexation" in establishing it. Obadiah Hesse has denied and contradicted Kelly's statement; and it is not merely witness against witness: there are two to one: for if Kelly tells the truth, and nothing but the truth, both Obadiah and George Hesse have deposed falsely. It is not, however, by taking bits and scraps of each deposition that the Court is to form its judgment, but by looking at the whole.

By Kelly's account there was a full detailed explanation of the whole of this corrupt agreement; not indeed specifying exactly the terms used, but mentioning a variety of circumstances which must necessarily have occasioned a full explanation on both sides without reserve.

On an interrogatory addressed to Obadiah Hesse, a further fact is suggested, which is not mentioned in the articles or in the deposition of Kelly. It is the 28th interrogatory: "On your oath did it not on one occasion (October the 12th) appear from a letter then shewn to you by Kelly that an application had been made to Mrs. Lytton for the said living of Knebworth immediately upon the death of the Rev. Mr. Price, and that [708] the writer of such letter had therein declared his

willingness to accept the said living subject to the moduses late in dispute between Mrs. Lytton and Mr. Price, and did you not upon reading such letter inquire of Kelly whether the curacy of the producent's living at Rowbarrow would be worth the acceptance of the writer of such letter?" So that besides the different facts stated in the fifth article, and by Kelly in his examination, here is suggested, and I must presume by Kelly, this further fact; the letter is produced and canvassed, and an inquiry made whether the writer would accept the curacy of Rowbarrow. All these facts then took place at the interview of the 12th; and yet it is alleged that it did not last above ten minutes or a quarter of an hour. The Court does not mean to place much reliance upon a computation of time, but it is hardly possible that all these things could have passed in so short a space.

As to the probability of Kelly's story, if probability is to found a test, is it probable that, taking these letters in his hand, communicating the kind, affectionate, grateful intentions of her old friend, Mrs. Lytton, towards Mrs. Hesse and her family, Kelly should at that very moment have fully disclosed the odious and selfish conditions upon which the boon was to be granted; should have said, in short, "You must admit the modus, though you well know it is good for nothing: you well know it has been set aside by the Court of Chancery, but accept the modus notwithstanding, and take 26l. a year in lieu of tithes worth 200l." This is not a very probable course to have been taken under such circumstances, and without reserve. Kelly must have [709] been not only a corrupt, but a very injudicious, agent and negociator: for his propositions, as he states them, of this corrupt and odious demand, completely falsify all the gracious professions of his mistress, Mrs. Lytton, contained in the letters which he had carried in his hand, had delivered, and read. It was unmasking the fraud, and exhibiting the falsehood of the whole case. It is more probable that, with a corrupt object in view, he should only make some general observations which he could pervert and distort into an acquiescence and agreement; that he should say "Here are moduses," should, in order to shew the value of the living, lay on the table the paper which mentions moduses, leaving it to be inferred that they are legal, valid, established moduses, but still at a mere glance shewing the value to be near 350l. But the story told by the two Hesses that the paper was only carelessly thrown down ostensibly to shew the value of the living, and not as the foundation of a corrupt bargain, is much more like the real course of such a transaction, more consistent with probability (as far as probability is concerned), and is in some degree confirmed by the indorsement and heading of the paper, which certainly would lead to an inference that these moduses were valid and established. The Court does not depend much, however, on probabilities or conjectures as to the private tortuous views and objects of Kelly.

But both Obadiah and George Hesse must depose untruly, if all or any considerable part of that which Kelly states took place, for they both say that the interview did not last more than ten minutes or a quarter of an hour: both of them contradict all the explanations, disclosures, and [710] agreements alleged by Kelly to have been made. For example: George Hesse says on the second article, "My father perused Mrs. Lytton's letters, both of them, in my presence, and in Kelly's; he read them twice, at first cursorily, as it appeared, for he read them to himself, and then more particularly; he shortly acquainted me with the contents of the letters, saying that Mrs. Lytton had been so good as to give my brother a living, and how much obliged to her he was. Whilst my father was reading the letters, Kelly stated that he thought we should like to know the value of the living, and that he had ascertained its value as near as he was able; that it was subject to a modus, about which Mrs. Lytton had had a great deal of trouble, and that the living was of course given, subject to the modus. I recollect well that the words Kelly used were 'vexation and trouble' with reference to the modus, subject to which he said Mrs. Lytton gave the living. Whilst my father was engaged reading the letters Kelly also placed on the table a paper, which he said contained the quantity and description of titheable lands in the parish, and the annual value of the entire tithes thereof: that was the effect of the statement he made with respect to the paper which he laid before my father." And in a subsequent part he says: "I can safely say, for I gave my whole attention to what passed at the time—it was a matter in which my brother was so much interested—that no stipulation was made or even suggested either by my father or Kelly, nor any undertaking or agreement entered upon or engaged for in respect to leasing or exchanging

with Mrs. Lytton any piece of land of any sort. No allusion was made to any thing of the kind: no-[711]-thing passed upon the occasion directly or indirectly touching upon such a matter or subject. I was not then acquainted with the fact, nor was my father, to my knowledge or belief, that Mrs. Lytton had failed to establish her modus. I knew, or rather I had an impression from having heard the matter talked of, that there had been a question as to a right of modus between Mrs. Lytton and the former rector of Knebworth. Mrs. Lytton had never consulted my father in respect to any dispute or litigation between her and Mr. Price that I know of, or have reason to believe; nor do I know or believe that my father had any knowledge that an order or decree had been made touching the right of modus in question, until the articles in this cause were filed." Obadiah Hesse deposes to the same effect.

Then, according to this evidence, all that passed is, Kelly delivered Mrs. Lytton's letters; while Obadiah Hesse was reading them Kelly laid down paper (A) as an account of the value of the living; said that there were moduses on the living, subject to which Mrs. Lytton made the presentation, and that Mrs. Lytton had had great trouble and vexation about them. George Hesse made a natural and civil answer, that he was sure it was not the wish of his brother to give Mrs. Lytton any trouble or vexation, merely repeating Kelly's words; but as to all these explanations, promises, and agreements, not a word took place. The inference to be drawn by George Hesse from this conversation was that, though the moduses had caused Mrs. Lytton vexation, they were valid and finally established; for paper A, by deducting them, described them as valid. Obadiah Hesse gives as positive a contradiction to Kelly's state-[712]-ment. He says that he did not attend to the whole of the conversation between Kelly and his son, and never heard the word modus mentioned. "Whilst I was still full of Mrs. Lytton's letters, Kelly had turned to my son, and, in answer to something which I did not hear, my son said that 'he was sure his brother would not give Mrs. Lytton any trouble.' I heard my son George say something to that effect to Kelly, but what called for it I certainly did not hear." And in a subsequent part of his evidence he says, "I did not hear Kelly, during the short time he was with me on the aforesaid 12th of October, say a word about moduses or allude to anything of the kind, and I can safely say that I then knew nothing whatever about them." One of the chief improbabilities pointed out in the evidence of Obadiah Hesse is that he should not have heard what Kelly said, nor any thing about the moduses; and it was argued that, as he was present when it is admitted that moduses were talked of, he must have heard it. When this argument was urged, I confess that I did not concur with the observation. Mr. Hesse had just received this unexpected but welcome intelligence of the preferment to be given to his son; he was reading Mrs. Lytton's letters, and naturally enough he read them twice over. Under these circumstances I thought it not improbable that he might not have heard the expression; it appeared to me by no means a departure from the ordinary course of the human mind; and since the argument I have accidentally been confirmed in that opinion by a passage in a recent publication of some celebrity, viz. "Dr. Abercrombie's Enquiries concerning the Intellectual Powers," in which there is this passage: [713] "It is familiar to every one that when the mind is closely occupied, numerous objects may pass before our eyes, and circumstances be talked of in our hearing, of which we do not retain the slightest recollection; and this is often in such a degree as implies not a want of memory only, but an actual want of the perception of the objects" (2d ed. p. 59).

Thus it is not improbable that O. Hesse was so full of the subject of the letters that he did not hear, or paid no attention to, the conversation between Kelly and his son; that he might have only caught the single observation of his son, and might not have heard the word modus mentioned. I am of opinion, therefore, that these accounts are not so improbable as to falsify the testimony of both or either of the witnesses; that, on the contrary, what is deposed to have taken place is so natural under all the circumstances, that the depositions of the two witnesses amount to a full contradiction of Kelly; and that these two witnesses are each at least full as worthy of credit as Kelly. Without entering, therefore, into a further examination of this part of the case, the circumstances in evidence as to what took place on the 12th of October are not sufficient to establish what constitutes the basis of the charge, that there was a corrupt agreement for a simoniacal promotion of the defendant.

It becomes therefore unnecessary to examine, with any degree of minuteness, the interview of the 16th of October, to which Lake is the only witness on the one side,

and O. Hesse on the other. It is not maintained that any corrupt agreement per se is proved to have taken place on the 16th: it is only contended that what then occurred when connected with the interview on **[714]** the 12th amounts to such proof: but if Kelly has proved nothing on the 12th, there is nothing to corroborate or to connect with, and Lake's evidence thus loses all its weight. He is Mrs. Lytton's solicitor, and there is no ground to question his general character and respectability. He, however, is not the solicitor conducting this cause, but is only a witness, Kelly, as I have said, furnishing the facts. It is not therefore extraordinary, nor any discredit to Lake, that his evidence does not support the ninth article as laid. In speaking of the interview with Obadiah Hesse, Lake expressly says: "I told him that Mrs. Lytton wished to have a lease of the whole of the tithes granted to her; and to this he answered 'that he was sure that his son would do any thing Mrs. Lytton wished.' The particular terms of the lease were not alluded to by either, nor was there any agreement concluded between us. I introduced the subject by mentioning how Mrs. Lytton had been circumstanced for a considerable time, owing to the dispute about the tithes; and he expressed himself as being fully aware of the circumstances, and so satisfied on my telling him that Mrs. Lytton's wish was to have a lease of the whole of the tithes granted to her, that he said his son would do every thing she required, and he distinctly undertook to me that his son would do so, and I, satisfied with his assurances, wrote to Mrs. Lytton to that effect: but nothing was said either by Mr. Hesse or myself that it was in consideration of his son's doing what he then undertook for him that he should do that he was to be presented to the aforesaid rectory of Knebworth; nor did he tell me that his son was privy to what he was then promising for him, or that he had his son's authority for what he did so promise—**[715]** he merely expressed his perfect confidence that his son would perform what he undertook for him, and do every thing to Mrs. Lytton's satisfaction."

What, then, is the fair construction of this?

Here is a mere general answer by Obadiah Hesse that his son would do what Mrs. Lytton wished—no particulars entered into, no agreement made, no privity nor authority on the part of the son suggested; and Lake expressly declares that this lease was not the condition of the presentation. On Lake's own statement no corrupt agreement or promise is proved on the 16th.

The granting a lease of the tithes is not necessarily simoniacal; it might be that the full value was to be allowed for the tithes. The answer, "He was sure his son would do any thing Mrs. Lytton wished," must be understood as any thing which Mrs. Lytton could with propriety ask, and his son could with propriety grant; not that he would do any thing corrupt or simoniacal as a consideration for obtaining the living. Obadiah Hesse gives a clearer account of the conversation than Lake—he says "that Lake spoke of the modus as valid; that the lease was suggested by Richardson, a former agent of Mrs. Lytton, but that he, Lake, doubted the expediency of it, as it might produce suits: and Obadiah Hesse pointed out the invidious circumstances in which his son might be placed thereby; and distinctly told Lake that he could undertake nothing whatever for his son." It is so pleaded in the responsive allegation, and it has not been counterpleaded, though it might have been. Obadiah Hesse so deposes, and it has not been attempted by an exceptive allegation to disprove the truth of this **[716]** part of the deposition, not even as to his fetching a volume of Burn to shew he could make no promise for his son.

From both accounts it appears that Mrs. Lytton was desirous of a lease of the tithes; and the most imprudent step, and the most unsatisfactory part of the case, is that Obadiah Hesse did so far give way to that wish as, on the 27th of October, to consent that a skeleton lease should be drawn and sent to him for perusal. In his answer to the seventeenth interrogatory he admits that; but he positively deposes that it was only to satisfy Mrs. Lytton, but without any intention of granting it. The skeleton lease is exhibited. In it no mention is made of moduses, nor is the amount of rent fixed; and without the rent it does not appear whether the modus of 26l. a year was even contemplated in lieu of tithes of 210l., or was or was not proposed to be accepted. All this takes place after induction; and Lake, as I have said, admits it was not on the 16th made the condition of the presentation; nor were any particulars then entered upon. On the 27th this preparation of the lease was set in motion: the defendant was not privy to it, and when it was communicated to him

he declined to execute it; he "cannot and will not have any thing to do with it:" and it was never executed.

There is a subsequent circumstance, which is not very material to the main issue, except as going to credit. After alleging various circumstances as occurring on the 25th and 27th October, the articles go on to plead in the eighteenth article: "In pursuance of the simoniacal covenants and agreements made by or for you, and with your privity and consent, as a consideration **[717]** for your obtaining the presentation to the rectory, Kelly, with your privity and consent, and in anticipation of the lease or leases undertaken to be executed by you in favour of the aforesaid Mrs. Lytton, did, on 28th October, 1830, take possession of the cow pasture meadow, part of the glebe aforesaid, for her, in her name and on her behalf, and also did, with your privity and consent, for her, and in her name and on her behalf, underlet the same cow pasture meadow to one Richard Ilott." And Kelly, in support of this article, deposes thus: "I took possession of the cow pasture meadow on the 28th or 29th of October last, in the name and on the behalf of Mrs. Lytton, and in pursuance of the agreement of which I have before spoken; but more particularly in consequence of the authority which Obadiah Hesse had given me in the name of his son James to take possession thereof for Mrs. Lytton, at an interview I had with him a day or two before. At the time I took possession of the said meadow I took the articulate Richard Ilott with me, and told him he might hold it as he had been in the habit of doing before. I do not recollect that I mentioned Mrs. Lytton's name to him; or said on what terms he was to hold the meadow, except that he might have it as he had held it under Mr. Price, and the time has not come when Mrs. Lytton receives her rent."

That is the way Kelly deposes to this article. He does not come quite up to the article, or say that he did underlet the meadow in the name of Mrs. Lytton, because he cannot recollect whether he mentioned to Ilott the name of Mrs. Lytton or not. Ilott has, however, been examined as a witness on the article, and does not support it: **[718]** for he says "that the meadow was let to him merely in the ordinary way, that Mrs. Lytton's name was not mentioned in the matter." Kelly says that he had not received the rent, because the time had not arrived when Mrs. Lytton receives her rent; but it appears from Ilott's evidence that he had paid the rent to Mr. Hesse, and not to Kelly, the agent of Mrs. Lytton; and that accounts for Kelly's not speaking quite up to the article.

The defendant pleads in the seventh article of his allegation: "That on Monday, the 25th October, 1830, James Hesse, together with Obadiah Hesse, George Hesse, and Kelly, being then at the house of Mrs. Lytton, at Knebworth, it was proposed that they should look at the rectory house and the glebe. That whilst they were engaged in the inspection of the glebe Kelly informed James Hesse that Ilott (then tenant and occupier of the glebe) was willing and anxious to continue to hold so much of the same as was arable. Whereupon James Hesse replied 'that he was ready to consent to such an arrangement for the following year.' That James Hesse expressed his intention of holding the said pasture land, including the cow pasture, himself, and requested Kelly, as his agent, to make the most of it till the pastures were shut up for hay. That on the said occasion no other conversation passed between the parties with reference to or connected with the cow pasture field, or the letting thereof." According to this statement, the meadow was not taken possession of for, nor let as belonging to, Mrs. Lytton; but James Hesse desires Kelly to make the most of it. And the tenth article pleads in confirmation of this "that Hesse caused the cow **[719]** pasture meadow to be shut up for hay, that he mended the gaps in the hedges, and received the rent."

George and Obadiah Hesse depose in confirmation of this article. The question, which is the true account, may throw much light on the relative credit of the Hesses and of Kelly. How does the transaction turn out? What is the conduct of both parties? Ilott had the pasturing as he had before for many years under the former rector; he says "he took it of Kelly, but that the name of Mrs. Lytton was never mentioned to him on the occasion." He pays his rent to James Hesse: at the proper season Hesse fences up the field for hay: he has the mole hills levelled—has it mowed for hay; he is rated to the parish for it, he pays the rates as well as receives the rent from Ilott. Kelly then thinks proper to set up a claim on the faith of a simoniacal contract or agreement. When was this done first? After the articles were given in. Before that time there was no suggestion that Kelly was in possession of the cow

pasture on behalf of Mrs. Lytton. It is not pleaded that a single step was taken to interrupt the possession of Mr. Hesse till after the articles were given in. Then this is set up for the first time. The articles were given in on the 13th of May: on the 1st of June Kelly turns in the cows of Mrs. Lytton, as an assertion of possession on her part. The cows are turned out by Hesse's servant. Kelly then, armed with his constable's staff and attended by the deputy steward and two or three other persons, turns the cows in again, and tells James Hesse's servant to turn them out at his peril. What does James Hesse do? He does not tamely submit—he boldly brings an **[720]** action against Kelly for a trespass, when of course this agreement must be the main defence against the action. Kelly is examined on the 8th of June, and he gives that part of his evidence which I have read. The action is tried; and it comes out in the evidence of George Hesse, incidentally, on interrogatory, that his brother succeeded in his action; and consequently that this agreement for the cow pasture was not substantiated, and was not really entered into. It is perfectly demonstrated that the field was not let for Mrs. Lytton, and that the rent was received by Hesse, and I must consider that Kelly, when he supplied the information on which this eighteenth article was drawn, must have known that he was causing matters to be inserted which were untrue and which the evidence of his own witness has completely falsified.

This circumstance, as I have said, only affects this criminal suit for simony, as shewing that false facts have been set up in these articles, and as bearing on the credit of Kelly. It is, however, hardly necessary for that purpose: for, on the whole, considering the burden of proof is on the promoters, and that a forfeiture of the freehold would be the result if this part of the case were proved, the Court is of opinion that the weight of the evidence is against the charge, and that the proof will not warrant a sentence that the defendant was simoniacally promoted. Even if there were a doubt upon the question, the defendant would be entitled to the benefit of the doubt, and to an acquittal. But supposing the proof on the second point had established that the defendant had been simoniacally promoted, the Court having decided that he is not guilty of simony, and that he was **[721]** not privy to the simoniacal promotion, or guilty of any ex post facto act confirming and carrying into effect any corrupt agreement, could a sentence of deprivation be pronounced by this Court in a criminal suit; for it is a criminal suit; the defendant is charged with a crime—with an odious and corrupt bargain; he is innocent of the charge: can he then be punished for a crime of which he is not guilty? The statute may render his title invalid, and it may be loosely said by some writers that the presentee is thereby punished. But the use of such a term will not render him liable to a criminal proceeding by articles "for his soul's health." This is not the sort of suit to be brought for that purpose. The moral character of the defendant, though untouched, has been attacked, for if privy, he must have been guilty of gross perjury; if he is innocent, he is in plain justice entitled to be dismissed from the suit, and to be dismissed with costs.

The suit in this form ought not to have been brought against the defendant. No authority is to be found that establishes such a principle—that in a criminal suit a party can be punished for a crime of which he is not guilty. Clarke (Praxis, tit. 132) and Oughton (Ordo Jud. t. 4) lay it down that for simony a party may be proceeded against and punished either ex officio or ad instantiam partis: but they do not lay it down that if a party be proceeded against criminally and be not guilty of simony, he may be deprived because he has been simoniacally promoted without his privity or sanction. They say nothing of "simoniacè promotus." The phrase is, si clericus commisit simoniam. There is no instance **[722]** of a proceeding since the stat. of Eliz. against a person as simoniacè promotus. Nor is there any case before the statute, recorded in the annals of these Courts. That statute declared the presentation to be void and to devolve upon the Crown. The proceeding under that statute has been in all instances, for nearly 300 years, by a quare impedit. The authorities do not quite satisfy me that the canon law had ever so far been received into the ecclesiastical law of this country as to render a clerk "simoniacè promotus," but not privy, liable to be deprived; or that such was the law of this country before the stat. of Eliz., by the ninth section of which statute the penalties before inflicted by the ecclesiastical law are preserved. The case of *Baker* v. *Rogers* (Cro. Eliz. 788), though relied upon and coming nearest, does not quite establish that point: nay, it rather seems to be an authority on the other side. In that case a prohibition was moved for in a suit before the High Commission Court. It was suggested as the facts of the case that the living

being void, the brother of Baker had given 180l. for the presentation, to which Baker was not privy: but after possession of the living the brother informed him what he had paid for the presentation, requiring him to have consideration thereof. The clerk was proceeded against before the High Commission Court, not as simoniacè promotus, but for simony. The Court pronounced that this was simony, and deprived him: for so, says the report, is their course when one is deprived as simoniacus. The prohibition was refused on the ground that the High Commission Court had found him guilty of simony: he was **[723]** deprived as simoniacus, not as simoniacè promotus; and the Temporal Court could not enter into the facts whether really or not guilty of simony; whether the brother, having told him that he had given this 180l. for the presentation during the avoidance, and requiring him to have consideration thereof, made him ex post facto a party to the simony; whether he had had consideration and repaid his brother, or what other facts there might be to render him simoniacus, and not merely simoniacè promotus, the Court would not inquire, for the High Commission Court, to which prohibition was prayed, had found it simony. If the High Commission Court had pronounced him simoniacè promotus merely, and entertained a criminal suit against the defendant, non constat, that a prohibition might not have been granted, and that it might not have been decided that the High Commission Court had gone beyond its jurisdiction.

In the present case there is no privity before, nor confirmation after: here the incumbent is not informed that any money was given or any promise made, nor has he been required to have consideration thereof. The fact that any contract or obligation was entered into is denied throughout. In the judgment of the Court, then, he is not simoniacus. Even if there had been proof that he was simoniacè promotus without his privity, he has not been guilty of any crime for which this Court, in this criminal suit, can punish him, supposing that his possession were invalid under the statute. It must be remembered that the case of *Baker* v. *Rogers*, the only decided case pointed out as countenancing in the remotest degree any such **[724]** proceeding, occurred in Queen Elizabeth's time, and that there has been no such case since.

The stat. of Wm. (1 W. c. 16) has been referred to in the argument. That statute merely enacts that the forfeiture shall not be taken advantage of after the death of the party guilty of simony or simoniacally promoted, when a subsequent patron has presented and a new clerk been admitted. The statute does not apply to the present case, except that the same principle of justice would apply to deprivation without guilt. It recites, "That whereas after the death of a simoniacal person, another, innocent of such crime, has been troubled to the prejudice of the innocent patron in reversion, and of his clerk, whereby the guilty goeth away with the profit of his crime, and the innocent succeeding patron and his clerk are punished contrary to all reason and good conscience." If it be contrary to all reason and good conscience that an innocent patron should be punished, it is equally so that an innocent clerk simoniacè promotus without his privity should be deprived of his living under the sentence of this Court in the present criminal proceeding. To the same effect Mr. Justice Blackstone says (2 Bl. Com. 280): "If a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the Crown as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture." The same is laid down in the 3 Inst. 154, and also in the 12th Rep., in *Dr. Hutchinson's case*: "If the presentee be not conusant of the corruption, then he shall not **[725]** be within the clause of disability of the same statute, and so it was resolved by all the judges (vide verba statuti), which are very well penned against the avarice of corrupt patrons." (*a*) It would be well if this observation of Lord Coke's were conveyed to the patroness of this living, if, indeed, Kelly charges her truly with having desired him to act as he has acted.

Upon the whole then of this third point (though it seems hardly necessary to decide it), the Court is of opinion that if the weight of the evidence had even proved a corrupt agreement between O. Hesse and the agent of Mrs. Lytton, without the knowledge and privity of his son, and unconfirmed by him, it would not be sufficient to authorize the Court in this criminal suit to proceed to a sentence of deprivation. After a full consideration, however, of the evidence in the cause, the Court is of opinion, on the second point, that the fact of a corrupt bargain, by which the defendant was

(*a*) See also *Wilson* v. *Bradshaw*, 2 Roll. Rep. 463.

"simoniacally promoted," has not been established. But, above all, I am of opinion, on the first point, that the party has been proceeded against criminally for an offence of which he is not guilty; and, considering all the circumstances of the case—who the parties are that have really instituted the suit, and the manner in which it has been carried on—I am also of opinion that the defendant is not only entitled to be dismissed, but to be dismissed with his full costs.

[726] BLAKE *v.* USBORNE. Court of Peculiars, Hilary Term, 1st Session, 1832.—A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew had for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation against a mere intruder, such permission by the churchwardens being illegal, as confirming the sale of the pew. On the plaintiff declaring he proceeded no further, the Court dismissed the defendant with a sum nomine expensarum, refusing to give full costs on the ground that there had been irregularities on both sides.—By the general law, the use of all pews belongs to the parishioners, who are to be in the first instance seated by the churchwardens, subject to the control of the ordinary.—On the expiration of a faculty limited to a certain period, the right of the parishioners to the pews the subject of such faculty revives.

This was a cause of perturbation of church seat between two parishioners and inhabitants of Croydon. The libel pleaded that the pew was erected under a faculty in 1725, and was transferred to Haines in 1816, under an assignment of the remainder of a term of ninety-nine years, which expired in 1826; that Haines continued to sit in it till his death in 1830: that in March, 1831, the house was let to Harman, and the churchwardens agreed that the pew should go with the house which was then under repair; but that while under repair Blake and his mother and family should occupy it; that on the 17th of April Usborne (without any authority), in opposition to this arrangement, intruded; and on the 23d of April the churchwardens gave Blake a written authority, No. 1, and on the same day Blake informed Usborne by letter, No. 2,(*a*)[1] of the arrangement. On the 24th Usborne again intruded; and on the 30th Blake wrote No. 3; (*b*) and **[727]** on the 1st of May Usborne wrote No. 4,(*a*)[2] and on the same day again intruded. On the 7th of May the churchwardens gave Blake a written authority to lock the door against Usborne; on the 8th Usborne endeavoured to enter, and finding the door locked used some angry expressions, and on the 15th, previous to the commencement of divine service, climbed into the pew: and on the 18th the churchwardens assigned part of another pew to Usborne; that on the 24th of July Usborne again intruded in the morning, and in the evening forced open the

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(*a*)[1] Extracts from No. 2. "The churchwardens have, while Mr. Haines' late house remains untenanted, given me an authority to use the pew allotted to that house, and the key, with the sanction of all interested parties, has been delivered to me. . . . I was not aware, till I saw the churchwardens to-day, that you had sat in the pew last Sunday, and had expressed an intention of taking possession of it for the use of your family; and both they and myself deemed it proper, in order to avoid inconvenience, that you should be apprised of the present arrangement."

(*b*) No. 3. "Recurring to the circumstances of the late Mr. Haines' pew, I repeat that the churchwardens have, in conjunction with Mr. Price and Mr. Harman, placed the care of the same in my hands under certain qualifications; I therefore think it right to say that the accommodation I require during the period of my occupation will be the seats on the side next to Mr. Minier's pew, the others, as far as I am concerned, are much at your service, upon the understanding that you enter the pew upon sufferance, undertaking to vacate the same whenever it may be demanded by Mr. Harman on behalf of his tenant. For the sake of clearness, I request the favour of your addressing a letter upon the subject, expressive of the conditions referred to, either to the churchwardens or myself before church-time to-morrow."

(*a*)[2] No. 4. "In answer to yours received late last evening, I beg to say, on no account will I compromise the rights and privileges of the churchwardens by any act of mine: and I am sure you will see this resolve correct, for in all probability next year you will be one."

lock: the libel prayed that Usborne might be admonished from disturbing Blake, and condemned in costs.

The allegation in reply pleaded generally—that Usborne had been long an inhabitant, and, though he had frequently applied, had been unable to obtain a pew, so many being supposed to be appropriated by faculty: that the faculty as to the pew in question had expired; that in March, 1831, the house was sold by auction; and that **[728]** Blake was the auctioneer. That in April, Usborne applied to one of the churchwardens for sittings in the pew in question, who told him that Harman, who had already a pew, was to have the choice of the two; and that Usborne should be seated in the other; that Harman declining to occupy, Usborne sat therein; that the permission subsequently given to Blake and his family was obtained on false representations that the pew was a faculty pew appurtenant to Harman's house. The remainder of the allegation went at great length into several communications from April 17 to May 29, between the churchwardens and Usborne, respecting the pew, in which, as pleaded, the churchwardens had not informed Usborne that they had given Blake a written authority to sit in the pew, nor to lock the door; and that Usborne was first informed thereof by a letter from Blake's solicitor on the 7th of June,(*a*)[1] and it denied or explained the several disturbances laid in the libel; and alleged that the pew assigned to **[729]** Usborne was insufficient in size. The allegation exhibited the conditions of sale, and a subsequent correspondence between Blake and Usborne respecting the pew.(*a*)[2]

Lushington and Nicholl in objection to the allegation. No claim by faculty or prescription is asserted: both parties rest on a mere possessory title, the **[730]** faculty has expired, and is merely pleaded historically.

(*a*)[1] Extract of a letter from Mr. Drummond to Mr. Usborne.

"Croydon, 7 June, 1831.

"Dear Sir,—Mr. Harman and Mr. Price have called upon me with Mr. Blake on the subject of a claim which you appear to have been making to the possession of a pew in the south gallery of Croydon church, and they have desired me to commence a suit against you in the Court of Peculiars. . . . This is a faculty pew purchased by the late Mr. Haines in 1816 of Mr. B. Long for 60 g^s^.; Miss Haines (Mr. Haines' representative) has granted a lease of the house, lately occupied by Mr. Haines, and of this pew, to Mr. Harman for 21 years. In addition to this, the churchwardens have by writing under their hands authorized Mr. Blake to occupy the pew until Mr. Harman has found a tenant for the house, and as you were unwilling to accept Mr. Blake's offer of occupying part of the pew upon the same terms that he would occupy the remainder, the churchwardens authorized Mr. Blake to lock the door against you."

(*a*)[2] Mr. Blake to Mr. Usborne—

"May 8.

"Dear Sir,—As my conduct while representing the interest of other parties may be misconstrued, I beg to say, in the case of the late Mr. Haines' pew, that there is nothing whatever of personality towards you: it is thought right the privileges of others should be protected, and of course my conduct as their representative results from the advice I have received."

"Sir,—In answer to yours, just received, there is nothing can justify your conduct at the church this morning in preventing my son entering the pew, and I regret you think proper to be made the tool of other parties. I have the assurance of the churchwardens to-day that they have given neither you or any other person permission to lock the pew against us, and are much surprised at your taking that liberty. Should I experience similar treatment next Sunday, I shall certainly apply to the proper authorities for redress. I hear this is not the only instance of your acting to prohibit parishioners in their right to a pew.—Your most obedient servant,

"Thos. Usborne."

"May 11.

"Sir,—I received yours of Sunday last by the 3d post; and will spare you all trouble upon the subject of the late Mr. Haines' pew, by assuring you that I shall keep the door locked. I chuse to be thus unequivocal that you may not remain in doubt as to my future conduct in the transaction.—Your obedient servant,

"John Blake."

"If a house has always had a pew, it may be a fair ground for the churchwardens to place the proprietor there." *Turner* v. *Giraud*, 3 Phil. 587. So in *Fuller* v. *Lane*, 2 Add. 438, the Court intimated a similar opinion. But in a suit of this sort, neither by nor against churchwardens, the Court cannot consider whether the party was properly seated, but whether, being legally seated by the churchwardens, he has been disturbed. For "whether the churchwardens have exercised a sound discretion in the selection of the actual occupant is no part of the question to be decided, even in a suit against churchwardens for disturbing one person in order to seat another." *Wyllie* v. *Mott*, 1 Hagg. Ecc. 40.

Per Curiam. The question of law is, Was Blake in such a possession of this pew as to be liable to be disturbed? Was he seated there as an inhabitant, or only to carry into effect the conditions of sale?

Argument resumed.

Whenever churchwardens have exercised their authority, no one can of his own authority dispossess them: the only mode of opposing the arrangement is an appeal to the ordinary, who, if the churchwardens are in error, will correct them: even the churchwardens having exercised their authority are functi officio. Lord Stowell, in *Groves* v. *Wright*, 1 Hagg. Con. 195, said, "A prescriptive title cannot be altered by any authority, nor a possessory title by the churchwarden alone, though it may be by the ordinary." This **[731]** is a little qualified in *Parham* v. *Templar*, 3 Phil. 523: "The churchwardens may remove persons originally placed in seats, or their descendants; but if they do so capriciously, or without just ground, the ordinary will control and correct them." Blake, therefore, though his sitting was temporary, had a primâ facie possessory title, and may bring a suit, for which a fact of possession is sufficient. *Petman* v. *Bridger*, 1 Phil. 324. The objection that Blake has no sufficient original title on which to found a suit of perturbation should have been taken to the libel which states all the facts. This allegation in effect amounts to an affirmative issue, because it admits no title in Usborne.

Addams contrà. I admit, generally speaking, that possessory titles are sufficient for such a suit. But what is Blake's possession? It is nothing more than occupancy till Harman can find a tenant for the house: Blake is not the real party; the suit is not by Blake for disturbing him, but is in fact for the enhancement of the value of Harman's house. Blake's letters shew that he was acting as the agent of others: the matter has been brought vexatiously into Court; my party is entitled to his costs.

Judgment—Sir John Nicholl. This is a suit for perturbation of seat brought by Mr. Blake, a parishioner of Croydon, against Mr. Usborne, also a parishioner. A long libel, consisting of eleven articles with several exhibits annexed, has been given in, and a long allegation, consisting of nineteen articles with further exhibits, is now tendered in contradiction and reply. **[732]** Upon these pleas many witnesses will probably be examined and considerable expence be incurred, yet the merits may be collected from the letters exhibited, which are sufficient to shew that the question is one rather of law than of fact. When such is the case, the Court is always anxious to give an early intimation of its opinion upon the law, more especially in parochial matters, in order that the parish should get into the right course, and that animosities should cease as soon as possible; since it seldom happens that the interest and excitement of such a contest are confined to the immediate litigants. The Court, therefore, will not restrict the expression of its opinion merely to the admissibility of the present allegation, but will extend it to the whole case as far as it is at present developed.

The facts appear to be these: In the early part of the last century, in the year 1725, a new gallery was erected in the parish church of Croydon, under a faculty then granted; the population of the place was at that time increasing, and has up to the present hour continued to increase very rapidly. It should seem that to encourage contributions towards the erection of this gallery the faculty allowed the contributors not only to have pews in the gallery allotted to them for a term of ninety-nine years, but to assign those pews to any other parishioners: whether this power of assignment was general or limited to one term is not now very material, as the whole term expired some years since; nor is it material to inquire whether during the term the general right of the parishioners and of the ordinary was suspended and excluded: at all events it revived at the expiration of the ninety-nine years.

[733] By the general law the use of all pews belongs to the parishioners: they

are to be seated therein in the first instance by the churchwardens: the power of the latter, however, is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority discreetly for the proper accommodation of the parishioners at large. This is the law not merely as held in this Court, not merely to be found in ecclesiastical authorities, but is the common law of the land as laid down by the highest common law authorities. It will be sufficient to refer to Lord Coke, 12 Rep. 105, and 3 Inst. 202.

In the present case, then, the faculty having by the lapse of the ninety-nine years expired some years since, the right of the parishioners to the use of the pews in the gallery revived. Such is my view of the clear law of the case thus far.

One of these pews, the pew in question, was, on the expiration of the faculty, occupied by a Mr. Haines, who had been in possession since 1816: he dwelt in a respectable house and premises, and with that house the possession of this pew seems generally to have been allowed to pass. But of course no prescriptive right had been acquired, for the origin of the title appears as well as the condition and terms on which the pew was granted. Though, however, this faculty right expired before Mr. Haines' death, and though he had no prescriptive right, yet as long as he lived and continued an inhabitant of the parish in this or some other respectable house he had personally such a possessory right as, except on very strong grounds of paramount necessity arising from an urgent want of accommodation for other persons, it might be improper to disturb.

[734] But upon his death, the pew having reverted to the use of the parishioners, it became the duty of the churchwardens to allot the pew to the use of the parishioners by accommodating as many families as it was capable of receiving. It was a large pew situated in the gallery where the higher classes of the inhabitants are placed. If there was not any one large family of long standing and respectable station in the parish who wanted such a pew, the churchwardens might place in it two or three families, giving them sittings in proportion to their numbers; for in a dense and increasing population a pew may be allotted in portions and sittings, if the exigency of the parish renders such an exercise of discretion expedient and proper.

Now, what were the facts? After the death of Mr. Haines his house was sold by auction and purchased by Mr. Harman. Mr. Blake, who was the auctioneer, held out that this pew increased the value of the premises, and promised to deliver possession of it, which he had no legal right to promise or engage to do:—because if he had no legal title to the pew, he had no power to give possession. Now, appended to the advertisement of sale is the following notice:—"There is a pew in the south gallery of Croydon church which was occupied many years by the late Mr. Haines. Possession of the pew will be given to the purchaser of the estate; but the vendor will not be bound to make out any title to it." Therefore Mr. Blake, as I have just stated, engaged to do more than he legally could do. The pew was vacant. Mr. Harman occupied another pew, and did not attempt to remove into this pew. Mr. Usborne, with or without the authority of the **[735]** churchwardens, for that is a point in dispute, sat in it as a vacant pew. Mr. Blake, finding what Mr. Usborne had done, and in order to keep possession for the purchaser and future occupier of the house, obtained the churchwardens' permission that he and his mother should temporarily sit in the pew; but there was no regular seating of him and his mother in this large pew as the future permanent occupants of it. If there had been, the churchwardens would have exercised their discretion improperly; but what they did was evidently done with the view before stated, of enabling Blake to fulfil the conditions of sale, by keeping possession till the pew was wanted for the occupant of Mr. Haines' house. This was perfectly irregular and improper, and gave no legal right to exclude others: Blake had no possession in which he was capable of being in legal consideration disturbed, and consequently he was not warranted in bringing a suit of perturbation against any person who might enter the seat.

The question is not whether Mr. Usborne has acquired any legal possession, but whether Mr. Blake has been illegally disturbed. The suit is founded on an asserted possessory right, but where was the legal possession? It has been argued that if a person is seated by the churchwardens, that is legal possession; but what they did was not legal; for Mr. Blake prevailed on them in fact to confirm a sale of this pew. Mr. Blake then had no legal possessory title; nor is the suit brought by the churchwardens complaining that their right of seating has been infringed. If the suit had

been so brought, the Court could not have supported this exercise of their office, viz. placing Mr. Blake [736] to keep possession for Mr. Harman, or his tenant: they had a right to seat a proper person, but they had no right to seat in order to confirm a sale, and thereby in effect to be parties to the sale. The faculty right having expired, it was the duty of the churchwardens to do the contrary of what they have done: it was their duty for the benefit of the parishioners rather to sever this pew from the late Mr. Haines' house, than to continue it to the succeeding tenant; they would then have discountenanced the impression which appears to be prevalent in the parish, that this pew was appropriated to the house: though if a large and respectable family had succeeded to Haines' house, and there had been no other claimants with equal pretensions, the churchwardens might with some degree of propriety have continued the pew to such family.

If, then, the facts should turn out as I have collected, and is pretty evidently the case from Mr. Blake's own letters, and if the Court has not taken an erroneous view of Mr. Blake's legal right, he possibly may be advised that his best course is to bring this suit to a termination on the best terms that he can, possibly even by payment of costs if required.

It appears that Mr. Usborne is a respectable person, and a parishioner of some standing; he, however, has certainly not acquired any right to the pew, and may be removed; and the Court would be unwilling to give a sanction to his conduct, and thus give currency to an opinion that a parishioner, when a pew is vacant, is justified in stepping into and occupying it without legal authority; but, at all events, he should be properly seated; and if there are not very strong [737] reasons to the contrary, I should certainly recommend that the churchwardens should not continue the pew to the occupier of Mr. Haines' house.

The matter had better stand over till the next session, and if no arrangement can be made in the interim, I must then proceed to examine the allegation more minutely before I admit it to proof.

2d Session.—On the second session Mr. Blake's counsel declared that, under the suggestion of the Court, Mr. Blake would proceed no further: and on costs being prayed on behalf of Usborne, remarked that Blake had a written authority (dated on 23d April) from the churchwardens to sit in the pew; that he had offered Mr. Usborne to sit jointly with him, and had in his conduct throughout been courteous; that there was no necessity to give in the allegation, as the objection to Blake's title appeared on the libel. It was answered that where a party proceeded no further, the other side was of course entitled to be dismissed with his costs.

Per Curiam. The whole proceeding originated in an error of law: the law being clear to the Court, there is no use in continuing the suit. Mr. Usborne seems, to a certain extent, to have acted irregularly; he was not seated by the churchwardens; besides, the real state of the case could have been sufficiently gathered from the libel; there consequently could be no necessity for this long allegation. Though Mr. Usborne's advisers might, for the purpose of defence, think it desirable to plead, the other party ought not to be burdened [738] with the costs of the plea. I shall therefore only give £15 nomine expensarum, which I conceive would have covered the expenses if the case had stopped at the libel.

STORY *v.* STORY. Arches Court, Hilary Term, 3rd Session, 1832.—In matrimonial suits the libel must contain all facts that can by diligence be ascertained at the time, and subsequently new facts only, which are nearly conclusive of guilt, can be pleaded. The Court, on appeal, affirmed the rejection of additional articles, on the ground that the facts might have been pleaded originally, and were inconclusive.

This suit commenced in the Consistory Court of London by a citation taken out by the husband on the ground of his wife's adultery.

The parties were married by banns in March, 1807, and cohabited until June, 1831. They had six children living. In support of the charge of adultery the following were circumstances pleaded in the libel as reformed after debate:—

That in June, 1830, J. A. Harper (a nephew of Mr. Story's) returned from India and resided with his father at Hackney, but often visited his uncle, and frequently walked alone with Mrs. Story, when improper familiarities passed, and a criminal intercourse was formed and carried on between them. That Mrs. Story, on the 21st

of May, 1831, in her way to Brighton, went to Mr. Harper's, the father of Mr. Story's nephew. That about two in the morning of the 22nd Miss Story, a sister of Mr. Story, was awakened by a noise from Mrs. Story's room; that on listening she distinctly heard the voices of Mrs. Story and J. A. Harper, as if conversing in an endearing tone: that Miss Story, having **[739]** knocked at the door of Mrs. Story's room and ascertained from her that she was not ill, went immediately to the bed-room of J. A. H., and not finding him there, knocked again at Mrs. Story's door and was admitted, the door being unlocked and opened by Mrs. Story in her night dress only, who, in answer to Miss Story, informed her that she did not know where was J. A. Harper; that Miss Story, observing the bed to be in great disorder, lifted up the vallance, and discovered J. A. Harper, in his night cap and shirt only, under the bed; that she thereupon retired to her room, but shortly afterwards, at Mrs. Story's request, returned, when Mrs. Story earnestly intreated her not to divulge what had occurred, and observed, "It was more my fault than his." That while Miss Story was at Mrs. Story's door Charlotte Tallowin, a servant in the family, having been disturbed by the knocking, came down stairs, saw Miss Story at the door and heard her speaking. That on the said occasion adultery was committed.

The libel further pleaded that Miss Story, about two days afterwards, thinking it was her duty not to conceal the transaction of the 22nd of May from Mr. Harper, the father, informed him, but by his desire did not disclose it to Mr. Story. That Mrs. Story having paid a visit in Richmond Terrace stayed for a few days with her husband at an hotel in Surrey Street, after which she on Monday, 13th of June, proceeded to Brighton with her daughters and servant, and there joined her mother. That almost immediately after Mrs. Story had left the hotel a letter (by the two-penny post) addressed to her was delivered to her husband: that he read it, and being much surprised and **[740]** alarmed at the contents,(*a*) advised thereon with his sister Mrs. W. Harper, who (aware of the circumstances already pleaded) strongly recommended him not to permit his nephew to visit his family at Brighton, and ultimately informed him, hitherto ignorant and unsuspecting, of his wife's adulterous intercourse: that the intelligence much shocked and distressed him, and he consulted with his half brother, and requested him to acquaint Mrs. Story with his (Mr. S.'s) determination not to live with her again: but it being arranged that this communication should be deferred, it was not made till the arrival of Mrs. Story in London, on her way home.

Annexed to the libel was a pocket book pleaded to be Mrs. Story's, and it was alleged that opposite to the date of 28th April, 1831, "My dearest life, I love you, H.," was written by J. A. Harper with her concurrence.(*b*)

On the by-day an additional article to the libel was debated: it pleaded that from the 15th to the 25th February, 1831, Mrs. Story and daughters were on a visit at Mr. Harper's, and Mrs. Story and J. A. H. occupied rooms opposite to each other: that, one morning, while making Mrs. Story's bed, Harbour, one of the housemaids, observed on the sheets certain marks or stains pre-**[741]**-cisely similar to those which had been frequently noticed by her and others in the bed of J. A. H., and which were well known by them to be occasioned by the discharge of the color from the silk drawers in which he had, since his return from India, usually slept. That Harbour, suspecting that J. A. H. had been in Mrs. Story's bed, shewed to Charlotte Tallowin the stains; that the same were not on the sheets when the bed was made on the previous day, and the sheets had not been changed. That on Mrs. Story's night dress, put on clean the preceding night, were corresponding marks. The article pleaded on this occasion adultery.

The rejection of this additional article having been appealed from, the admissibility of it was again debated.

Addams and Matcham against the admission.

Dodson and Haggard contrà.

(*a*) The letter was as follows:—

"Dearest Mary,—I am most cruelly disappointed not having the pleasure of seeing you, shall wait at home all to-morrow in anxious expectation of a note. Do let me see you.—Yours ever most sincerely.

"Sunday.

"Did you get mine safe?"

(*b*) The rest of the libel was totally irrelevant to the question before the Court.

Judgment—Sir John Nicholl. This is an appeal from the Consistory Court of London on a grievance—the rejection of additional articles to a libel. It is a suit brought by the husband for separation by reason of adultery; the citation was returned on the 4th of August, 1831, the libel was brought in on the 20th of October, 1831, was admitted on the second session of Michaelmas Term, the 18th of November; on the by-day, the 10th of December, the additional articles were brought in; on the 14th of December were rejected; and from that rejection the **[742]** husband has appealed. I must suppose there will be some evidence of familiarities at St. Alban's, and if the libel be proved as laid, there will be full proof of adultery.

I am of opinion that these additional articles were properly rejected. First, a party is not at liberty to make charges by piecemeal; he must bring forward all his case at once, particularly as, though the suit is not a criminal suit, the charges are of a criminal tendency and nature: it is causa criminalis civiliter intentata. It is the duty of a party before he decides on such a suit to make every possible inquiry and then to propound all his facts at once. Here the party had ample opportunities for making inquiries; he had pleaded indecent familiarities, and a fact of adultery on the morning of the 22nd of May, and had vouched the servant, Tallowin, as a corroborating witness; she therefore must have been questioned as to her observations of the conduct of the parties, not only then but previous to that period, and she is now one of the witnesses vouched to these additional articles. The party had no right to lie by a month and then bring forward fresh facts; there is no appearance that these facts were discovered subsequent to the admission of the libel, or at least that they might not with diligence have been sooner discovered.

Again, there are, as I have said, sufficient facts pleaded in the libel to entitle the party to a sentence, but at all events the Court would not admit new facts unless they were not merely important, but nearly decisive and conclusive. What, then, are the facts? That there were in both beds stains of a similar colour; the colour is not stated, but it is conjectured that these stains were pro-**[743]**-duced by the silk drawers of the alleged paramour; and from thence they infer adultery. The fact is much too equivocal to warrant any inference, still less to amount to proof, of adultery: these marks are only pleaded to have been observed on this single occasion; nor are there any specific familiarities alleged, nor is there any averment that there was the impression of two bodies in the bed, or any other indicia of the parties having lain together. This was three months before the only fact of adultery charged, and arguments favorable to the wife might be drawn from this, for if such suspicions were excited among the servants, the absence of all subsequent conduct exciting suspicion tends to exonerate her.

But this matter comes too late: the libel must contain all facts that could by diligence be ascertained at the time. If the husband is able to prove his libel, that will be sufficient; if not, it is unjust to put the wife to answer such vague conjectures in an amended libel.

I pronounce against the appeal and remit the cause.

COTTERELL *v.* MACE AND JAMES. Arches Court, Hilary Term, By-Day, 1832.—On the refusal of a monition against district churchwardens to join the parish churchwardens in making a rate, the district churchwardens, though no parties to the suit below nor to the decree complained of, may, notwithstanding the formal words of the inhibition, be made the only respondents in an appeal, and the refusal of such monition being a case within the third exception of the statute of citations, authorizes the citing the parties out of their diocese. Respondents appearing under protest assigned to appear absolutely. Costs reserved.

This was an appeal from the Consistorial Court of Lichfield promoted by Joseph Cotterell, one of the churchwardens of the parish of Walsall, residing in the borough thereof, by reason that the Judge of the Court below had refused to grant a monition against Thomas Mace and John James, **[744]** the churchwardens residing in the foreign of Walsall, to shew cause why they should not join in making a general and equal rate upon all the inhabitants of the parish for the repairs of the church, and for other necessary expences.

The parties cited (under protest) alleged: that they had never been cited to appear, and never had appeared, nor were in any manner privy to nor cognizant of the proceedings in the cause in the first instance from the decree in which this pretended

appeal was prosecuted, and accordingly that the decree neither was nor could have been made at their instance, as in the inhibition and citation is alleged, by reason whereof they are not by law liable to be cited in this appeal. That in October, 1830, Cotterell caused a citation to issue from the Consistory Court of Lichfield against the predecessors of the parties now cited for the purpose, as pretended, of obtaining a general and equal church-rate throughout the parish of Walsall, but which suit he withdrew upon a writ of prohibition: wherefore they prayed a dismissal with costs.

On the other side it was alleged that the citation was proper; and that reference to other proceedings was irrelevant.

Addams in support of the protest. A suit had not commenced in the Court below: the language of the inhibition, "that certain injuries were done at the unjust instigation and procurement" of my parties, is quite absurd. They were not parties nor privies to the refusal of the monition by the Court below; nor had in any way appeared before the Court. How then can **[745]** the injuries be said to have been done "at their instigation or procurement." They therefore were not the proper parties to this appeal. Cotterell might have proceeded by mandamus against the judge, or in some shape he might have come here by appeal, making the judge the party. By the second exception in the bill of citations (23 Hen. 8, c. 9) a party may be cited out of his diocese on appeal, after a cause has begun: but here no cause had begun. The third exception, "in case that the bishop or other immediate judge or ordinary dare not, nor will not, convent the party to be sued before him," might apply to the present case. The proceedings should then have been different: the judge should have been the party to the appeal, or the respondents should have been cited in an original suit, on the ground that the immediate ordinary would not convent them. *Whiston's case* is the only case which can furnish any thing of a precedent.(*a*)[1] In that case Dr. Pelling wished to exhibit articles for heresy against Mr. Whiston, who dwelt in the jurisdiction of the dean and chapter of St. Paul's. Dr. Harwood, the judge, gave letters of request to Dr. Bettesworth, the official of the Arches: Pelling prayed a citation from the Arches; Dr. Bettesworth refused. Pelling appealed to the Delegates against this refusal; the Delegates reversed the sentence, and ordered a citation for Whiston to appear before them: Whiston denied that the Delegates were "judices competentes," being empowered by their commission only to hear and determine a cause of appeal between *Pelling* v. *Dr. Bettesworth*, to which Whiston was no party, and that **[746]** they had no original jurisdiction. So that the judge was made the only party to the appeal; and I apprehend, from the report going no further, that the protest was sustained. I contend that under the bill of citations, as there was no suit below, my party is not bound to appear.

The King's advocate and Lushington contrà. The application for a monition was in fact the commencement of a suit, and was quite sufficient to enable this Court to cite the parties out of their diocese. The language of the inhibition is mere form. In *Whiston's case*, the acceptance of letters of request having been refused, no suit had been commenced; but still the Delegates reversed the sentence and directed a citation to issue, and there is nothing to shew that Whiston's subsequent protest was sustained.(*a*)[2]

Judgment—Sir John Nicholl. This is an appeal from the refusal of the judge at Lichfield to grant the appellant's prayer for a monition against Mace and Symes. The usual inhibition, citation, and monition issued, and were served. The parties cited have appeared under protest, alleging that they were not bound to give an absolute appearance; and the only question is whether they are bound to appear absolutely.

The first ground of protest is, that they were not parties to the suit in the Court below, nor to **[747]** the decree complained of: but it is quite evident that a proceeding against them had been commenced and that a monition had been refused. It is argued that the inhibition is absurd; for that it sets forth that certain "injuries were done at the unjust instigation and procurement" of Mace and Symes; and that such could not have been the fact when the parties were not before the Court. The answer is, that it is a mere averment of form. The monition does not appear to have been absolutely refused; for the Chancellor of Lichfield uses these expressions; "he for

(*a*)[1] *Pelling* v. *Whiston*, Com. 199.

(*a*)[2] From a MS. note it appears that the Delegates overruled the protest, and assigned Whiston to appear absolutely.

the present at least declines to comply with the request of Cotterell, in other words, decides against issuing the monition now applied for." It might have been therefore only intended to allow the matter to stand over.

Again, it is said that the party not having been cited in the Court below is not now to be cited out of his diocese: and this, if unprovided for by the statute of citations, might possibly have been a more solid objection; but the third exception in the statute is expressly in point—"in case the immediate judge dare not or will not convent the party to be sued before him." The party therefore is properly cited in the present instance. No precedent has been adduced to shew that any different course has been adopted in other cases. The case cited, whether the protest was or was not eventually sustained, is not in point. It would be premature to decide whether the other churchwardens can be compelled to make a rate for the whole parish: but they cannot, by now refusing to appear, prevent the decision of that important question which the ultimate merits will involve. The Court, however, can determine nothing until **[748]** the parties are before it. It is at least desirable that the question should be decided by some tribunal; for until it is decided the repairs of the church cannot be made.

I shall overrule the protest, and assign the parties to appear absolutely: but I shall give no costs; or rather reserve the consideration of that question till the hearing on the merits (see 1 Nolan, 10, 34. 2 B. & A. 161).

IN THE GOODS OF HENRY SELWYN. Prerogative Court, Mich. Term, 1st Session, 1831.—The husband and wife having been drowned together, the Court (the wife's next of kin not opposing) granted probate, in common form, of the husband's will to executors substituted "in the event of her dying in his life-time," the will appointing her executrix "if living at his decease."

Mr. Selwyn and his wife, while on a voyage from Liverpool to Bangor, perished at sea on the 18th of August. They left no issue. By his will he directed that his wife, if living at his decease, should have all his property and be sole executrix; and, in the event of her dying in his life-time, then the will appointed three executors and trustees. No proof could be obtained as to the exact time at which either of the parties died: their bodies were found floating near the shore some few days after the wreck.

Addams for the substituted executors, prayed probate.

[749] Per Curiam. This case arises out of the unfortunate accident of the "Rothesay Castle." Instances have occurred where, under similar circumstances, the question has been, which of two persons survived; but in the absence of clear evidence it has generally been taken that both died at the same moment. In the case of *Taylor* v. *Diplock*,(*a*) which was elaborately argued, both on authorities and presumptions, the Court held that the parties must be taken to have died at the same instant; that nothing vested in the wife; and granted administration to the next of kin of the husband. Here the wife and her representatives would have no interest in the effects under the words "in case she should be living at his death." The only difficulty arises from the other clause providing that the substitution of the executors and the devise over shall take effect in the event of her "dying in his life-time." Without going into the general presumption that the husband was the stronger and therefore survived, the intention is so clear that, whatever might be the strict construction of the words in other Courts, I shall decree probate to the substituted executors in common form; the next of kin making no opposition to the grant, and having it in their power, if they should hereafter see fit, to call in the probate and contest the point.

Motion granted.

[750] BIRKETT *v.* VANDERCOM. Prerogative Court, Mich. Term, 1st Session, 1831.—A married woman—executrix—and having separate property, over which she had and exercised an appointing and disposing power, can continue the chain of executorship.

Daniel Birkett, senior, left by will certain property to Sarah, wife of Daniel Birkett, junior, his nephew, for her separate use; and gave the residue of his effects to his said nephew, and appointed him sole executor. The nephew proved in 1817, and died, having made his will, appointing Quilter and Vandercom residuary legatees

(*a*) 2 Phill. 271. See also *Colvin* v. *The King's Proctor*, 1 Hagg. Ecc. 92.

in trust for his wife for life, then for his children as she should by will appoint. He named his wife and Quilter executors, and they proved the will.

Mrs. Birkett subsequently married Logan, reserving to herself by two several indentures the power of making a will. She survived Quilter, and in Logan's life-time made a will, and died in March, 1831. By her will she gave the property to which she was entitled, or which she had the power of appointing (under the above two wills), among her children equally; and appointed her sons, Charles and John, executors. Charles renounced. John prayed probate, limited, 1st, to the powers under the two indentures; 2dly, to the effects of Daniel Birkett, senior, and Daniel Birkett, junior, left unadministered, over which she had and exercised a power of disposing and appointing by will; and 3dly, to the power of appointing an executor to Daniel Birkett, the younger. A decree having issued citing Vandercom to shew cause why probate, so limited, of Mrs. Logan's will should not be granted to her son John, as executor, an appearance was given for Vandercom, who prayed administration to Daniel Birkett, junior, as his surviving residuary legatee in trust.

Proceedings were pending in Chancery in respect to the property of Daniel Birkett, senior.

[751] Addams for Vandercom. The prevalent notion, that the chain of executorship is broken, is certainly at variance with the cases of *Scammell* v. *Wilkinson* (2 East, 554), *Stevens* v. *Bagwell* (15 Ves. 156), and *Hodsden* v. *Lloyd* (4 Bro. C. C. 533), which will be relied upon on the other side. In Mr. Stevens's will, however, there was no residuary legatee in trust; while here, Vandercom's power, as such, extends to the children after the death of their mother, whose executor now claims the representation.

The King's advocate and Haggard contrà, were stopped by the Court.

Per Curiam. I cannot see on what principle the chain of executorship is not continued: besides, John Birkett has a direct interest; he is the most proper person to be the representative, in order to bring all adverse matters to a final decision, while Vandercom is a mere trustee, and has no beneficial interest, but is the solicitor for others claiming a beneficial interest.

Addams prayed Vandercom's costs out of the estate.

The King's advocate. Vandercom should be satisfied that he is not condemned in costs.

Per Curiam. I shall decree the probate as prayed.

[752] PHILIPPS *v.* THORNTON. Prerogative Court, Mich. Term, 1st Session, 1831.—

An allegation pleading that a will made at Batavia containing a revocatory clause, dispositive, and duly executed, was not intended to revoke or to dispose, rejected.

Robert Thornton, formerly of Southwark, died at sea in October, 1824. In 1812 he executed a will in respect to his landed property, which he gave to his brother, and appointed him sole executor: and in June, 1819, he appended a codicil to the will bequeathing to his brother all his property of every description. The testator in August, 1819, sailed from this country with his sister, to carry on his mercantile pursuits at Batavia; and while resident there he, on the 12th of August, 1820, executed a will, drawn up in the Dutch language, and attested by a notary public and two witnesses. The will contained a general revocatory clause, and, through default of lineal descendants, appointed his sister, of mature age, his executrix and universal heiress of all his goods, property and chattels, moveable and vested, stock and credits without any exception. It excluded from his estate and property the members of the Orphan's College. A copy of this will (the original having been proved at Batavia) was propounded by Mr. Philipps, who, after the testator's death, intermarried with the sister and had survived her. The allegation was admitted unopposed; and the answers of the brother admitted the deceased's affection for his sister, and that he was of perfectly sound mind when he executed the will propounded.

A requisition having issued to Java to take evidence on the above plea, an allegation on the part of the brother was brought in: it pleaded that at Java the Orphan's College in cases of in-**[753]**-testacy immediately takes upon itself the custody and control of the deceased's effects, and invariably appropriates to itself at least one tenth of the property; that another tenth at least, and frequently more, is absorbed by the costs and charges occurring during such custody, and the fees and dues payable on the recovery of the remainder by those entitled to the succession, and that such possession occasions great delay; and that to defeat such claims it is almost the invariable practice for strangers at Batavia to make a testamentary disposition, and

thereby exclude any interference on the part of the chamber; that such instruments are local from their very nature, and not intended to affect property not situated within the island; that the testator's sole object was to bar the college; and that he was not aware that he was revoking any subsisting will which disposed of his property elsewhere.

The King's advocate. The allegation must be rejected: the Court cannot look at such averments in direct contradiction to a regularly executed and subsisting will.

Phillimore contrà. This must be considered as a question of foreign law, as the will was executed in Batavia. The Court must, in order to decide the question, have the law of Batavia before it.

Judgment—Sir John Nicholl. This allegation is rather of an extraordinary kind, not denying affection for the sister, not **[754]** denying the execution of the paper, not attempting to shew any improbability that the deceased should leave his property to this sister who had accompanied him to the other side of the globe, but alleging that the instrument was executed quite for a different purpose—to prevent the Orphan's College from taking possession of his property after his death in case of an intestacy. That cannot destroy the disposing effect of the paper, which is regularly attested by a notary and two other witnesses. It is quite impossible to admit evidence to the effect of this allegation against the executed instrument.

I reject the allegation.

IN THE GOODS OF ELIZABETH BRAND. Prerogative Court, Mich. Term, 3rd Session, 1831.—A testatrix executed a will, and thereupon destroyed a former will, and subsequently executed two other wills. The last will was propounded, but abandoned. A decree then issued calling on all parties interested to shew cause why probate of the instructions for the first will should not be granted; and the Court, on proof per testes that the instructions were of the same effect as the first will, that that will was executed when the deceased was sane, but destroyed and the other wills executed when insane, pronounced for the instructions, and refused costs out of the estate to persons in distribution who by interrogatories set up insanity when the first will was executed.

Elizabeth Brand died on the 9th of January, 1831, aged 80; she left a sister, only next of kin, and a nephew and several nieces entitled in distribution. On the 2d of December, 1828, she executed a will, prepared by her solicitor in conformity with her instructions which he had written down in her presence, and which were then read over to, and approved of by, her. Of this will she appointed four executors and four residuary legatees, two of whom were her nephew, Charles Brand, and her niece, Elizabeth Brand. The deceased became of unsound mind some time before the 10th of March, 1830, and so continued till her death. During her insanity she destroyed the will of December, 1828, and executed three other wills, the first dated the 10th of March, 1830, the **[755]** second on the 19th of March, and the third on the 28th of October, with various executors and residuary legatees. The two executors (who were also two of the residuary legatees) renounced the instrument, dated the 28th of October, but probate of it was propounded by the third residuary legatee,(*a*) and opposed by Charles Brand, the nephew: an allegation in support of the paper was admitted, and witnesses examined on it, when the residuary legatee declared that she proceeded no further.

The King's advocate, upon an affidavit of the solicitor as to the will of the 2d December, 1828, being of the same purport and effect as the instructions, and also as to the destruction of the original will, and the deceased's incapacity, moved for a decree with intimation to issue against the several parties in distribution, and against parties interested in the pretended wills of the 10th and 19th of March, 1830; the latter to appear, propound, and prove the wills, if they saw fit; and all to shew cause why probate of the instructions of the will of the 2d of December, 1828, as containing the last will of the deceased, should not be granted to Charles and Elizabeth Brand, as two of the executors.

Motion granted.

The decree having issued, an appearance was given for several of the parties in distribution; an allegation, propounding the instructions, pleaded the factum of the

(*a*) In the paper of the 10th and 19th of March she was also joint residuary legatee.

original paper, the subsequent insanity of the deceased, continued affection to the parties benefited till the time she became insane, [756] and the destruction of the paper on executing the paper of the 10th of March, 1830, and during her insanity. This allegation was admitted without opposition. Witnesses were examined to whom interrogatories were administered with a view of establishing that the insanity existed previous to the execution of the will of December, 1828. On the second session of Trinity Term the cause came on for hearing.

Burnaby and Nicholl for parties in distribution, admitted the sanity of the deceased when the will of December, 1828, was executed; and the destruction of that will while in a state of insanity: and prayed costs out of the estate on the ground that under the decree the parties were fully justified in administering interrogatories, that though insanity had not been carried back to December, 1828, yet that there were traces that the deceased's mind had been affected sometime previous to the period fixed on by the executors; and that the instructions must have been proved per testes against the parties interested in the wills of March, 1830.

The King's advocate and Lushington contrà.

Per Curiam. The parties were justified in, but were not under the necessity of, coming before the Court. I can see no grounds for decreeing costs out of the estate.

[757] SMITH *v.* SMITH AND OTHERS. Prerogative Court, Mich. Term, 3rd Session, 1831.—Royal peculiars being altogether independent of the archbishop, the will of a deceased who left goods in two royal peculiars, in one of which he died, and other goods in one diocese only within the province, is rightly proved in the royal peculiar where he died. The executor who so proved the will and appeared under protest to a citation calling upon him to take a prerogative probate dismissed.—Quære, whether the probate of one royal peculiar will authorize the administration of goods in another.

On protest.

John Smith, late of Ludstone Hall in the parish of Claverley, Shropshire, died on the 18th of February, 1830, and on 15th of May his will was proved by his executors (under 4000l.) in the royal peculiar of Bridgnorth. John Smith, a son, and one of the residuary legatees, having since cited the executors to bring in the will and take probate in this Court, they denied the jurisdiction, and alleged that the testator died within the royal peculiar and exempt jurisdiction of the deanery of Bridgnorth, and that he left goods within that peculiar, and also within the royal peculiar and exempt jurisdiction of the collegiate church or King's free royal chapel of Wolverhampton, in the county of Stafford, but was not, at his death, possessed of any other goods within the province of Canterbury: that the granting probate of the wills of persons deceased leaving goods within the deanery of Bridgnorth, and also within the jurisdiction of the collegiate church of Wolverhampton, belongs to the Courts of the same respectively. In reply, Bridgnorth and Wolverhampton were not admitted to be royal peculiars; and it was alleged that the deceased's goods in each of the said jurisdictions were upwards of 5l.; that there was also due to his estate divers debts of upwards of 5l. in value within the diocese of Lichfield and Coventry, besides his goods within the respective peculiars; and that therefore the deceased had, at his death, goods, chattels, and credits in divers dioceses or peculiar jurisdictions within the province of Can-[758]-terbury sufficient to found the jurisdiction of this Court.

In support of the protest an affidavit of the registrar of the royal peculiar of the deanery of Bridgnorth set forth that Bridgnorth was a royal peculiar, and that the jurisdiction was free and exempt from all ecclesiastical authority; that it extended over six parishes, of which Claverley was one; that the Court had, as he believed, from time immemorial exercised the power of granting probates of wills and letters of administration of persons deceased leaving, within its jurisdiction, goods of whatever value, and also if, in addition, they left other goods of whatever value within any other jurisdiction. That causes entertained in the Court of Bridgnorth were appealed direct to the Delegates; that, in 1829, the Prerogative Court of Canterbury received from the said royal peculiar an office copy of the will of Robert King, proved at Bridgnorth, upon which the Prerogative Court granted a second probate, the original will remaining at Bridgnorth; and that this was the practice.(*a*)

(*a*) The following extract of a letter dated 28th October, 1808, to the registrar at Lichfield, was read to the Court:—

[759] The registrar of the Court of the Collegiate Church of Wolverhampton made an affidavit that Wolverhampton was a royal peculiar: he was not aware of any appeals from that Court; that the probates of wills and letters of administration issued under the seal of the Wolverhampton Court are headed, "Official Principal of the Peculiar and Exempt Jurisdiction of the Collegiate Church or King's Free Royal Chapel of Wolverhampton." That in office copies of wills the copies were always headed, "Extracted from the Registry of the Royal Peculiar of Wolverhampton." On the other side there was an affidavit, dated on the 18th of November, in which it was stated that three persons living, at the testator's death, in the diocese of Lichfield and Coventry, were indebted to him in 90l.

[760] The King's advocate for the executors. Bridgnorth and Wolverhampton are stated in the registrars' affidavit to be royal peculiars; and the averment to the contrary is not supported.

Per Curiam. There being nothing to contradict the statement in the protest, I must consider them both as royal peculiars.

Lushington. I do not object to argue the case with that concession.

"Sir William Wynne, Judge of the Prerogative Court, is of opinion that the Royal Peculiar of St. Mary in Shrewsbury is to be taken as a place out of the province, and he will accept an office copy of the will instead of the original, provided it commences with 'Extracted from the registry of the Royal Peculiar of Saint Mary in Shrewsbury,' and assigned by the Registrar as such."

*** The editor has been furnished with the following case:—

Crowley v. *Crowley.* Prerog., Mich. Term, 1744.

Sarah Colman died intestate, leaving an only child, wife of G. Crowley. A proctor exhibited his proxy for her, and prayed a commission to swear her administratrix: commission extracted on 6th July, 1744, and not being returned, Rous, for the husband, prayed commission of appraisement and monition against the wife to shew the goods, &c. to the commissioners. Monition personally served and oath made of the service, and that she refused to appear and shew the goods. On 6th September Rous prayed her to be decreed excommunicate, and administration to be granted to the husband, giving security. Holman appeared for the wife, under protest to the jurisdiction, and prayed Rous' petition to be rejected, alleging that the deceased some time before and to her death lived at Poole, which is within the royal peculiar jurisdiction of Great Canford, and totally exempt from all ecclesiastical jurisdiction but that of the person appointed by the Crown: that all the deceased's effects were within the jurisdiction of Canford, except a leasehold estate of 9l. per annum at Pudlesome in the county of Dorset; that his client before and at the time of granting the commission was an inhabitant of Poole, and therefore not subject to the jurisdiction of this Court; that the commission being directed to be executed within that royal peculiar without a requisition to the proper ordinary, his client was advised that by law she was not obliged to appear at the execution of the commission; that she is willing to take administration in this Court of the deceased's effects lying without the said royal peculiar, in case the judge shall direct her so to do; and to shew all such effects as are not within the same to such commissioners as the Court shall hereafter name.

Contrà. It appeared by affidavits that there was a legacy of 50l. due to the deceased from a person living out of the jurisdiction of the royal peculiar in the county of Dorset, and also debt by bond from a person living at Winborn Minster, which is another royal peculiar jurisdiction in that county.

Dr. Jenner for the husband, cited 23 H. VIII. c. 9, s. 4.

Dr. Andrew contrà, cited *Sir George Markham's case*, and *The Duke of Hamilton's case.*

The Judge (Dr. Bettesworth) was of opinion that he could not enforce the monition in the royal peculiar jurisdiction without directing letters of request to the proper ordinary of the place.

The above case Sir Edward Simpson says he transcribed from the notes of Dr. Jenner, who added:—

"The wife afterwards took different administrations for the goods which were in the several royal peculiars, and an administration in the prerogative for those which were in other places: the whole effects were, as far as I can recollect, within the county of Dorset."

King's advocate. As royal peculiars, then, they are exempt from [761] archiepiscopal jurisdiction. The affidavit and account brought in on the part of the legatee seems at variance with the executor's oath—that the testator had at his death no goods out of the jurisdiction of Bridgnorth and Wolverhampton; but, in reply to the protest, no particulars of the effects alleged to be in the diocese of Lichfield and Coventry were set forth, and the affidavit, to sustain the averment, has been brought in so very recently that the executors have not had an opportunity of answering it. If, however, there were such effects, this Court could not direct a transmission of the will.

Lushington contrà. Gibson, p. 472, in commenting upon the 93rd canon, says, "Where one dies possessed of goods in several peculiars within the same diocese, in that case administration shall be granted by the metropolitan, as they are exempt from the ordinary." Here the testator left bona notabilia both in Bridgnorth and Wolverhampton, and they are both locally within the same diocese. The 92d canon, on which the Court relied in *Scarth* v. *The Bishop of London*, 1 Hagg. Ecc. 637, directs inquiry as to whether a party, at his death, had "any goods or good debts in any other diocese or peculiar jurisdiction than in that wherein he died to the value of 5l.," and if so, the probate or administration belongs to the archbishop.

Per Curiam. Can it be maintained that under the word "peculiars" the rights of the Crown have been taken away by the canon?

[762] Lushington. If an exemption had been contemplated in favour of royal peculiars, it is most probable that Bishop Gibson would have noticed it. Westminster is a royal peculiar; yet, in practice, when a party dies within that peculiar, the prerogative jurisdiction is not ousted. A decision supporting this protest will lead to extreme inconvenience and the expense of multiplied probates.

Judgment—Sir John Nicholl. This is a question respecting the jurisdiction of the Prerogative Court, arising out of the following circumstances:—John Smith died sometime since in the parish of Claverley, in the county of Salop: he made a will, appointing his two sons executors and three residuary legatees. John Smith, one of the residuary legatees, has cited the executors to bring in the will and take probate in this Court, alleging that the deceased left bona notabilia within the province of Canterbury.

An appearance has been given for the executors under protest, denying that there were bona notabilia, and alleging that the deceased died in the peculiar jurisdiction of Bridgnorth; that the will was proved there; that the deceased had considerable property within that jurisdiction, and also in the peculiar jurisdiction of Wolverhampton, but that both are royal peculiars: the protest further denied that there were any effects within the province of Canterbury.

It is admitted that there are goods in both peculiars, and it is asserted in the affidavit that there are also other goods within the diocese of Lichfield and Coventry. Affidavits have been [763] made by the respective registrars of each peculiar, which there is nothing to contradict, and which satisfactorily prove that they are royal peculiars; that, as such, they have at all times been in the habit of granting probates and administrations, and that the appeal lies from them, not to the Archbishop's Court, but to the Court of Delegates. It is disputed whether there are any effects in the diocese of Lichfield and Coventry; but I will assume such to be the fact, for the purpose of considering this case.

Two questions arise: First, whether goods in one or both of the royal peculiars found the jurisdiction of this Court so as to make it incumbent on a party to bring in the will, and take probate here: secondly, whether the goods within the diocese of Lichfield and Coventry found the prerogative jurisdiction.

In the first place, I apprehend that a royal peculiar is in no degree subject to the archbishop; it is independent of him: it is out of his province in point of jurisdiction as much as the province of York or of Dublin: it is co-ordinate. An appeal from a royal peculiar does not lie to the archbishop, but to the King in Chancery, that is, to the Delegates. The deceased, then, having died in the royal peculiar jurisdiction of Bridgnorth, being domiciled there, his property lying there, it follows that the probate there granted is regularly granted, and that jurisdiction is rightly in possession of the will. The fact that he had goods also at Wolverhampton, another royal peculiar, does not vary the case in respect to the jurisdiction of this Court, any more than if those goods were within the province of York. Whether the probate at Bridgnorth

legally authorizes the [764] administration of the goods at Wolverhampton, or whether there should also be a probate there, is not a matter that affects the question in this Court. The peculiars contemplated by the canon, and by the authorities referred to, are not in my opinion royal peculiars, but subordinate peculiars.

It is true—and that is the great argument—that the inconvenience and extra expense occasioned by royal peculiars are the same which are provided against in the case of other peculiars by the prerogative of the archbishop: but that inconvenience and expense, arising from the necessity of two probates, where there are two independent jurisdictions, neither subject to the archbishop, equally exist when there are goods in Canterbury and York. All peculiars, even royal peculiars, may be of public inconvenience; but at present they exist lawfully, and possess legal rights which must be respected. The inconveniences have been pointed out, and are such as call loudly for a remedy, particularly now that personal property is so extended: but under the present law I am of opinion that this Court has no right to call in the will, and compel probate here, because the goods in one or more of the royal peculiars happen, geographically speaking, to be locally situate within the province.

Another point has been made, viz., that some of the goods are in neither of the royal jurisdictions, but are in the diocesan jurisdiction of Lichfield and Coventry. In the first place, that fact is not admitted nor fully established; but assuming that such is the fact, it follows that the Bridgnorth probate would not reach to those effects: but does it therefore follow that a prerogative probate is necessary? Would not the [765] diocesan jurisdiction have a right to grant probate; and is not the question of the jurisdiction to which he shall resort rather a matter open to the choice of the executor? Upon the principle of the case of *Scarth* v. *The Bishop of London's Registrar*, I think there is a concurrency of jurisdiction when a person dies in a foreign jurisdiction (as in York, Scotland, or abroad, and, by analogy, in a royal peculiar) and leaves goods only in one diocesan jurisdiction, within the province. In that case either the diocesan jurisdiction may grant the probate as the goods are there,(*a*) or the metropolitan may, because the party did not die within the diocesan jurisdiction; but probably that is not a point which the parties are disposed to try, nor is the Court bound to decide it under the present protest.

The question here is rather between the royal peculiars and the prerogative. The executors are called upon to bring in the will; they protest against being bound so to do. They shew that they have proved the will at Bridgnorth, which is a royal peculiar and where the party died; they have therefore taken a proper probate, and the will is properly deposited. If the deceased left goods in several diocesan jurisdictions or peculiars, not being royal, so as clearly to require a prerogative probate, the executors even then could not be called upon to bring in the will. Probate here could only be taken upon an office copy or exemplification, as in the case where probate has been taken in the province of York. I allow the protest and dismiss the parties.

[766] In the Goods of John Reitz. Prerogative Court, Mich. Term, By-Day, 1831.—The Court refused to grant administration cum test. ann. to A. B. as the attorney of the Orphan Board at the Cape of Good Hope acting on behalf of the next of kin, but subsequently granted it to a creditor, the next of kin having been cited by a decree on the Royal Exchange.

The deceased, a lieutenant under the command of Captain Owen, R.N., died in May, 1824, on the coast of Africa, a bachelor, leaving three brothers and a sister, his next of kin. By his will he gave his property to Miss Stanley, but appointed no executor nor residuary legatee. Conformably to the laws of the Cape of Good Hope two of the deceased's next of kin, there resident, placed his affairs under the management of the Orphan Board (the president and members of which became officially executors and administrators of the effects), which, in November, 1825, by power of attorney authorized Captain Owen (with the concurrence of the next of kin) to collect the deceased's property; and after a settlement of his account with his agent, Mr. Stilwell, to pay over the balance to Miss Stanley. Captain Owen's absence from England and other circumstances had hitherto prevented his making the present application. The property was £220.

(*a*) *Griffith* v. *Griffith*, Sayer, 83, and the cases cited in *Scarth* v. *Bishop of London*, 1 Hagg. Ecc. 625.

Lushington, referring to the necessary documents, and stating that justifying security would be given, moved for administration, with the will annexed, to Captain Owen, as the attorney of the Orphan Board, acting on behalf of the next of kin.

Per Curiam. It would be quite irregular to grant this administration to a nominee of an official board at the Cape of Good Hope. The property is to be here administered; and there are several next of kin. Why does [767] not Mr. Stilwell, who is a creditor, apply for administration, on citing the next of kin? Why does not the attorney of the next of kin, or the legatee, take administration? There are all these regular ways, and yet the Court is asked to do what seems very irregular.

Motion rejected.

On the third session of Hilary Term, the next of kin having been cited by service on the Exchange, notice was sent to the legatee, and on a proxy of consent from Captain Owen the Court granted administration to Mr. Stilwell.

IN THE GOODS OF ANNE DORMOY. Prerogative Court, Hilary Term, 1st Session, 1832.—A domiciled Frenchman having of his will appointed an executor but no residuary legatee, and administration cum test. ann. (granted, after citing the executor, to the son's attorney in 1828) being brought in, the Court, doubting whether it ought not to require the ambassador's certificate, ultimately on justifying security and on the French consul-general's certificate (confirmed by an affidavit) that by the French law the next of kin was entitled to the residue, granted the administration to the son without citing the nude executor, he having never applied for the grant, though the deceased died upwards of thirteen years before.

The deceased, a widow, died in November, 1818, in the West Indies: she left four children, and of her will appointed Cremony, her son-in-law, sole executor; but except as to bequeathing to several of her slaves their freedom, she made no disposition of the property. Cremony, having assigned over all his interest in Mrs. Dormoy's estate to the eldest son, declined to interfere further in her affairs: and after being cited by a decree of this Court, administration in 1828 was granted with the will to the son's attorney. The attorney became a bankrupt, and brought in the administration, which was now prayed to be granted anew to the son: but it was objected in the registry that, the residue being undisposed of, Cremony, as nude executor, was entitled to the [768] grant. To meet this objection the son made an affidavit "that the French part of the island of St. Martin in which the deceased was domiciled was, and is, subject to the laws of France: that by the 913th article of the code no person leaving three or more children at his death can dispose by will or deed of more than a fourth part of his effects: and by the 1025th and 1026th articles a testator may name testamentary executors, and may give them the possession of his moveables, but that such possession cannot continue beyond a year and a day from his decease; and if he has not given them such possession, they cannot claim it." That the deceased's will was executed according to the French law; and by that law Cremony ceased to be executor at the expiration of the year and day, and could no longer interfere with the estate.(*a*)

Lushington moved for the administration.

Per Curiam. If the law of England prevailed in this case there might be a doubt whether Cremony would not be entitled, as nude executor,(*b*) to the administration: but as the law of France governs the succession, the residue is undisposed of, and the son, as one of the next of kin, is entitled. My difficulty is whether I have sufficient evidence of the French law. The absence of any application [769] for the grant on behalf of Cremony during the long interval of time that has elapsed since the death of the party is confirmatory of the correctness of the son's affidavit and of the certificate. But is the certificate of the French consul-general sufficient proof of the law: should not the ambassador himself have certified? That might have been considered as

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(*a*) The French consul in London certified that the French part of the island of St. Martin (W. I.) was effectively governed by the French laws; and that the affidavit set forth the law with perfect accuracy, and in entire accordance with the articles of the code therein recited.

(*b*) See, however, 1 W. IV. c. 40, cited in notis, sup. 205.

adequate authority on such a point.(*a*) Under all the circumstances, however, I will grant the administration; but as there are other parties in distribution the securities must justify. As the case is governed by the law of France there is no occasion further to cite Cremony.

FIELDER AND FIELDER *v.* HANGER. Prerogative Court, Hilary Term, 2nd Session, 1832.—Administration de bonis non to a feme coverte granted to the representatives of the husband, an appearance having been given and administration prayed by the next of kin of the wife. The Court directing that though the modern practice had been otherwise, such grants should for the future pass to the husband's representatives, unless cause to the contrary was shewn.

[Distinguished, *In the Goods of Crause*, 1858, 1 Sw. & Tr. 146.]

This was a cause of granting administration to the executors of Philip Leader of certain effects of his late wife left unadministered by him: an appearance having been given for, and administration prayed by, the niece and one of the wife's next of kin, the executors alleged in act on petition that in June, 1812, in contemplation of marriage, Leader and Mrs. Dawson signed an agreement that her property should on the marriage pass to Leader, save as to "her monies in the funds which shall be for her separate use to all intents and purposes as if she were sole and unmarried, and that the same shall be conveyed [770] to trustees, and a proper settlement executed." That no settlement was made, but the marriage took place, and on her death in June, 1828, she was possessed of personal estate consisting of 2475l. in the four per cents., and some long annuities standing in her name of "Dawson."

The proctor for the niece having returned the act unanswered, Lushington moved that the grant should pass to the husband's executors. It was true that the modern practice had been different, but as all the interest was in the representatives of the husband, they were the parties best entitled to the grant. All the cases were collected in 1 Hagg. Ecc. 341-8, and 2 Hagg. Ecc. Appendix, 158-170.

Per Curiam. Those cases shew that there have been contradictory decisions on the point. On the principle, however, that the grant ought to follow the interest, and that the whole interest is vested in the husband's representatives, I shall decree this grant. I should have done the same if the husband had not taken out administration, unless it could be shewn that he had not the interest, but that the property belonged to the wife's next of kin: and it will be understood in the registry that this is to be the rule for the future, unless special cause to the contrary be shewn.

Motion granted.

[771] LONG AND FEAVER *v.* SYMES AND HANNAM. Prerogative Court, Hilary Term, 3rd Session, 1832.—Any acts which shew an intention to take upon them the executorship prevent executors renouncing: therefore the insertion of an advertisement calling upon persons to send in their accounts and to pay money due to the testator's estate to A. and B., "his executors in trust," held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance; the estate being small and left for two years and a half without a representation.

This was a proceeding by two legatees under the will of John Feaver to compel the executors to take probate, alleging that they had intermeddled: and the question was whether they had so intermeddled as no longer to be entitled to refuse. The facts of the case as stated by the legatees were these.

John Feaver died on the 17th June, 1829, leaving a will dated on the 11th of June, 1829, of which the defendants were the executors. On the 29th of July and on the 3rd of August the following advertisement was inserted in the *Sherborne Paper*:—"All persons who have any claim on the estate of the late John Feaver of Horsington, in the county of Somerset, deceased, are requested to send their respective accounts and are desired to pay all money due to the said estate without delay to Mr. Symes of Combe Farren in the county of Dorset, or to Mr. Hannam of Darkhourbour, in the county of Somerset, his executors in trust." It was alleged further that Symes and Hannam applied to several persons for payment of their debts,

(*a*) Lushington. The authority of the consul-general as to the law has been considered sufficient in similar applications.

particularly that Symes applied to one Hilliar, and on the 20th August received of Allan 20l., for which sum Symes and Hannam opened an account, as executors, with a banking house, and which sum was afterwards withdrawn by Symes. That Symes and Hannam received and paid other monies; and on the 17th June, 1831, signed an authority to Melmoth, a solicitor who had possession of the will, to deliver it up to another solicitor, Newman.

In reply it was alleged that soon after the **[772]** deceased's death Symes informed the widow and Feaver that he would not act; that on the 4th of July, 1831, he and Hannam renounced by proxy, and steps were taken to obtain administration for the widow and George Feaver, the residuary legatees; that the advertisements were inserted because the widow was receiving the debts; that Symes applied for no debt but Allan's, though he delivered small accounts to two or three persons; that on the 20th of August he received 20l. of Allan for the widow, and deposited that sum at the bankers to the credit of the deceased; that on the 17th of June he signed the order for the delivery of the will, but afterwards countermanded it. Hannam did not deny that the advertisements were inserted with his privity, nor that he signed the order on the 17th of June, but he denied that he applied for or received any debts.

Lushington for the legatees. The principle of law is quite settled: whoever has intermeddled as an executor cannot repudiate the duties: he has made his election. Swinburne, part 6, § 22. Therefore any interference with the property of the testator binds an executor to the office. Both the executors have brought themselves within the two general rules laid down in Bacon's Abridgement, tit. Executors (E.), 10. In *Edwards* v. *Harben*, 2 T. R. 597, Buller, J., says, "Every intermeddling after the death of the party makes a party so intermeddling an executor de son tort." The advertisement was a notice to the public that they were executors; and according to all the rules, principles, and precedents, amounted to an acceptance. If after such an act **[773]** a party can retract and disavow his intentions, there would be no safety for creditors or legatees. If this and the other acts alluded to do not bind, I know not what will.

Addams for Symes. Directing the funeral, making an inventory of the property, advancing money to pay debts or legacies, or other offices merely of kindness and charity do not make a man an executor de son tort, Toller, p. 41; nor consequently bind a rightful executor to take probate. Symes did not receive the debt quà executor, but for the widow as administratrix. All the acts done are merely of humanity, kindness, and charity. Besides, the Court has a discretion to exercise. It is not bound to compel these parties to take probate.

Nicholl for Hannam. No case has been cited to shew that any acts prevent the renunciation of a rightful executor which do not make a stranger executor de son tort. Now an executor de son tort is one liable to answer out of his own goods for the testator's effects which come to his hands; and therefore must not only have intermeddled with the office, but must have intermeddled with, i.e. got possession or disposed of, the effects of the deceased, as in *Edwards* v. *Harben*. Hannam never intermeddled with the effects: he only, while deliberating, inserted the advertisement; and an executor may investigate the state of the testator's property before he accepts or refuses, Godolphin on Wills, 102. Even after having been sworn, executors have often **[774]** been allowed to renounce. In *Orr* v. *Newton*, 2 Cox, 274, the acts for which the executor was not held liable were much stronger.

Judgment—Sir John Nicholl [after stating the substance of the act on petition on either side]. The question then is whether there has been such an intermeddling as to render the executors compellable to take probate? There is no doubt on the law that if a person named executor intermeddles, he cannot afterwards refuse to take probate; and if not named executor, he becomes so de son tort. There are certain acts of necessity, such as feeding the deceased's cattle and the like, which do not bind a party; and if a party even has shewn himself willing to take upon himself the execution of a will, he may, in aid of justice, be dismissed by the Court, in order to become a witness; (*a*) but otherwise slight circumstances are obligatory and sufficient

(*a*) *Panchard* v. *Weger*, 1 Phill. 212; *Jackson* v. *Whitehead*, 3 Phill. 577. See also *Meek* v. *Curtis*, 1 Hagg. Ecc. 129; *M'Donnell* v. *Prendergast*, supra, 212, and Williams' Law of Executors and Administrators, 1 Hagg. Ecc. 148, as to cases where an executor may refuse the office.

to compel a person to take probate if really executor, or to render him executor de son tort if not really executor. Swinburne in several passages lays down the obligation, and says (part 6, s. 22) "he must beware not to administer the effects as executor." He is compellable "when he does those acts which are proper to an executor." "The most safe course is not to meddle at all, but utterly to abstain:" "the refusal cannot be by word only, it must be entered and recorded in Court."

[775] This doctrine is laid down no less strongly in several books of common law. In Bacon's Abridgment (Executors (E.), 10. Also Roll's Abr. 917) it is said, "What acts amount to an administration, so that a party cannot afterwards refuse." "1st, Whatever an executor does which shews an intention in him to take upon him the executorship, will regularly amount to an administration." "2d. Whatever acts will make a man liable as an executor de son tort will be deemed an election of the executorship." In *Edwards* v. *Harben* (2 T. R. 597) Mr. Justice Buller says: "He can be charged as executor, because any intermeddling in the testator's effects makes him so: every intermeddling after the death of the party makes the person so intermeddling an executor de son tort." If such acts will make a man executor de son tort, à fortiori it will render an executor compellable to take probate.

What then are the facts? Have the executors done anything that shewed an intention on their part to take upon them the executorship? It is unnecessary to go one step further than the advertisements: nothing can be a more strong intermeddling than the insertion of such an advertisement, and expressly in the character of executors. It does not merely "shew an intention to take upon them the executorship," but it is an absolute acceptance of the executorship. Nor was this done by Symes alone, for Hannam admits that it was done with his concurrence; that it was their joint act: and after this concurrence the acts of Symes in a great degree bind Hannam.

They subsequently make inquiries, and they find that the executorship may turn out a trouble-**[776]**-some business, and then they give notice to the family that they will not act; the matter lies dormant till the following year, when, in answer to an application by letter, they decline to undertake the office. That was too late in time and insufficient in form—"the refusal must be recorded in Court:" till that was done no person could take administration. They should have decided at once; they might have delivered up or brought in the will and given a proxy of renunciation. As the authorities point out, they should "beware" how they do slight acts. I think they have not been cautious; they should not have first acted and given notice to the debtors to the estate, and afterwards leave the substituted residuary legatees without that protection for their legacies which the testator intended. For two years and a half they have left this estate, though small, without a representative or any person even to collect the debts.

I am of opinion that the executors have so far intermeddled as to be compellable to take probate, and that their resistance subjects them personally to costs, which certainly ought not to be paid out of the estate without the consent of the residuary legatee and substituted residuary legatee; nor till after the legacies which have been put in jeopardy by the conduct of these parties have been discharged.

The Court condemned the executors personally in costs, and assigned them to extract probate before the by-day.

[777] DANIEL *v.* NOCKOLDS. Prerogative Court, Hilary Term, 3rd Session, 1832.—A latter will, disposing of realty and personalty, containing a clause of revocation and uncancelled, is not revoked and a former will revived by reading over the former will, and by parol declarations, unaccompanied by acts that it was his last will—the former will being found carefully deposited and locked up in a drawer, and the latter will, though in the same drawer, lying among useless papers; and all the devises and legacies lapsed.

Robert Nockolds died in June, 1831, leaving his half-brother sole next of kin; and a personalty of 800l. By his will of November, 1819, attested by three witnesses, he gave this brother 100l., and after bequeathing further legacies left the residue to Mary Tomkins, and appointed Mr. Daniel, his medical attendant, and Mr. Bush executors, but without a legacy to either. In 1823 he made a new will, in which he devised a small freehold to Tomkins, and appointed Parkinson executor and residuary legatee. This will contained a clause of revocation, and was duly executed. Both Tomkins and

Parkinson died in the testator's life time: and an allegation was now offered to set up the will of 1819: it pleaded that in April, 1827, the deceased lodged with Mrs. Seabrook at Colchester, and continued there till his death: that on several occasions during his last illness he conversed with her, her daughter, and others respecting his affairs, produced and read to them his will of 1819, declared that it was his last will and what he wished to be carried into effect; and that after the executors (one or either) thereby appointed had been with him, he told the Seabrooks and others that they were his executors and would have the management of his affairs: that after his death the will of 1819 was found carefully deposited and locked up in one of the drawers in his bed room, and that of 1823 at the [778] bottom of the same drawer, but much soiled and crumpled amongst old and useless papers.

Addams in objection to the allegation. Every legatee, I understand, under the will of 1819, is dead.

Lushington. Not so. Tomkins' brother, a legatee in 200l., is alive.

Per Curiam. Can you produce a case of a latter will, with a revocatory clause, remaining uncancelled, and in the same drawer with a former will, set aside on the ground of a republication of that prior will by mere declarations?

Lushington. That amounts to a question what will effect a republication of a will of personalty. In wills of personalty no particular form of republication is necessary. *Miller and Ross* v. *Brown*, 2 Hagg. Ecc. 210. That was a case, indeed, of a will made by a wife during coverture: but there is no material distinction as to a republication in such a case, and the present—where there are two wills. The principles there laid down are generally applicable to all wills of personal estate; and constitute the true doctrine of Courts of Probate.

Judgment—Sir John Nicholl. The law, in my judgment, presents insuperable [779] objections to the admission of this allegation. It is not like the case of a later cancelled will, because then the very act of cancellation revokes the latter, and lays a foundation for an inference that the testator intended the former will to operate: but here is a latter revocatory will entire and in force as a revocation of the former, though the devises and bequests may have lapsed. Can the former will be revived without an act of republication, or indeed of re-execution; or rather can the latter will be revoked by mere declarations? If it were merely a will of realty, it clearly could not have been contended that there had been a republication of the former will, because the words of the 6th section of the statute of frauds are express (29 Car. II. c. 3, s. 6). It is clear also, under s. 22, that the latter will could not have been revoked by mere declarations unaccompanied by some writing: but here is no declaration in writing; nothing reduced into writing during the deceased's lifetime; nor are there any acts: the circumstances of the finding are too slight—they might be merely accidental. The latter will was in an envelope; and there is no appearance that it was rumpled—why did not the deceased, a professional man, cancel if he intended to revoke it and revive the former will? Declarations without acts are always dangerous evidence: they are frequently insincere—liable to be misapprehended—not accurately recollected. The case of *Miller and Ross* v. *Brown* does not apply. In that case there had been no revocation? all that was there required was to shew adherence. In this case there is an express revocation, and that revocation is to be removed by parol—that is the [780] difficulty. I must reject this allegation, and decree administration, with the later will annexed, to the brother.

Allegation rejected. Costs out of the estate by consent.

YOUNGE *v.* SKELTON. Prerogative Court, Mich. Term, 4th Session, 1831.—In a suit for inventory and account and to make distribution, on application that an administration bond should be pronounced forfeited, on the ground of a devastavit by the administrator's appropriating the property to his own use, and that the bond might be delivered out of the registry in order to be put in suit against the sureties, the Court (a declaration instead of the inventory and account being allowed) referred to the registrar to report what residue remained to be distributed, and to allot portions; and on such report (which was not objected to) assigned the administrator to pay to each distributee his respective share, and, the administrator alleging that he had become bankrupt and obtained his certificate, directed the bond to be attended with, but declined to pronounce it forfeited.

This was a cause of inventory, account, and allotment of portions of the effects of

Charles Schweitzer, promoted by the administratrix of the natural and lawful brother and one of the next of kin of the deceased against his administrator. The citation issued on the 13th, and was served on the 14th of June, 1831. The deceased died on the 17th of November, 1828, and shortly afterwards his brother died; and on the 1st of June, 1830, administration to Charles Schweitzer (Mrs. Choppin, the other next of kin, having renounced) was granted to John Henry Skelton, the father and guardian of his minor children, nephews and nieces of C. Schweitzer, for their use and benefit. The property was sworn under 25,000l. This administration expired on the 21st of July, 1831, by reason of Skelton's son being then twenty-one. Mrs. Choppin's distributive share had been previously paid. On the 1st of June, 1831, Skelton became a bankrupt; a commission issued on the 7th, and on the 19th of August he obtained his certificate, which was confirmed on the 15th of September.

An allegation having been given in on behalf **[781]** of Miss Younge, Skelton, in his answers, admitting that he had of the deceased's estate converted to his own use 10,875l. 8s. 9d., submitted that his certificate discharged him from the payment thereof.

On this day the proctor for Miss Younge prayed the declaration instead of an inventory and account to be allowed, and to order a decree to issue against George Robertson (the surviving surety in the bond entered into by the administrator), to shew cause why the bond should not be pronounced forfeited and attended with for the purpose of being sued upon at common law. The proctor for Skelton prayed the conclusion of the cause to be rescinded to permit him to bring in an allegation.

Addams for Miss Younge. The bond is forfeited on the ground of a devastavit. There is proof of a complete conversion of property to his own use; then the breach of the bond assigned will be such devastavit; for a next of kin may sue the sureties on the bond and assign devastavit as a breach, though a creditor may not; for that is the effect of what was said by Lord Holt in *The Archbishop of Canterbury* v. *Willis*, 1 Salk. 315, 16. In this case the administrator being a bankrupt, the Court could not make an order on him to allot portions. The Court must pronounce the bond forfeited.

Lushington and Dodson contrà. The administrator in his answers does not deny the devastavit, but it is quite impossible to sue **[782]** him, because having been a bankrupt his certificate is a bar. The practice of late has been not to pronounce the bond forfeited, but to direct it to be attended with, leaving to the court of common law to decide upon the question of forfeiture.

Judgment—Sir John Nicholl. This is a case of considerable importance in respect to the practice of the Court and the interest and convenience of suitors. If from the rare occurrence of such cases, more especially in modern times, some difficulty should have arisen and some errors and irregularities have taken place, no blame attaches to any party, though it is most desirable that a correct mode of proceeding should be established as a precedent for future cases.

The present is a suit for an inventory and account and to make distribution, brought by a party in distribution against an administrator. In such a case the form of proceeding (when rightly understood) is plain and simple, and might afford a very convenient and expeditious mode of attaining justice; but if errors and difficulties are interposed, parties may be induced or driven to resort to other jurisdictions.

The statute of distributions (22 and 23 Car. II. c. 10), which is the only authority under which the Court now acts, provides in the first three sections that ordinaries who have power to grant administrations shall take bond with two or more able sureties; it then sets forth the form and condition of such bond (see also 4 Burn, Ecc. Law, 286), and enacts that ordinaries shall have power to call administrators **[783]** to account, and to make distribution of the residue among the parties entitled. Under the provisions contained in these sections the administrator is to perform and to give bond with sureties for performing the following matters:—

1st. To exhibit a true and perfect inventory.

2d. To administer the effects, that is, to collect the assets and pay the demands and expenses.

3d. To exhibit the account of his administration.

4th. To pay the balance, found remaining after the accounts have been examined and allowed by the Court, to such persons as the Court shall assign as entitled in distribution.

5th. To deliver up the administration if a will shall appear.

These are the five conditions under which the bond is given, and on the performance of which the bond is satisfied.

The statute further enacts in s. 8 that no distribution shall be ordered till after the expiration of twelve months from the intestate's death. This provision is for the purpose of affording an opportunity to creditors to recover their debts, and to the administrator to collect the property and to discharge all claims thereon. The mode of proceeding under this statute is obvious and plain, if the statute itself and the terms of the bond are duly attended to. The mode of calling for an inventory and account is so much a matter of every day's practice that it need not be particularly described. It may be proper, however, to consider what is to be done if they are called for by a party in distribution who means to proceed to enforce distribution. Objections may be taken to the inventory and to the account. In [784] that case the objections must be stated in an allegation, and proof be given thereof; or the party may proceed by petition and affidavit, till the Court decides that the inventory and account are sufficient and allows them: but if the inventory and account are not objected to, the administrator prays they may be admitted and allowed, which prayer the Court accordingly grants.

The inventory and account, then, not being objected to, or after objection being allowed, what is the next step? To refer them to the registrar to examine and report what is the residue or balance remaining to be distributed according to the statute, and to allot portions; that is, to report what is the share of each person in distribution, previously deducting all necessary costs and expences which ought to be first paid.

The registrar's report is of course open to objection, but when confirmed by the Court the next step is to assign the administrator to pay to each person, reported to be entitled, the share which has thus been limited and appointed, and to enforce that payment by the compulsory process of the Court, unless sufficient cause be shewn against enforcing its order. The administrator and his sureties ought to obey that order, but their bond cannot be put in force against the sureties in this jurisdiction.

This, I apprehend, would be the regular course of proceeding and its several stages in any ordinary case: it seems quite plain and obvious; and as far as I have been able to ascertain from considering the statute and from looking through the cases, it was the old mode. Special circumstances may however arise in each of these stages. The inventory may be objected to—that property [785] has not been entered; the account may be objected to—that payments have been made or debts entered which are not properly to be charged against the estate. The right of the party as being in distribution may be denied. The registrar's report may be objected to; the liability of the administrator may be denied: but whatever circumstance of that kind may occur the objection should be taken at the proper stage. Injury may be done to the other party by interposing the objection prematurely, or the party may defeat himself by irregularity; and it is always the duty of the Court, in case the matter falls under its notice, to prevent irregularity for the sake of other suitors.

To come then to the circumstances and proceedings in this particular case. Mr. Schweitzer died in November, 1828, a bachelor, and intestate, leaving one brother, a sister, and several nephews and nieces. There was a contest about his will, so that no administration was taken till June, 1830, when Skelton became administrator: and in June, 1831, he was cited, at the suit of Elizabeth Younge, as guardian of a party entitled in distribution, to exhibit an inventory and account, "and to see portions allotted, and distribution made according to the statute." If there existed any objection to that inventory, such as omissa, a wrong valuation or the like; or to the account, such as want of vouchers, fraudulent charges, or the like, that was the time to take such objections; but if no objections were taken, the proctor for the administrator ought to have prayed that the inventory and account be allowed, and the proctor for the party in distribution to admit their correctness, or [786] not objecting to their allowance, to pray that they be referred to the registrar to ascertain the residue to be distributed, and the parties to whom the portions should be limited and appointed. Upon his report being confirmed, the Court would order the administrator to pay.

But instead of this course an allegation has been brought in on the part of Elizabeth Younge, not objecting to the inventory and account, but alleging that it was true and correct, and that a certain balance remained. Answers were taken to that allegation;

the cause was formally assigned for sentence; and at the hearing the Court is prayed to allow the inventory and account, and to issue a decree against the surety citing him to shew cause why the bond should not be pronounced to be forfeited and be attended with for the purpose of being sued upon at common law: not to examine the account, nor to pronounce what residue remained, nor to limit and assign portions to the persons entitled.

In giving this allegation the party, I think, lost her way, and the prayer was premature. No blame attaches to any one, the error has arisen from the infrequency of this course of proceeding. The Court itself, without looking carefully into the statute and old cases and maturely considering the whole, might have felt at some loss. However, as I have said, the allegation and answers were quite useless, and the prayer was premature; and it is necessary to proceed with due caution, as third parties may be affected, and in the present case there are many persons in distribution. If it should be requisite ultimately to proceed against the surety, it should appear by [787] the proceedings in this Court that there was a breach of the condition after all the regular steps had been taken; and it should also appear by the proceedings what are the portions allotted to each party. It is convenient and important to bring the matter back to its proper channel, in order to establish a precedent pointing out what the regular practice ought to be, and in order that the rights of all the parties in distribution should be ascertained and, as far as this Court has power, be protected. I shall therefore refer the declaration, the same being allowed and not objected, to the registrar to report the amount of the residue remaining in the administrator's account to be distributed according to law, and who the persons are to whom the portions thereof are to be limited and appointed.

That report having been confirmed, when application shall be made to the Judge to decree payment of the portions or any of them that will be the proper time on the part of the administrator to shew that he is exonerated from payment, and for application to be made against the surety. Before a breach of the bond can be assigned, I apprehend that these steps must be taken. The Court must look to the protection of all parties. Some parties may have received their full distributive shares, and others may have had advances on account. The registrar will of course attend to all these points.

It may not, however, be improper now to observe that there is one part of the prayer with which the Court will hesitate to comply, unless some decisive authority can be shewn requiring the Court to proceed that length; I mean the prayer to pronounce the bond forfeited: by autho-[788]-rity is to be understood either a decision of the point upon argument, or a series of instances shewing that such is the established practice. The bond cannot be put in suit, nor the payment of it enforced in this Court, but it must be sued at law: it only therefore seems necessary for this Court, in aid of justice, to order the bond to be attended with. The plaintiff would then have the same benefit as if the bond were here pronounced forfeited, for it appertains to the Court in which the bond is sued to decide ultimately whether it is or is not forfeited, or, in other words, whether any breach has taken place. This point, however, is open to future discussion; the Court now only makes the order already stated.

The following minute was entered:—

"The Judge allowed the declaration, instead of the inventory, the same not being objected to; referred it to the deputy-registrar to report the amount of the rest and residue of the effects of Charles Schweitzer remaining on the administrator's account, and to what person or persons respectively the said residue should be limited and appointed, and in what portions allotted; and directed all other matters to stand until the report be brought in."

1832.—The registrar's report was made and allowed. On the part of Miss Younge the Court was then prayed to decree distribution of the sum of 10,875l. 8s. 9d. agreeable to the report, and to direct the registrar to prepare an order of distribution accordingly. In objection to this prayer an allegation was brought in. The allegation pleaded the grant of administration to Skelton; [789] and its expiration on the 21st of July, 1831, in consequence whereof he was not amenable to the jurisdiction of this Court. That, as administrator, he had converted the property into money, paid Mrs. Choppin's supposed distributive share; made other payments as stated in his declara-

tion; and had appropriated the residue to his own use, but from the payment of which he was discharged by his subsequent bankruptcy and certificate.

Addams, in opposing the allegation, admitted that Skelton was a bankrupt.

Per Curiam. In consequence of Skelton, the administrator, having become a certificated bankrupt, he cannot be called upon to make distribution of the balance of the deceased's effects. I shall, on that ground, decide that he is entitled to be dismissed.

By-Day.—The facts pleaded in the allegation were then admitted in acts of Court: and on the next session the Court dismissed Skelton from the suit, and, on motion of counsel, granted a monition against Mr. Robertson, the surviving surety, to shew cause why the bond should not be pronounced forfeited, or at least be attended with for the purpose of being put in suit at common law.

Easter Term, 2d Session.—An appearance was given for Robertson, and on the 2d Session of Easter Term an allegation on his behalf came on for debate, when Addams, in objection, was stopped by the Court.

Per Curiam. I am inclined to direct the bond to be attended with: the party in distribution may then, in the proper Court, shew a breach of **[790]** it. The Ecclesiastical Court, when cases of this nature have been properly considered, has never, I conceive, decided whether there has been a breach of the bond or not: it avoids prejudicing either party. In this instance it is quite clear that there has been no distribution; and the object of the proceeding here is to enable a party to put the bond in suit. I shall suspend this allegation, and direct the bond, entered into by the surety, to be attended with, and produced at common law, as may be requisite for the furtherance of justice.

WATERS *v.* HOWLETT. Prerogative Court, Mich. Term, 3rd Session, 1831.—When probate of a will and codicil, both prepared by the same person, who was also an attesting witness, was called in, and the executor was put on proof of the codicil by a niece, who pleaded incapacity from apoplexy, without suggesting fraud, circumvention, custody, control, or the improbability of the disposition, the Court (having, on the admission of a responsive allegation, strongly intimated its opinion that the opposition was hopeless), at the hearing, the cause being unopposed, condemned the niece in costs.

Charles Henry Riley died on the 22d of December, 1829, at the age of sixty-six, a widower; leaving Edmund Waters, a brother, and Mary Ann Waters, a niece, by the half-blood. His property was of the value of 8300l. His will, dated in November, 1826, and attested by two witnesses (of whom Mr. Harris, his solicitor, was one), after giving several small legacies (among them 40l. each to his brother and niece), left the residue to his wife, and appointed her and Mr. Howlett executors.

In April, 1829, his wife died, and in about three weeks afterwards the deceased made a codicil, giving a legacy of 40l. to his housekeeper, and the residue to Mr. and Mrs. Price; and confirming the appointment of Howlett as an executor. This codicil, like the will, was also attested by Mr. Harris and by another witness. In January, 1830, the executor took probate both of the will and codicil. After the probate had been outstanding above a year it was called in by the **[791]** niece; and the executor, being put on proof of the codicil, propounded it in May, 1831, in a common condidit, on which the subscribed witnesses having been examined, an allegation, in opposition, consisting of twelve articles, charging incapacity, was admitted on behalf of the niece. The present question respected the admissibility of a responsive allegation, consisting of thirteen articles and several exhibits.

Phillimore for the niece, in opposition.

Lushington and Addams contrà.

Judgment—Sir John Nicholl [after stating the circumstances before detailed]. The allegation, on the part of the niece by the half-blood, which charges the deceased with incapacity, is very much in the usual form: it gives a history of the deceased; it pleads an attack of apoplexy in June, 1826 (which therefore was prior to the will, which is not opposed), a later attack in 1828, and subsequent imbecility: and then the fifth and remaining articles heap together a number of circumstances which usually, or at least frequently, occur in persons who are subject to apoplectic or paralytic attacks, especially about the periods of those attacks; but which also generally subside after a time, and then the patient again becomes rational and capable. In support of such

circumstances, persons who accidentally visit the deceased are usually brought to depose; but their evidence almost universally turns out to be of no weight against acts of capacity at other times, particularly if there is **[792]** no appearance of fraud in the testamentary act itself.

Such an allegation, of course, calls for contradiction, and necessarily produces a long responsive plea, as in this case: and the evidence taken on both sides, after occasioning much expense, generally leaves the case where it found it, that is, depending upon the evidence on the condidit as to the instructions and execution, and the state of capacity at that particular time.

Such seems to be the course of the present case; and the party opposing the codicil is apparently involving herself and the deceased's estate in hopeless litigation. The Court is the more strongly impressed with this conviction from a consideration of some of the admitted facts. First, by the death of the wife the bequest of the residue lapsed, and that circumstance would naturally lead to a new disposition of it: and to effect that the codicil is confined. Secondly, the brother and niece were by the will excluded, except that it gave to each a trifling legacy of 40l. No particular regard or affection for them is even pleaded; nor is it even averred that they kept up any intercourse with the deceased. The opposing allegation, as I have said, merely sets up incapacity; it does not suggest any fraud, circumvention, custody, control, nor even any improbability in the disposition. Thirdly, the person who draws and attests the codicil is the very same solicitor who draws and attests the will, the validity of which is not questioned.

The opposition has therefore every appearance of being a vexatious experiment. The Court has thus early stated its impression of the appearance of the case, in order to put the niece, Mrs. Waters, **[793]** upon her guard, for she certainly litigates at the peril of costs, not only of her own costs, but of the costs of her opponent, if it should turn out that she has, without sufficient grounds, called in the probate; not even contenting herself with interrogating the witnesses.

The present allegation, being generally responsive and contradictory, is admissible; but, upon the whole, I suggest to the niece's re-consideration whether she will not act more wisely in abandoning her opposition, rather than in persevering at the risk of costs.

Hilary Term, 4th Session, 1832.—The allegation was accordingly admitted: witnesses were examined on it, and on this day the cause stood for hearing, when the codicil being fully proved, the cause came on as an unopposed case, and the Court pronounced for the codicil, directed the probate to be re-delivered out, and, on application of counsel, condemned the niece in costs.

IN THE GOODS OF WILLIAM HILTON. Prerogative Court, Mich. Term, By-Day, 1831. —Motion for an administration limited to a debt due to a bankrupt's estate, and paid into a bank after the death (but not to the credit) of the assignee of such estate, rejected.

On motion.

The deceased died intestate in March, 1831, leaving a widow and a father—the only persons in distribution. At his death he was sole assignee of a bankrupt's estate, to which there was due at that time an outstanding debt of 130l. The debtor wished to make payment: but (there being no one authorized to give a legal discharge) by an arrangement between the debtor's solicitor **[794]** and the solicitor under the commission the sum was paid into the hands of a banker to their joint credit. A new assignee having been since chosen, the commissioners had declined to assign the sum to him, unless the legal representative of Hilton executed the assignment.

The widow and father were resident in the country—the latter out of the jurisdiction. No administration had been taken; and in reply to a notice that the assignee proposed to apply for the administration limited to the above sum, they declined to interfere. They had not, however, been cited.

Phillimore moved.

Per Curiam. How can the Court grant this motion? If this sum regularly vested in, and in law became the property of, the deceased, then his father and widow are entitled, and they should have been cited, or an appearance should have been given for them. If, however, as would seem to be the case, the money never vested in the

deceased, but is the property of the bankrupt's creditors, then the Court has no authority over it.

Motion rejected.

[795] THOMPSON *v.* BEARBLOCK AND BEARBLOCK. High Court of Delegates, April, 1832.—Sentence of the Court of Arches, pronouncing "that to set out the tithe of potatoes, by the tenth basket, as raised, and immediately remove the nine parts, is not sufficient," affirmed by the Delegates.

This was an appeal from the Court of Arches in a cause of subtraction of tithes brought by Messrs. Bearblock, the lessees of the tithes of the parish of Hornchurch, Essex. The tithes claimed were for potatoes during the potato season in 1828 and 1829. The circumstances in this case were similar to those in the case of *Bearblock* v. *Meakins* (2 Hagg. Ecc. 495), also decided by the Court of Arches. In both cases the tithes were set out in prittle baskets; and the learned Judge holding that, under the circumstances, "to set out the tithe of potatoes by the tenth basket, as raised, and immediately remove the nine parts was not sufficient," pronounced the tithes to be one, and condemned the tenant in costs.

From this sentence the tenant appealed to the High Court of Delegates; and the case was argued before Mr. Justice Gaselee, Mr. Baron Vaughan, Mr. Justice James Parke, and Drs. Daubeny, Phillimore, and Blake, by Boteler and Lushington for the respondents, and by Addams and Mirehouse for the appellant, when the decision of the Court of Arches was affirmed.(*a*)

(*a*) See *Thompson* v. *Bearblock*, 1 Barn. and Adol. 812.

REPORTS of CASES ARGUED and DETERMINED in the ECCLESIASTICAL COURTS at DOCTORS' COMMONS and in the HIGH COURT of DELEGATES. By JOHN HAGGARD, LL.D., Vol. IV.

[1] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS, AND IN THE HIGH COURT OF DELEGATES.

GRINDALL *v.* GRINDALL. High Court of Delegates, 22nd June, 1831.—An appellant, suing not as a pauper in the Court below, admitted a pauper in the Court of Delegates.—When understanding sufficient to comprehend the act, and an intention to exclude the next of kin, and to give the property to a stranger in blood were proved, and an attempt to shew that the intention to exclude the former was produced in the mind of the deceased by the fraud and contrivance of the latter failed, the Court pronounced for the will, condemned the next of kin (who appeared by separate proctors), the one, who did not appear by counsel at the hearing, in the costs of, and consequent upon, an allegation given by him, and charging fraud and incapacity: and the other in the costs of separate interrogatories to the witnesses on the responsive allegation of two allegations tendered by him, and of the final hearing; but gave no costs as to the interrogatories addressed to the witnesses on the condidit.

On an appeal from the Prerogative Court of Canterbury.

The Judges Delegate who sat under this commission were: Mr. Baron Bolland; Mr. Justice Bosanquet; Mr. Justice Taunton; Dr. Arnold; Dr. Burnaby; Dr. Daubeny; and Dr. Curteis.

This was an application on the part of the appellant to sue in formâ pauperis. The petition sets forth the general history of the cause, the subject of the appeal, and the grounds on which the present application was founded and was resisted.

[2] The act on petition was, in substance, as follows:—

On the 10th of February, 1831, personally appeared Charles Edmund Grindall, the appellant, and presented a commission of appeal to Dr. Arnold, Dr. Burnaby, Dr. Daubeny, and Dr. Curteis, Condelegates therein appointed, who accepted the same, and decreed the usual inhibition, citation, and monition. C. E. Grindall then prayed to be admitted a pauper. This was opposed; whereupon the Condelegates administered to C. E. Grindall the usual oath, but reserved the admission of him as a pauper, and assigned to hear on petition, in objection to his being admitted a pauper. They then appointed him a counsel, and proctor.(*a*)

For the respondent it was then alleged that Thomas Adcock Grindall, formerly of Broad Street, Bloomsbury, and late of Saint Mary Abbot's Terrace, Kensington, died on the 25th of August, 1828, having first duly made and executed his last will and

(*a*) Before the Condelegates the case of *Wild* v. *Hobson* was mentioned. It was an appeal from the Prerogative Court of Canterbury, in which Court William Wild, who asserted himself to be a cousin german and one of the next of kin of the deceased and opposed a will, as a contradictor, was admitted a pauper. He afterwards appealed from the sentence, and on the 19th of March, 1811, prayed to be admitted a pauper, when, Hobson objecting thereto, a counsel and proctor were assigned to Wild by the Condelegates, in order that the matter might be heard on petition. The point, however, was never decided, as the appeal was abandoned.

testament in writing, with a codicil thereto; the will bearing date the 30th of January, 1827, and the codicil the 20th of February, 1828; and therein appointed Henry Evelyn Pitfield Sturt sole executor. That caveats against probate having been entered and warned, on the first session of Mich. Term, 1828, H. E. P. Sturt **[3]** prayed probate. That Charles Edmund Grindall and John Stone Grindall were alleged, by separate proctors, to be, respectively, the nephews and next of kin of the deceased, and which interests were admitted. That the will of the deceased was opposed and propounded, and the usual allegation given in and admitted, upon which the subscribing and other witnesses were examined. That a long allegation was also admitted on behalf of C. E. Grindall, upon which forty-three witnesses were examined, and that sundry other proceedings were had therein. That an action of ejectment was brought in the vacation after Michaelmas Term, 1828, in pursuance of an order of the High Court of Chancery, by C. E. Grindall against H. E. P. Sturt, for the purpose of trying the validity of the last will and testament of the deceased as relating to his real estate; and the same came on for trial in the Court of King's Bench at Westminster, before the Lord Chief Justice of that Court and a special jury: that the trial lasted for two days, and the jury found a verdict for the defendant, H. E. P. Sturt, thereby establishing the validity of the will so far as respected the real estate of the deceased.(*a*) That C. E. Grindall did not instruct counsel to argue the cause in the Prerogative Court of Canterbury, but the same was argued by counsel on behalf of John Stone Grindall only; and on the 23d of December, 1830, the cause having been heard,(*b*) **[4]** the Judge pronounced for the force and validity of the will and codicil, and decreed probate thereof to be granted to H. E. P. Sturt; and condemned Charles Edmund Grindall in the costs occasioned by the giving in of his allegation, and condemned John Stone Grindall in the costs occasioned by his administering separate interrogatories to the witnesses examined in support of the will and codicil, by the allegations given in by him, and also in the costs of the hearing. And further alleging that C. E. Grindall had appealed from the decree, and prayed to be admitted to prosecute his said appeal as a pauper, which was objected to, and alleged that C. E. Grindall is now an ensign on half-pay, at two shillings a day, in the London Militia. Wherefore it was submitted that C. E. Grindall is not a fit and proper person to be permitted to sue as a pauper in this appeal.

Prayer to reject the petition with costs.

On the other hand it was alleged that C. E. Grindall was the eldest nephew and heir-at-law of T. A. Grindall, deceased. That from the time of the death of Charles Grindall, the father of C. E. Grindall, which took place in Saint Luke's Hospital in 1791, he, T. A. Grindall, the deceased in this cause, adopted C. E. Grindall as his own son. That he brought him up to no business or profession, whereby he might have been enabled to gain his own livelihood, but always, whilst of sound mind, meant and intended him to inherit the bulk of his own large property. That from the time of H. E. P. Sturt obtaining the possession of the person and property of the deceased, in the beginning of 1827, C. E. Grindall hath been in a **[5]** state of great destitution and distress, having nothing beyond his half-pay as an ensign in the London Militia, the amount whereof is two shillings per day, to subsist upon, and which is less than the pay of a day labourer, and inadequate to supply himself and his wife with the bare necessaries of life. That he hath incurred debts to a very large amount, far beyond the value of his half-pay, if it were in his power to sell or mortgage the same, but which he is by law restricted from doing. That he hath no means whatever beyond the said half-pay, and is in daily expectation of arrest for his debts, and hath been so arrested several times since the commencement of the said suit, and hath been much impeded and injured thereby, as not having been able, in consequence thereof, to instruct his professional advisers, or to bring up the necessary witnesses in support

(*a*) An allegation, pleading this verdict, and the remarks of the judge thereon, and the names of the witnesses examined, was rejected by the Prerogative Court. The trial, printed at length from the notes of a short-hand writer, is published.

(*b*) The cause was argued on the 18th, 21st, 22d, and 23d days of December. Lushington and Dodson in support of the bill and codicil; and Phillimore and Gostling for John Grindall, contrà. See the judgment of Sir John Nicholl, infra, p. 10.

of his case. And further, that previously to the time hereinbefore mentioned, when H. E. P. Sturt obtained possession of the deceased as aforesaid, he, H. E. P. Sturt, was also in distressed and straitened circumstances, as appears by the proofs in the said cause, but that immediately afterwards he became opulent, and was then enabled to avail himself of the deceased's property to counteract all the enquiries and proceedings resorted to by his said party; the more so, as H. E. P. Sturt not only obtained possession of the deceased's person, but also of all the said deceased's title-deeds and papers, and actually procured the transfer of the property belonging to the deceased in the Bank of England into his own name jointly with that of the deceased, and finally obtained entire controul over the whole of the deceased's estate and effects, to the utter ruin of C. E. Grindall, who hath since endeavoured [6] to obtain redress for his grievances as far as in his power. That although the undoubted heir from his childhood to an estate of several thousand pounds per annum he is now a pauper, and unable to obtain any redress whatever for the great injury which he has sustained by the interference of H. E. P. Sturt between himself and the deceased.

Prayer to admit him, C. E. Grindall, to sue as a pauper in this appeal.

In reply, the allegations on behalf of C. E. Grindall were denied, and protested against as irrelevant.

Mr. Campbell, Dr. Lushington, and Dr. Dodson, for the respondent. An admission of a party to sue in formâ pauperis only takes place when it is indispensable to justice. This case has already undergone much investigation, and the result is, two concurrent decisions (besides a decree in the Court of Chancery) in favor of the will. The verdict at common law was satisfactory to the learned judge who tried the cause. These concurrent decisions disprove some of the averments in the appellant's act on petition. In the Prerogative Court the appellant was condemned in a proportion of the costs; his sole motive for appealing must, it is conceived, either be for delay, or to extract something from the successful party. There would be nothing detrimental to justice if the appellant were allowed to prosecute his case further, only on the usual liability as to costs in case of failure: at least he should be bound to pay the costs in which he has already been condemned in the court below; such an order would come within the rule in Co-[7]-myns, where it is said that, "in the Court of Exchequer, if a person be admitted after commencement of the suit, the pauper is to give security to pay the costs before admittance" (Com. Dig. tit. "Formâ Pauperis," p. 442, ed. 1822). Here the applicant is not entirely destitute; he is in possession of his half-pay, and the income arising from this leaves his whole time at his own disposal. *Lovekin* v. *Lovekin* (1 Phill. 179) embraces the authorities that apply: and the principle is of consequence that an individual in the receipt of an income, though it may be subject to debts, yet is not entitled to be admitted a pauper and to have the gratuitous services of others. *Riley* v. *Revett* (1 Phill. 184). It was said and admitted, in *Taylor* v. *Bouchier*,(*d*) that a party could not appeal as a pauper: and a material distinction must always prevail as to the admission of a party to sue, as appellant, in formâ pauperis, and his admission in a Court of the first instance. The appellant, here, has nearly the same income as the clergyman in the case in Salkeld (*Anon.*, 2 Salk. 507). The appellant's petition should be rejected, both on the merits of the cause, and on the ground that he is disqualified.

Dr. Addams and Mr. Adolphus contrà. The merits of the principal question as to the will have no bearing on the present question, unless it can be assumed that the decision of the Prerogative Court is unimpeachable; nor has the verdict any application; it was offered in plea in the Court [8] below, was debated, and rejected: it ought not to have been adverted to in the act on petition. There is nothing, therefore, in the general circumstances that have been relied upon to bar the admission of the appellant; on the contrary, in proportion to the strength of the sentences against him, is the application entitled to a favorable consideration. Secondly, it is argued that he is disqualified by his half-pay: but the cases cited to prove that do not at all come up to the present. In every one the income has much exceeded what the present appellant, who is the deceased's heir at law, is possessed of. In the *Anonymous case* in 2 Salkeld there were two judges against one. There the clergyman had a

(*d*) 2 Dick. 504. It would seem, however, that the point did not arise, because it was the respondents, and not the appellant, who were paupers in that case. S. C. 4 Bro. P. C. 709-715.

living of 40l. per annum, and two judges thought that he ought not to be dispaupered; though it is true that Holt, C. J., differed from them. But a living of 40l. per annum 150 years ago was a considerable estate. How different is such an income from an officer's half-pay of 2s. per diem. A living is a freehold; it may be assigned; be sequestered, and money raised upon it in various ways; but half-pay is not subject to assignment; it is inalienable, it has so been decided on a construction of the annuity act, and also in other instances.(*a*) Even if an officer takes the benefit of the insolvent act, the provisional assignee never takes possession of military pay. The appellant, then, cannot be said to be worth 5l., because he cannot raise any money on his daily pittance: besides this, on the 5th of July the act expires by which this half-pay is secured, and non constat that it will be renewed. The analogy attempted to be [9] drawn from Comyns as to the practice in the Exchequer is not correct; there the rule was applied before a verdict, before the party had been saddled with the payment of the costs. The case of *Mathews* v. *Warner* (4 Ves. 193, 4) alone is conclusive against any doubt that can be suggested as to the jurisdiction and power of the Court. There the appellant, the next of kin, was admitted a pauper in the Delegates; the Delegates affirmed the sentence of the Prerogative Court; but the pauper ultimately succeeded in obtaining a sentence under a Commission of Review. That the appellant, in this case, did not sue in formâ pauperis in the Court below is so far from being to his discredit that it shews exertion on the part of his friends to assist him, and an anxiety, on his own part, to avoid an irksome and disreputable situation.

The Court, after deliberation, admitted the appellant to sue in formâ pauperis.

The case was afterwards argued on the merits, before the same Judges: when the Court, after hearing

Mr. Campbell, Dr. Lushington, and Dr. Dodson in support of the sentence,

Mr. Adolphus and Mr. Thessiger contrà, affirmed, but without costs, the sentence of the Prerogative Court, pronouncing for the will and codicil; and condemning Charles and John Grindall in certain parts of the costs.(*b*)

[10] *Grindall* v. *Grindall.* Prerogative, 23rd December 1830.

Judgment—Sir John Nicholl. My reason for requiring a reply from the counsel for Captain Sturt was rather to afford an opportunity of repelling the charges of fraud and perjury made against that officer, than from entertaining any doubt on the merits of the case; for after hearing very full arguments on behalf of the parties opposing this will, I cannot hesitate in respect of the validity of the papers propounded.

The question is involved in an immense mass of proofs and evidence, including numerous letters and other exhibits. A multitude of witnesses has been examined, and a great variety of details, spreading over a considerable space of time, has been brought forward; so that it is hardly possible that the Court can minutely discuss the whole with any material advantage. The real grounds of the decision lie within a very narrow compass. If the evidence on the condidit and on the first allegation be fully credited, the will is established beyond all question, unless, on the other hand, the clearest proof be adduced of direct fraud in obtaining it. Such proof, however, is hardly consistent with the evidence of the factum, which would shew that the deceased gave minute instructions and directions for the preparation of this will; duly executed it in the presence of the attesting witnesses; was a person of sufficient testamentary capacity to make such a disposition of his property; and was, moreover, a free agent. In this view of the evidence it will only be necessary for the Court to advert to the general [11] substance of the depositions on the condidit and first allegation, and then inquire whether the other proofs in the case overthrow their effect.

The deceased, Thomas Adcock Grindall, died upon the 25th of August, 1828, a widower (his wife having died nearly thirty years before him), without children, but his only next of kin were two nephews, Charles and John Grindall; Thomas, a third nephew, has been dead many years. Having no children, he, the deceased, had bred up and educated his two nephews, Charles and John; and, intending to give them his large fortune, he had not brought them up to any regular business.

(*a*) Neither the full nor the future half-pay of a military officer is assignable. *Lidderdale* v. *Duke of Montrose,* 4 T. R. 248; *Berwick* v. *Reade,* 1 H. B. 627.

(*b*) For the judgment in the Prerogative Court, see next page.

The deceased, at the time of his death, was nearly eighty years of age; and left behind him property, both real and personal, of a very considerable amount, about 100,000l.; the exact amount, however, need not be inquired into, nor is it accurately before the Court. This property was, for the most part, acquired in his business as a distiller, but he had retired from trade, and lived in a very penurious manner towards the latter part of his life.

Besides the usual infirmities of age, the deceased had an apoplectic and paralytic attack about the year 1816; ten years before the date of the transactions now under investigation. That attack he had so far recovered as to remain in the full possession and management of his own property, and the entire government of himself. Still both body and mind were in some degree affected; his eyesight was defective; his hearing dull; his speech slow and rather difficult; and his powers of motion were to a certain extent feeble. So as to his mental faculties: his memory and apprehension were not **[12]** so clear as they had been in his younger days, and more especially if he was required to pay any thing. Being extremely penurious, he much more readily recollected and entered into business where he was to receive, than where he was to pay, money. It appears in evidence that, on the occasions of having to make disbursements, he affected a degree of dulness and want of apprehension that did not really exist. The powers of his mind also varied at different times, as is usually the case with persons of advanced age and of paralytic infirmities: his mental apprehension and capacity fluctuated; but that he was reduced to a state of mental imbecility, or of testamentary incapacity, is not now maintained: but it is said he was in such a stage of weakness as would demand very satisfactory evidence of intention, of knowledge of the act he was doing, and of a full understanding of its effect; and as such would naturally excite the vigilance of the Court when inquiring into the factum of any testamentary instrument, more particularly of an instrument made in favor, and at the residence, of a stranger in blood.

Mr. Grindall resided, first, in Broad Street, Bloomsbury; about 1817, at Chelsea; and afterwards at Judd Place, Somers' Town: and at each of these residences his establishment and expense of living were upon the narrowest scale. For about twenty-six years Mrs. Suett, first the wife, and afterwards the widow, of the comedian of that name, resided with him as his housekeeper; but about the month of April or May, 1826, either on account of suspicions, which the deceased himself had formed, or which had been instilled into his mind by others, that she had abused his confidence, and made too **[13]** free with his property, she was compelled to leave his house; and he was left residing in Judd Place with Mr. and Mrs. Charles Grindall.

The deceased was somewhat of a will maker; there are several wills before the Court; one in 1808; one in 1816; one in 1824; two in 1826; and the one in question bearing date the 30th of January, 1827. Some are cancelled; in one the execution is begun and not finished; it is not attested: another, that of October, 1826, is not executed at all. But it may here be noticed that, in April, 1826, the deceased, not chusing to trust to the cancellation of wills, executed a will revoking all former wills, and disposing of his property, real and personal, in the course it would have gone if he had died intestate; it gave all his real property to his nephew Charles, and his personal property equally between the two nephews. He also stated to Mr. Haddan that he would have that will made lest he should have signed some testamentary instrument of which he had not sufficient knowledge.

The deceased and his nephews often quarrelled, even in early times; the latter had no regular occupation; the former was very penurious, particularly in more advanced life; and did not act very liberally towards them, considering he had bred them up, and intended to give them his fortune. Charles had contracted a marriage with a Scotch lady; John remained unmarried; when Mrs. Suett, as I have stated, was in the early part of the spring of 1826 obliged to quit the deceased's house. Under these circumstances Charles determined to get possession of the deceased's person, in order to prevent, or at least it would have had the effect of preventing, any alteration in the **[14]** disposition contained in the will of April, 1826, the intestate will, if I may so describe it. Both Charles and John had been taking steps in the course of that year to get the deceased declared a lunatic; each of them had applied in August, 1826, repeatedly to the deceased's solicitors, Messrs. Wimburn and Collett, for the purpose of obtaining a commission of lunacy; though it does not appear from the evidence that there was any pretence for it.

About that time Dr. Mitchell was introduced into the house, under the colour that he was a Scotch friend on a visit to Mrs. Charles Grindall. He expressly states that the deceased at that time was not in a state of insanity, so as to justify any application for a commission of lunacy, and he did not assist in applying for a commission. But it appears that Charles Grindall procured, about the 24th of September, the attendance of a person of the name of Hunter from a lunatic asylum, and that he and Hunter together began to treat the deceased as a lunatic, and actually put him into a strait waistcoat. The interference of Dr. Mitchell, when informed of this proceeding, alone protected him against such treatment: and Dr. Mitchell, with the assistance of some neighbours, compelled Hunter to quit the house after a very severe reprimand for daring to employ this personal violence against the deceased.

That John Grindall was a party to the sending for Hunter, and to this outrage on the deceased, is not proved; but it is proved that in August he repeatedly applied to Mr. Wimburn, with a view to having the deceased declared a lunatic. On the expulsion of his confederate, Hunter, **[15]** by Dr. Mitchell, Charles was not deterred from pursuing the object he had in view; he gets Hunter back on the following day; and, having upon the night before placed his wife under confinement, he and Hunter together carry off the deceased upon the 28th of September, stating he had taken him into the country, but not apprising any party where. John Grindall afterwards heard he was at Worthing. Charles, however, had carried him to Tonbridge Wells, confining him on the journey in a strait waistcoat, the cords of which hurt him much. At Tonbridge Wells he was treated as an insane person, and from that treatment and situation he was rescued by a writ of habeas corpus; and proceedings were also instituted against the parties engaged, for the assault on Mrs. Charles Grindall.

The deceased was brought back to town, and his nephew Charles, being prosecuted for this abduction, ill-treatment, and false-imprisonment, was convicted upon the 22nd of February, 1827. It is not proved that John, his brother, was privy to the abduction of the deceased; nor is it probable; for he and Mrs. Charles Grindall were active in procuring his release; and John went down to Tonbridge Wells to assist in bringing the deceased to town. But it does not follow from thence that John Grindall was very anxious to protect the deceased, though extremely unwilling that the latter should be in the separate possession of Charles. Their applications to Mr. Wimburn were constantly separate, and though Mr. Wimburn said, "Unless you join together to apply for a commission of lunacy I will not take any steps in it," they never came together.

The interference, however, of John produced **[16]** considerable gratitude in the mind of the deceased; temporary gratitude, as Dr. Mitchell's expulsion of Hunter produced temporary confidence in Dr. Mitchell. Under the influence of that gratitude the deceased immediately applied to his then solicitor, Mr. Haddan, who also had gone down to rescue him; indeed, even before he left Tonbridge Wells he gave instructions to Mr. Haddan to prepare a will cutting off Charles, and giving the principal part of his fortune to John, but he very soon, viz. upon the 4th of October, declined proceeding with that will; said it might stand over; and finally refused to execute, though, as the instrument itself now before the Court shews, it was ready for execution, and was complete, all but the formal execution.

The deceased, after his return to town on the 2nd of October, resided in his own house; John Grindall and Mrs. Charles Grindall living with him; and upon the 9th or 10th of October a young woman, Mary Gillett, an acquaintance of Mrs. Charles Grindall, was hired as servant to the deceased. These persons were the only inmates of the house.

However, Mrs. Charles Grindall and John soon began to disagree. The former, perhaps thinking that the interests of her husband and herself might suffer if too much power were left in the hands of John, that they might be omitted in the deceased's testamentary dispositions, charged John with having been privy to the abduction of the deceased. A breach ensued, and Mrs. Charles Grindall quitted the house upon the 19th of October; and thenceforward till the deceased left Judd Place on the 28th of December John Grindall and the maid-servant alone had **[17]** the exclusive custody of him, and the sole possession of his house.

It appears from the evidence of this maid-servant that the deceased frequently evinced great alarm during this time; if he heard a door shut, or open, he eagerly demanded who it was, and enquired if she would take care of him. Upon the 19th

article she says, "That at the opening or shutting of doors the deceased was alarmed, and seemed frightened, and used to enquire 'who it was,' thinking, as it appeared to her, that some one was going out or coming in. On one occasion, about a month or six weeks after she went to live with him" (that would bring it to about the beginning or the middle of November, 1826), "he called her up into his room, and said to her as soon as she had got up to him, that he had something particular to say to her. Then he asked her if she would take care of him, and he told her to be candid and speak. The deponent told him she would, and then he said, 'then I will be a friend to you as long as I live;' and continued 'that was sufficient, and it was all he wanted her for.'" So that at this time he was under apprehension, and thought that he was not safe from further violence, even in his own house. Under these circumstances, that he should remove from that house and put himself in a state of greater security, and under better protection, is not extraordinary; and accordingly, upon the 28th of December, he did actually remove to the house of Captain Sturt.

His acquaintance with Captain Sturt arose out of these circumstances: Mrs. Suett had a son, who used during the holidays to come to the deceased's house, and he appears to have become partial to him. The lad wished to go to sea, **[18]** and through an acquaintance with the purser of His Majesty's ship "Skylark," of which ship Captain Sturt was then in command, young Suett was received on board as a midshipman, about the year 1805. The deceased, from the interest he took in this youth, became acquainted with, and frequently visited, Captain Sturt, and Captain Sturt also visited him; but they seem to have lost sight of each other for two or three years, perhaps longer, before the forcible removal of this old man to Tonbridge Wells. But an account of that proceeding which appeared in all the public papers naturally attracted much attention; for, certainly, an act of more impropriety, to use a very mild term, can hardly be imagined than the abduction of this defenceless old man. Captain Sturt, in consequence of seeing this account, called upon the deceased on the 8th of October, and there is no direct evidence that he saw him again till the 28th of December. Mary Gillett deposes that she never saw Captain Sturt there but on that occasion in December. However, he called and saw the deceased upon the 8th of October.

It is unnecessary to discuss the evidence very minutely in order to ascertain whether, towards the end of December, the deceased caused Captain Sturt to be hunted out, or whether Captain Sturt, of his own accord, called again upon the deceased upon the 28th of that month. Gillett, the only person in the house, except John Grindall, and the only person whose evidence can be obtained, says, upon the 35th interrogatory, "She shewed the ministrant (Captain Sturt) in; the ministrant and the deceased were quite friendly; she thought they were old friends." While Captain Sturt was at the house on that occasion John Grindall **[19]** went, or was sent, into the city, upon some business or other, and during his absence the deceased, in a coach, accompanied Captain Sturt to Captain Sturt's house, and there continued to reside till his death upon the 25th of August, 1828 (about a year and eight months). There was no violence in the removal, no concealment; it was well known where he was gone, for this maid-servant says that when Captain Sturt went away he left with her his card of address in order that it might be known where the deceased was; and John Grindall supposed that the deceased was only gone upon a visit. He took no legal step whatever to attempt to remove the deceased out of the possession of Captain Sturt, which it would have been competent for him to do, in case he had considered the deceased as unfit to consent to his own removal, or that this removal was for the purpose of taking advantage of, and of carrying on improper practices towards, a person in a state of imbecility. On the contrary, he wrote letters to the deceased at the close of the year in 1826, and in 1827, in which he did not impute any improper conduct, or fraud, or any thing of the kind; nor was he refused access to the deceased when he desired it.

On the 30th of January, 1827, about a month after the removal of the deceased, the will in question was executed. It gives 500l. to Mrs. Sturt, 500l. to Miss Sturt, 300l. to Mr. Perfect, who had been employed by the deceased in collecting his rents, and 500l. 3 per cents. to John Grindall, assigning as a reason for not giving anything to Charles that he had already had about the same sum. The rest of the property is given to Captain Sturt, and the will is attested by three witnesses.

[20] The Court has not thought it necessary to enter, with any very minute particularity, into the previous transactions; because the true question is whether,

upon the evidence, this will is proved to be the free and voluntary act of the testator. The evidence to the factum, if it be credited, establishes almost beyond all question that the deceased was a capable testator, that he freely and voluntarily executed this will, and that he had a full intention to do so, and understood and knew what he was doing at the time. There is no room for any of that suspicion which sometimes arises in cases of this description; there is no mistake; there is no ground to believe that the witnesses formed an erroneous opinion respecting the state and condition of the deceased, that they were deceived and imposed upon, or that the deceased was a mere tutored instrument in the hands of those about him, he not knowing and understanding what, or the effect of what, he was doing. The Court must judge of all this from the deceased's own language, from his own directions, from his own free instructions and conduct upon the occasion, from the steps taken and the precautions adopted at this time in order to ascertain his testamentary capacity; by a careful examination of the deceased's capacity by medical persons, some of them of great eminence in their profession; and from various subsequent declarations and recognitions of this will. Unless, then, the witnesses have deposed untruly, it is extremely difficult to conceive any ground for pronouncing against this will.

The deposition of Mr. Hall, the drawer of the will, was read by the counsel who led the cause in support of the will, and its forcible parts were **[21]** fully commented upon by him; the Court, therefore, feels that it is needless to travel again through that gentleman's deposition. But he does not stand alone; the deposition of Mr. Parkin, the medical gentleman first desired to attend for the purpose of ascertaining the testable competency of the deceased, affords the fullest confirmation of Mr. Hall's testimony. It is also by no means an immaterial fact that the deceased himself was extremely anxious to have his mental fitness to make a will ascertained; and this is not extraordinary; for it is hardly possible, after what had passed after this conspiracy, and the violent treatment of the deceased by Charles, to suppose that the deceased, if he retained a scintilla of understanding or memory, would not wish to make some will in order to destroy the effect of the will of April, 1826, which, as I have said, was tantamount to an intestacy. With the impression that he entertained, or at least with the suspicion that he had formed, it was not likely that John would be the object of his bounty; because it most clearly appears, in the first place, that he declined in October to execute the will in his favour, and that upon the 7th of November, as is proved by an unimpeached and a highly respectable witness, Mr. Haddan, he had completely abandoned, and during the time Mr. Haddan had communication with him never resumed, the intention of giving the property to John.

After the notoriety of the facts respecting the abduction to Tonbridge Wells, and the treatment of the deceased already as an insane person, it was not unreasonable for Captain Sturt to desire to ascertain, by the most satisfactory medical evidence, that the deceased was competent to **[22]** a testamentary act, nor would it have been safe on the part of Mr. Hall, with any regard to his professional character, to have proceeded to make a new will for the deceased, without taking every possible precaution.

The evidence of Mr. Parkin, considering the repeated opportunities he had of seeing and of conversing with the deceased, removes every doubt of his testamentary capacity; but the abduction and the subsequent treatment of the deceased, his taking up his residence at Captain Sturt's house, and his being in possession of a very large property and intending to leave it to Captain Sturt, rendered every precaution natural and proper.

The will is not hurried; a month elapses between the first instructions and the final execution; the instructions originate with the deceased himself; they come from himself; and Captain Sturt, though he was in and out of the room, did not interfere; he dictates nothing, his only remark was respecting the executorship, which, as far as it went, was in favor of the nephews, and that, it appears, the deceased resisted with great positiveness and firmness. The deceased also states all the circumstances that had occurred at Tonbridge Wells, so that his memory must have been perfectly fresh.

But, notwithstanding all that passed in the presence of Mr. Parkin, that gentleman (not from any doubt that he entertained of the capacity of the deceased, but in order to avoid the responsibility that would otherwise rest upon him) desired that other medical persons should examine him. Accordingly, the deceased was examined repeatedly by persons of the highest character and **[23]** skill; by Dr. Yeats, by

Dr. Thomson, and, finally, by Dr. Willis; each of them sees him more than once, and all of them state, without doubt or hesitation, that he was capable of making a will and managing his concerns: and no act of insanity is proved, although John Grindall, as well as Charles Grindall, wished to make out the deceased insane four or five months before. No unsoundness of mind is shewn; there was certainly a degree of debility from age and supervening infirmities; the understanding was weakened and impaired; but that does not render a person intestable or incapable of judging of injuries done him, or of benefits conferred upon him; he had sufficient understanding to comprehend what he was doing; nor can his full volition nor his intention to give Captain Sturt his property at this time be doubted or questioned.

Against this mass of evidence of testamentary capacity, of testamentary intention, and of instructions for, and the execution of, the will, Charles Grindall, in his plea, sets up total incapacity. That, however, was renounced in argument; and the argument was not an attempt to discredit the testamentary witnesses as to the factum; for that was felt to be impossible; not an attempt to deny the deceased had testamentary capacity; for that was equally impossible in the face of this evidence from the medical persons, and from Mr. Haddan and other professional persons; not an attempt to deny the intention to exclude the nephews, nor to assert that this instrument was by Captain Sturt imposed upon the deceased contrary to the intention he at that time entertained; but that this intention of excluding John, and giving the property to Captain Sturt, was produced in the **[24]** mind of the deceased by fraud and contrivance practised by Captain Sturt. This does seem to me, after reading all the evidence, to be an utterly hopeless and desperate case to set up, even in argument. It must indeed, under any circumstances, be a matter of extreme difficulty to establish fraud of this kind. Is the Court to suppose that when Captain Sturt called upon the deceased, upon the 8th of October, he was able to instil into his mind such a disaffection towards John Grindall, and such a regard towards himself, that they should without any further intercourse have produced the change in the deceased's mind, which upon the 7th of November, as is clear from the evidence of Mr. Haddan, determined the deceased not to make a will in favor of John (an intention which continued unshaken from that time); and further, that such change was effected by fraud practised upon the deceased by Captain Sturt at this single interview? Even assuming that the deceased saw Captain Sturt once or twice more, it is difficult to conceive how it can have entered into the mind of any person to build an opposition to this will upon such grounds; and more especially when the Court recollects that the deceased was in his own house from the 8th up to the 19th of October with Mrs. Charles Grindall as well as John Grindall and their servant Mary Gillett, and that from the 19th of October to the 28th of December John Grindall and this servant had the sole possession of the deceased; but that the deceased should have been set against John by this solitary interview between Captain Sturt and the deceased early in October is most highly improbable. The probability is, that Mrs. Charles Grindall, who at this time, as I **[25]** have before noticed, thought it expedient to side with her husband and to implicate John Grindall in the abduction, or that the conduct of John himself, for no other person had very free access to the house of the deceased during the months of November and December, was the cause of the change; and that the deceased himself either through some insinuation of Mrs. Charles Grindall, or on a revival of some suspicion he himself had formerly entertained of the conduct of John, returned to his unfavourable opinion of him; for that he had an unfavourable opinion of him in the former part of his life is proved. John had been in prison, and had been occasionally estranged from the deceased. That the deceased, therefore, should himself have taken up the opinion that John Grindall was in some degree accessary to his forcible removal is not altogether surprizing; for the Court must repeat he was accessary to the wish of having the deceased declared a lunatic, a wish incontestably proved by Mr. Wimburn to have been expressed in the month of August, 1826. That that impression and suspicion should now arise in his mind, while living in the house with these parties in the way I have described, is so infinitely more probable than that it should be an impression worked into his mind by the visit of Captain Sturt in October, that I cannot for one moment hesitate in holding that the fraud is not proved (and where fraud is charged it must be proved); but on the contrary I think that the probability is most decidedly and infinitely more strong on the other side, viz. that the alteration in the deceased's intention was not produced by any fraudulent practice on the part of Captain Sturt; because it is quite

clearly proved that the deceased did intend [26] to exclude John Grindall as early as the 7th of November.

Then the previous fraud not being proved, the deceased went to Captain Sturt's house for the purpose of protection upon the 28th of December, without any appearance of force or controul; during the time he remained there no custody by Captain Sturt is proved, no refusal of access to John Grindall; though access was refused to Mrs. Charles Grindall, when she came there and acted with violence, and both to her and her husband, when they came there to annoy the deceased. Considering these circumstances, it might well be expected that the deceased should make a will unfavourable to both the nephews, and should either give his property to Captain Sturt, with whom he had been acquainted in early life, and who he conceived had done acts of kindness to young Suett, who had been killed in action in 1813 when just upon the point of being made lieutenant; or should do what he sometimes threatened, rather give it to charities or hospitals than to his nephews. Indeed, as he himself declared, with respect to Charles Grindall, he must have been mad indeed if he could have thought of giving his property to him after the treatment he had received from him; and if he had unfavourable impressions respecting John Grindall, though John might not have been privy to the abduction, it is not extraordinary that he should exclude him.

That the deceased continued in a state of capacity after the factum of the will is abundantly proved: the medical men see him subsequently; they see him just prior to the trial on the 22d of February, and they think him of sound mind: he continues of sound mind for nearly a year and [27] a half afterwards; he is employed in various transactions of business; there are various confirmations of the will, various recognitions—recognitions not only in conversation with witnesses, but recognitions in his own handwriting, both in 1827 and in 1828.

With respect to the subsequent transactions resorted to with a view to secure the property to Captain Sturt, and to protect him against any vexatious disturbance by these nephews, they have but little bearing upon the real and true question in the cause. Whether they were wise or prudent is not a question necessary for the Court to discuss. If the evidence of the factum had been doubtful, it might have been worth while to consider how far those subsequent circumstances might reflect back and tend to decide such doubt; but the proof of the factum being beyond doubt and incontestable, those subsequent circumstances become immaterial, and do not require any detailed consideration: they will not render the evidence of capacity incredible; they will not shew that the medical men, and Mr. Hall, and Mrs. Jupp were either mistaken as to the deceased's intention or capacity, or that they are perjured.

The Court has perhaps hardly done justice to the case by not stating the evidence more in detail as the foundation of and warranting the sentence that the Court is about to pronounce for this will and codicil; but, entertaining no doubt as to the sentence, I feel myself sufficiently excused towards the parties in abstaining from a more minute investigation of the depositions.

The only remaining question is in respect to [28] costs. It may possibly be no benefit to Captain Sturt to have a decree of costs against these parties; but I am of opinion that justice would not be done if the Court did not make that decree, for the suit has been vexatiously conducted by both the nephews, and at an enormous expence.

With respect to Charles Grindall, no doubt can exist that he ought to be condemned in the costs occasioned by his long allegation charging incapacity and fraud, and in support of which he has examined forty-three witnesses. John, his brother, has thought proper to proceed by a separate proctor, not, as far as I can judge, from suspecting that Charles was acting in collusion with Captain Sturt, but that he might appear in a less invidious character with respect to the abduction: but he has, in a great measure, adopted the acts of Charles; he has even examined some witnesses, two, I think, upon his brother's allegation; he has gone further; he has added to the expence by exhibiting separate interrogatories to all the witnesses examined upon the responsive allegation; he has also offered additional allegations, an allegation both before and after publication; he has also persisted to the very last—to the hearing of the cause, and by putting his papers into the hands of counsel placed them in the desperate situation of attempting to set up no other point than that of fraud and perjury against Captain Sturt; for it was quite impossible for the counsel

to have contended that the witnesses proving the factum were not credible, or that their evidence was not amply sufficient to prove the factum. No hope, therefore, remained but in establishing fraud against Captain Sturt to lay a foundation for invalidating the whole transaction.

Under such circumstances it would not be justice **[29]** to allow these parties, after occasioning this immense expence, to escape without costs. John, as well as Charles, had both a right to cross examine the testamentary witnesses: but for the expence occasioned subsequently, first of all by Charles giving in his opposing allegation, and by the consequences of it, as far as he proceeded, Charles Grindall must be condemned in those costs; and John Grindall in the costs occasioned by the separate interrogatories he addressed to the witnesses produced by Captain Sturt upon the responsive allegation, in those occasioned by the two allegations he has offered to the Court, and by the present hearing.

Whether Captain Sturt will think it worth his while to enforce his decree for costs, or whether he has any chance of recovering them, is not a matter for the consideration of the Court; but a case of this description ought not to pass without the Court marking its opinion by taking that line, with respect to costs, which I have now stated.

Affirmed, on appeal.

[30] HUGHES *v.* TURNER. High Court of Delegates, 1831.—Where a testatrix had a power of appointment, and a general probate of her will of 1829 and codicil thereto had been granted, the Delegates, reversing a decree of the Prerogative, held that the Court of Probate could not also grant an administration, with a will of 1815 and codicils annexed, limited to become a party to proceedings in equity touching the execution of the power by such wills; but must itself decide whether the will of 1815 was under the circumstances revoked by the will of 1829, and thereupon grant either a probate of the will and codicil of 1829 alone, or a probate of those papers and of the will of 1815 and its codicils, as together containing the will.

[See in Chancery, 1835, 3 Myl. & K. 666. Referred to, *Henfrey* v. *Henfrey*, 1842, 4 Moore, P. C. 35; *Hughes* v. *Hosking*, 1856, 11 Moore, P. C. 15; *Enohin* v. *Wylie*, 1862, 10 H. L. Cas. 10. Disapproved, *Cadell* v. *Wilcocks*, [1898] P. 21.]

On appeal from the Prerogative Court of Canterbury.

The Judges Delegate who sat under this commission were: Mr. Baron Bayley; Mr. Justice Patteson; Mr. Justice Alderson; Dr. Daubeny; Dr. Phillimore; Dr. Dodson; Dr. Blake; and Dr. Curteis.

Elizabeth Leighton Bonsall (formerly wife of George Bonsall) died, a widow, on the 22d of December, 1830. The deceased, under and by virtue of the will of her sister, Martha Davies, spinster, deceased, was entitled to the rents, dividends, interest, and annual produce of the residue of her sister's real and personal estate for life, independent of her husband, the same being given to trustees, upon trust, to pay the same to her for her separate use; and upon her death, then "upon the further trust to pay, apply, and dispose of all and singular the said trust monies and premises to such person and persons, in such parts, shares, and proportions, and in such manner as the said Elizabeth Leighton Bonsall, notwithstanding her coverture, and as if she were sole and unmarried, should by her last will and testament in writing, or any codicil thereto, to be by her signed and published in the presence of three or more credible witnesses, give, devise, direct, limit, or appoint, and in default of such direction, limitation, or appointment, or in case any such shall be made which shall not extend to the entire disposition of the said trust monies then subject thereto, and as to so much of **[31]** the said trust premises whereof no effectual gift, devise, direction, limitation, or appointment shall be made, upon trust, for the said George Bonsall, his heirs, &c.," and appointed him executor.

The will (which contained the above provisoes) of Martha Davies was dated on the 13th of December, 1808; and a codicil, dated on the 5th of August, 1815, substituted Mr. Sharon Turner, as a trustee, in the place of John Hilton, deceased. This will and codicil were respectively executed and attested to render valid devises of real estate; and Mr. George Bonsall, the husband of the deceased in this cause, took probate of them in November, 1815. The trustees were J. O. Trotter and Sharon Turner.

On the 16th of December, 1815, Mrs. Bonsall, the deceased in this cause, made her will, wherein, after reciting part of her marriage settlement, dated on the 12th of May, 1808, she directed, limited, and appointed that S. P. Parson and Sharon Turner, their heirs, &c. &c. &c., should, immediately after the decease of the survivor of her husband and herself, and failure of children, assign and convey to John Jones, Sharon Turner, and S. P. Parson certain monies upon trust, after paying the legacies therein mentioned, to divide the residue between and amongst themselves as tenants in common. In a subsequent part of her will Mrs. Bonsall, after referring to the will of her late sister, Martha Davies, and reciting the power of appointment (as printed above) given to her, Mrs. Bonsall, under that will, and that probate had been duly taken, proceeded, in substance, as follows:—"Now in pursuance and by virtue of every right, power, or authority, to me given in and by the said last will and testament, and **[32]** codicil, of my said late sister, or either of them, and by virtue of every other right, power, or authority, enabling me in this behalf, and in execution thereof, I, the said E. L. Bonsall, do by this my last will and testament, by me duly signed, sealed, and published, in the presence of the said three credible persons whose names are intended to be hereunto subscribed as witnesses attesting the execution thereof by me the said E. L. Bonsall, direct, limit, and appoint that Sharon Turner and J. O. Trotter, their heirs, executors, administrators, and assigns, do and shall immediately after my decease convey and assign unto and to the use of the said John Jones, Sharon Turner, and S. P. Parson, their heirs, &c. &c. &c. respectively, upon the trusts hereinafter mentioned, all the said real and personal estate of my said late sister, Martha Davies, now vested in them the said Sharon Turner and J. O. Trotter, or over which I have any disposing power; and I do hereby declare that Jones, Turner, and Parson, their heirs, &c. &c. &c. respectively, shall stand, and be seized, and possessed of the said last mentioned real and personal estate respectively: upon trusts hereinafter declared concerning the same," viz.: that as to 4000l., John Gould, of Woolwich, and his wife shall take the dividends for their respective lives; and upon the death of the survivor the principal, under certain conditions, to be paid to their children. The testator then gave a legacy of 200l. to Mary Ann Honour Parson; and of 1000l. to her own god-daughter, Martha Elizabeth Turner, daughter of Sharon Turner; and "in trust as to all that freehold, messuage, land, hereditaments, and premises purchased by my late sister, in the county of Cardigan, called **[33]** Fynnon Wenn, and all that slang, or piece, or parcel of land, in the parish of Llancadarnefawr, in the county of Cardigan, also purchased by her, and all other the real estates purchased by my sister in Wales, in trust for the said Sharon Turner, for and during the term of his natural life. And from and after the decease of him the said S. T., in trust for Alfred Turner, son of the said S. T., his heirs and assigns for ever. And in case S. Turner and Alfred Turner shall die in my life time, then in trust for William Turner, the second son, his heirs and assigns for ever. And in case the said S. T., A. T., and W. T. shall all die in my life time, then upon the trusts hereinafter mentioned and declared concerning the same. And I give to my god-daughter, Martha Elizabeth Turner, the piano-forte, which belonged to my late sister. Also, I give to Mary Turner, the wife of Sharon Turner, all my wearing apparel, table and bed linen, lace, trinkets, watches, plate, china, jewels, and books, which I have in any way the power of giving or disposing of. And I desire my executors to give and distribute twenty-five mourning rings to such of my friends as they shall think fit. And as to all that freehold estate purchased by my late sister in the county of Cardigan, and all other the real estate purchased by my sister in Wales, from and after the events and contingencies hereinbefore mentioned of and concerning the same, and also as to all the rest, residue, and remainder of the said real and personal estate, over which I have any disposing power, under the will and codicil of my late sister, or either of them, I declare and direct that the said J. Jones, S. Turner, and S. P. Parson, and the survivors of them, his heirs, &c. &c. &c. **[34]** respectively, shall and do stand, and be seized of, and interested in the same, in trust, for themselves, their respective heirs, &c. &c. &c. as tenants in common, and for their own respective absolute use and benefit. And if any one or more of them, Jones, Sharon Turner, and Parson, shall die in my life time, then the share or shares which such person or persons so dying would have been entitled to, if he or they had survived me, shall not lapse, but shall be in trust, and to be paid to such person o persons as shall be his, or her, or their respective heirs, executors, and administrators

absolutely and for ever. And so far as the law enables me in this behalf, I constitute and appoint the said John Jones, Sharon Turner, and S. P. Parson executors of this my will and testament. And I hereby revoke all my former wills; and I give to my servant, Mary Langford, Widow, 300l."

This will (contained in ten sheets of paper) was dated on the 16th of December, 1815, and duly executed to pass real estate; and according to the power under her sister's will.

On the 31st of March, 1818, Mrs. Bonsall made a codicil, republishing her will; and desiring, that in case she should die before her sister's monument was put up, that it should be paid for by her executors out of the property bequeathed to them by her will.

On the 20th of March, 1819, she made a second codicil, wherein, after reciting the appointment by her will, in virtue of her marriage settlement, to Jones, Turner, and Parson; and that Parson was dead leaving only one child amply provided for, she gave Parson's share to her husband if he should survive, confirmed the appointment of the other two shares to Jones and Turner; and also, after reciting the appointment by her [35] will, in virtue of her sister's will, to Jones, Turner, and Parson, "upon the trusts therein declared, and amongst others, as to 4000l. for the benefit of John Gould and his family, as to 200l. for Mary Ann Honour Parson, as to 1000l. for my god-daughter therein mentioned, and as to the freehold premises at Fynnon Wenn and Llancadarnefawr, for Sharon Turner and his sons: and as to the piano forte of my said sister, for my said god-daughter; and as to my wearing apparel, table and bed linen, lace, trinkets, watches, plate, china, jewels, and books, to Mary Turner, wife of the said Sharon Turner; and as to all the rest, residue, and remainder of my said real and personal estate over which I had any disposing power, under the will and codicil of my said sister, I gave, directed, limited, and appointed the same unto them, Jones, Turner, and Parson;" she gave Parson's share of this residue to her husband, George Bonsall, if he should survive her, to and for his own absolute use and benefit. The testatrix then confirmed the appointment of the two parts of the residue to Jones and Turner, and proceeded: "And I also give, direct, limit, and appoint to my said husband, for and during the term of his natural life, all that the said freehold messuage, lands, hereditaments, and premises at Fynnon Wenn and at Llancadarne fawr, with liberty to cut the wood on the same for his own use; and after his decease, then I give and appoint the same to the said S. Turner, and to his sons Alfred and William, their heirs and assigns, as mentioned and appointed by my said will. And I give and appoint to the said George Bonsall, the carriages and horses, and all the household furniture, books, plate, and linen, over which I have any disposing power, for his own absolute use and benefit; but the piano forte, wearing apparel, lace, [36] trinkets, watches, jewels, and other effects, I give and appoint to the said Martha Elizabeth Turner, and Mary Turner, as mentioned in my said will. And I will and appoint that all funeral and testamentary expenses, and that the costs of my sister's monument and my own, be paid for out of the said last mentioned rest and residue, before the same is divided, and I revoke and annul the said sum of 200l. given to the said Mary Ann Honour Parson, and also the sum of 300l. given by my said will to Mary Langford, and instead thereof, I direct my executors to pay to the said Mary Langford the sum of five pounds a year during the term of her life, out of the said residue: and I appoint the said John Jones and Sharon Turner executors of my said will, and I confirm my said will, and the codicil thereto annexed, in all respects in which the same have not been altered by this my last codicil; and do declare the said will and codicil to be, with this present codicil, my last will and testament, and I revoke all others."

On the 22nd of October, 1824, she made a third codicil, whereby, after reciting the death of her late husband, she bequeathed "to her other surviving executors and trustees all that by my codicils I heretofore gave and bequeathed unto George Bonsall, to their own use and benefit; but subject, &c. &c. and in all other respects I confirm and do hereby republish my will with the former codicils added thereto."

These codicils were respectively duly executed.

On the 26th of October, 1829, Mrs. Bonsall made a further will, the substance of which was as follows:—

"This is the last will and testament of me Elizabeth Leighton Bonsall, of Queen Square, Bloomsbury, widow." (After certain directions respecting [37] her funeral

and monument.) "I desire that my funeral and testamentary expenses be first paid, and then I give unto my friend Mrs. Mary Lawrence, of Keppel Street, 500l. and also my best set of pearls, for her own sole and separate use, free, &c. To my friend Mrs. Mary White, of Montague Place, 500l. and also all my trinkets (except the set of pearls bequeathed as aforesaid, and my watches). To my friend Mrs. Scarborough, 500l. and also a plain gold watch (which belonged to my sister), for own sole and separate use, free, &c. To my friend Mrs. Hawkins, sister to Mr. Jonathan Hayne, of Red Lion Street, 300l. To my friend Miss Hinds, my companion, 300l. and also all my furniture, clocks, watches, books, pictures, glass, linen, and wearing apparel, and my piano forte and music books. To my friend Mr. Jonathan Hayne aforesaid, silversmith, 500l. To my friend Mr. Sharon Turner, 50l. and to Mr. Alfred Turner, his son, 50l. To my friend Mr. John Gould, of Brompton, Kent, solicitor, 3000l.; but if the said John Gould should happen to die before me, then I will that the said 3000l. be equally divided between and amongst such of the children of the said John Gould as shall be living at the time of my decease. I give, devise, and bequeath all my freehold and copyhold estates in the county of Middlesex, in Cardigan, and elsewhere, unto my relation John Jones, of Ystrad, in the county of Carmarthen, esquire, member of Parliament, his heirs and assigns for ever. And as to all the rest, residue, and remainder of my estates and effects, whatsoever or wheresoever, whether real or personal, plate, monies, leasehold, mortgages, bonds, or other securities for money stocks, funds, or other property, and whether in possession, reversion, or **[38]** expectancy, or held in trust for me, I give, devise, and bequeath the same, and every part thereof, unto the said John Jones, his heirs, executors, administrators, and assigns for ever. And I do hereby nominate the said John Jones, and the aforesaid Jonathan Hayne, executors of this my will, at the same time revoking and making void all and every other will and wills by me at any time heretofore made, and declaring this only to be my last Will and Testament. In witness whereof, I, the said E. L. Bonsall, have to this my last Will and Testament contained in three sheets of paper, set my hand and seal, this 26th of October, 1829.

"Elizabeth Leighton Bonsall" (L.S.).

There was a regular attestation clause; and the will was attested by William Young, Charlotte Row, Mansion House, solicitor; and two of his clerks.

"This is a codicil to my last will and testament. I give to Sharon Turner, Esquire, 3000l., at his death to be equally divided between his family; 500l. in addition to the 500l. already left, to Mrs. Mary Lawrence, for her sole and separate use; 100l. lent to John Leslie to be given to him, and not called for; to my servant Mary Mark, 20l.: to Miss William, daughter of Doctor Rice William, of Brydge Street, Aberystwith, 300l."

This codicil was dated the 14th of June, 1830; and signed and attested by three witnesses.

Prerogative Court.—On the 25th of February, 1831, Mr. Jones and Mr. Hayne proved, in the Prerogative Court, the will, dated on the 26th of October, 1829, and the codicil thereto.

[39] Shortly after this probate had been taken, Mary, wife of James Hughes, the appellant, devisee for life of the real estate of George Bonsall, and also his sister and next of kin, filed a bill of complaint in Chancery against Sharon Turner, the surviving trustee under the will of Martha Davies, also against Jones and Hayne, the executors of Mrs. Bonsall, and also against the Reverend Isaac Bonsall, the administrator (with the will annexed) of George Bonsall, in order to obtain a decree whether Mrs. Bonsall's said last will and codicil contained a valid appointment of the estate and effects of Martha Davies, and also for the due and proper application thereof. This suit was still depending.

In April, 1831, a decree issued under seal of the Prerogative Court, at the instance of Sharon Turner, against Jones and Hayne, calling upon them to bring into the registry the probate which they had obtained, and to shew cause why it should not be revoked, and probate of both wills, and of the several codicils thereto, should not be granted, as containing together the last will of the deceased, or in such other manner and form as the Judge of the said Court should direct.

An appearance having been given for Jones and Hayne, an allegation of twelve articles was given on behalf of Turner, pleading "the contents of the will of Martha Davies, also the making and execution of the will (of 16th December, 1815) and

codicils thereto of Elizabeth Bonsall, and that she had by them made a complete and effectual disposition and appointment of her own real and personal estate, and of the real and personal estate of Martha Davies, over which she, Bonsall, had a disposing power." It further pleaded "the making and writing of the will (whereof probate had been **[40]** granted to Jones and Hayne) by William Young, and that he, Young, was in total ignorance at such time that Mrs. Bonsall had the power of appointment contained in her sister's will, and that having prepared the same under the impression that Mrs. Bonsall had thereby made a complete disposition of all the estate and effects which could pass under any will, he inserted a clause of revocation."

"That (under the circumstances pleaded) several questions had arisen which could be decided only by a Court of Equity, viz., whether the will of 26th October, 1829, is a good execution of the power of appointment to be exercised by will over the estate and effects of Martha Davies, given by her to Mrs. Bonsall, by reason that in the will of 26th of October, 1829, no reference is specially made to the power. 2ndly, whether in the event of the said will being deemed not to be a good execution of the power, so as to convey the property of the said Martha Davies according to the disposition therein contained, the will ought, by reason of the general revocatory clause therein mentioned, to have the effect of revoking the previous execution of the power contained in the will of the 16th of December, 1815, and the codicils thereto. That there were also several other questions arising upon the said power of appointment, and the exercise or presumed exercise thereof, fit and proper to be decided by a Court of Equity."

"That according to the rules of the Court of Equity, in cases where a power of appointment over personal property is to be exercised by will, those Courts will not receive any paper being or purporting to be a testamentary execution of such power, or a testamentary revocation of an execution of such power, unless the paper had received **[41]** probate from an Ecclesiastical Court, and that by reason of the premises, unless probate were in some form granted of the testamentary papers therein set forth, the questions before stated could not be adjudicated or justice done in a Court of Equity." (*a*)

The prayer of the allegation was, that the Court would grant probate of all Mrs. Bonsall's testamentary papers thereinbefore pleaded in such form as justice might require, and so as to enable a Court of Equity to decide all necessary questions, and give the necessary directions for administering the trust funds of Martha Davies.

This allegation was admitted without opposition, and the facts and circumstances therein pleaded were afterwards confessed by Jones and Hayne in acts of Court.

The cause came on for hearing on the 3rd Session of Easter Term, 1831, when the proctor for Jones and Hayne, who stood assigned to bring in the probate of the deceased's last will and codicil, prayed the Court not to enforce the assignation in respect to such probate upon him. The Court directed that such probate should not be brought in; and under the special circumstances of the case, and as not affecting the general rule, "decreed letters of administration with the will, bearing date the 16th day of December, 1815, and the three codicils annexed, to be granted to the nominee of Sharon Turner, one of the executors named in the second codicil, limited only to become a party to, and to attend, supply, substantiate, and confirm proceedings in the Court of Chancery, or **[42]** any other Court of Equity, touching and concerning the execution of the power of appointment, under the wills and codicils of the said deceased, or either of them." But the Court directed that the limited administration to Turner's nominee should be without prejudice to the probate taken of the latter will by Jones and Hayne.

Before this grant of limited administration had passed the seal a caveat was entered on the part of Mrs. Hughes; an appearance was given for her alleging that she was the natural and lawful sister, next of kin, and one of the persons entitled in distribution to the effects undisposed of by the will of George Bonsall, and as such a party entitled to the residue of the estate and effects of Martha Davies, there being no appointment made thereof by Mrs. Bonsall; and a prayer was made on her (Mrs. Hughes's) behalf to be heard on petition against the grant of administration as decreed.

(*a*) A Court of Equity has no jurisdiction to determine on the validity of a will. *Jones* v. *Jones*, 3 Mer. 161. *Jones* v. *Frost*, Jacob, 467. *Pemberton* v. *Pemberton*, 13 Ves. 297. *Kerrich* v. *Bransby*, 7 Bro. P. C. 437. See also Williams on Executors, vol. 1, p. 157-8.

The act on petition, after a formal heading on the part of Turner, alleged for Mrs. Hughes: "That the decree of the Prerogative Court, dated on the third session of Easter Term last (to wit, the 7th of May, 1831), was obtained by collusion between Sharon Turner, John Jones, and Jonathan Hayne, they, or at least *two of them, being the parties severally interested in obtaining a grant of letters of administration (with the will of the 16th of December*, 1815, *and codicils annexed) of Mrs. Bonsall, the deceased, the same being to be made use of for their benefit in the Court of Chancery, in the suit instituted in that Court by Mary Hughes,*(*a*) they, Turner and Jones, being the parties respectively in whose favor Mrs. Bonsall had by her will of 1815, and codicils thereto, made an appointment **[43]** of the principal part of the property of Martha Davies (the same being of large amount), over which she had a disposing power, and Jones and Hayne, the executors under the latter will of 1830, accordingly at once admitting all the facts and circumstances pleaded on behalf of Sharon Turner to be true. That notwithstanding such the interest of Turner and Jones, and that he, Turner, has since the commencement of the suit in Chancery acted, and still continues to act, as solicitor both on his own part, and also on the part of Jones and Hayne, as of the Reverend Isaac Bonsall, yet that he, Turner, did not give any notice to Mary Hughes, or her solicitor, in the Chancery suit, of the proceedings in this Court, and they remained in ignorance thereof until the 27th of May, 1831, when, by the answer of Turner to the bill in Chancery, Mary Hughes's solicitor first discovered that a special probate of the former will and codicils of Mrs. Bonsall had been, or was about to be, granted. That any grant issued by the authority of this Court *recognizing in any manner the said former will and codicils thereto as an existing will and codicils of the deceased*, will prejudice Mary Hughes in her suit in Chancery; wherefore the Judge of this Court was prayed to rescind his aforesaid decree, made on the third session of Easter Term last, in the pretended cause promoted by Turner against Jones and Hayne."

On the part of Turner—*denying* "that Mary Hughes is a party entitled to the residue of the estate and effects of the said Martha Davies—it was *expressly* alleged that the said Mrs. Bonsall *did make a full and effectual appointment thereof.* And it was further alleged, that the cause in this Court, between *Turner* v. *Jones and Hayne*, was **[44]** promoted for the express purpose of obtaining the decree of the Lord Chancellor whether Mrs. Bonsall, deceased, *had or had not by either of the aforesaid wills or codicils made an effectual* appointment of the residue of the estate and effects of Martha Davies, deceased, either in the suit now depending in the Court of Chancery, or in some other suit to be commenced in the said Court wherein the several persons interested in the issue thereof were intended to be made parties. And it was expressly denied that the decree of this Court was obtained by collusion between Turner, Jones, and Hayne. It was alleged that the interests of the said parties are untruly set forth and alleged on behalf of Mary Hughes; for that although Sharon Turner, and Jones, were the persons in whose favour Mrs. Bonsall had by her will of the 16th of December, 1815, and three codicils thereto, made an appointment of the principal part of the property, and which it is contended by *Turner is a full and effectual appointment thereof*, yet Jones, as the *residuary legatee* named in the will of Mrs. Bonsall, dated the 26th of October, 1829, contends that he is entitled to, and by his *answers* to the bill filed by Mary Hughes in Chancery, claims the whole of the residue of Martha Davies' real and personal estate. That Jones, in his said answer, sets forth that Mrs. Bonsall, by her said will, had devised (among other things) her freehold estates in the county of Cardigan, and that she was not possessed of, or entitled to, any freehold estate in that county, except under the will of her sister, Martha Davies; that by her said will she had given the gold watch, a piano-forte, and music books, which formerly belonged to Martha Davies, and after **[45]** giving other legacies, gave and devised all the residue of her estate and effects, whether in possession, reversion, or expectancy, or held in trust for her. And Jones therefore insists that Mrs. Bonsall had by her will of 1829 sufficiently referred or alluded to the will of Martha Davies, or to the estate and effects thereby devised and bequeathed, to render her said will an effectual appointment thereof, and that he, Jones, is consequently entitled thereto, that hence the interests of Turner and Jones are distinct, and opposed to each other; and that they had no motive for colluding, and did not in fact collude. That Jones and Hayne did, in the

(*a*) The words printed in italics are in conformity with the printed papers in the cause.

cause in this Court, acknowledge the facts and circumstances pleaded therein, on behalf of Turner, to be true, and he expressly alleged that such *facts and circumstances are true, and if they had been denied might have been readily proved on oath.* That Turner has acted, and still does act, as solicitor (as alleged), and that he had acted for the Reverend Isaac Bonsall as his solicitor in other matters, previously to the commencement of the said suit in Chancery, and he still continues to act for him at his particular request. That Jones and Bonsall have each a separate counsel in the said suit. That the said Reverend *Isaac Bonsall* is the *brother* of Mary Hughes, and has *an equal* interest with her, if any, under the will of Martha Davies, deceased. That no notice was given to Mary Hughes of the cause lately depending in this Court, *because* it was instituted for the sole object of enabling the Court of Chancery either under the bill filed by her, or a new bill if necessary, *to take into consideration the several testamentary papers left by the said Elizabeth Leighton Bonsall, deceased*, and not for **[46]** the purpose of obtaining a decision of this Court affecting her interest. That justice cannot be *administered* to the several parties interested, under the testamentary papers of Mrs. Bonsall, without *some grant under seal of this Court* with her will bearing date the 16th of December, 1815, and the three codicils thereto annexed; and that the grant decreed by this Court on the third session of Easter Term last past will enable the Court of Chancery to enter fully into the merits of the case between all parties interested: wherefore the said decree was prayed to be enforced with costs."

By-Day.—On this day the petition came on for hearing.

Addams for Mrs. Hughes. The object of the petition is to enable Mrs. Hughes to set up the papers of December, 1815, and of October, 1829, as together containing the will of the deceased: this question is purely for this Court to decide, and not for a Court of Equity.

Per Curiam. By refusing to direct the general probate of the will of 1829 to be brought in, and to grant probate of all the papers, I virtually held the will of 1815 revoked.

Lushington contrà. No injustice will accrue by the confirmation of the decree of limited administration. The object of the other side is to prevent the only Court—the Court of Chancery—from deciding upon the claims of the different parties.

Judgment—Sir John Nicholl. In granting a limited administration, under the **[47]** special circumstances of this case, I proposed to put the whole matter in such a shape that the opinion of a Court of Equity might be taken as to the validity of the appointment under Martha Davies' will. A Court of Equity is, I conceive, the fittest jurisdiction to decide that question. As Mrs. Hughes was not before the Court when that decree was made, it has been competent for her to shew that she is prejudiced by it, or that it was made under an erroneous statement of facts; but her petition does not satisfy me that the decree should be rescinded. I will, however, allow the matter of the limited grant of administration to stand over for consideration as to any further limitation which may assist in more completely effectuating the object of the Court.

From this decree the cause was appealed to the Court of Delegates.

Delegates, November 25.—Mr. Pepys, Dr. Addams, and Mr. Griffith Richards for Mrs. Hughes the appellant.(*a*) The argument, in the first instance, is confined to one point, viz., whether the limited administration with the will of 1815 and codicils can be **[48]** supported. The object of the Ecclesiastical Court was to have a particular question decided in the Court of Chancery; but the case belongs completely to the Ecclesiastical Court; and it cannot devolve upon any other Court to say which is the last will of the testatrix. Where the question is whether a paper be or be not testamentary, that question is exclusively for the Ecclesiastical Court. Other Courts may decide as to what may be the effect of a testamentary paper; that is another question. There are now, in effect, two

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(*a*) Some discussion took place as to which party should be first heard.

Addams admitted that it was usual in such a case for the appellant to be first heard; but suggested a distinction in this case, inasmuch as the other party had begun the act on petition.

Lushington contrà. It was Mrs. Hughes who prayed to be heard on petition; and though my party first wrote to it, it was a mere formal statement, and Dr. Addams was first heard in the Prerogative Court.

The Court directed the appellant's counsel to begin.

probates of two last wills. The will of 1829 is stated by the testatrix to be her last will; it is so headed and concluded: the testatrix has therefore declared her intention. This will may leave the power unexecuted, or it may be an execution of the power; but, it having received probate, the instrument is ripe for the consideration of a Court of Equity. Mr. Turner applied to the Prerogative Court to recall its probate of the will of 1829: this was a very legitimate object, if there were grounds for the application, and proper parties before the Court: but the party applying and the parties opposing had, in fact, the same interests, viz., that of upholding the will of 1815. The Court declined to revoke the probate of the will of 1829; but granted an administration with a will dated in 1815: this latter grant must be a nullity. There cannot be two last wills. And the Prerogative Court, having granted probate of the will of 1829, decided that it was the last will; and it therefore was bound to have rejected the paper of 1815. The Court of Chancery probably will reject it, or take no notice of it unless to send it back to the Court of Probate. In *Rich* v. *Cockell* something **[49]** of a similar nature occurred;(*a*) but in that case the question of probate still remained in contest; there was no inconsistency as in this case, where the second decree is in direct opposition to the former. If the executors of the will of 1829 wish to raise a question as to whether the will of 1829 is or is not a revocation of the will of 1815, we do not object; only let it be done in the proper Court—the Court of Probate.

Bayley, B. Can this Court decide whether a probate of the two instruments, as together containing the will, ought to be granted?

Per Counsel. Not at present. The executors under the will of 1829 are not before the Court. Such an application may hereafter be made.

Dr. Lushington and Mr. Loraine contrà. Unless a limited administration of the will of 1815, such as has been already granted, be sustained, the Court of Chancery can have no knowledge whether the power has been duly executed. How, without the will of 1815 before it, can that Court decide whether the will of 1829 revoked it? The question depends on the due execution of a power. It will be admitted that the Ecclesiastical Court has no authority to decree the execution of a trust (see *Ex-parte Jenkins*, 1 B. and C. 655); and we much doubt whether the execution of a power can be considered as within the jurisdiction and authority of that Court. What was known about powers when the Ecclesiastical Court first received its jurisdiction? Nothing is **[50]** more common than for the Court of Probate to pronounce for an imperfect paper, and thus give the litigant parties an opportunity of taking upon it the opinion of a Court of Construction. In what way is Mrs. Hughes damaged by this decree? The question as to the execution of the power by the testatrix must be tried either in the Ecclesiastical Court or in the Court of Chancery. We submit that it belongs to a Court of Equity; and the Prerogative Court has refused to call in the probate granted to Jones and Hayne of the will of 1829, till the Court of Chancery has decided whether that will had revoked the will of 1815 as to the execution of the power.

In the course of the argument observations to the following effect were made by the Court:—

Suppose that the Court of Chancery should receive this limited administration, and entertain the suit, and decide that the power executed under the will of 1815 was not revoked by the subsequent will, and that the party should afterwards go back to the Ecclesiastical Court and ask for a general administration; it would be competent for the Ecclesiastical Court then to say, "I do not agree with the Court of Chancery upon this point; I think that the execution of the power is revoked, and I will not give you a general grant." This might happen, for the Ecclesiastical Court does not in such a matter consider the decision of a Court of law, nor of a Court of Equity, as absolutely binding upon it: it only regards such a decision of a Court of Equity as the advice of a sensible man.

There are many cases where the best Court does not decide a question; as where questions of **[51]** blockade arise in insurance causes; there the Court of Admiralty would be the best Court to resort to; but the Court of common law, where such a question arises as an incidental point, must entertain it, referring to cases decided in the Court of Admiralty. So as to questions of foreign law, and other incidental points. It is not here a question whether the Court of Probate could best decide

(*a*) 9 Ves. 369. See the observations of Eldon, C., pp. 371, 380-1.

whether there has been a revocation of the execution of the power; but whether it is not bound to decide. That it might be inconvenient for the Ecclesiastical Court to entertain such a question, or that its decision upon such a question might conflict with the decision of a Court of Equity, will not enable the Ecclesiastical Court to throw upon a Court of Equity to determine which is the will of this testatrix; for that, at last, must be the point. The Ecclesiastical Court constantly considers questions of construction, as, for instance, in revocations. Where is the line of distinction to be drawn? What cases of construction are to be entertained by the Ecclesiastical Court, and what not? No case has been cited, and we know of no case in which the Court of Chancery, on a limited administration, with a paper annexed, like this, has ever decided that such paper was testamentary; and that the will of a later date was only a pro tanto revocation.

The Court reversed the decree of the Prerogative Court as to the grant of limited administration; and retained the cause.

Mich. Term, By-Day.—On this day, before the Condelegates, the proctor for Sharon and William Turner prayed, pursuant to the original decree duly served and **[52]** returned into the Prerogative Court, probate of the several testamentary papers, as containing together the last will and testament of Mrs. Bonsall. This was opposed on behalf of Mrs. Hughes, who prayed to be heard on act on petition.

The Condelegates, after hearing Lushington in support of the motion, and Addams contrà, assigned to hear the matter before the whole commission.

11th January, 1832.—A proctor, on this day, gave an appearance for, and exhibited a proxy under the hands and seals of, Jones and Hayne, the executors of the will of 1829 and codicil thereto.

On the 3rd and 4th of February the cause was argued before the Judges Delegate, at Serjeant's Inn, and the following prayers were made by the respective proctors:—

The proctor for Sharon and William Turner prayed the Judges to revoke the probate of the testamentary papers of Mrs. Bonsall, dated on the 26th of October, 1829, and the 14th of June, 1830, granted to Jones and Hayne, and to decree probate of the testamentary papers dated respectively the 16th of December, 1815, 31st of March, 1818, 20th of March, 1819, 22nd of October, 1824, 26th of October, 1829, and 14th of June, 1830, as containing together the last will and testament of Mrs. Bonsall, to be granted to Jones and Hayne, the executors thereof; and to assign the proctor for Jones and Hayne to bring the probate, heretofore granted under seal of the Court below, into the registry of this Court.

[53] The proctor for Mrs. Hughes prayed the Judges to confirm the probate granted to Jones and Hayne, and to condemn the Turners in costs.

The proctor for Jones and Hayne prayed the Judges to confirm the probate already granted to them, or to decree probate of the several testamentary papers as containing together the deceased's last will, limited only to become parties to, and to attend, supply, substantiate, and confirm proceedings commenced or to be commenced in Chancery or any other Court of Equity, touching and concerning the execution (under the said testamentary papers, or either of them) of all powers of appointment possessed by the deceased, and remain parties to such proceedings until a final decree shall be given; and to condemn Sharon and William Turner in costs.

Sir Edward Sugden, Dr. Lushington, and Mr. Kindersley for S. and W. Turner. Mrs. Bonsall made several depositions of her property: the first will of which we hear was made on the 16th of December, 1815; this will is, in all respects, as technically prepared as possible; the power has been most fully and carefully executed: she recites her sister's will, and proceeds to dispose of what she had the power of disposing under that will: she revokes all former wills, and appoints Jones and Turner executors. Had there been no subsequent paper, no difficulty could have arisen; but in October, 1829, she executes another will, directly opposed in many of its bearings to the will of 1815; and upon this latter will the present question arises.

The will of 1829 was drawn by a solicitor, who **[54]** was ignorant that Mrs. Bonsall had any property over which she had a power of appointment.

It is a settled principle that if by a will you give property generally, however unlimited the terms you employ, yet property over which you have only a power of appointment will not pass. To make a will operate as an execution of a power there must be a reference either to the power or to the property held under the power. If a testator gives all his property to A., property over which the testator had a power

of appointment by will would not pass under such a devise. *Andrews* v. *Emmot* (2 Bro. C. C. 297). In that case Lord Chancellor Thurlow says, "The question is whether the testator, in making that will, has executed the power against his wife whose property the fund was. It is necessary, in order to do this, that he should by his will notify his intention to do it. It is too late now to expect that a testator, in order to execute a power, shall make an express reference to it; because it has been determined that, if a man disposes of that over which he has a power in such a manner that it is impossible to impute to him any other intention but that of executing the power, the act done shall be an execution of the power." And further on he says, "Here the testator has made a will, by which it does not appear he recollected the settlement made upon the marriage, at least there is only one circumstance—the postponement of the residue till after the death of his wife—by which he appears to remember it." In *Lovell* v. *Knight* (3 Sim. 278) a married woman, having a power to appoint leaseholds and stock, by her will, executed as required by the power, but not referring to it, gave to her husband "the whole of her property, **[55]** both real and personal, and whatever she might possess at the time of her decease;" and it was held that the specific property would not pass under so general a bequest, and that the will was not a good execution of the power. In that case the report states that "the only property liable to be affected by the will consisted of the leasehold premises and funds comprised in the settlement, and of the sum of 112l. 18s. 9d. or thereabouts, which, at the time of Mrs. Lovell's decease, was in the hands of or due and owing to the trustees of the settlement, on account of the rents and dividends of the property comprised therein, but in trust nevertheless for the separate use of Mrs. Lovell." The decision in *Lovell* v. *Knight* has been since affirmed upon appeal. And "it is firmly settled that a mere general devise, unlimited in terms, will not comprehend the subject of the power unless it refers to the subject, or to the power itself, or generally to any power vested in the testator, or unless some part of the will would otherwise be inoperative" (see Sugden on Powers, p. 289, 5th ed.).

In *Jones* v. *Tucker* (2 Mer. 533) a poor woman, who had nothing of her own in the world, gave by her will 100l., and which sum of 100l. exactly tallied with the sum she had the disposal of under a power: she did not refer to the power; and the Master of the Rolls (Sir William Grant) did not allow it to operate as an execution of the power. There the precise sum was given, yet it was held to be no execution.

Another branch of the case is that, if the will of 1829 disposes specifically of a part of the property under the power, a general bequest of all the residue of the property will not carry the rest of the settled property. If, however, a testator disposes of all his real and personal estate, and **[56]** has no real estate except under the power, that estate will pass: but the personalty over which he has an appointing power will not pass. Personalty, indeed, such as stock, if specifically described, will pass, but not otherwise, unless the power be referred to. *Wallop* v. *Lord Portsmouth* (reported in Sugden on Powers, App. No. 11, 5th ed.). *Standen* v. *Standen* (2 Ves. jun. 589), affirmed in the House of Lords (*Standen* v. *M'Nab*, 6 Bro. P. C. by Tomlins, 193). *Lewis* v. *Llewellyn* (1 Turn. 104). *Napier* v. *Napier* (1 Sim. 28). The cases are collected in *Doe dem. Roake* v. *Nowell* (2 Bing. 497. 5 B. & C. 720), in which case the judgment of the Court of K. B., reversing the decision of the Court of C. P., was affirmed in the House of Lords.

Such being the general rule, how does it apply to the will of 1829? The drawer of that will, not being aware that the testatrix had the power, did not word the will in any other way than to pass an interest in property absolutely in her disposal, and not as an execution of the power. The words in that will, "held in trust for her," are no reference to the power: they are no more than the words "effects which I have or am interested in," which in *Langham* v. *Nenny* (3 Ves. 467) were held not sufficient. As to the greater part, this will of 1829 cannot, consistently with the authorities, operate as an execution of the power: and the Court cannot in this case find the intention except as it is expressed in the instrument: it cannot look at extrinsic facts, nor supply words to support it.(*h*)

[57] The will, then, of 1815 is a complete execution of the power; the paper

(*h*) In *Andrews* v. *Emmot*, 2 Bro. C. C. 303, Thurlow, C., says, "You must not go out of the instrument itself to gather the construction of it." See, however, Wigram "On the Admission of Extrinsic Evidence in the Interpretation of Wills," p. 49, note b.

subsequently executed, not being an execution of the power, cannot operate to defeat the former execution, and cannot therefore operate as an entire revocation of the will of 1815. The execution of the power by the will of 1815 put the legatees in the place of being appointed legatees under the first testatrix's (Martha Davies') will. Then, to defeat their interest under the will of the sister, Martha Davies, there should be some reference to that will; something to shew that Mrs. Bonsall had in view the property over which she had a power. The clause of revocation in the will of 1829 must be taken with the context to it. If the intention to execute the power is apparent on the will, then the power is sufficiently executed; and a general revocatory clause would be sufficient; but if in the will there is no reference to the power, nor to parts of the property under the power; as, in this case, there is no reference to the great mass of the personalty under the power, for the residuary clause is not such a reference as the law holds sufficient, in such a case a revocatory clause has no effect upon a prior will which is a due execution of the power. The revocatory clause must be taken in reference to the subject matter of the instrument.

But what may be collected to have been the testatrix's intention? The relations of the husband, who would come in for Martha Davies' property in the case of non-appointment, would come in under that lady's will, and not as the deceased's legal representatives, whom, by dying intestate as to any property, the deceased might be presumed to intend to benefit. Bonsall, the testatrix's husband, was not a favoured object of her bounty. **[58]** When he would have taken all unless she took it from him, she gave it to strangers: subsequently she bequeathed him a part, but after his death it was probable that she would prefer benefiting her own relations rather than his representatives. It would indeed, then, be singular if the Court were to make the bequests to the husband a vested interest in him, and thus pass to his representatives. Such, however, would be the result if effect were not given to the will of 1815.

As a question of intention, then, the case is wholly with us. Is there any rule of law which should prevent the Court from giving effect to that intention? So far from it, that to defeat the intention the rule of law as to revocation must be entirely reversed. The question of revocation is always to be gathered from, and turns upon, the question of the testatrix's intention; and that intention is to be gathered from the whole tenor of the instrument.

It is true that to the words of revocation must not be attributed any other or latent meaning than what such words express: the rule of law prevents a Court from looking at any other intention when the words are clear: but the whole instrument must be taken together; and in deciding whether general revocatory words operate to revoke a former appointment of certain property, the Court must bear in mind that the no less general dispositive words in the same instrument do not operate as an appointment of that property. Here, taking the whole instrument together, the conclusion is that the testatrix did not intend to revoke the former disposition, although, taking the exact words of the revocatory clause in the will of 1829 separately and detached from **[59]** the rest of the will, they would infer such an intention: and there is no rule of law but this—that it is the duty of Courts to give such a construction to the words of a will as the testatrix herself would put upon them.

Onions v. *Tyrer* (1 P. Wms. 345) governs this case: it decides that a general clause revoking all former wills is not imperative; but that it is to be considered in some measure and under some circumstances with reference to intention, if that intention can be collected from another instrument. Lord Chancellor Cowper there said: "A second will devising lands to the same person as the former, and revoking all former wills, and this subscribed by three witnesses, but not in the testator's presence, shall never revoke the former will so as to let in the heir; nay, if by the latter will the premises in question had been given to a third person, it should never have let in the heir, in regard that the meaning of the second will was to give to the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing the first could have lost nothing." In that case the testator intended to exclude the heir; and therefore the revocation was held not to destroy the instrument and thus let in the heir. On the same principle, if the will of 1829 does not operate as an execution of the power, it does not revoke the former will, which was an execution of the power: for a will is not revoked by any subsequent act unless that act is operative for the purposes for which it was intended. *Matthews* v. *Venables* (2 Bing. 136). *Eilbeck* v. *Wood* (1 Russ. 564).

[60] In *Powell* v. *Mouchett* (Madd. and Geldart, 216) the Court of Chancery directed an issue whether a revocatory clause ought to operate as a revocation. Upon that issue it was found not to be a revocation. Why? Because it was contrary to the testator's intention. So the Prerogative Court, in *Denny* v. *Barton and Rashleigh* (2 Phill. 575), notwithstanding a clause of revocation, gave effect to a previous instrument.

That the deceased was a married woman, and that the question relates to the execution of a power of appointment, can make no distinction as to intention; a married woman having any power of appointment must be considered as sui juris, and consequently, as to intention, she must be considered as any other person who is sui juris. All these instruments, then, may have operation: and though this Court cannot decide on the beneficial interest of the parties under them, yet it will decide as to what instruments may be looked at: for the Court of Chancery has settled this rule, that an instrument cannot be received as a will unless it has been admitted to probate. But if the will of 1815 were admitted to probate, and this case should come on for decision either in the Court of Chancery or in a Court of law, neither of those Courts would be further guided by the decree of this Court than as to whether this latter will revoked or not the former will—that is, as to the testamentary nature of the instruments.

Mr. Campbell, Dr. Addams and Mr. Griffith Richards for Mrs. Hughes.(*c*) **[61]** There is a preliminary objection in this case. The Court, we submit, cannot enter into the question; for in the Prerogative Court Mr. Turner's original prayer was the same that it is here, viz.—that the probate of the will of 1829 might be revoked, and probate of all the testamentary papers granted. Mr. Turner acquiesced in the decree refusing that prayer, but now repeats the same prayer. His present application, therefore, is in effect an appeal from a sentence of the Prerogative Court, in which he had acquiesced.

Whether probate should be granted of these several papers, as together containing Mrs. Bonsall's last will, is a question of intention for a Court of Probate to decide upon a view of all the circumstances: such intention is not to be collected solely from the face of the instruments, but they may assist. Mrs. Hughes, however, has had no opportunity of shewing that the deceased did not intend her testamentary papers to operate collectively: they have not even yet been propounded in that form, and the Court is not, therefore, at present, in a condition to decree such a probate. If it should think that probate, as prayed by Turner, cannot be granted, then cadit quæstio; but if it is not of that opinion, then Mrs. Hughes should be allowed to go into evidence. Before the Condelegates it was submitted that the Court could not decide to grant probate of all the papers, as the case then stood; and the appellant prayed to be heard on petition on that point.

[62] Per Curiam. Did you inform the Court on what ground it was incompetent to entertain such an application?

Addams. No. It is not the usual course.

Per Curiam. It will require strong proof to satisfy the Court of the correctness of that position. Some ground surely must be stated before a party can be allowed, under such circumstances, to be heard on his petition; at least you can hardly be allowed now to go into evidence without paying the costs of this hearing.

Argument continued.

Upon the merits of the case. The question is whether the will of 1815 formed the will or part of the will of Mrs. Bonsall at her death. If probate of the will of 1815 be granted, there will be an end of the case in the Court of Chancery; for that instrument, of which probate is granted by the Ecclesiastical Court is, in a Court of Law or Equity, conclusively the will. Mrs. Hughes would then be excluded for ever; and would have no opportunity of urging her claim beyond this Court. The case, as regards the parties who would take under the original disposition and execution of the power, is not hard; it is not harder than if a power is improperly and imperfectly

(*c*) Previously to the appellant's counsel commencing their argument a question arose whether, in this case, there would be a reply on the part of the respondents: when the Court decided that, as the case was now before it on the whole merits, and not—as in the Prerogative, and in this Court on the former argument—viz. on act on petition, a reply would be allowed.

executed in any other manner—as by deed, when it ought to be done by will, and vice versâ. Mrs. Davies leaves the property in trust for the benefit of Mrs. Bon-[63]-sall, with a power in her to appoint to others: if then Mrs. Bonsall fails to appoint, or makes a defective appointment, the property necessarily goes as Mrs. Davies otherwise intended, viz. to Bonsall, the husband, and his representatives. If the instrument of 1815 is not Mrs. Bonsall's will, there is no power in the Court to give it probate. What reason exists for the Court to suppose that Mrs. Bonsall at her death ever thought of the will of 1815?

The point for decision belongs wholly to a Court of Probate, and to be determined on its recognized principles. Even if the will of 1829 had not contained a direct revocatory clause it would equally have revoked the prior will. Swinburne (part 7, s. 14, pp. 974, 5, 7th ed.). If both papers are pronounced for, Turner, as an executor, must have probate as well as Jones and Hayne; yet the prayer porrected to-day by Turner (and it is the same as the original prayer in the Prerogative Court) is for probate to be granted only to Jones and Hayne.

The will of 1829 contains an express revocatory clause; and effect must be given to the language used. The original attempt to shew that the attorney had introduced such a clause without authority has been abandoned as not maintainable on the facts. *Powell* v. *Mouchett* only proves that the insertion of such a clause may be explained by evidence. If the revocatory clause is not to have effect, a mistake must clearly be shewn. Quod dixit non voluit is a dangerous argument. Suppose that the testatrix had said, "I revoke all other wills by me made and the will of 1815," what would have been the effect of such a revo-[64]-catory clause? Can it be doubted that the will of 1815 would be revoked. Had the testatrix thrown the will of 1815 into the fire, or otherwise cancelled it, would it not have been destroyed? And is not the clause of revocation equal to a cancellation? All the cases, cited on the other side, are merely as to real estate; in this case the landed estate compared with the personal is small.

Bayley, B. A will, simply in execution of a power, affecting realty, and not even appointing an executor, would be dealt with in Chancery without the interference of a Spiritual Court.

Argument continued.

Yes. But here a question arises as to the revocation of a will disposing both of realty and personalty by a later instrument; and the great bulk is personalty.

Bayley, B. Yet as to the Cardiganshire property a Court of Chancery could take this paper into consideration.

Argument continued.

This case is quite distinct from *Eilbeck* v. *Wood* (and that is the only case that applies); because here the will of 1829 performs all that is required of it: but in *Eilbeck* v. *Wood* the deed of 1811 was altogether void as an appointment, and the Court, therefore, could no more look at it than a parol declaration as to what the deceased meant.

Richardson and Lang v. *Barry* (3 Hagg. Ecc. Rep. 249) is a case of [65] some importance, and very similar to the present, and the arguments there urged are those used here to-day.

Alderson, J. In the case you have just cited the power was expressly referred to: and, as in this case, all former wills were expressly revoked. There might, however, be a case of only a partial revocation: suppose, for instance, the will had contained no revocatory clause, yet with an express devise of all the other property, except the gold watch, the Court would still have to consider what was to be done.

Argument continued.

It is quite as probable that the testatrix intended to benefit the persons whom she names in the will of 1829, as that she still intended the first appointment to stand; or she might mean to benefit her husband's relations; and unless it is quite manifest that she did not so mean, the Court must take the last will to express her intention; the testatrix describes it "as her last will and testament:" it is in no way limited, and the revocatory clause cannot otherwise be considered than that it was designed by the testatrix to have that effect which the plain sense of the words necessarily imports.

To allow Turner to take under the will of 1815 would be to defeat the deceased's intention. The bequests and legacies in the will of 1829 make it perfectly clear that

her mind and intention, in executing that will, was to make a different disposition of her property from what she had done in 1815. The wills are utterly inconsistent. In the will of 1829 she gives directions for her funeral and monument; so also in the codicil of March, **[66]** 1818; but the two instruments are at total variance as to the fund out of which such expenses shall be paid. In the will of 1829 there are several new legacies; to Mrs. Scarborough she gives a gold watch that had belonged to Martha Davies. This she had before given to Mrs. Turner: what is to become of it if the will of 1815 stands? Who is to have it? In the will of 1829 the testatrix gives all her trinkets to Mrs. White, the same had been given to Mrs. Turner in the first will. Again she gives out of her own property a legacy of 3000l. to Mr. Gould; by her former will she had given him 4000l. out of her sister's property. Is Gould to have 7000l.? (*a*)[1] If the matter were left to conjecture the inference would be that it was the testatrix's intention that he should only take the lesser sum; that the last legacy was a substitution of the former.

Per Curiam. When, without any question arising as to the execution of a power, finished and unfinished papers are taken as together forming the will, bequests in the latter are in substitution for those of the former (see *Ingram* v. *Strong*, 2 Phill. 313).

Argument resumed.

The legacy only of 50l. to Turner, and the same to his son, without any mention of those other members of his family whom she had benefited by the will of 1815, shew that the deceased had altered her mind as to the extent of benefit to that family.

[67] Bayley, B. The legacy of 3000l. to Sharon Turner, "at his death to be equally divided between his family," under the codicil of June, 1830, shews a substitution.

Mr. Wilson for Mr. Jones. (*a*)[2] Mr. Jones, one of the executors in the will of 1829, has intervened in order that his interest may be protected. I submit first, the last will is a good execution of the power, and therefore that no limited probate of the will of 1815 ought to be granted: if, however, the Court should be of opinion that the last will is not a good execution of the power, then my prayer is for a probate of the several testamentary papers limited to substantiate proceedings in Chancery touching the execution, under any of the wills, of the power of appointment.

Bayley, B. Suppose the Court should be of opinion that the will of 1815 remains good as an appointment, and should grant probate of both papers, we should grant it distributivè to the respective executors, though the prayer stands as for probate collectivè to the two executors. Jones, Hayne and Turner are executors of the will of 1815: but whatever is done under the will of 1829 must be done exclusively by Jones and Hayne.

Argument resumed.

The cases cited to shew that general words cannot operate as an appointment of personal estate **[68]** do not establish the position so broadly as it has been laid down in argument. If some words of the will would be inoperative unless they were construed to apply to the power, then they are a due execution of the power. The words "or held in trust for me" in the residuary clause of the will of 1829 cannot apply to other property than that over which the testatrix had a power of appointment: the former part of the clause being sufficient to pass all other property. In *Standen* v. *Standen* the testatrix had a power over the produce of the real property, and over the personalty: and that she referred to real estate, having no real estate of her own, was considered a material circumstance as proving that she had in contemplation the power: and it was held that her will was not only an execution of the power over the real, but also over the personal, estate. That this was the decision appears from the registrar's book, and also from the decree in the House of Lords (*Standen* v. *Macnab*, 6 Bro. P. C. 202). It is quite sufficient if Mrs. Bonsall had in her contemplation, when she executed the will of 1829, the power of appointment which she possessed: and in that will she distinctly refers to some part of the property, viz.—to the gold watch, which she took under her sister's will. In *Walker* v. *Mackie*

(*a*)[1] Mrs. Gould, the wife, equally benefited as her husband under the will of 1815, was stated to be alive.

(*a*)[2] The counsel for the appellant objected to counsel for Mr. Jones being heard; but the Court decided that Mr. Wilson should be heard.

(4 Russ. 76) "all other her property" was held to mean the property under the power of appointment.

Here, the language of the will of 1829, as to the Cardigan estate, over which it is admitted she had a right of disposal only under the power, is a due execution of such power. *Standen* v. *Standen* is an authority in that respect.

[69] Sir Edward Sugden in reply. In *Napier* v. *Napier* I contended in like manner as Mr. Wilson has done in this case; that all that was wanted was something to lead to the conclusion that it was intended to exercise the power; but I limited my argument to the real property, and for this reason—because a devise of real property is always specific. *Standen* v. *Standen* was a case of a very peculiar nature: the real and personal estate were to be invested in the funds, and ultimately appropriated for the same purpose. In that case the Lord Chancellor said he could not distinguish between absolute property and a power over property; but by every successive Judge that argument has been deemed contrary to the rule of law: there is not even a dictum to uphold it.(*a*)[1] *Walker* v. *Mackie*, cited by Mr. Wilson, puts him out of Court; because there the testatrix, by expressly excepting out of the general bequest 50l. stock which formed a part of her trust property, told you, by that very exception, that she intended to include the other.

My client will derive no further advantage from the probate of 1815 than to enable counsel to argue upon it in the Court of Chancery: it will in no degree bind that Court in its construction. All that a Court of Equity wants, is to be told by this Court that it is a paper quà testamentary; and then it will be able to determine on its effect.

As to the inconsistencies between the first will and codicils and the latter, every hour of every day in the Court of Chancery is employed in deciding whether legacies are cumulative or substitutionary. There is nothing to shew that the **[70]** testatrix took the gold watch under her sister's will; it might have been a gift in her life-time. Here is, in this case, a power to give; an instrument sufficient to do it, but the evidence of the intention is wanting. My case is the converse of that of *Eilbeck* v. *Wood;* for there was intention and nothing else. Here there is every thing but intention.

Patteson, J. In *Eilbeck* v. *Wood* the Court held that the deed of settlement being void would not operate as a revocation of the will. Now here is an instrument which is not void, which is admitted to be valid and effectual for some purposes, may not such an instrument operate as a revocation of a will, notwithstanding it may be itself ineffective as an appointment?

Sir Edward Sugden. No intention to appoint is apparent in the will of 1829.

On the effect of a clause of revocation the case of *Richardson* v. *Barry* has been cited: that case was the simplest possible. The intention, both to revoke the former appointment and also to allow the property to pass as in default of appointment, was declared in the second paper; and, as it is quite clear that a will to effect a power is subject to all the incidents of a will, the instrument, though not attested to appoint, was sufficient to revoke.

Alderson, J. In *Mouchett's case* parol evidence was admitted as to the effect of an express clause of revocation: the like course might have been adopted here.

Sir Edward Sugden. Yes: and the Court of Chancery would allow evidence to be taken upon **[71]** that point. The revocatory clause in the will of 1829 must be confined to the subject matter to which the dispositive part of that will applies: that will is limited to her own absolute personal property; and does not and cannot affect the personal property over which she had a power. The clause of revocation in the will of 1829 must then be understood to apply to, and operate as a revocation of, a proper will, and not as a revocation of an appointment in the nature of a will.

The Court confirmed the probate of the will of 1829 and codicil thereto, as originally granted to Mr. Jones and Mr. Hayne, the executors.

It is understood that the ground of decision in the Court of Delegates was that the contents of the will of 1829, taken altogether,(*a*)[2] clearly shewed a departure

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(*a*)[1] See the observations of Eldon, C., in *Bradly* v. *Westcott*, 13 Ves. 453.

(*a*)[2] In *Bailey* v. *Lloyd*, 5 Russ. 341, the Master of the Rolls, in speaking of the point whether a testator intended by his will to execute a power, says: "The question is a mere question of intention, and the intention is to be collected, not from a

from the original intention in 1815, and therefore revoked that will: but that the clause of revocation, taken per se, and without a clear intention, would not have had that effect.

[72] SMYTH *v.* SMYTH. High Court of Delegates, 1831.—Under 55 G. III. c. 184, schedule pt. 1, and 5 G. IV. c. 41, schedule pt. 2, a protocol of appeal, being a notarial act, requires a 5s. stamp; and the Court of Arches having decided on that ground against the validity of an appeal from the Consistory, the defect is not cured by a stamp affixed previous to the hearing in the Court of Delegates on an appeal from that decision. A seal is unnecessary to the validity of a notarial act. Semble, that an inhibition does not remain in force so as to prevent the inferior Court from proceeding on the same, and also on additional facts in a subsequent suit, the original suit having been dismissed in the Court of Appeal by consent of parties.

[See further, p. 509, post.]

This was a suit of divorce, promoted originally in the Consistory Court of London, by the wife, for cruelty and adultery; the husband (on certain grounds not material to the points reported) appeared under protest. This protest came on for hearing on the 1st Session of Easter Term, 1831, when the Court took an objection, not raised in the protest, viz. that in a former suit, also for cruelty and adultery, between the same parties, it had been served with an inhibition, and on this ground directed the libel in the present suit to be brought in; and the question both as to the validity of the protest and the admissibility of the libel, as affected by the former proceedings, to stand over.

The libel was accordingly brought in; and on the 3d Session the wife's proctor prayed the Court to overrule the protest, and admit the libel, alleging that the former suit was agreed in the Arches, and in May, 1828, the husband dismissed by consent; and that no cause between the present parties was then pending either in the Arches or Delegates. The libel pleaded the former suit, and craved leave to refer, for the libel and proofs and for the proceedings therein in that former suit, to the records of the Consistory and Arches Courts. It then pleaded new facts.

Per Curiam (Dr. Lushington). The Court (after hearing Phillimore for the wife, and the husband in person) overruled the **[73]** protest, as containing nothing sufficient in law to support it; but refused to direct the husband to appear absolutely, or to admit the libel, holding that the inhibition was so far in force that the Court ought to defer to it.

From this decree the wife appealed. The inhibition was returned on the 15th of June. Mr. Smyth appeared under protest, chiefly alleging the insufficiency and irregularity of the proxy by which Mrs. Smyth had appointed her proctors. On the 1st of July the protest came on for hearing, when the instrument of appeal and the protocol of appeal were produced, and, for the first time, seen by the registrar: they were, however, not filed.

The Court of Arches overruled the protest, and assigned the husband to appear absolutely.

From this assignation the husband appealed; but on the 5th of July he prayed (without prejudice to his appeal) to be heard further in support of his protest, and alleged "that the appeal produced at the last session of the Court was not attested by a notary, nor was the protocol of appeal upon stamp, as required by law, and that it purported to have been interposed in one thousand eight hundred and thirty, the word 'one' being interlined in pencil."

These facts were admitted, on behalf of Mrs. Smyth, to be as stated: save that it was alleged "that it is not required by law that an appeal or protocol of appeal should be written on stamp; that the appeal was attested by two witnesses, and bears date 1831, and that both the appeal and protocol had been sent by the general post to the **[74]** notary public, before whom the protocol was interposed, for his attestation to the appeal."

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particular expression, but from the whole will." See as to the execution of a power over realty, *Hunloke* v. *Gell*, 1 Russ. and Mylne, 515.

*** The case of *Hughes* v. *Turner* is mentioned in a note in Sir George Lee's Cases, vol. ii. p. 542.

Mr. Smyth, in further support of his protest. An appeal has not been in due time and place interposed. The protocol, being a notarial act, requires a 5s. stamp, 55 Geo. III. c. 184, schedule part 1. And 5 Geo. IV. c. 41, which repeals certain duties on law proceedings, does not, among those that are repealed, specify a notarial act. The protocol therefore, not being duly stamped, is a nullity. The informality of the appeal itself is admitted.

Phillimore contrà. The protocol was duly interposed: it is signed by a notary public in the presence of two witnesses; and nothing further is necessary to give it effect. The ecclesiastical law only requires an appeal from a grievance to be in scriptis, it does not prescribe any particular form, Oughton, tit. 277. The 5th Geo. IV. c. 41 takes off stamp duties on certain judicial acts; and in the second part of the schedule this case is specifically provided for. Since that statute the practice, I conceive, has been not to use a stamp upon a protocol.

Per Curiam (Sir John Nicholl). Is not a protocol of appeal an extra-judicial act? Such an instrument is, I apprehend, nothing more than a notarial act. Besides, an appeal from a grievance is stricti juris; here is an informality in the date.

Phillimore. A protocol is to be extended into a more formal instrument; but it is the initiation and therefore an integral part of an appeal. The appeal **[75]** was drawn out immediately after the execution of the protocol, but the notary who attested it has since been absent from his office, and both instruments have now been forwarded to him by the general post for his attestation of the appeal.

Per Curiam. Have you then appealed so as to preclude objection? The statutes 55 Geo. III. c. 184, and 5 Geo. IV. say nothing even about appeals from a Diocesan Court. In the schedule of both statutes the words are these: "Appeal from any definitive sentence or final decree, or from any interlocutory decree, or order of the Court of Arches, or the Prerogative Court of Canterbury or York." If protocols have, in practice, not been lately drawn out on stamp, it may be because the defect is cured by an appeal properly extended; but if an appeal be not properly extended, then it is necessary to fall back on the protocol, and that is a notarial act, and requires a stamp.(*a*) I do not then think that the appeal has, in this case, been rightly and duly interposed.

The Court rescinded the order made on the last session, pronounced for Mr. Smyth's protest, dismissed him from the citation, and from all fur-**[76]**-ther observance of justice in the premises; and decreed the inhibition to be relaxed.

The wife appealed to the Delegates. The proctor for the wife brought in, at the hearing, the protocol of appeal, and also the appeal itself from the Consistory Court to the Arches Court, both on stamped paper, and both duly executed and signed by the notary and witnesses.

On the 23rd of May the cause was argued at the Delegates.

The Judges who sat under the commission were: Mr. Justice Gaselee, Mr. Baron Vaughan, Mr. Justice James Parke, Dr. Burnaby, Dr. Dodson, Dr. Curteis.

Mr. Smyth, in addition to his former objections in the Arches, contended that a notarial seal as well as subscription was essential; and consequently that the appeal to the Delegates, which, though signed, was not sealed either with a private or official seal, was a nullity.

Dr. Phillimore and Mr. Cockburn contrà. No seal is necessary: the notarial seal has long gone into disuse. The 55 Geo. III. c. 184, schedule part 1, which requires a 5s. stamp on a notarial act, "any whatsoever not otherwise charged in this schedule" relates solely to stamps on mercantile transactions. Even if a stamp were required for a protocol, the absence of it, at the time of execution, would not vitiate the instrument. The protocol (now, for the first time, brought into the registry) and

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(*a*) There never was any stamp required specifically on appeals from the diocesan and inferior Courts; and in practice the 5s. stamp as for a notarial act was always employed: while on appeals from the Arches or Prerogative Courts, a 15l. stamp being required, the stamp as for a notarial act was not used. When the 15l. stamp on such appeals was taken off, then the necessity for the notarial-act stamp was considered to revive; but, at all times, the 5s. stamp was, in practice, employed on the protocol, whenever such an instrument was drawn up, whether the appeal was from a diocesan and inferior Court, or from the Arches or Prerogative Courts. Appeals, apud acta, do not require a notarial-act stamp.

the appeal to the Arches are both stamped as notarial acts; the original defect, therefore, as to a stamp, if any **[77]** stamp be necessary for a protocol, is sufficiently cured. *Burton* v. *Kirby* (Taunt. 174), *Roderick* v. *Hovill* (3 Campb. 103), *Wright* v. *Riley* (Peake, 230, 3d ed.).

Cur. adv. vult.

June 5th.—The Court affirmed the decree of the Court of Arches.(*d*)

THE OFFICE OF THE JUDGE PROMOTED BY GREENWOOD AND SPEDDING *v.* GREAVES, CLAY, AND OTHERS. High Court of Delegates, June 28th, 1832.—Estimates for the repairs of a church and the lawful and necessary expenses of churchwardens, amounting to 111l., laid before a vestry, and a rate to that amount proposed, but a rate of 50l. 17s. only granted, whereupon two churchwardens exhibited articles against two other churchwardens and ten parishioners for refusing to make a sufficient rate. A decree, rejecting the articles, affirmed with costs. Semble, that the Ecclesiastical Court cannot decide on the quantum of a rate, and therefore that parishioners who do not contumaciously refuse to make a rate, but grant one not manifestly collusive, are not liable to be articled for refusing a sufficient rate.

On an appeal from the Chancery Court of York.

The Judges who sat under the commission were: Mr. Baron Bolland; Mr. Justice Bosanquet; Mr. Justice Taunton; Dr. Daubeny; Dr. Haggard, and Dr. Curteis.

This was originally a cause of citing James Greaves, James Clay [and ten others] (the respondents in the present suit), respectively parishioners and inhabitants of the parish of Dewsbury, in the county and diocese of York, "to answer to certain articles touching the health of their souls, and the lawful correction and reformation of their manners; and particularly for their refusing to make, or concur in making, a rate or assessment, or sufficient rate or assessment, for the repairs of the parish **[78]** church of the said parish, and for the lawful and necessary expenses of the churchwardens thereof, relating to the parish church, and incidental to their said office, promoted in the Chancery Court of York by Jonathan Greenwood and Thomas Spedding, two of the churchwardens."

The articles were as follows:—

1. "We article and object to you, James Greaves, James Clay [and ten others], that the parish of Dewsbury consists of the three townships of Dewsbury, Soothill, and Ossett, and that the inhabitants of each of the townships possessing, enjoying, or occupying messuages, lands, tenements, or dwelling-houses, within the same, were and are parishioners of the said parish, and as such have, from time immemorial, been liable to be, and have accordingly been, rated and assessed to the payment of one-third part of the expenses of the repair of the parish church of Dewsbury, and the lawful and necessary expenses of the churchwardens of the parish, relating to the parish church, and incidental to their office."

2. "That Greenwood and Spedding, together with James Greaves and James Clay, have been duly elected and appointed churchwardens of Dewsbury for 1830, and have been duly sworn, and taken upon them the execution of the office; and that, on or about the 16th day of August, 1830, a meeting of the parishioners and inhabitants of Dewsbury (consisting, as aforesaid, of these townships) was held in the vestry of the parish church, pursuant to due notice thereof previously given, for the purpose of taking into consideration certain estimates and statements of the charges for the ensuing year relative to the repair of the **[79]** parish church, and providing bread and wine for the holy communion, and other incidental expenses; and to make a rate, levy, or assessment for and towards defraying the said charges and expenses: that such vestry meeting was attended as well by divers of the inhabitants of the township of Dewsbury, and also by divers of the inhabitants of the townships of Soothill and Ossett, all of whom were parishioners of the said parish: that, amongst others, you, Greaves, Clay [and the other respondents], were present: that a statement or estimate of the said charges and expenses, amounting to the sum of 111l. 1s. or thereabouts, was then read and submitted to the consideration of the vestry meeting; and the rate or assessment proposed and required by the churchwardens, or some of them, to

(*d*) By affirming the sentence, instead of dismissing the appeal, the Court of Delegates must, it is conceived, have held that the second appeal without a seal was valid.

be made for the payment of one-third part of the amount thereof by each of the townships: that the charges and expenses were estimated moderately, and were lawful and necessary, notwithstanding which, you the said Greaves, &c. &c. and others of the parishioners, objected to, and did refuse to make or concur in making a rate, to the amount necessary to defray the charges and expenses; but, in lieu and stead thereof, proposed, consented, and agreed to make a rate of a part of the same to the amount altogether for the three townships of 50l. 17s. only: that the said sum of 50l. 17s. was and is wholly inadequate to pay for the necessary repair of the parish church, and the necessary expenses to be legally incurred by the said churchwardens relating thereto, and incidental to their office; and that by reason thereof the necessary and legal repairs cannot be done, nor other expenses necessary for the due performance of divine service be defrayed."

The rest of the articles were formal.

[80] The Court at York having rejected the articles with costs, the cause was appealed to the Delegates.

The King's advocate, Dr. Phillimore, and Mr. Greenwood for the respondents. This proceeding is entirely novel, and does not present itself very favourably for a first experiment, as the two churchwardens, who are cited with ten other parishioners, have a concurrent authority and equal voice with the promoters. The second is the only important article; it pleads a vestry meeting for the purpose of considering certain estimates. None are annexed to the plea: if it were possible to uphold the articles, these estimates should be annexed. We do not impugn the doctrine that, where parishioners refuse to meet, or, meeting, decline to make a rate for necessary repairs and expenses, such parishioners may be proceeded against, and compelled. Watson's Clergyman's Law, c. 39, p. 388-9. Gibson's Codex, vol. 1, c. 4, p. 196. Degge, p. 203, ed. 1820. If parishioners contumaciously refuse or oppose a proper rate, a monition should in the first instance be served upon them. Thus in Lyndwood, in his chapter "Ecclesiarum reparationi debitè Archidiaconus invigilet" (lib. i. tit. 10, p. 53), in a note in verb. "subpœna," it is said, "Si aliqui, qui tenentur ad reparationem contribuere, et dum possunt, nolunt, vel nimis remissi sunt, tales, monitione præmissâ, potest ad hujusmodi contributionem compellere." Again, if Greaves and Clay, as churchwardens, had failed in their duty, they might have been proceeded against: but here a sum **[81]** is offered that should have been accepted and applied as far as it would go, and when exhausted another vestry should have been convened for a further rate. Here the parties have shewn nothing like contumacy or opposition to a church-rate; and yet they are cited in a criminal suit: if they had even acted contumaciously, the citation ought to have been preceded by a monition. It is, however, pleaded in this cause that other parishioners were present at the vestry besides the twelve upon whom a citation has been served: non constat that the respondents were not the minority. But even the majority did not refuse to make a rate; they thought the estimates too high, that there was no necessity for so large an assessment, and proposed to substitute a sum of 50l. 17s. The vestry is to judge of the quantum (Gibson, p. 196, s. 2. Degge, p. 203). Where is the offence for which these parishioners can be sued criminally? What punishment can attach—assuming that the Court should be of opinion that they had been guilty of an error in judgment in refusing the larger sum? Churchwardens alone cannot make a rate without first calling a vestry: and it is for the majority to say whether they acquiesce in the rate proposed, and what rate shall be assessed. *Jeffrey's case* (5 Rep. 66). Bacon Ab. tit. Churchwardens (C.), Prideaux, p. 48. The right to tax themselves is vested in the majority; yet for this exercise of their right, their privilege, and their franchise, they are cited criminally. In *Blank* v. *Newcomb* (12 Mod. 327) Holt, C. J., says the Ecclesiastical Court cannot assess a quantum: nor can it, we conceive, proceed against parishioners, collectively, for their vote as to such quantum.

[82] Mr. Hoggins for the appellants.(*a*) There is no necessity to use the word "contumacy," in order to raise the question involved in these proceedings. I assume that by the pleadings this question is raised, whether the defendants—the present respondents—contumaciously refuse to make a rate? I contend that they do. The authority of Degge, and the references given by that writer, and perhaps of the other

(*a*) Dr. Lushington, who was also of counsel for the appellants, was absent at the argument.

text writers that have been quoted, rather make against me: I admit this; but I rely on the case of *Rogers* v. *Davenant* (1 Mod. 194, 236), where it is held by North, C. J., that the Spiritual Court may compel parishioners to repair their parish church; and by three other judges that "the churchwardens cannot, none but a parliament can, impose a tax." If therefore the churchwardens cannot of themselves and of their own authority proceed to make a rate for repairs, the question arises whether divine service is to be impeded by the refusal of the parishioners. We allege that the parishioners of Dewsbury will not make a sufficient rate; and my argument is, that they are properly sued under the present proceedings.

By the Court. There is no precise allegation that the church is out of repair. The case of *Rogers* v. *Davenant* is against you. The question here is as to two assessments—which sum shall be adopted. Estimates for repairs may easily vary. If the Court were to say that the higher estimate shall be adopted, it will then decide on the quantum of rate, and your own case, from 1st Modern, says that the Court cannot assess the parishioners. If it had been **[83]** alleged that the parishioners had contumaciously, obstinately, and pertinaciously refused to make a rate, or that they would only make such a rate as was manifestly collusive, there might be some ground for proceeding against them: but such a state of things is not alleged to exist in this case: there is no appearance of any wilful contumacy, either avowedly or impliedly.

Argument resumed.

In Bacon's Ab. tit. Churchwarden (C.), Burn's Eccl. Law, vol. 1, tit. Church, s. 6, and in *Pierce* v. *Prouse* (1 Salk. 166), it is laid down that parishioners ought to assess the rate for repairs, and not the churchwardens: so in *Groves and Wright* v. *The Rector and Parishioners of Hornsey* (1 Hagg. Con. 191) it is said, "According to the general rules of law, a churchwarden cannot make a rate himself." *Thursfield* v. *Jones* (1 Ventris, 367) is the only case in which it is held that the churchwardens alone can make a rate, after the parishioners have been summoned for that purpose, and refused. This authority stands alone; it is copied into Degge, Prideaux, and Anderdon, and with no other reference in support of the same doctrine. What churchwardens would, with these conflicting authorities, venture to make a rate of their own authority? They might subject themselves to be indicted. If churchwardens are liable to be sued and censured if repairs are not done, and yet have no power to make a rate against the will of the parishioners, what remedy remains but that resorted to in this case? The present course has been adopted in order to coerce the parishioners to do their duty.

The Court affirmed the decree, with costs.

[84] WATNEY *v.* LAMBERT AND SIMPSON. Arches Court, Mich. Term, By-Day, 1831.—1st. The plaintiff's allegation must not go beyond the citation: therefore where the citation is limited to shew cause why a rate should not be set aside by reason of its inequality, the party cannot plead the illegality of such rate in other respects.—2ndly. The Court has not jurisdiction, upon an original proceeding by an individual rate-payer, to set aside a rate on the ground of inequality in the assessment, the remedy for the party unequally assessed is to enter a caveat against the confirmation or to refuse payment of the rate.

On the admission of an allegation.

This was a suit, brought by letters of request from the Commissary of Surrey, citing the churchwardens of the parish of Beddington to bring into and leave in the registry a certain pretended church rate, and to shew cause why the same should not be set aside by reason of its inequality.

An allegation of thirteen articles, on behalf of Watney, a parishioner, and a party rated, was brought in. In the first four articles it was pleaded that on the 18th of March, 1830, the parishioners of Beddington, in vestry, resolved that the churchwardens should take and report the opinion of a surveyor as to repairs necessary for the church; that at a vestry of the 26th of August, the estimate being reported at 600l., it was resolved that the repairs should not be undertaken at such an expense, but that the opinion of another surveyor should be taken on certain other estimates. That in May, 1831, Lambert and Simpson (again being churchwardens), without order of vestry, had a part of the tower taken down and the bells sold. That the church rate objected to was, as pretended, made at a vestry on the 7th of July, 1831, when the principal rate payers were absent, and a motion of adjournment had been negatived:

that prior to the 7th of July a consi-[85]-derable expence had been unnecessarily incurred in taking down the tower, and that the rate was to defray that expense, and also as a reimbursement for expenses incurred by the churchwardens in 1831, and the two preceding years. The fifth article pleaded, "that the assessment was unequal, and without respect to the quantity of the possessions and rents of divers of the parishioners, and that Watney was unequally and unjustly assessed, and at a greater sum than by law he ought." The allegation then proceeded to set forth several instances (among others specifying Sir B. C. Carew and Mr. Tritton, but not the complainant) to shew that their relative assessments were very unequal; and concluded by praying that "the pretended church-rate might be quashed, or declared null and void by reason that the same was illegally made and assessed, and without respect to the quantity of the possessions and rents of divers of the parishioners and inhabitants, and that John Watney was unequally and unjustly assessed to the said rate, and to condemn the churchwardens in costs."

The King's advocate and Phillimore opposed the admission of this allegation. 1. The proper course has not been adopted: this mode of proceeding is without precedent. 2. The first four articles are irrelevant to this suit.

Per Curiam. Can the plaintiff's counsel state any instance of a proceeding of this kind?

Lushington and Dodson for Mr. Watney. We might have objected to the confirmation of [86] the rate, or, possibly, appeared under protest; but the present course seemed the most convenient and solemn. The Court, we apprehend, has complete jurisdiction; it can exercise a full right of supervision in respect to churchwardens, and we know of no reason why they should not be cited in a suit of this description. Extreme inconvenience and expense would ensue if the rate could not thus be stopped in limine. Here the rate is heavy; it is also a rate to reimburse, and therefore illegal: and Mr. Watney is one of the largest rate payers. If the inequality had been slight the case would not have been pressed. Should the Court be of opinion that the suit itself cannot be defended, it is unnecessary to discuss the merits of the allegation.

Judgment—Sir John Nicholl. This proceeding is quite of a novel description; nor has any attempt been made to shew an instance in which a similar course has been pursued: but it is argued that it is an expedient and convenient form of suit; and should now, for the first time, be adopted. If this be so, the Court must take especial care that it has jurisdiction to entertain the cause; and that if it has jurisdiction, the suit be confined strictly to the immediate object for which it has been brought.

The suit is brought by a rate payer to quash a rate altogether, by reason that he is unequally assessed, that is the only ground set forth in the decree. Has this Court any jurisdiction to give relief under an original proceeding of this nature? It has hitherto entertained suits of subtraction of church rate, the object of which suits is to enforce [87] payment. As matter of defence, the rate payer may shew that the rate was illegally made, or that he has been over-rated. Instances also have occurred, though they are very rare, where a party has been permitted to enter a caveat against the confirmation of a rate, and to shew that he has been over-rated; but the assessment, and valuation of the property to be assessed, rests, at least in the first instance, with the parishioners in vestry assembled, in like manner as the expenditure belongs to their decision: thus this Court can enforce the production of churchwardens' accounts, but it cannot examine them if they have been produced and allowed at vestry (*Leman* v. *Goulty*, 3 T. R. 3): and on the same grounds the Court would be cautious not unnecessarily to enter into the taxation and assessment, unless under precedents, and as essential to justice. All the arguments that I have heard to prove the convenience of the course, now for the first time pursued, would be equally satisfied by entering a caveat. If a rate payer is dissatisfied with his assessment, he should appear at a vestry and object to it; if his objections are in vain his remedy is twofold, first, by entering a caveat against the confirmation of the rate: for in that case he is in the nature of a defendant—the churchwardens are the parties applying for the confirmation—secondly, by refusing payment. In either case, if he can make out that he has been over assessed he will be relieved.

But can one individual rate payer, not appearing at vestry to object to a rate being made on the ground that it is for an illegal purpose, nor that the vestry has not been legally called, nor that the as-[88]-sessment has been unequally made, nor on any ground going to the invalidity of the whole rate, nor objecting that his own property

is assessed above its true value, nor that, of the whole sum to be raised by the rate, he will have to pay more than his just proportion, can one individual rate payer thus lie by, and then come to this Court and pray that the whole rate may be quashed, because he offers to allege and shew that the value of the properties of a few individuals is greater in proportion to the assessments than the properties of other individuals? This Court would long hesitate before it determined to entertain such a suit. Any one individual in a parish could in this mode effectually prevent the vestry from making and collecting a rate: and as to the suit itself there might be as many issues as there are assessments.

It is unnecessary to enquire what might be gone into as matter of defence in a cause of subtraction of rate; but even in such a cause the party ought to be confined to shewing either that the rate was illegally made, or that his assessment was too high and beyond his just proportion of the whole rate. In that respect he might shew inequality. Here Mr. Watney, the ratepayer, is not the defendant, but the plaintiff; and it is to be considered both what his allegation does not, and what it does, contain.

It is not alleged that the vestry at which the rate was agreed upon and the assessment made was not duly called: it is not alleged that Mr. Watney attended and objected either to the rate altogether, or to his own assessment, or to that of other individuals. It is not alleged that at ninepence in the pound he is too highly rated. It is not even alleged that, taking the whole sum to [89] which this rate would amount, Mr. Watney's quota would, if the rate were equally made, be less than the sum at which he is now charged: possibly, however, upon his calculation of the value of the other property it might be so. On the other hand, what are the matters alleged? The first four articles are quite irrelevant to the present suit, as described in the citation, and the plaintiff cannot go beyond the citation. The citation or decree is expressly limited to the inequality of the rate. That is the only issue, and to that, in such a suit as the present, the party must be strictly confined. The first four articles refer to previous matters not bearing upon the question of inequality and are therefore inadmissible: they at all events must be rejected. The fifth article is merely general and introductory; and the remaining articles plead specific instances of inequality.

The thirteenth prays that the rate be quashed, by reason that it hath been illegally made and assessed, and is unequal, and that Watney has been unequally and unjustly assessed. The prayer then goes to both points—the illegality of the rate arising from the facts pleaded in the first four articles, and the inequality; and it will lead to an investigation of the positive value, and of the relative value of some of the principal assessments in the parish: it only states generally that the plaintiff is over assessed, not specifying in what manner, or in comparison with any particular individuals; and the whole argument in favour of this novel mode of proceeding is, that it is convenient; but it is not so convenient nor so speedy as a caveat.

Upon the whole, as there is no precedent of [90] such a suit, I think the Court has no jurisdiction to entertain it. The assessment of the several properties rateable belongs peculiarly to the parties themselves in vestry; and if every rate could be set aside because any dissatisfied individual undertook to shew some inequality in the assessment, no rate could ever be made, and the parish might be perpetually involved in litigation. The protection which the law gives to the individual is to allow him, as a matter of defence, either to shew that the rate is altogether illegal, or that he is overcharged. This Court has hitherto confined itself to suits of subtraction of rate, or to confirmations of rates when caveats have been entered against them: but even in respect to the confirmation of rates, the very words in which the ordinary confirms them shew some doubt how far it has authority to interpose in respect to the amount taxed as the assessment—"We confirm as far as by law we may:" but it has been held that the rate is valid without such confirmation.(*a*) I reject the allegation and dismiss the churchwardens.(*b*)

Allegation rejected.

(*a*) *Knight and Littlejohns* v. *Gloyne*, 3 Add. 53.
(*b*) See *Greenwood and Spedding* v. *Greaves*, supra, 77.

[91] LAMBERT AND SIMPSON *v.* WEALL. Arches Court, Hilary Term, By-Day, 1832.—Objections to church-rates, on the ground of inequality tending to occasion great inconvenience and expense to parishes, are stricti juris, and the pleas must be confined to the points originally put in issue. A rate-payer, in his defensive allegation objecting to his assessment on the sole ground of being overrated as compared with two others, shall not, in additional articles, introduce, as a fresh objection, that a railway passing through the parish has not been assessed. Quære, if the question, whether such railway was liable to be rated to church-rate, could have been originally raised as a collateral, incidental point by a party objecting to payment of his own rate on the ground of being overrated.—The Court pronounced for a church-rate and condemned in costs a rate-payer, who, as overseer of the poor, had collected rates, and had long acquiesced in the payment of church-rates made on the same valuation as the church-rate objected to on the ground of inequality, such inequality not being established in evidence. —The presumption of law is that a church-rate made at a vestry duly holden, and the same as in former years, is fairly assessed, and the burden of proof is in the party objecting to payment on the score of inequality; and the presumption and burthen are both increased when the rate is founded on a valuation long acted upon both for church and poor-rate.

This was a cause of subtraction of church-rate, promoted (by letters of request from the Commissary of Surrey) by the churchwardens of Beddington parish (the defendants in the preceding suit) against Thomas Weall, Esq., a parishioner and inhabitant of the hamlet of Wallington, within the said parish. The sum at which Mr. Weall was assessed in the rate amounted to 48l. 16s. 6d.

The libel consisted of eight articles; and, first, pleaded a rate (duly made on the 7th of July, 1831) of 1s. 6d. in the pound, towards the necessary repairs of the parish church of Beddington, and the churchwardens' expenses incidental to their office.

2. That Weall was duly, rightly, and legally assessed for his lands and houses in Beddington and in the hamlet of Wallington within Beddington. The article specified the property and the proportions of rate, and (inter alia) that for a house and four and a half acres, valued at 100l. per annum at the least; twenty-two acres of meadow at 29l. 6s. 8d. per annum; and a house and garden at 4l. per annum (all in Wallington), collectively his assessment in the rate was 10l.

3. Exhibited the rate, and pleaded it to have been subscribed by the churchwardens, overseers, and some of the most considerable parishioners; that it had been confirmed, and generally paid.

4. That Lambert and Simpson were and are churchwardens, and that, as such, Weall's assessment is due to them.

[92] No witnesses were examined on the libel, as the rate was admitted to have been made as pleaded.

On the 25th of February, the by-day after Hilary Term, an allegation was admitted on behalf of Weall, which pleaded, generally,

1. That the rate was not equally and fairly assessed: that Weall was assessed according to a much higher scale of valuation than several other parishioners.

2. That Sir B. H. Carew's house, garden, and appurtenances were of the value of 200l. per annum: and so assessed for King's taxes, and in the judgment of competent persons are well worth such rent; but that he was rated at 100l. only.

3. That Mr. Tritton's house, garden, and appurtenances were of the yearly value of 80l. and paid King's taxes at that sum, but that he was only rated at 47l. 2s.

4. That in comparison with the assessment of Sir B. Carew and Mr. Tritton, Weall is greatly overrated for his house and four and a half acres in Wallington; which are not rated to the King's taxes at a value exceeding 100l. per annum.

On the 2d, 3d, and 4th articles of this allegation four witnesses were examined.

On the second session of Easter Term, the 24th of April, an additional article to Weall's allegation was opposed and debated.

The article pleaded that "the Croydon and Merstham iron rail-way traversed Beddington parish and hamlet; that the proprietors of the land, or of the tolls collected thereon (of the value of about 40l. per annum) were liable to be assessed in respect thereof for church-rate; [93] that part of the rail road going through Mitcham parish was so assessed, but that in the rate sued for the proprietors aforesaid were omitted."

The King's advocate and Phillimore for the churchwardens.

Lushington and Dodson for Mr. Weall.

Per Curiam [after stating the dates and substance of the pleas]. The question then is, whether this additional article is now admissible. Great facilities ought certainly to be extended towards the recovery of a church-rate, since much inconvenience arises to a parish if its rates are opposed in a litigious spirit by individual parishioners.(*a*)[1] This allegation, or additional article, raises a question of very considerable importance, viz.—whether this rail-way passing through the parish is liable to be assessed to the church-rates, and if it be so liable, then again, on what principle, and in what proportion?(*b*)[1] The Court would not allow such a **[94]** question to be raised unnecessarily, nor merely as a collateral question—not between the parish and the owners of the rail-way—but, incidentally, by a person refusing to pay his own rate on the ground of inequality.(*a*)[2] Such inequality is a fair ground of resistance; but this additional article opens quite a different line of defence. I should have entertained considerable doubts as to the propriety of admitting this article, even if it had been originally set up in the defensive plea: for it is not suggested that this objection was taken at the vestry when the rate was made, nor that it was then brought to the consideration of the parish: it would seem, therefore, to be rather an after-thought, tending to protract the suit and harass the parish.

Another material question arises, whether this plea has not been offered too late. It is a well-established rule that a party cannot make his defence bit by bit, but must plead all his facts at once,(*b*)[2] especially in so simple a suit; and the fact now offered cannot but have been within the party's knowledge when the defensive allegation was admitted, and if that be the case, the rule is, **[95]** that he is not at liberty to introduce it subsequently. This objection is doubly strong on account of the particular time at which this article has been brought in. The allegation was admitted in the last term; by the order of Court the term probatory expired on the first session of this term, and on that day the defendant's proctor, instead of praying publication, his witnesses having been examined, tenders this additional article: no affidavit is offered in support of it, nor is any special ground stated why this Court should depart from its regular practice. I reject the article, and decree publication, unless an allegation is asserted on the other side.

Additional article rejected.

A responsive allegation pleaded—

1. That the rate was not unequal: that the assessment was made by a committee appointed by vestry on the 21st of December, 1830, for the valuation of Wallington: that Weall attended the valuation of his house and land in Wallington, when the committee separately valued his house and four and a half acres, and the twenty-two

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(*a*)[1] So, as to poor-rates, the 41 Geo. III. c. 23, after reciting "that the quashing or setting aside of rates for the relief of the poor is attended with great inconvenience," gives a power to the Quarter Sessions to amend without quashing; and enacts that notice of appeal shall not prevent the recovery of the rate; and that notices of appeal shall specify the particular cause and ground of appeal; and, at the hearing, that the Court shall not examine into any other cause or ground of appeal but such as are so specified. See ss. 2, 3, 4.

(*b*)[1] That the proprietors of canals are rateable to the poor-rate of every parish through which the canal passes, as the occupiers of land covered with water, for their tolls as profits arising out of the land there situate; and that they are rateable in each parish for the amount of tonnage dues actually earned there, and not for a part of the whole amount earned along the whole line of the canal in proportion to the length of the canal in that parish; and on the net profits—not for the gross amount of tolls received. See *Rex* v. *Nicholson*, 12 East, 330. *Rex* v. *Trent and Mersey Navigation*, 1 B. and C. 545. *Rex* v. *Palmer*, 1 B. and C. 546. *Rex* v. *Portman*, 1 B. and C. 551. *Rex* v. *Inhabitants of Kingswinford*, 7 B. and C. 236. *Rex* v. *Oxford Canal Company*, 10 B. and C. 163. The same principle, it is apprehended, applies to railways.

(*a*)[2] Upon the construction of 41 Geo. III. c. 23, it has been held that the justices cannot hear an appeal against a rate on the ground that a party has been omitted who ought to be rated, unless it be proved that notice of appeal has been served on that party. *Rex* v. *Brooke*, 9 B. and C. 915.

(*b*)[2] So in pleading in matrimonial suits. *Story* v. *Story*, 3 Hagg. Ecc. Rep. 739.

acres of meadow land (the assessment for which jointly was 129l. 6s. 8d.) and rated the former at 100l.

2. That Carew's house, &c., was in such a state that persons qualified would not estimate it at more than 100l. in comparison with sums assessed on other property in the parish.

3. That Tritton's house, &c., at 47l. 2s. was fully valued in comparison, &c.

4. That Weall's house and four and a half acres were of greater value than 100l. —house in all respects superior to Carew's.

[96] 5. That the Beddington church-rates were never regulated by the King's taxes; but were taken from the poor-rates, at about two-thirds of the supposed actual value of the property. That Weall was overseer for ten years; always rated Carew at 100l. and Tritton at 47l. 2s. to poor-rates: *also assessed Hansler at* 99*l. which is of less value than his own, but has more accommodation than Carew's.*

6. *That before the rate was made the churchwardens proposed at vestry that Beddington district should be re-valued; that Weall, who occupies* 800 *acres in Beddington, opposed the revaluation, and it was abandoned.*

7. *That formerly the churchwardens assessed houses and other property held by the same person in one sum; that the present churchwardens specified separately each sort of property; that Carew and Tritton were so separately assessed to the poor-rates by Weall; and are now assessed in the same gross amount, taken together, as in the rate of* 1830, *signed by Weall.*

This allegation was debated, and the parts now printed in italics were struck out as inadmissible.

Per Curiam. The Court is particularly desirous that these suits should be short, and the pleas strictly confined to the issue. The defence set up is the inequality of the rate, and that Weall, the defendant, is rated higher in proportion than others. In support of this averment the party has referred to certain assessments for the King's taxes, and has specified two individuals—Sir B. Carew and [97] Mr. Tritton—as being under-rated in comparison with himself. It was argued that the attempt to mix up poor-rates and church-rates was not tenable, inasmuch as they were subject to different considerations and formed no proper analogy the one to the other. To this it was well replied that a poor-rate, when equally assessed over all the parish, is a better criterion than the King's taxes: and I think, in this case, that the acquiescence of the parish for some years in this mode of assessment to the church-rate is primâ facie evidence of its propriety: (*a*) the first part of the fifth article may therefore stand; but the latter part introduces a new comparison—a new issue; and, if admitted, will not prove that Carew and Tritton are not rated too low in comparison with Weall; which is the sole issue in this suit. I therefore reject the latter part of the fifth article.

So, again, how will the sixth article prove that Carew and Tritton are not under-rated, and consequently Weall overrated, and the rate unequal? This then must be struck out. The seventh also is unnecessary; for the conduct of the defendant, while overseer of Beddington parish as set forth in the fifth article, furnishes a sufficiently strong inference that Carew and Tritton were fairly assessed to the poor-rate at the sums which have been since adopted as a proper valuation in the assessment of a church-rate.

The allegation was reformed, and admitted.

Upon this allegation four witnesses were examined.

Weall's answers were also given in: the first, after admitting the appointment in 1830 of a com-[98]-mittee, of which he was a member, for the valuation of Wallington with a view to assess that hamlet to a poor-rate, proceeded—"That the church-rate in question was unduly and unjustly founded upon such scale of assessment, for that Wallington having always maintained its own poor, such scale of assessment was made by the committee solely for the purpose of assessing that hamlet only for poor-rates, and had no reference whatever to the comparative value of the rateable property in other parts of the parish, and that the rate of valuation of the property within the hamlet was made upon a much higher scale than the general scale of valuation for the poor-rate in the rest of the parish: that the houses and premises occupied by Carew and Tritton are not in Wallington." The answer admitted the mode and amount of

(*a*) See *Thompson and Sandford* v. *Cooper* (cited in *Lee and Parker* v. *Chalcraft*), 3 Phill. 641, in notis.

valuation of the respondent's house and four acres and a half, but set forth "*that by a subsequent committee duly appointed, for that purpose, by a vestry of Wallington hamlet, a fresh valuation was made on the 19th of April, 1832, of the rateable property within the hamlet, for the aforesaid purpose, in which valuation the respondent's said house and land were rated at 80l., the same together with several other houses in the hamlet in like manner being reduced, having been considered by the committee as much higher rated than similar houses in Beddington parish not within the hamlet.*"

The 2nd, 3rd, and 4th articles were not objected to. The 5th admitted "that the assessments to the church-rates were and are taken from the parochial poor-rate books, but denied that the church-rate was just and equal, inasmuch as the whole parish of Beddington was not impartially assessed to the poor: it also denied that the rate of assess-[99]-ment throughout the parish was at about two-thirds; for that the estimate of the value of house property in Wallington, to the poor-rate, was made on a much higher scale of valuation than some house property for the like purpose in the rest of Beddington parish." The respondent admitted "that, as overseer, he had, as alleged, assessed Carew, his predecessor, and Tritton:" *but he said, "that he and his colleague did not assess them justly and equally with the other parishioners, but followed the same rate of assessment as made upon the said persons by their predecessors in office; and that this was done in consequence of the numerous acts of charity towards the poor exercised by the said persons, and with a full knowledge that the said assessment was not equal, and that he and his colleague so acted with a view to the advantage of that part of the parish.*"

Trinity Term, 2nd Session.—The parts of the answers now printed in italics were objected to as irrelevant and redundant.(*a*)

The admissibility of an allegation, offered on the part of the defendant, was debated at the same time. The principal articles of this allegation pleaded what the defendant had set forth in his answers: viz. that the assessment made in 1830 was for Wallington only (which maintained its own poor), and was made at a higher scale than the rest of the parish, which was not included in the said assessment, and that the assessments on Carew's and Tritton's houses to the poor were always considered by Weall as inadequate, but were not altered on account of the benevolence of their owners.

Per Curiam. The observation is well founded that there has [100] been no unnecessary delay, provided the plea now offered is relevant. But where are the pleas to end? If every frivolous little matter is allowed to be counterpleaded the pleas may run on ad infinitum. The sole object here is to obtain payment of a church-rate; that is opposed on the ground of inequality; and the defendant has selected two persons who are underrated as compared with his assessment: two instances for this purpose are as good as two hundred; and the real gist of the case depends on the true valuation of these three houses, and that must be proved by the valuation of competent persons. Whatever other matter is introduced can hardly be of importance, except for the purpose of assisting the judgment of the Court if the conflicting evidence of competent witnesses should be very nicely balanced.

Some collateral matters have crept into the cause which perhaps in strictness might have been excluded. On the one side, the defendant pleaded the scale of assessment to the King's taxes; on the other side, the churchwardens—what was the assessment to the poor-rates; the one led to the other; but each has only a distant and inferential bearing, and might with advantage have been left to be extracted by interrogatory.

Primâ facie the poor-rate seems to furnish a fair ground of analogy; it is generally much higher than a church-rate, and therefore the assessment is laid with greater accuracy: but if the poor-rate is not fairly laid over the whole parish it ceases to be a just criterion.

It is said that the valuation of 1830 did not extend to Beddington proper; and a new principle of inequality is thus introduced; for if, as is now alleged, Wallington be assessed in a higher scale than the rest of the parish, the whole of Bedding-[101]-ton proper is underrated to the church-rate, or, which is the same thing, the whole of Wallington is overrated: this would be a ground for a re-assessment of the whole parish in order to make an equal church-rate. But the issue in the present case is confined within narrower limits, viz. to a comparison of the assessment of Weall on the

(*a*) These parts were ultimately struck out, v. infra, p. 101.

one hand with Carew and Tritton on the other. True it is that the assessment to, and valuation for, the poor-rate would not, if these averments be true, furnish a fair rule, and it was therefore necessary that the circumstances should be explained either in the answers or by plea; but even if the poor-rate had been properly laid over the whole parish generally, it would not have been so just a criterion as a regular valuation, because there may be reasons of expediency and policy to prevent the rigid enforcement of a poor-rate at its full value against particular individuals, lest it might lead to a curtailment of their liberality to the poor.

My view of the matter, then, is to allow the explanation in the answers to stand, except as to the valuation in 1832 which is thrown in at the end of the first answer; but the preceding part of the explanation has been properly brought to the notice of the Court, and renders any pleading upon the matter unnecessary. The rest of the allegation, however, is quite immaterial: the fourth article states the opinion of the defendant Weall: this also is set forth at the close of the fifth article of the answers, and has been properly objected to. The Court having before it the fact of the assessments, of what advantage in forming its judgment can be the opinion of Mr. Weall? By rejecting the allegation, and directing the end of the first and fifth articles of the answers to be struck out, **[102]** the Court will bring the case within its proper bounds.

On this day the cause was argued upon the effect of the evidence on the respective pleas.

Judgment—Sir John Nicholl. This is a suit of subtraction of church-rate brought by the churchwardens of Beddington against a parishioner. No question arises on the regularity of the rate, nor on the liability of the defendant to be assessed, nor is it alleged that he is overrated except relatively. The sole ground of defence is that the rate is unequal; and the ground of inequality is stated to be, that two other parishioners, Sir Benjamin Pole Carew and Mr. Tritton, are, each for his house and garden, rated relatively and proportionally lower than the defendant for his house and four acres and a half of land. The defendant is assessed for various other lands, but those assessments are not objected to: whether or no they are paid I am not informed; but I suppose that they are not, because he maintains that the whole rate is invalid. Both Carew and Tritton are also separately assessed for lands, besides their assessments for house and garden. Then the only inequality alleged is between the assessments of these three individuals with regard to their respective houses and gardens.

The fact is not denied that the church-rate is made on the same assessment as the poor-rate, and agrees with it in all particulars; nor is it denied that all the three parties, Carew, Tritton, and Weall, have been rated for several years past at the same amount as in the present rate, nor that **[103]** Weall himself, as a member of the parochial committee of valuation in 1830, as overseer and ratepayer, has for several years acquiesced in, and acted upon, the assessment of which he now complains. In suits where the rate is objected to on the ground of inequality, and especially under the circumstances of this case, the burthen of proof lies upon the rate-payer who resists: he must prove, and satisfactorily prove, the inequality: if the matter be left doubtful he fails in his defence. Where the rate is regularly made in open vestry, where it is the same as in former years, and there is no suggestion of any fraud or oppression in the mode of assessment, the presumption is strongly in favour of the assessment, and the refusal of payment is not to be encouraged.

The resistance produces great inconvenience to the parish; it increases the burthen of the rates; it excites disputes and animosity, and therefore should not be made upon slight grounds.

The question, then, is whether Mr. Weall has established by evidence the inequality of the assessment. Weall is, as I have stated, rated at 100l. a year for his house and four and a half acres of land; Sir Benjamin Carew at the same for his house and garden; and Mr. Tritton at 47l. 10s. for his house and garden. The general scale of rating, both for poor-rates and for church-rates, is the same throughout the whole parish—as well for Beddington proper, as for the hamlet of Wallington—two-thirds of the full value. That scale of course is not adopted as to the King's taxes; but that the assessments both for poor and church-rate should be on the same principle seems natural.

It is not alleged that Weall is overrated, except as compared with two other parishioners: but his defence is, that if he is properly rated at 100l. a year, **[104]** Carew ought to be rated at as much more, and Tritton at more than half of Weall's

assessment. In support of this inequality Weall has examined four witnesses—Blake, an auctioneer of Croydon; Foakes, a surveyor and agent; Ray, a carpenter; and Michael, a baker and overseer at Carshalton. They certainly give an opinion not exactly agreeing as to amount, but they do concur in saying that Carew's premises are much more valuable than those of Weall; and that Tritton also is relatively underrated: this, at most, is only matter of opinion, and of opinion formed rather loosely and without adequate grounds. Weall goes to Mr. Blake one evening and gets Foakes to meet him there; he asks them what they think of the relative value of his premises and those of the other two; they answer without hesitation that Carew's are of much greater value—of double; and that Tritton's are nearly as much as Weall's. In his examination in chief Blake says, "My belief is that Sir Benjamin's property, which is called Beddington Park, is worth nearly as much again as Mr. Weall's;" and in respect of Mr. Tritton's he says, "I do not hesitate to depose that if Mr. Weall's house and lands are assessed as of the value of 100l., Mr. Tritton's ought at least to be assessed as of the value of 75l. or 80l." Foakes says, "The annual value of Beddington Park would be moderately stated at from 180l. to 200l. per annum;" "and Mr. Tritton's residence I should state at 100l. to 120l. per annum."

These witnesses were not employed carefully and accurately to survey and estimate the several premises; they give their evidence without having seen them for a considerable time, and are principally acquainted with them by seeing them in riding by. Before their production as witnesses to disprove the fairness of the assessment of the **[105]** vestry and parish officers for years past, they should have regularly surveyed the respective premises.

Loose evidence, however, of this description would scarcely be sufficient to invalidate the rate, if the case rested here. But it is opposed by testimony much of the same sort and of about equal weight, viz. of witnesses giving a contrary opinion and stating in their judgment the fairness and equality of the rate. These witnesses are, Mr. Loraine, a barrister, who is well acquainted with the whole of the parish and resides in Wallington hamlet: this gentleman was overseer for five years, has therefore had a good opportunity of forming a correct judgment; is himself a large rate-payer, and has throughout this business acted a very proper and impartial part. There is also Mr. Streeter, an auctioneer; Fludder, a master carpenter; and Robert Blake, a bricklayer. These concur in opinion that the rate is fair and equal, and quite balance the testimony of Weall's witnesses. Streeter, on the third and fourth articles, deposes in this manner: "If Mr. Tritton's house were rated at about half the value of Sir B. Carew's, I should say it was fairly rated; and Mr. Weall's house I should myself rate rather higher, if any thing, than Sir Benjamin's. Mr. Weall's house with the garden and pleasure ground belonging to it, taking them at four acres, is fairly worth 150l. per annum; that is a very low rent for it."

The Court cannot venture to form any estimate as to the comparative value of these different houses from a description of them; but I can easily conceive that Sir Benjamin Carew's, with a centre and two wings, standing at the edge of an old park, may excite from its external appearance an opinion of high value, which on an accurate investigation would prove to be incorrect. The centre is **[106]** described to consist of a hall open to the roof; and of the two wings, one has been gutted by fire, and is useless except for lumber: this would be a forlorn residence to any person but the owner of the park. Even the extent of the pleasure grounds would, by occasioning additional expense to a tenant, be a drawback from the amount of rent. I am not then surprised that witnesses should think that Weall's house would probably let for as much as, and would find many more takers than, this old mansion, notwithstanding the grandeur of its external appearance. But the value upon which a house is to be assessed is that for which it would let, not at what a proprietor, who from family feelings would choose to submit to inconveniences rather than abandon the old mansion, would value it.

It is difficult to conjecture what has induced the resistance to this rate. There seems no just ground to suppose that the property in Beddington is rated on a lower scale than in the hamlet of Wallington. Mr. Loraine on the tenth interrogatory thus deposes: "The committee, in making their scale of assessment for the hamlet of Wallington, acted upon the same principle upon which Mr. Bainbridge in 1806 valued the whole of the rateable property in the parish, both in Beddington and Wallington, viz. that of putting a moderate value upon all property and assessing upon two-thirds

of that value. The assessment to the poor-rate upon the inhabitants of the other parts of the parish without the limits of Wallington is not made from a distinct scale of assessment; the scale is the same as that of Wallington, although they have not had a revaluation: the assessment, whereby the Beddington district is assessed to the poor-rate, is not made upon a lower rate than that [107] of Wallington; it was proposed at the time Wallington was revalued that Beddington should be too; but the defendant Weall said, 'No, they did very well in Beddington,' and so little difference did we find in the revaluation of Wallington from the valuation of that hamlet in 1806 that in a gross amount of about 3000l. the difference was under 20l." Again, on the twentieth interrogatory: "The parish is very liberal, we can do any thing in the parish for the poor among the gentlemen; and that makes the present dispute about the church-rate the more unfortunate; if it were not for the private charities in the parish the poor's rates would be half as much again as they are."

I agree with the witness that this is an unfortunate resistance, and not only so, but I think that it is a vexatious resistance, and one which the party must be held to have undertaken at his own peril. The Court is of opinion that the inequality of the rate is not sufficiently proved: and I pronounce for the rate sued for, and condemn the defendant in costs.

HOWARD *v.* WILSON. Arches Court, 2nd July, 1832.—In a suit of subtraction of legacy a coachman, a married man, originally hired by, and who had lived five years with, the testatrix, residing over her stables in town, occasionally accompanying her into the country where he lived in the house, though, like all her servants, on board wages; waiting sometimes at table, and remaining with her though she changed her job-man, held (although the several job-masters paid him his wages and board wages—except 3s. per week extra in the country—and found him in liveries) entitled under a bequest "to each of my servants living with me at the time of my death 10l.," and the executrix condemned in full costs.

This was a suit of subtraction of legacy, brought by Thomas Howard against Elizabeth Wilson, the acting executrix under the will of Isabella Chandless, late of Dorset Square, widow, who died on the 17th of May, 1829.

The libel, after pleading that the testatrix by [108] her will gave as follows:—"To each of my servants living with me at the time of my death ten pounds," alleged in the fourth article "that at the testatrix's death, and during nearly four years and ten months previously thereto, T. Howard was in the service of, and living with, her as coachman."

On behalf of Mrs. Wilson it was pleaded "that Howard was a job-coachman in the service of Hill, and by virtue of an agreement between the deceased and Hill, a job-master, dated the 1st of May, 1828, drove the deceased; that Hill paid, to the deceased's death, the coachman's wages and board wages, and provided him with a box-coat and other necessary articles." The agreement was exhibited: it stated that "Hill agreed to let and Mrs. Chandless to hire of him, for the term of one year from the date thereof, a pair of carriage horses, at 200l. per annum; including harness, coachman, and livery; and, if out of town, Mrs. Chandless was to pay three shillings per night extra."

On this allegation Hill deposed: "My agreement was to furnish Mrs. Chandless with a pair of horses and harness: I did not find her a coachman, although I engaged to pay him twenty-six shillings per week. I made no contract to find him a livery; I never did find him with livery or box-coat."

On interrogatory: "I found Howard in her service, and he continued so. He never drove for me; and I never returned him to the collector of King's taxes as my servant. I considered him in all respects as Mrs. Chandless' servant. I considered that I paid him to save her the trouble."

Mary Carter servant to Mrs. Wilson, deposed: "I was Mrs. Chandless' maid: I have heard [109] her say she paid Hill for horses and coachman, and that she had nothing to do with the coachman (Howard) beyond paying him 'night money,' while he was out of town with her."

On interrogatory: "Howard was sometimes sent by deceased on errands: she gave him orders as she did to the other servants: he occupied two rooms over the stables. He never during my service waited at table."

A responsive plea denied the defendant's allegation, and pleaded "that Howard

was hired by and went into the service of the deceased as coachman, in January, 1825; and that she herself selected him from among various applicants:" it then set forth his wages and allowances, both in town and country, and that he was to occupy the room over her stable; and that on his being so hired, deceased informed him that, "to save herself trouble, she always wished her coachman to receive his wages, except the extra pay when in the country, from the job-master who furnished her with horses; and that he might receive his wages from him either by weekly or monthly payments or in any way he pleased. That while in her service, Shepherd, Gale, and Hill supplied her with horses: that Howard never entered into any agreement with either of them, and was always treated by them as the servant of the deceased, and that she settled his rate of wages without consulting any job-master. That he, Howard, assisted, when there was company, in waiting at table; constantly went on errands for deceased, and was returned by her as her servant to the collector of the King's taxes. That after Mrs. Chandless' death he was taken into defendant's service; that **[110]** for about seven months afterwards Hill supplied her with horses, and that he remained in her service after Hill ceased to supply her."

On this allegation Mrs. Wilson's answers were taken; and four witnesses were examined; among others, Shepherd, the job-master, who deposed: "I never considered Howard as my servant: I did not consider that I had any control over him: I had no power to discharge him; he was entirely the servant of Mrs. Chandless."

Dodson for Mrs. Wilson. A job-coachman is not within the description of a servant living with the deceased. In *Chilcot* v. *Bromley* (12 Ves. 114) it was held that, under a general bequest to servants, a coachman provided with the carriage and horses by a job-master was not entitled. There the legacy was large—500l. and 20l. for mourning, with all the deceased's wearing apparel; but the principle of law equally applies to this case.

The King's advocate and Addams contrà. In *Chilcot* v. *Bromley* the job-master supplied a coachman according to the usual course of business, and paid him weekly wages. The circumstances of *Chilcot* v. *Bromley* are so different from those under consideration that they cannot be held to govern the present case. Here the testatrix's intention is clear that she contemplated including Howard in the bequest.

Judgment—Sir John Nicholl. This is a legacy suit brought against the exe-**[111]**-cutrix of the will of the late Mrs. Chandless. The words of the will are, "to each of my servants living with me at the time of my death, ten pounds." Howard claims as her coachman; and for this little legacy, though the testatrix left considerable property, he has been compelled to resort to this suit, consisting of a libel and two allegations, it being contended that this man was not her servant, and is not within the proper construction of the will, nor the intention of the testatrix, so as to be entitled to this legacy.

The deceased, who kept her carriage, jobbed her horses, for which she paid 200l. a year; and the job-man was for that sum to pay all expenses, and among the rest twenty-six shillings a week, as wages and board wages, to the coachman. It is not at all uncommon for a job-man to pay the wages of the servant of the person who hires the horses; but whether the coachman received his money from the hands of the job-man or from his mistress is not very material; the wages, at all events, came out of the pocket of the deceased. The question is whether Howard was the servant of the testatrix, and comes within the meaning of the words of the bequest. The case is quite distinguishable from that of *Chilcot* v. *Bromley*,(*a*) which has been cited. In that case the Master of the Rolls says, "The question is whether the plaintiff was a servant of the testator within the intent of this will. Can the testator be supposed to include a person whom he had not selected nor chosen to bring into his service for any definite period? It is not probable that a testator in such a situation as this testator, with the experience he had of the manner in which these ser-**[112]**-vants were changed, could have intended to put this person on a footing with servants brought into his house by a contract of his own, from preference arising out of previous inquiry into their characters and satisfaction with their services." So that the Master of the Rolls puts the case of *Chilcot* v. *Bromley* as a question of probable intention, on the part of the testator, depending upon the circumstances of the particular case.

(*a*) 12 Ves. 114. See also as to "who are entitled under the description of servants." Williams on Executors, v. ii. 735.

The coachman in that case did not live nor board in the deceased's house; and there the job-master hired the servant, and contracted to provide the deceased with a coachman, who, says the Master of the Rolls, "was so far in the testator's service as driving his carriage; but in consequence of a retainer by the other and a contract with him." The Master of the Rolls considered that the job-master could discharge the coachman at any period. There, also, the coachman had only driven the deceased for ten months, and the legacy in question was 500l. and 20l. for a suit of mourning. Here the legacy is only 10l., and the plaintiff was hired by the testatrix, she herself selecting him from various coachmen who applied for the place, and he remained with, and drove, her from 1825 till her death in 1829—nearly five years. The facts and the probabilities of the two cases are as remote as possible. Here the only circumstance to shew that there was no intention to include the coachman is, that the job-man was the hand to pay him his wages out of this round sum of 200l., and it is on that account maintained that Howard was not one of the deceased's servants. That seems to be the only ground of opposition. Shepherd, who, at the time the plaintiff was hired by the deceased, served the deceased as job-man, and who had been job-man to her husband, did not inquire the man's **[113]** character, and never exercised any authority over him: Howard was never employed by the job-men, but in the care of the job-horses let to the deceased: he lived in rooms over the stable on the deceased's premises; he assisted in waiting at table when there was company, and went on errands and messages when wanted. When out of town, at watering-places, he lodged in the house, and received from the deceased extra allowance. All the servants being on board wages, the deceased gave them a treat dinner at Christmas; but the coachman, being a married man, she did not ask him to dinner; but, more kindly, sent a leg of mutton for himself and his wife to enjoy together. The deceased hired her coachman without consulting her job-man: she changed her job-men but did not change her coachman: Howard continued the deceased's servant; and even after her death he remained with the executrix. At length he quitted her service, but Hill continued to job the horses; so that there was no connexion between the contract with the job-man and the service of the coachman.

Every circumstance, therefore, marks Howard as the deceased's servant: he is always so treated. Can I then suppose that, after living with the deceased for nearly five years—a period longer, it seems, than any other servant, and always giving satisfaction—the deceased did not intend to include him in this little remembrance of a 10l. legacy. I see not the least reason to suppose that she did propose to exclude him: but if there could have been any doubt, how could the executrix have hesitated to pay it? I think the resistance is very frivolous, and I pronounce for the legacy, and with full costs.

[114] KENRICK *v.* KENRICK. Consistory Court of London, 1831.—A suit for cruelty and adultery against the husband, and a recriminatory charge of adultery against the wife. The Chancellor of London, and, upon appeal, the Dean of the Arches (affirming the sentence), held the husband's cruelty and adultery not proved, and the adultery of the wife proved by the evidence of a single witness only to any undue familiarity, proximate act, or fact of adultery, which evidence, though confused, was corroborated by the evidence of the conduct of the wife.—The Court will not delay the hearing of a cause on an affidavit that a true bill has been found against a material witness for perjury in her evidence in such cause.—Quære, whether a conviction would be evidence.

On appeal from the Consistory of London.

This was a cause of separation, originally promoted by the wife, in the Consistory Court of London, for cruelty and adultery.

The libel pleaded the marriage of the parties—the one a widower, the other a widow—on the 9th of May, 1829: and in the 4th article alleged that during the latter part of 1829 the husband frequently, and without occasion, staid for several days together at Webb's Farm, Enfield, leaving his wife at his house in Foley Place; that his language and manner to her were harsh, insulting and cruel.

5. That in consequence of his ill-treatment they separated, in virtue of a deed executed on the 20th of January, 1830; that Mrs. K., relying on her husband's assurances, and ignorant of his adulterous intercourse, resumed cohabitation with him in London on the 8th of March, and on the 17th of April accompanied him to Webb's Farm.

6. Pleaded adultery with Maria Thomas, placed by K. as housekeeper at Webb's Farm, and by whom, prior thereto, K. had had children: and alleged that they had been seen to kiss each other; that he had been seen to have his arm round her waist, and that he called her "my love," and "my dear;" that on the 7th of April, 1830, he drove her to Barnet Fair and back; that he was often in her **[115]** bed-room, and from the 9th of May, 1829, to the middle of April, 1830, they at times slept together.

7. That while at Webb's Farm, after the 17th of April, K., in the presence of his servants, called his wife a strumpet, and falsely accused her of adultery; that he tore her dress, and repeatedly struck her violently with his clenched fist; that on the 2nd of June, 1830, he quarrelled with her, struck her, ordered her to leave the house, threatening to send for a constable; that she was hurt and terrified, and being, for the first time, apprised of his adultery with Thomas, finally quitted her husband on the 4th of June.

Thomas Burge, the first witness examined on the libel, deposed: "I went as bailiff to Webb's Farm on the 2nd of March, 1830, and lived there three months. I and my wife left on account of Mr. and Mrs. Kenrick's differences: they never met without quarrelling: his language was offensive and insulting to her: he told her she had been the death of her first husband. I have heard him say to his wife that she was as bad as a common prostitute. On the day I left, Mrs. Kenrick was speaking to my wife in the yard; K. ordered his wife to go in; she continued to speak to my wife, and K. then took his wife by the shoulders and shoved her in, saying, if she did not keep in he would send for a constable. I do not remember in his conduct anything like very severe cruelty or violence towards her."

On the 6th article. "Maria Thomas was housekeeper when I went to the farm: she quitted in the morning that Mrs. Kenrick came in the evening: K. drove her away in his gig. I know of no adultery with her and Kenrick: they were always very friendly: I have seen them, when he **[116]** came home at night, kiss each other. I never saw any other familiarities."

On the 7th. "I have heard K. accuse his wife of having lived in adultery with an acquaintance of his. On the day I left he pushed his wife with great violence into the house: he told her to take her things and leave the place."

On interrogatory. "Six months ago Mrs. Kenrick called to ask me to be a witness: I have not seen her since. I do not know whether Thomas is Kenrick's niece: he usually called her 'Maria.' She frequently went out with him in his chaise. I have heard Mrs. K. say, on the occasion of the quarrels, that she would leave her husband's house, for that she could not live with him."

Sarah Burge deposed: "Kenrick behaved very unkindly to his wife: she studied every thing to please him."

6. "When I and my husband went to the farm, Thomas acted as mistress: I thought she was Mrs. Kenrick, until after two or three days I found they had separate beds, and heard her say she had two children, one of which was at the farm for the last three or four weeks she remained; and the child used to call him 'Papa.' I really cannot say whether there was any adultery between K. and Thomas. I never saw any thing improper between them, beyond his calling her 'my dear,' and 'my love.' I saw them the evening before Thomas left the farm sitting on the sofa together: she was very unhappy at leaving the farm. I never saw K. and Thomas kiss, nor his arm round her waist, nor entering nor coming out of her room. I have heard him knock at her door and call her in the morning. On Barnet Fair day K. drove Thomas out, and at starting **[117]** said they were going to the fair. Occasionally I helped to make the beds: I never observed, while Thomas was at the farm, that either her bed or that of K. had the appearance of having been slept in by more than one person. While I lived at the farm I have no reason to form a belief that they committed adultery together. On the day K. pushed his wife into the house he tore her dress."

7. The witness confirmed her husband's evidence generally on this article.

On interrogatory. I never heard that Thomas was K.'s niece until just before I left. I saw K. twice, on his wife's refusal to go into the house, take her by the shoulders and push her with great force. After Mrs. K. had been at the farm a few weeks she said, if she should leave her husband, she would like me to live with her.

Two other witnesses deposed that K. behaved unkindly to his wife; but that they

knew of no familiarities with Thomas; they had seen him, undressed, knocking at her door in the morning, and calling "Maria, Maria."

The counter allegation pleaded that K. took Webb's Farm at the request of his wife, and that he always treated her with kindness; and exhibited a letter from her, of the 5th of October, 1829, to Miss Paris, a daughter of a clergyman at Coventry, in which she said, "I think you will like Mr. Kenrick very much; he is very fond of me, and does every thing he possibly can to make me happy and comfortable." That after Mrs. K. abruptly left Foley Place, in November, Miss Paris endeavoured to induce her to return; that K. never committed adultery with Thomas, who was his niece.

The 7th article pleaded that in July, 1829, **[118]** K. became acquainted at Brighton with Mr. Elder, of Oxford Street, stable keeper; that Elder afterwards visited in Foley Place, and Mrs. K. made appointments for him there in K.'s absence: that Elder frequently, when he knew K. would be attending horse sales, visited her, and remained with her for a considerable time.

8. That after Mrs. K. had quitted her husband in November, she frequently, unknown to K., went to Elder's, and particularly on one Saturday in November she came about five o'clock, dined with him, and they were alone together during the evening and greater part of the night. That shortly after they had dined, and also a second time during the same evening, Ann Nickless, suspecting an improper intercourse, saw them, on both occasions, through the key-hole of the bed-room door, on the bed together: and pleaded adultery.

9. That Mrs. K., on several occasions subsequent to the said Saturday, was at Elder's till very late at night; that they laid down together on the sofa; and upon her leaving the house Elder went with her: and pleaded adultery.

10. That Elder often gave Mrs. K. night-gowns and wearing apparel which had belonged to his deceased wife; that both Mrs. K. and Elder strictly enjoined Nickless never to disclose that Mrs. K. came to Elder's house; and that she never did so disclose until after the commencement of this suit.

11. That K. consented to resume cohabitation in March, 1830, in compliance with the letters, now destroyed, but read by Morrey, his (K.'s) foreman, and who knew Mrs. K.'s writing.

12 and 13. That in May, 1830, Mrs. K. several **[119]** times came to London with K. and went out by herself; that on the 6th, about 2 p.m., Morrey saw her go into White House brothel, in Soho Square, with a stranger, and that they remained there upwards of three-quarters of an hour: that Morrey did not inform K. of this till after the commencement of this suit.

14. That Mrs. K. frequently at Webb's Farm quarrelled with K. without provocation; that on Thursday in the latter end of May, 1830, after a quarrel between K. and his wife, Mrs. K. went to London in a post-chaise, as she said, to consult with her solicitor about leaving her husband; that on her return she admitted to Mrs. White that she (Mrs. K.) had, on returning to live with K., no intention to remain long with him, and that her reason for coming back was to get some clothes and letters; and that she had on that day, when in London, called upon and informed Elder that she was again about to leave her husband, and that he, Elder, had offered to protect her.

Ann Nickless, a widow, aged fifty-three, examined on the 3d of June, 1831, on the 8th article. "I was housekeeper to Elder for about five years. I quitted last Christmas. About a year and a half before, as near as I can remember, Mr. and Mrs. Kenrick one Sunday dined, and together spent the evening, with Elder. After some time Mrs. K. used to come alone: this I think was not so early as November. At first she came with a Miss Paris: Elder walked out with them. One Saturday, I think after Christmas, about five p.m., Mrs. K. for the first time, as nearly as I can remember, came alone. I was at the door of the house, which is down the yard: Elder was in the yard looking about as if for somebody. Pre-**[120]**-sently Mrs. K. came down the yard: Elder went to her, and told her to run up stairs into the nursery as fast as she could: she passed me; ran up stairs, and Elder followed immediately. They dined and were alone together. It occurs to me that Mrs. K. had dined with E. in the early part of that week: she called about two, just as dinner was ready, and remained till nine: she told me at that time that she and K. were parted, and that K. had turned her out of doors. On the Saturday she remained until one in the morning. Nobody went into the room to them but myself: there was no one else in the house: they dined in the nursery, which is not so public as the parlour: Elder's bed-room

adjoins the nursery: on the Saturday he and Mrs. K. went into it twice; the first time as soon as dinner was over. I was in the parlour; I distinctly heard them go. I suspected what was going forward, having previously observed several familiarities between them, which were very improper in a married woman like Mrs. K. I therefore listened to hear what I could: the bed-room is over the parlour: I plainly heard the noise of two persons getting on the bed, and presently afterwards that sort of breathing which left no doubt on my mind that such two persons were in the act of sexual intercourse. About half an hour afterwards K. came down stairs and told me to take the glasses away. I went up; and from the nursery went into the bed-room. Mrs. K. was there: the bed was very much tumbled, and had the appearance of having been lain on by two persons; I tucked it up before Mrs. K. who said nothing: the window blind was down, which was very unusual. Mrs. K.'s face was very much flushed. I said nothing to **[121]** her. After tea, as I passed the nursery door, which was ajar, and not seeing Elder or Mrs. K., I went very softly to the bed-room door, and peeped through the key-hole: the bed was just opposite the door, and I could see it very plainly, and almost every thing in the room. I saw Mrs. K. and E. in adultery."

9. Elder went out with her on the Saturday night, and did not return until after I had gone to bed. I went to bed about twelve. Several times before the Saturday he had gone out with her, but never afterwards that I remember: they used to sit in the parlour on the sofa together; and I have sometimes, on going into the room, seen them with their arms round each other's necks; at other times kissing each other; at others she has been lying on the sofa, and he has been putting her clothes down, and toying with her in some manner; but I cannot, except on the Saturday, depose to adultery.

10. One morning Elder came up stairs into the room where I was, and taking some of his late wife's clothes out of the drawers, said, speaking of Mrs. K. who was below—"Poor thing! I must let her have some things to change; for she has nothing but what she stands upright in!" I afterwards saw Mrs. K. take the bundle of things away. When Mrs. K. told me that she and K. had parted, she told me to deny that she ever was or ever came to the house; for were K. to know it, it would be Elder's ruin, and that K. would not mind giving her 20*l.* if I was to let him know she was in the house; she repeated to me her anxiety that K. should not know of her visits almost every time she came to the house: she used to say she loved Elder's little finger better **[122]** than K.'s whole body. I never disclosed any of these circumstances to K. (nor to any one) until about six weeks or two months ago: I never saw him from the time this happened until then, when he came to me with a lawyer, and after I had been asked a few questions I told them every thing I have now deposed.

On interrogatory. Mrs. K. was dressed on the Saturday in a black silk dress, with a velvet bonnet and veil. There was no light in the bed-room either time that I remember; and yet there must have been: they had candles in the nursery, and must have taken them into the bed-room; but I do not remember to have noticed them there. Elder's bed stood in the middle of the room between the door and window: it could not stand otherwise. The largest part of the bed could be seen through the key-hole of the door, particularly the foot of it, and it was across the foot that Mrs. K. and E. were lying. The key was turned so that a person could see through the hole; I always kept it turned round to prevent it from falling out.

Caroline Paris, aged twenty-eight. K. did not treat his wife with indifference or unkindness that I ever saw; they quarrelled sometimes; but it was as much her fault as his. She told me he was fond of her; that she might have what she wanted, and that at her request he took the house in the country.

[The evidence of this witness on the 4th article is given in the judgment.]

On interrogatory. I was intimately acquainted with Mrs. K. and her first husband—a clergyman in Shropshire: she was on a visit at my father's for a month, in the autumn of 1830: she was **[123]** treated by all the family (including myself) with great kindness, attention and respect: she mixed in the society that came to my father's and was received without reserve by our connexions, and treated by them with attention and respect, though they made certain remarks afterwards: she comported herself with general, though perhaps not perfect, propriety. There was at times a certain levity of language and behaviour more than was proper in a married woman. She accompanied me and a young lady to Leamington, and staid there with us. I occasionally called

with Mrs. Kenrick at Elder's. It appeared to me that K. did not much like him: I never remember K. to have invited him but once: he treated him with civility merely.

Stephen Morrey, aged thirty-three, foreman to James Marks, horse-dealer. K. was a horse-dealer: I his foreman or salesman. I went into his employ about May, 1829, and remained a year. I boarded and lodged in the house. K. always behaved to his wife with kindness and indulgence: she told me that he took Webb's Farm to please her: and that she believed if she could eat gold she might have it: he had a house for her a considerable time at Brighton, and had three horses there for her use, and he must have been fond of her to do this, as he is rather a careful man.

7. About July or August, as nearly as I can remember, Elder became a visitor in Foley Place; and in about a month got into the habit of calling in K.'s absence—more frequently on Monday mornings—when K. was at Tattersall's: of this absence Elder could not, I think, have been ignorant. Elder used to ask if K. was at home; if he was, he waited to be asked to walk in; if he was not at **[124]** home, he would remark he would just step in and ask Mrs. K. how she was. The only sitting room is up stairs. Elder would remain with Mrs. K. from half an hour to an hour: I sometimes went up stairs while they were together in the parlour: they were very friendly; but I cannot say that I saw at any of these times any improper familiarities: his visits were as often as two or three times a week.

11. K. was much distressed at the separation between him and his wife. I was at that time much in his confidence, and he consulted me upon solicitations made to him to take her back, and shewed me letters on the subject; the first was anonymous, describing how miserable Mrs. K. was, and entreating him to receive her: he asked me what I thought he had better do; and afterwards shewed me other letters to the same effect (purporting to come from Mr. and Mrs. May, friends of Mrs. K., and residing at Brighton), and he consulted me upon them. Some of the letters may have been written by Mrs. K., but I am not certain. I know not what has become of them: K. is a very careless man about letters.

12. On Friday, 6th May, Mrs. K. came to town as usual with K. I speak to the day from reference to a memorandum I made as to some business of my own about which I was on that day, with K.'s permission, in the city. On my return, I was in Crown Street, Soho, when I caught sight of Mrs. K. coming down the same street; it must have been between two and three: a gentleman was with her, a perfect stranger to me. I saw them turn the corner of a small street called Sutton Street, leading from Crown Street into Soho Square. I was on the opposite side of the **[125]** way, and about fifty yards from them: it was quite in my way to cross Soho Square to get to Foley Place: I therefore followed so as to avoid being seen by Mrs. K. I saw her and the gentleman enter a large white house the front of which is in Soho Square; it is a brothel or house of ill fame, though of a superior description, and goes by the name of the White House. I waited near the door for about ten minutes, but Mrs. K. and the gentleman did not come out again in that time. I was late and therefore did not continue watching longer. Upon recollection it may have been near half an hour but I think not so much as three-quarters that I waited. I left K.'s employ a few days afterwards without disclosing these circumstances. I went again into his employ in January last, and left it about two months ago; and shortly before I had some conversation with his solicitor about my giving evidence in this cause; and I then communicated what I have stated as to the White House. This was the first communication I made of the fact, either to K. or to any person on his behalf.

On interrogatory. K., as my security, had to pay money for me. I owe him about 100l., or perhaps rather more. I have made no communications as to my evidence, except as deposed, to the solicitor: he was urging me to give evidence as to K.'s general kind behaviour to Mrs. K. I was trying to avoid it, saying there were many who could give better evidence than I could; he told me it was better I should come willingly, or he must oblige me: I remarked that it might make unpleasantness between me and K., and that I might lose my situation; but he undertook that it should not, and I then told him what I knew **[126]** about Mrs. K. going to the White House. I did, however, lose my situation by it, for K.'s behaviour to me afterwards became so altered, and I had so much difficulty to do anything to please him, that we found it better to part. I am unable to recollect at what time Mrs. K. returned to Foley Place on the 6th of May; but she did return in time to go back

with K. to the farm; I do not recollect her dress on the 6th of May; nor to have seen her on that day save when she went into the White House. Having neglected to inform K. of what I had seen for the first day or two, it became a matter of greater delicacy; and I became less inclined to speak about it: I had also some little hope that Mrs. K. might alter her conduct. I left K. because of my embarrassments and had no fixed employment till I returned to his service.

Elizabeth Sullivan deposed that Thomas passed as K.'s niece, that she slept with Thomas's child in one bed, and Thomas occupied the other; and that she had no reason to believe they ever committed adultery together, and that she never saw any thing improper in their conduct.

Elizabeth White (wife of James White, formerly carter to Mr. Kenrick). Deposed to the declarations pleaded in the 14th article, adding, "that Mrs. K. said she should not accept Elder's offer, for fear Mr. K. should hear of it and be jealous, and that she should, on leaving him, take a lodging."

Elizabeth Mizen. I was in K.'s service on his second marriage; he was very kind to Mrs. K., and she admitted it. On the 7th she deposed: Elder used to call as often as two or three times a week; he would inquire of me if my master was at home: he very seldom was; but if he was, E. **[127]** did not go upstairs: K. did not invite him; but in the evening when he called Mr. or Mrs. K., one or both, would tell me to shew him upstairs. I think that Elder knew the day on which my master was usually out: his visits to Mrs. K. sometimes lasted only a few minutes; sometimes a quarter of an hour: but after he had gone upstairs, as they were friends, I gave myself no more trouble about the matter: and I did not always see him go away.

Mich. Term, 1st Session.—After publication of the evidence had passed, an exceptive allegation was offered in the Consistory Court, on the part of the wife, to the testimony of Ann Nickless on the 8th article, and on the 12th interrogatory. The exceptive allegation pleaded that Mrs. Kenrick never dined with Elder in the nursery of his house, nor remained with him till one o'clock in the morning, nor went with him into his bed-room, nor had sexual intercourse with him. It further pleaded that, from the relative position of the bed and door of the bed-room, no part of the bed could be seen through the keyhole.

A plan of the room was exhibited.

Addams for the husband, opposed the allegation, and cited *Foley* v. *Foley*.(*a*)

Phillimore and Haggard contrà.

[128] Per Curiam. The only question is whether the eighth article of the

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(*a*) In *Foley* v. *Foley* the libel charged the wife with adultery both in London and in the country; but the evidence upon the libel was shortly as follows:—

John Davis deposed (in the words of the libel) that on the 30th of September, 1784, as he was walking in the road adjoining the shrubbery of Stoke Park, about six in the afternoon, he heard a female cry out three times, "Oh, Dear, you hurt me:" that on looking through the shrubbery trees he saw the parties charged committing adultery.

Benjamin Smith (a marksman, aged 25) used to drive, as postillion to the parties out in the country, and he deposed to four separate acts of adultery.

There was also a letter from the paramour changing the day of appointment from Sunday to Monday, because on that latter day the husband would be absent from home.

Damages against the paramour, 2500l.

An exceptive allegation was offered in the evidence of John Davis, which pleaded that the parties charged were not in the shrubbery, as libellate; and further, "that by reason of the thickness and closeness of the trees, shrubs, and hedges which separate the said shrubbery from the road, it was impossible for John Davis, or any person in the road, to see into the walk within the shrubbery, so as to distinguish any person or object whatever."

This exceptive allegation was rejected.

No other allegation nor evidence was tendered on either side; and the Court (Sir William Wynne) signed a sentence of separation.

Dr. Harris and Dr. Scott for the husband.

Dr. Bever for the wife.

husband's allegation is sufficiently minute and specific, so that it might have been counter-pleaded before publication; and I am of opinion that it might have been so counter-pleaded; and that the evidence of the witness objected to upon it is not extra-articulate. This allegation, therefore, is not sustainable; and the Court will accordingly adhere to the well-known rule—that a party cannot plead in contradiction to a witness what he might have pleaded in contradiction to the plea—and rejects the present allegation.(*a*)

[129] Upon the rejection of the exceptive allegation the conclusion of the cause was rescinded, at the prayer of the husband's proctor, to enable him to plead and prove the marriage. One witness was examined as to the fact of marriage: and the principal cause was then argued.

Judgment—Dr. Lushington. The first question is whether either the adultery or cruelty charged in the libel has been proved: and I am quite satisfied that legal cruelty is not established. Quarrels and, if implicit credit can be given to the witnesses on the libel, much improper language by the husband passed, but there was no conduct to excite in the wife any reasonable apprehension of danger to her person.

In regard to the charge of adultery which is pleaded in the libel to have taken place with Maria Thomas, Mr. Kenrick, in his allegation, expressly avers that she was "his niece;" if this averment of the husband had been proved, it would have removed all ground of suspicion, but it is, I much lament, left without proof. The Court does not require or expect that such an incidental averment should be established through the medium of proof as strict as in a pedigree cause; but here it might easily have been proved by Mr. Kenrick's own son: no witness, however, has been examined to this point, and the averment is not proved.

But is the affirmative of the husband's guilt proved? The parties are never seen in any indecent, nor even suspicious, situation: no proximate act nor improper familiarities are spoken to. Burge and his wife, two of the witnesses on the libel, depose that in their opinion there was no **[130]** criminal connexion between Kenrick and Maria Thomas. They certainly depose to two circumstances of suspicion, viz. that Thomas's child called Mr. Kenrick "Papa;" and also that on the very day on which Mrs. Kenrick went down to the farm at Enfield, Thomas quitted it; and that Mr. Kenrick drove her away in his gig. The facts, then, proved on the libel, do not establish adultery, and I am of opinion that both on this charge, and on the charge of cruelty, there is a failure of proof.

The more difficult and important part of this case remains, viz. whether there is proof of adultery against Mrs. Kenrick. The witnesses, Nickless and Morrey, it has been said, are not entitled to credit; and an impression has been attempted to be made on my mind that a single witness is insufficient to support a charge of adultery; but I am not, in this case, under the necessity of considering such a proposition, although I am not prepared to say that one clear and unimpeached witness is insufficient; but it is hardly possible to conceive a case so naked of proof as to reduce it, exclusively of all collateral circumstances, to the testimony of a single witness, unconfirmed or unimpeached; and here the case clearly is not so destitute.

The principal witness on the part of the husband is Ann Nickless. The general character of this witness is not impeached; her testimony then is impeachable only on two grounds—first, the probability or improbability of the circumstances to which she deposes; secondly, her manner of deposing. It has been argued that she speaks to a grossly improbable story: but the whole of the facts are to be considered. There may be discre-**[131]**-pancies in her evidence, and she may confound the time of certain visits, yet I cannot say that these circumstances will entirely discredit her. From my experience, I am well aware that when witnesses are examined after an interval of time from the occurrence of the facts to which they are to speak, they will differ from the plea, and also from themselves; and particularly, if there was nothing at the time to fix a circumstance on the mind of the witness, an inaccuracy as to a date is extremely probable. But there is much to fix in her mind the material transactions to which Nickless deposes.

It is said again that "this witness has been tampered with, that Kenrick has given her half a sovereign, and that the expressions which she says Mrs. Kenrick

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(*a*) *Verelst* v. *Verelst*, 2 Phill. 150. *Atkinson* v. *Atkinson*, 2 Add. 484. *Burgoyne* v. *Free*, 2 Hagg. Ecc. Rep. 480. *Whish and Woollatt* v. *Hesse*, 3 Hagg. Ecc. Rep. 680.

made use of to her, viz. "That Mr. Kenrick would not mind giving her (the witness) 20l. if he knew of Mrs. Kenrick's visits to Elder," are so strange and incredible that "no one in her senses was ever so besotted" as to make such a declaration. But if I once believe the probability of adultery having been committed, I shall not hesitate to believe such a declaration; for it is quite notorious that a party living in this state of profligacy soon ceases to use any due precaution against detection. But does Nickless stand alone? Are there not some subsidiary witnesses? There is the evidence of Miss Paris, of Elizabeth Mizen, and of Mrs. White. These witnesses prove a degree of intimacy with Elder which is not quite consistent with female propriety. Miss Paris proves that, on the night on which Mrs. Kenrick quitted her husband's house, she was not indifferent to Elder; I refer to the expression of Mrs. Kenrick on that night to her husband—"You **[132]** need not sit making faces there against Mr. Elder." Mizen speaks of the frequent visits of Elder to Mrs. Kenrick when he must have known that Kenrick was absent from home: and if the Court believes White, she speaks to a declaration of Mrs. Kenrick, which, in plain English, is that Elder had offered to take her, Mrs. Kenrick, into keeping. These subsidiary circumstances confirm Nickless. Nickless also speaks to other circumstances, which could not have been invented, such as to Elder giving her (Mrs. Kenrick) some of his late wife's clothes. It was also suggested in the argument that if the adultery which the allegation pleads to have passed in November, and Nickless deposes to as happening after Christmas, had been laid in the plea as spoken to in the evidence, the party would have counter-pleaded it, and proved an alibi. But if a plea avers a particular time and place, and the evidence of the witness to that part of the plea is quite at variance with it, I know of no rule that would preclude the party from counter-pleading; and if the facts cannot be counter-pleaded before publication, the Court itself is not precluded from rescinding the conclusion of the cause for that purpose. In this case an exceptive allegation, after publication, was offered, and in it no notice was taken of this variation.

It only remains for the Court to dispose of the witness, Morrey; and considering every part of his evidence, and the utter impossibility of contradicting it, and being satisfied with the testimony of Nickless, corroborated by the other evidence to which I have referred, I do not think it necessary for me to sift his, Morrey's, evidence, or further investigate it. I am satisfied that the charge of **[133]** adultery is sufficiently proved against Mrs. Kenrick, and I pronounce for a divorce at the prayer of the husband.

From this sentence the wife appealed.

A true bill having been found at the Old Bailey on the 6th of April, 1832, against Ann Nickless, for perjury in her evidence in this suit, she had entered into her own recognizance to take her trial on the 17th of May.

Phillimore, on this day (8th of May), moved the Court, on affidavit, to postpone the hearing of this cause till the result of the indictment should be known.

Addams contrà. The witness was examined and cross-examined in June, 1831; the trial on the indictment might have taken place at the last April Sessions.

Per Curiam (Sir John Nicholl). I am unwilling to delay the hearing of this cause; I shall therefore assign it for sentence on the next Court. I can stay my decision for the result of the indictment, if I shall think that the justice of the case requires it.

The cause was accordingly assigned for sentence, the costs of the wife being first paid; and on the next session it was argued by Addams for the respondent: Phillimore and Haggard for the appellant.

Judgment—Sir John Nicholl. This was a suit brought by the wife, charging **[134]** her husband with adultery and cruelty: the husband denied the charges, and gave in a recriminatory plea, alleging the adultery of the wife: and the sentence of the Consistory Court of London was—that the wife had failed in proof of her libel, but that the husband had proved his allegation. From this decree the wife has appealed. Two questions are to be considered: first—whether the wife has proved her plea; secondly, whether the husband has failed in his defence, or in his recriminatory charge.

The marriage took place in May, 1829; it is confessed; and it is also proved by the husband's son, who was present. Mr. Kenrick was at that time a widower—not very young, for his son describes himself as twenty-eight years of age: his second

wife was the widow of a clergyman. At the period of this marriage the husband kept livery stables in Foley Place; and shortly afterwards he also took White Webb's Farm, in the parish of Enfield. It would seem from a letter of the wife to her friend, Miss Paris, that for some time they lived happily together: and in October, 1829, Miss Paris, at the special and pressing invitation of Mrs. Kenrick, visited and stayed with her for five or six weeks.

The parties had previously formed an acquaintance at Brighton with a person of the name of Elder, of whom, it appears, the husband after a time became jealous. Miss Paris thus speaks to this jealousy, and to Mrs. Kenrick's leaving her husband's house: "I remember a quarrel, which led to Mrs. Kenrick's leaving Mr. Kenrick's house in Foley Place: it was about a week before I left. They had had a few words in the morning, and were very distant with each other in the evening. **[135]** As late as ten in the evening a Mr. Elder came in, of whom Mr. Kenrick was rather jealous, and it was generally about him that he and Mrs. K. quarrelled, when they did so. Mr. K. was rather sulky, and Mrs. K. was taking little notice of him, which annoyed him very much, for he always liked a great deal of attention from her. Something, but I forget what, was said by Mr. K. which induced Mrs. K. to observe to him, 'You need not sit there making faces or motions about Mr. Elder'—a very improper remark, as it appeared to me, in Mr. Elder's presence" [and in this opinion I certainly must concur with the witness]; "Mrs. Kenrick got more angry afterwards, and the husband appeared very much annoyed but spoke very little: at length she said to him, 'You know I have often declared I would leave you, and I will:' still I did not think she was in earnest, but a few minutes afterwards she went out of the room; he followed her; I remained: he returned in a few minutes, saying that his wife was gone, but he did not suppose she was gone far. After a little time Elder went away, and K. again went to look for Mrs. K.; he returned, and said he could not find her: he was much vexed: I never saw any one so distressed: I did not see her again till in August or September, 1830."

These are the circumstances which are stated to have induced this lady to retire from her husband's house: and I must bear them in mind, especially the observation as to Elder, in reference to the subsequent charge which the husband has brought against her. The parties after this lived separate, and a deed of separation was prepared in January, 1830; where the wife lived during the separation does not appear; but she returned **[136]** to her husband in March of that year, and again withdrew on the 4th of June. There is no proof that this reconciliation was at the husband's request; the tendency of Morrey's evidence, on the 11th article of the allegation, shews that it was desired by the wife. Mrs. Kenrick immediately took out a citation against her husband, which was not returned till the first session of Michaelmas Term. This was not rapid; the husband appeared on the second session of that term; but no libel was given till the third session of Hilary Term, 1831. On this libel five witnesses have been examined; and it is impossible to say that they establish either cruelty or adultery. The charge of cruelty, indeed, has scarcely been noticed in argument; and there is nothing in the depositions to lead to the conclusion that the husband has committed adultery. No indecent familiarity is proved, nor any expression beyond what would occur between an uncle and a niece; the circumstance of the child calling Mr. Kenrick "Papa" is at most a circumstance of suspicion; it might arise from his being the god-papa. There is not only then a failure of proof on the libel—which is not to be left out of my consideration when I look to the subsequent conduct of the wife—but the evidence for the defence—that of Sullivan in particular—goes further: it disproves the libel.

The only question, therefore, is whether the recrimination is proved; and if the witness, Nickless, be believed, there can be no doubt about it. She is a single witness; but if circumstances support her testimony it is sufficient. There need not be two witnesses: one witness and circumstances in corroboration are all that the law in **[137]** these cases requires. It is true that Nickless gives her evidence with some degree of confusion; but a variation between the plea and the witness as to time is of little importance: the solicitor in taking her statement, or the proctor in drawing the allegation, might mistake. So as to the number of visits at Elder's, there is some confusion; but there is not sufficient for the Court to say that this witness has not deposed honestly and truly: still her evidence requires corroboration; and I think that the conduct of the wife herself in leaving her husband's house, as detailed in

Miss Paris' evidence, coupled with the other evidence upon the allegation, is sufficient to corroborate Nickless. The wife leaves her husband's house, almost, it may be inferred, with an invitation to Elder to follow, and absents herself from some months. That Mrs. Kenrick cultivated Elder's acquaintance is obvious. Miss Paris states that during her visit Mrs. Kenrick occasionally went to Elder's, and her servant, Elizabeth Mizen, and also Morrey, prove that Elder was in the habit of calling at Kenrick's, and that these calls were on a day when it would seem Elder must have known of Kenrick's absence from home. It is also proved that on the occasion of these visits Elder was alone and up stairs with Mrs. Kenrick. These are suspicious visits. There is also the evidence of White as to Mrs. Kenrick's declaration—that "Elder had offered to protect her, and find her a home." The circumstances, therefore, in corroboration of Nickless, are sufficient. Some observations have been made on Morrey, but, upon the whole, they do not discredit him: and the charge to which he deposes on the 12th article, of seeing Mrs. Kenrick retire with a gentleman—a stranger—to a **[138]** brothel, is confirmatory of the husband's allegation. The testimony of this witness may not establish a fact of adultery, yet it furnishes a strengthening circumstance of proof in connexion with the general evidence. Even if the fact stood alone, and were sufficiently established, it would, in the judgment of Sir George Hay,(*a*) and according to the decisions of these Courts, go far to make out a case of adultery.(*b*)[1] The second se-**[139]**-paration of the wife from her husband, without a cause, tends also to the same conclusion. I cannot, upon the whole view of the case, arrive at any other decision than what was taken by the Court below, and I therefore affirm the sentence and remit the cause.

In regard to the bill of indictment found against Nickless, it does not appear on whose evidence it was found: it might have been on the evidence of the party herself, or on that of her paramour. I fully concur in the case of *Maclean* v. *Maclean* upon this point (2 Hagg. Ecc. Rep. 601); and on reference also to the cases there cited,(*b*)[2] I am satisfied that I adopted the right course in not postponing the hearing of this cause. Even if the witness had been convicted of perjury, and if Mrs. Kenrick had been a witness on the trial, I should feel very great hesitation in holding that the conviction could be received in evidence in this suit.

Sentence affirmed.

(*a*) See *Eliot* v. *Eliot* (cited in *Williams* v. *Williams*), 1 Hagg. Con. 302. In *Eliot's case*, Dr. Bettesworth, jun., held that there was a failure of proof. The husband appealed to the Court of Arches; and the Dean of Arches, Sir George Hay, reversed the judgment of the Consistory Court of London, and pronounced for the separation.

(*b*)[1] *Wood* v. *Wood*, Delegates, Nov. 25th, 1789, before Mr. Baron Hotham, Mr. Justice Buller, Mr. Justice Heath, Dr. Fisher, and Dr. Battine. This was a suit of divorce, by reason of adultery, brought by the husband against his wife originally in the Consistory Court of London. Nine witnesses were examined on the libel, and the cause was heard on the evidence of the plaintiff only. The Chancellor of London decreed for the separation. This sentence was affirmed upon the same evidence in the Court of Arches; and the cause in the Delegates was heard also upon the same evidence as in the two former instances. For the wife, it was argued—that the chief evidence relied on was Mrs. Wood's having been watched into a house of ill fame, called Hooper's hotel, in Soho Square, where she met M. D. several times. That a woman might be induced to go every length except the last, and if that last step were not proved there could be no proof of adultery.

Buller, J., said there were many cases in the King's Bench where the adultery was established on presumptive evidence; and damages given: and Dr. Battine observed that the sentence in *Eliot* v. *Eliot* in the Ecclesiastical Court was founded on the presumption arising from Mrs. Eliot having accompanied a man to a house of ill fame. Sentence affirmed. [From the MSS. of the late Dr. Swabey.]

See also the observations of Sir William Wynne in note (*b*) to *Timmings* v. *Timmings*, 3 Hagg. Ecc. Rep. 82. Also of Lord Stowell in *Loveden* v. *Loveden*, 2 Hagg. Con. 24-5. And see *Astley* v. *Astley*, 1 Hagg. Ecc. Rep. 719.

(*b*)[2] *Thurtell* v. *Beaumont*, 1 Bingh. 339; *Warwick* v. *Bruce*, 4 M. and S. 140; *Bartlett* v. *Pickersgill*, 4 East, 577.

SWIFT *v.* SWIFT, OTHERWISE KELLY. Arches Court, Mich. Term, 3rd Session, 1832.—In answers, a party, 1st, is bound only to answer to facts, not to his own motives, nor to his belief of the motives of another person: and 2ndly, where the plea avers ignorance of the real nature of a transaction by a party to such transaction and to the suit, the other party is, in his answers to such plea, allowed to state facts, inferring full knowledge thereof and acquiescence therein. A party is not bound to answer, when his answer would criminate himself, nor (as semble) when it would tend to degrade him.

[Referred to, *Redfern* v. *Redfern*, [1891] P. 148.]

This was a cause of restitution of conjugal rights promoted by William Richard Swift against Elizabeth Catherine Swift. The lady, at the commencement of the suit, being a minor, appeared by her guardian, and described herself as a spinster.

[140] The libel pleaded that Mr. Swift and Miss Kelly agreed to be privately married, and, in the third article, alleged that in order to effect a marriage at Rome, they by the advice of the Abbé de Sair, an ecclesiastic of the Roman Church, respectively, on the 24th of March, 1830, abjured the Protestant religion, received absolution, and became members of the Roman Catholic Church.

The fourth pleaded that, with the concurrence of Miss Kelly, a marriage licence was obtained from the cardinal vicar, and in pursuance of it Mr. Swift and Miss Kelly were, "in the afternoon of the twenty-fifth of March, 1830, in the apartments of the said Richard Swift, lawfully joined together in holy matrimony according to the rites and ceremonies prescribed by the Council of Trent, which is received and obeyed as law in the city of Rome."

The seventh pleaded that by the laws and customs of Rome the aforesaid marriage was good and valid to all intents and purposes.

The eighth, ninth, and tenth pleaded consummation of the marriage, and clandestine visits of Swift to the bed-room of his said wife both at Rome and at Naples.

An allegation, responsive to this libel, after pleading (in contradiction of the third article of the libel) in its own third article that W. R. Swift did not, as untruly alleged, apply to the Abbé de Sair for advice and assistance in respect to any proposed agreement of marriage between him and Miss Kelly with her knowledge or consent, nor communicate to her that he had so applied, nor any thing in respect thereof, further pleaded: that Miss Kelly never gave her consent **[141]** to the abjuration of her religion for the purpose of becoming a member of the Roman Catholic Church, neither did she ever, either in fact, or truly, or bonâ fide, or at all abjure the Protestant religion, nor receive absolution nor confirmation, nor were any penances enjoined upon or performed by her, nor did she ever do any other act whatever with her own privity and knowledge in order to become a member of the said Roman Catholic Church: that she has always been and still remains a member of the Established Church of England and Ireland. That W. R. Swift never did make any real and sincere abjuration of his religion, nor receive absolution or confirmation, nor were penances enjoined upon or performed by him according to the rites of Holy Mother Church of Rome: that, if he did in fact make a pretended abjuration of the Protestant religion and receive absolution, yet that such abjuration and all other acts relating to the same were not bonâ fide, but merely colourable, and for the purpose of fraudulently carrying into effect his intentions with respect to the said marriage: that Swift never did truly or bonâ fide become a member of the Roman Catholic Apostolical Church; that he was and still is a member of the Established Church of England and Ireland, and has never professed or been admitted a member of any other church or religion.

4. That no application was made to the Cardinal Vicar of Rome by W. R. S. for leave and licence to celebrate a marriage between him and Miss Kelly with her knowledge and concurrence (as untruly alleged); for that she did not at the time (i.e. on the 25th of March, 1830) entertain any intention or manifest by any declaration or act any intention of being united in marriage with **[142]** Swift, nor was she aware that any marriage was being had or celebrated, and that they were never joined together in holy matrimony or pronounced to be lawful husband and wife according to the rites and ceremonies prescribed by the Council of Trent, nor in any way whatever with her privity, knowledge, or consent. That between eight and nine of the evening of the 25th of March, 1830, she having gone up-stairs into one of the apartments of the Comtesse de Molandi (Swift's mother) by Swift's desire, found herein with him three persons—strangers to her: that she remained in the room for t

about five minutes, during which time one or two papers were presented to her, which she was requested to sign, and which she did without looking over the same, supposing them to contain the consent to her marriage to Swift on her coming of age; that after this she immediately returned down-stairs to her mother's apartments. That on the said occasion nothing was done by Miss K. save the signing of the said papers, nor did any thing further pass between her or any of the other persons then present than the giving her assent to such her signature in their presence as witnesses. That if any pretended ceremony of marriage did take place (as untruly alleged) the same was fraudulently practised, and without her privity, knowledge, or consent.

5. That Miss Kelly, feeling great uneasiness at having signed the said papers unknown to her mother, she, a few days afterwards, communicated the same to her: that Miss Kelly remained in entire ignorance that any ceremony of marriage had taken place on the evening of the 25th of March until some days afterwards, when, having accidentally met Swift, she told him that she had informed **[143]** her mother what she had done on that evening, and he then, for the first time, acquainted her that a marriage had been on the 25th celebrated between them, and added, "that he considered her as his wife:" that Miss K. denied that any ceremony of marriage had taken place between them, expressed great indignation at his conduct, and that she felt assured that it would not be considered a valid marriage, and that she would hold no further communication with him.

The twelfth pleaded that William Richard Swift did not immediately after the said pretended marriage, or at any other time subsequently, or at all, retire to the bed-chamber of the said Elizabeth Catherine Kelly; nor was the said W. R. Swift ever admitted into her bed-chamber, nor did any sexual intercourse ever take place between them.

The allegation consisted of fifteen articles; but the other articles are not deemed material for the report for which the above articles are printed.

The allegation was opposed.

Trinity Term, 4th Session.—Phillimore and Dodson for Mr. Swift. The allegation, as far as it denies the facts or the law, as pleaded in the libel, or as far as it sets forth relevant facts, is not opposed. The third article is the most objectionable, viz. that Miss Kelly (as she is described) never did "either in fact, or truly, or bonâ fide, or at all, abjure the Protestant religion, nor receive absolution." The Court cannot inquire as to the feelings of conscience in a party, the words "bonâ fide" seem as if the other side distrusted their own case. It is of no importance of what religious persuasion the lady now **[144]** is: she must be taken to be, for the purposes of this case, of the creed she professed at her marriage. It is not now competent to her to explain away her own act. Again, it is pleaded that her abjuration was not bonâ fide: how can that averment be proved?

The King's advocate and Lushington contrà, were stopped by the Court.

Per Curiam. I am at a loss to know what part of this allegation requires to be reformed. It is admitted to be in part admissible. The allegation is contradictory as to the law, as pleaded in the libel, and also states the facts differently. Each party states the circumstances in their own way; and is entitled so to do.

Allegation admitted.(*a*)

Mr. Swift's answers to the third, fourth, and fifth articles of the allegation were as follow:—

[145] 3. Respondent admits "that, by error, it is in the libel alleged that to

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(*a*) Trinity Term, By-Day.—On the second session of this term an application had been made to the Court for the depositions taken at Rome upon the libel to be inspected by the registrar in order to ascertain whether the interrogatories had been administered, there being a suspicion on the part of Miss Kelly's advisers that they had not been. This application had been refused: and the inspection was now moved for again, in order that the interrogatories, if found not to have been, might be, administered on the requisition which would issue to take evidence upon the defensive allegation.

Per Curiam. No blame attaches for the repetition of this motion: but it would be extremely dangerous for the Court to grant it. It is right for the proctor to do what he thinks will properly promote his client's interests, or vindicate his own diligence: but I must reject the motion.

carry into effect the agreement (as to the marriage) he, in the beginning of March, 1830, applied for advice and assistance to the Abbé de Sair, and says that it was to the Abbé Pifferi to whom he so applied, and that the application was made with the knowledge and consent of E. C. Swift (Kelly); and that he informed her of it and what had passed. That respondent denies that E. C. S. never gave her consent to the abjuration of her religion and becoming a member of the Roman Catholic Church, and says that she did in fact, and, as he believes, in the form and manner required by the laws of Rome, abjure the Protestant religion, and that she received absolution and confirmation as was required on that occasion, but whether she did so truly and bonâ fide he knows not to answer: that penance was enjoined upon her (and upon him) but was not enforced, and consequently not performed; and he believes that she did all such acts as were necessary in order to her becoming a member of the Roman Catholic Church; and that all the acts which were done were voluntary, and done with her entire privity and knowledge, and that she was by competent authority admitted a member of the Church of Rome. Respondent submits to the law and the judgment of the Court that he is not bound to answer whether the abjuration he made of his religion was real and sincere; but he says that he did make that abjuration in the form and manner prescribed by the ecclesiastical authorities at Rome, and that he did receive such absolution or confirmation as was necessary in order to his being truly and bonâ-fide admitted a member of the Roman Catholic Church."

[146] 4. "That the application to the cardinal vicar by respondent for leave and licence to celebrate a marriage between him and E. C. S. was made with her full concurrence and knowledge; and that until the same was obtained he personally and almost daily communicated to her the result of his application and his hopes of success; and that she entertained and declared an intention and desire of being united in marriage with respondent; that she asked him who were to be the witnesses to the marriage, and requested they might not be Englishmen whom she knew. That shortly previous to the marriage he declared to her that, although she had repeatedly promised and consented to be married to him, yet if she repented that she had done so, and did not from her heart wish to be married by a Roman Catholic priest after previously abjuring her religion, she was entirely at liberty to retract her promise, but she of her own free accord declared her desire that her marriage should be so celebrated: and on the 25th of March, 1830, they were joined together in holy matrimony, and pronounced lawful husband and wife; and he believes and submits to the law and judgment of the Court that they were so joined according to the rites and ceremonies prescribed by the Council of Trent: and he declares that E. C. S. was fully aware and perfectly understood that by the ceremony which was performed she and respondent were so married to each other: and respondent admits that according to the English mode of reckoning the same took place at a later hour than between eight and nine in the evening, namely, at about ten, but according to the mode of reckoning observed at Rome, the same took place at five. That E. C. S. freely and voluntarily went **[147]** up stairs from the apartments in which she and her mother resided to the apartments in which respondent and his mother resided, and into his room; that she so went up knowingly and in consequence of the previous arrangement made with her concurrence and privity for the clandestine marriage of herself and respondent, and for the purpose of having the same then and there solemnized; that she there found the Abbé Ludovico Lepri, a Roman ecclesiastic of rank, specially appointed by the Pope, or cardinal vicar, who has the same power, to perform the marriage ceremony, and also Senors Mazio and Gregori, who attended as witnesses, whose persons, he believes, were entirely unknown to her; and says it was at her desire that strangers were witnesses: that she remained in the room for more than about five minutes, viz. for half an hour, or twenty minutes at the least; that two papers were successively, before and after the marriage, presented to her; one, her abjuration, which she calmly and deliberately read and repeated; that she was asked by Abbé Lepri or the witnesses, in the English or Italian language, if she understood what she read, and having declared that she did, was requested to sign the same; that the other document was the record of the marriage, the contents of which she also well knew and understood, and so declared, having been asked in Italian by the priest (Abbé Lepri), before the ceremony of marriage, if she knew for what purpose she attended, she answered 'Yes, perfectly!' and respondent positively denies that she signed the documents supposing they only contained her consent to her marriage to respondent on her coming of age; and also that nothing

was done on her part save [148] the signing of the documents, or that nothing further passed save giving her assent to such signatures: for that she well knew that the ceremony of marriage had been regularly and fully performed, that she answered distinctly the usual questions put to her by the priest, viz. whether she took respondent to be her wedded husband? She answered 'Yes!' She also received most willingly and without the slightest hesitation the marriage ring which respondent put on her finger, and afterwards she returned down stairs to her mother's apartments, and from thence retired to her own bed-chamber, where, in consequence of their said marriage, she on that night admitted respondent into her bed and to the rights of a husband, and the marriage was then and there consummated."

5. "Respondent does not know or believe that E. C. S., feeling great uneasiness at having signed the said two documents unknown to her mother, was thereby induced to communicate the same to her; but says that, after the marriage was had and celebrated, E. C. S. permitted him in a secret manner to go into her bed-chamber every night, and to remain in bed with her for several hours, and that one morning, about a week after the marriage, Mrs. Kelly having forced open the door of her daughter's bed-room, which door she was in the habit of securing by a string, there being no bolt or lock, the respondent in great haste escaped, as was agreed in case of alarm or danger of being discovered, out of the room by another door: and he believes that Mrs. Kelly, having seen or heard him leave the room, or having suspected that he had been therein, interrogated her in respect thereto, and she was thereby induced, as she told respondent the same morning, having [149] gone up to his chamber for that purpose, to make some confession that she had been clandestinely married to respondent, but concealed many circumstances as to the marriage, especially that witnesses were present: and he says that on the next night E. C. S. was compelled by her mother to sleep in a bed-chamber within her own room, for the purpose, as he believes, of preventing further sexual intercourse between them, notwithstanding which she constantly, and he believes without the intermission of one single night, continued to admit respondent through her said mother's bed-room, after she had retired to rest, and into her own bed-chamber. And respondent denies that E. C. S. was, at any time after the 25th of March, ignorant that any ceremony of marriage had taken place on the evening of that day, and that she was first informed thereof some days afterwards by respondent. He also denies that she ever denied to him that any ceremony of marriage had taken place between them, or expressed any indignation at his conduct: he also denies that she felt assured that it would not be considered as a valid marriage, and would hold no further communication with him, or that she expressed herself to that effect; but he says that some time after the marriage came to Mrs. Kelly's knowledge, and in consequence of her representation, E. C. S. inquired of respondent whether the marriage was valid, and respondent assured her that it was, and she was satisfied."

The King's advocate and Lushington in objection to the answers. The answer on the third article is not sufficient. Answers should be made available as evidence; if [150] they are not so framed, it would be better to avoid the expense and to waive them altogether: these answers seem framed with a view expressly to defeat all information. If a fact be within the respondent's knowledge, he must answer directly to it; if he has not an actual knowledge of the fact, then he is bound to answer as to his belief or disbelief. There may be exceptions to this rule, as where the answer would subject the respondent criminally, and perhaps some other exceptions, but these considerations do not now apply. In this case a marriage is pleaded in the libel to have been solemnized at Rome; that all the formal requisites were attended to, and that the marriage is valid. On the other hand, it is alleged that, if the abjuration of the parties were not bonâ fide, the marriage would be invalid, unless contracted by parties of the Roman Catholic Church. Our case is that the marriage is null and void from collusive fraud on the marriage-laws of Rome. The gist of the question depends on the abjuration being on both sides sincere: Swift, in his answer to the third article, avoids the plea on this point: as to Miss Kelly's abjuration of the Protestant religion, whether true and bonâ fide, he says "he knows not to answer:" this is invariably objectionable: of what use to the other party or to the Court is such an answer? It is resorted to for the purpose of evasion. The party is bound to answer to his belief or disbelief. Next, as to Swift himself, "he submits to the law, &c. that he is not bound to answer." By what law is he to ask for protection? If he has committed an offence in respect to his marriage, it is against the laws of

Rome, and he ought to have so stated. He declines to answer as to himself, first, whether **[151]** he became a bonâ-fide member of the Church of Rome; secondly, whether he is or is not still a member of the Church of England.

The answer to the latter part of the fourth article, and to the fifth, are irrelevant and redundant. The matter thrown in is not requisite for the purpose of explanation, but to prevent those answers being read by us unless we make evidence against ourselves. In *Oliver and Tuke* v. *Heathcote* (2 Add. 35-42) the principles applicable to answers are laid down: "Much of answers, perhaps usually the most stringent part, consists of matter which is not capable of being put in plea. All such matter, then, is admissible in answers, and yet is that to which the other party has no opportunity of cross-examining. How, for instance, could the motives by which these parties were actuated, as they insist in assenting to, or rather in not dissenting from, the purchase of this estate by the deceased, be put in plea? or, if put in plea, who was capable of deposing to them? But were the respondents bound to admit the fact without an accompanying statement of these motives?" That was a testamentary suit, but the same doctrine applies in a matrimonial suit. An explanatory and extra-articulate answer therefore is to be restricted to what cannot be in the knowledge of any one but the respondent: still he is not to go out of the plea to answer to averment of facts, which, if true, may be pleaded and proved by witnesses.(*b*)

[152] Phillimore and Dodson contrà. Two grounds of objection are taken; 1st, that the answers are defective; 2dly, that they are redundant. How can it be expected, when the statements on the libel and on the allegation as to the validity of the marriage in question are so opposite that the answers on that point will alone suffice? Mr. Swift is required, by the argument on the other side, to answer as to the abjuration of his wife being bonâ fide: but how can his conscience be so taxed? He cannot answer expressly as to the motives of another party. Again, as to himself: if his answer were framed in the manner argued that it should be, it might impute perjury to himself: and supposing that he could not be punished in this country for such perjury, yet his character would be ruined; and at Rome at least it seems admitted that he might be punished. Any fuller answer as to himself would lead into an inquiry of his religious creed. But the law of England constrains no man to accuse himself: the great principle is, "nemo tenetur se ipsum accusare." And no human tribunal is entitled to ask a man whether bonâ fide he is of this or that religion; it is a question between God and himself: such a question was never pressed, even by the Court of Star-Chamber. The objection on the ground of redundancy cannot, we submit, be sustained; consummation is part of the res gestæ establishing her cognizance of an actual marriage.

Judgment—Sir John Nicholl. The present question relates to objections taken to the answers of Mr. Swift in a cause instituted by him for restitution of conjugal **[153]** rights. On the part of the alleged wife—a minor at the commencement of the suit—acting by her guardian, it has been pleaded that the asserted marriage not being conformable to the laws of Rome, where it was celebrated, is null and void. The cause therefore has assumed the shape of a suit of nullity of marriage.

In 1829 the parties, viz. Miss Kelly, then about nineteen, with her mother, and Mr. Swift and his mother, met at the same hotel in Florence. Mr. Swift paid attentions to Miss Kelly, which were not altogether rejected: he was permitted to apply to the mother, but she refused her consent. The two families removed to Rome; and it is alleged by Swift that a secret marriage there took place; and the validity of this asserted marriage at Rome is the question at issue. The wife denies her consent to any fact of marriage; but an attachment, a willingness on her part to be united to Swift, cannot be denied, because she was ready to sign a promise to marry him on her coming of age. Consummation is strongly alleged in the libel, but it is also strongly denied by the other party.

In order to obtain a valid marriage at Rome it is necessary that there should be a solemn renunciation of the Protestant religion, and that both parties should confess themselves to have become Roman Catholics, and that certain other ceremonies should be gone through. This is the husband's statement; and the wife pleads that such

(*b*) The objection taken to the answer upon the 11th article corresponded with the objection to the third article, and it was admitted would be entirely governed by the decision upon the third answer.

renunciation must be bonâ fide, but that in the present case it was only colourable and formal, was therefore of no avail, and could not confer any validity on this pretended marriage. Is then Swift bound to answer whether the renunciation and all the circumstances accompanying it were bonâ fide on his part and on the part of the lady?

[154] The Court must recollect that by the common law of England no party is bound to furnish evidence against himself. In the Ecclesiastical Court and in the Courts of Equity, however, a party is bound to answer under some limitations: but I apprehend that neither the Ecclesiastical Court nor the Courts of Equity would be disposed to carry answers further than precedents sanction: and I can find no precedent compelling a party to answer as to secret intention and meaning: he is bound only to answer as to facts. In this case Swift does aver that all the requisite forms and ceremonies were gone through. Must it not be presumed that they were gone through bonâ fide? The bonâ fides is to be inferred and deduced from the facts themselves. It has been held that a party is not bound to answer so as to criminate himself, however remotely, so as even to form a link in a chain of proof. This is the doctrine of these Courts in criminal suits; and in a civil suit, as, for instance, in a suit for separation by reason of adultery a party is not bound to answer those articles which involve an express or implied charge of criminality.(*a*) And this is the doctrine of the Court of Chancery, with respect to witnesses: it was so held there in *Paxton* v. *Douglas* (19 Ves. 225), in which Lord Chancellor Eldon expressly states that he had looked into all the cases on the point. The decision in that case shews that a witness is not bound to criminate himself; à fortiori, a party is not bound to answer where a witness is not: and my impression is that a party is entitled to protection, not **[155]** only if the answer may tend to criminate, but even to degrade, him. I cannot, then, think that in this or any other Court Mr. Swift can be called upon to answer what were his meaning and intention, in his own private conscience, and what was passing in his mind upon the occasion of these forms: the answers must be to the facts, and upon these the Court will have to draw its own conclusion.

Suppose a party abjures Catholicism as a qualification for an appointment, can you enquire further than whether the forms prescribed by law have been observed? The party could not, I apprehend, be afterwards called upon under any proceeding to state upon oath whether his abjuration was bonâ fide—whether he was not still a Catholic? If Mr. Swift were to admit a mental reservation in the solemn acts connected with this marriage it would be to accuse himself of a fraud, nay, almost of perjury. Would not such an admission expose him to punishment? At least, if afterwards he should ever shew himself at Rome, it may be doubtful whether his person would be very safe: and in England such an admission would certainly, and at all events, tend to degrade him. I cannot then compel Mr. Swift to answer to his meaning and intention: nor can I oblige him to answer as to his belief of the mental intention of Miss Kelly: he is bound to answer as to his belief—but of what? of facts, not as to what was passing in the mind of another person.

In respect to the objection to the answer on the fourth article, I was inclined, at the first view, to think that the answer was redundant: but upon further consideration of the latter part of that article, and also of what is pleaded in the fifth **[156]** article of the wife's allegation, I have arrived at a different conclusion, and my opinion is that it is open to the husband, in denial of her allegation, to state in his answers, as the ground of such denial, conduct at the time inconsistent with what she now alleges, inter alia, that the marriage was consummated, and that he was constantly admitted to her bed, though clandestinely, both before and after the alleged communication to the mother—Mrs. Kelly—and until the intercourse was stopped: the statement in his answers is his causa scientiæ, and that on which his disbelief of the averment in the allegation is founded.

The objection to the eleventh article is of the same character as to the third; and is therefore disposed of. On the whole, I am of opinion that the answers are neither deficient nor redundant.

(*a*) See *Schultes* v. *Hodgson*, 1 Add. 111. *Durant* v. *Durant*, ibid. 114.

THE BISHOP OF ELY *v.* GIBBONS AND GOODY. Arches Court, Hilary Term, By-Day, 1833.—Upon an application for a prohibition propter defectum triationis, the Court of Arches had been enjoined from proceeding as to a custom till an issue was tried, the record of the judgment setting forth a verdict finding a custom for the parishioners to repair the chancel is conclusive evidence in the Ecclesiastical Court of the existence and validity of the custom.

[Referred to, *Morley* v. *Leacroft*, [1896] P. 93; *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 10.]

On appeal from Norwich.

This suit commenced in the Episcopal Consistorial Court of Norwich, and was originally a business of the office of the Judge promoted by the churchwardens of Clare, Suffolk, against the Bishop of Ely, impropriator of a portion of rectorial or great tithes of that parish, for not repairing the chancel of Clare church.

Articles on the part of the promoters were admitted.

The bishop, in his answers to these articles, admitted that by law parsons or rectors of pa-**[157]**-rishes are bound to sustain the chancels of their parish churches, save as to exemptions by special composition, custom, or otherwise. He also admitted that, among the hereditaments, &c. of which, as appertaining to the Bishop of Ely, he was in possession, was a portion of tithes arising within Clare parish: that such portion heretofore belonged to, and was from time immemorial (as he believed) in the possession of, the dissolved religious house of St. John the Baptist at Stoke near Clare; that it became vested in the Crown, and was granted by 42 Eliz. to the see of Ely.(*a*)[1]

An allegation on behalf of the Bishop of Ely was afterwards admitted, which—after setting forth that neither the Bishops of Ely nor their lessees had ever exercised any right in, or enjoyed any advantage from, the chancel, either in respect of pews, burials, or monuments;(*b*) and that the benefits therefrom had always been enjoyed by the vicar and churchwardens of the parish—pleaded, that "from time immemorial the chancel had always been repaired by the churchwardens out of certain rents, or by means of rates equally levied on the parishioners for the repairs of the church including the chancel, to which rates the lessees of the portion of tithes, appertaining to the see of Ely within Clare parish, **[158]** were assessed, and had paid, in respect of such tithes, in common with the other parishioners; and that in no instance, except the present, had any proprietor or his lessee of such portion of tithes been called upon to repair the chancel."

The answers of the churchwardens to this allegation were objected to; and being pronounced sufficient, that decree was, on appeal, reversed by the Court of Arches, and the cause retained. Further answers were given in, and evidence was taken on both sides, and the cause was set down for hearing.

On the second session of Hilary Term (28th of January), 1831, the registrar of the Court of Arches alleged that he had been served with an order from the Court of Common Pleas, setting forth that a rule nisi had been granted to shew cause why a prohibition should not issue to prohibit the further proceedings in the Court of Arches, and enjoining it to stay proceedings in the mean time.

This rule for a prohibition nisi, generally, was obtained at the instance of the churchwardens. On the 15th of April the rule was made absolute.

On the 3rd Session of Trinity Term (12th of June), 1832, the registrar of the Arches alleged that the writ of prohibition had been amended by limiting the prohibition to the trial of the custom.(*a*)[2]

On the 1st Session of Michaelmas Term, 1832, the Court, upon the application of the proctor for the churchwardens, directed the hearing of the **[159]** cause to be suspended until the question of the custom had been tried.

(*a*)[1] From that period to the present the see of Ely had granted leases of such portion of tithes at the reserved rent of 10l. These leases had been generally renewed about every seven years upon payment of a fine.

(*b*) The respective rights of the impropriator, the vicar, and the parishioners in, and the authority of the ordinary over, these matters in the chancel were much considered in the case of *Rich* v. *Bushnell*, which is printed below, vide p. 164.

(*a*)[2] This amended rule was obtained at the instance of the churchwardens on their payment of the defendant's costs.

On the 8th of January, 1833, the trial came on before Lord Chief Justice Tindal and a special jury, when a verdict was given—that in the parish of Clare there is and hath been from time immemorial a certain ancient and laudable custom for the parishioners to repair the chancel. Judgment was signed on the 30th of January: and the churchwardens were condemned in the costs attending the application for the writ of prohibition.

On the 4th Session of Hilary Term an office copy of the judgment was brought into the registry of the Court of Arches; and on the by-day the cause stood for hearing.

After the pleadings had been opened the Court said: there is in this case a decision at law that from time immemorial the parish of Clare has repaired the chancel of its own parish church.

Phillimore and Lushington for the churchwardens. The jury have decided on the fact, not on the law; and the question now is whether their finding can exonerate the impropriator of the great tithes or his lessee from the repair of the chancel, which is imposed upon them by the general law. The question of the legality of such a custom is most important, and belongs to this Court.

Per Curiam. A custom, which is found by a jury to be imme-**[160]**-morial, will here be considered valid: a composition or agreement will be presumed.

Argument resumed. The mere existence of the fact, that there is a particular custom, is not sufficient to establish the validity of the custom. Many customs, or rather usages—for the word custom implies the notion of legal validity—may prevail which are not legal: e.g. that tithes shall be assessed to the church-rate, instances of which seem to have occurred in this parish of Clare: but however ancient such an usage may be, we apprehend that it cannot be sustained, whether the parsonage and tithes be in lay or spiritual hands. The whole of the parsonage, be the possession in whomsoever it may, is subject to the repairs of the chancel: all persons who are in the reception of the rectorial tithes are liable in this respect: their relative proportions may be settled among the parties. If the fabric of the chancel be very solid it may not require repair within the memory of man: but though there is an absence of proof that the person, who is de facto liable to repair the chancel, has ever been called upon to repair it, that will not exonerate him; his liability to make the repairs when they are required will still remain.

Per Curiam. The finding of the jury is that the parishioners have repaired the chancel from time immemorial: whereas the argument goes on the assumption that no repairs have been done. If that had been the case, the jury could not have found that the parishioners repaired: and the general law would take place.

[161] Argument resumed. Where it is shewn that the chancel has been repaired by the parishioners at large out of a church-rate, they may have taken a burthen upon themselves which seems to admit a liability, but it is different where the repairs have been paid for out of a church estate. We know of no authority, nor of any instance, where the parishioners are bound to repair the chancel, except in London: but in London the custom arose from the land in the different parishes being covered with houses, whence also grew that other custom prevailing in this city—that of the appointment of both churchwardens by the parishioners. Ignorance may often lead parishioners to repair the chancel; but that will not bind them when better informed. 1 Burn, Ecc. Law, tit. Church, s. 6 (Repairs). Prideaux, p. 74. Gibson, vol. 1, p. 199. Lyndw. p. 53. *Williams* v. *Bond* (2 Vent. 238), *Pence* v. *Prowse* (1 Ld. Ray. 59), *Hawkins' case* (5 Mod. 390).

Per Curiam. The general impression in *Hawkins' case* seems that the parishioners may be bound to repair. Is there any case where it has been held that a custom for the parishioners to repair the chancel is illegal?

Dr. Lushington. None that I am aware of. *Hawkins' case* must be taken with reference to all its circumstances. We submit that there is no authority by which it can be held that great tithes are exempted from a portion of liability in the repairs of the chancel.

[162] The King's advocate and Addams for the Bishop of Ely. We are surprised to find the case argued, the hearing of the cause having been suspended by a prohibition on the other side. The fact that there is "a good and laudable custom" for the parishioners of Clare to repair the chancel is now established by a verdict. How can this Court take the question into consideration? We admit that, generally, the lessee of the great tithes is bound to keep the chancel in repair; but there may be a special

exemption: and when a custom exists for the parishioners to sustain the chancel, they may be compelled so to do. It is however said that a custom may have existed, and yet be invalid; and this perhaps may be so in a case of very gross manifest invalidity. *Hawkins' case* has been remarked upon by the Court: the other cases do not affect the question.

Judgment—Sir John Nicholl. This was originally a suit by the churchwardens of Clare, in the diocese of Norwich, against the Bishop of Ely, as impropriator of a portion of the great tithes, to compel him to repair the chancel. The bishop in defence pleaded that he never had repaired the chancel, that he had no enjoyment of it, nor emolument from it, either as to seats, or burials, or monuments; but that the rights in respect thereof had always been exercised by the vicar and churchwardens of the parish, and that from time immemorial the parishioners had by custom repaired the chancel. To try this latter defence the churchwardens moved for a prohi-**[163]**-bition, which accordingly issued to this Court; the question of custom has been tried in the Court of Common Pleas, and a verdict given that the parish is bound to repair the chancel: this verdict is accompanied with costs. In trying the question of custom at common law it was open to the churchwardens, I apprehend, to shew that there was no such custom, but that the expense of the repairs, as they were wanted, had been defrayed out of the rents of estates vested in the churchwardens for such a purpose. However that may have been, the finding of the jury is in general terms, and in favour of the defendant, the Bishop of Ely.

This seems to me quite decisive of the question. It is not open to this Court now to investigate the custom whether it be legal or not. The finding of the jury in this case sets the matter at rest; and so I think it must have been considered, because on the part of the parish the proceedings here have stood over from time to time until the result at common law should be ascertained: and upon the verdict being given it certainly was the expectation of this Court that the churchwardens would have proceeded no further in the suit. Whatever then may be the general law and primâ facie presumption in regard to the repairs of a chancel, still they are liable to be controlled by special custom: and I can see no reason why such a custom, as has been found, should not exist in Clare parish: in London such a custom exists generally: that indeed may be on peculiar grounds; but the inference from the authorities upon the point is that such a custom may also exist in country parishes. It turns out then that these **[164]** proceedings have been an attempt of the parishioners of Clare to throw a burthen from themselves upon the impropriator; and they prove to have been unfounded Under these circumstances, I am of opinion that the impropriator is entitled to be dismissed with his costs both in this Court and in the Episcopal Court of Norwich.

RICH *v.* BUSHNELL, Clerk.(*a*) Trinity Term, 4th Session, 1827.—The lay rector is not entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary, nor is he entitled to a faculty for such purposes without laying before the ordinary such particulars as will afford the vicar and parishioners an opportunity of judging of it, and satisfy the ordinary that such vaults or tablets will not interrupt the parishioners in the use and enjoyment of the chancel: nor has the vicar an absolute veto, though he may shew cause against the grant of a faculty. Semble, that the consent of the lay rector must precede the leave of the ordinary for the construction of a vault or the erection of tablets in the chancel.

[Referred to, *Rugg* v. *Kingsmill*, 1867, L. R. 1 Adm. & Ecc. 347; *Winstanley* v. *North Manchester Overseers*, [1910] A. C. 10.]

The present case came before the Court by letters of request from the Chancellor of Sarum, under which a decree with intimation issued, "calling upon the vicar, churchwardens, parishioners and inhabitants of the parish of Beenham, in the county of Berks, to shew cause why a faculty should not be granted to Sir Charles Rich, Baronet, lay rector of Beenham and sole owner and proprietor of the chancel of the parish church thereof, to make a vault for burials in the chancel for himself and his family, and to erect tablets against the wall to the memory of himself and of his family."

An appearance was given for the Reverend John Bushnell, the vicar; and an act

(*a*) See the preceding case, p. 157, in notis.

on petition entered into, wherein it was alleged, on his behalf, that he was patron and incumbent of Beenham, possessed the glebe land and tithes of beans, hay, &c.; that he had a pew in the chancel which he repaired; that no one can be buried, or affix a [165] tablet, in the church without his leave, and for which he is entitled to a fee.

The act on petition is more fully stated in the judgment: and the question raised in this case was discussed upon the law applicable to the facts laid in the act on petition. There was no affidavit, nor exhibit on either side.

Arnold and Addams for the vicar. No one can properly be buried in any part of the church without the leave of the incumbent, Gibson, 453. "Which right of giving leave (says Gibson) will appear to belong to the parson, not as having the freehold, at least not in that respect alone, but in his general capacity of incumbent, and as the person whom the ecclesiastical laws appointed to judge of the fitness or unfitness of this or that person, to have the favour of being buried in the church." On these grounds it is contended that the leave of the incumbent is necessary, and that the right to consent, when the rector is a lay impropriator, resides in the vicar: for the common-law notion, that the right must belong to him in whom is the freehold, is incorrect, and would prove too much; since, as the freehold of the church-yard is in the rector, his right would apply also to burials in the church-yard, whereas the right of the parishioners to burial in the church-yard is notorious. The right, then, of consent depends not on the freehold, but belongs to the incumbent, be he rector or vicar, in his character and capacity of incumbent—the person who has the general superintendence of all divine offices, and the judge of the fitness and propriety of what is done both in church and chancel. The rector's property in the chancel is much qualified, [166] is subject to the use of the vicar and parishioners, and to the discretion of the ordinary as to the offices to be performed therein; the vicar has a pew, which he repairs, possibly in right of the tithes (ordinarily rectorial) with which he is endowed. But the question of property does not affect the matter; we rest the vicar's case on the principle that he is the judge of the fitness of interments. If his consent be necessary to a single interment, à fortiori to this faculty which provides for numerous interments.

As to the tablets, it is clear that the ordinary's leave is necessary, and we contend that the consent of the incumbent is a preliminary requisite: he is the best judge of what would occasion deformity or injury to the fabric, or hindrance to himself or the parishioners in the performance of divine offices: and, further, the faculty should not be a general permission to erect such tablets for all persons buried in the vault, but should be limited to a particular tablet; as to which the vicar and ordinary might exercise a sound discretion in granting or refusing their consent and sanction, on a statement setting forth the situation and dimensions of each.

Per Curiam. The application is for tablets, not monuments.

Argument resumed. The vicar is entitled to a fee for his consent, and may stand on his own price—*Dean and Chapter of Exeter's case* (Salkeld, 334. 1 Burn, tit. Burial, p. 273). *Maidman* v. *Malpas* (1 Hagg. Con. 208). The vicar, then, is entitled to a reasonable fee.

[167] Per Curiam. Who is to be the judge of the reasonableness of the fee, for here it is not claimed as a custom?

Argument resumed. The ordinary is guided by the usage in neighbouring parishes.

Jenner and Lushington for the impropriator. Is the vicar such an incumbent as is intended by Gibson? A vicar is only entitled to what the endowment may give: he has a qualified species of freehold in the body of the church and in the church-yard, but the perpetual curate has not; and the vicar stands in the same relation to the chancel that the perpetual curate does to the body of the church or church-yard. There are no direct or satisfactory authorities as to whether the consent of the lay rector, or of the spiritual person having the cure of souls, is the consent required for such erections in a chancel. The present question is not whether the lay rector can give consent to other parishioners and take a fee, but whether he is entitled to a faculty for himself and family. It has been contended that the consent of the vicar, as incumbent, is necessary; but he does not contribute to the repair of the chancel: as possessor of a pew, if his rights are interfered with, he is entitled to object, but here his general rights only are said to be infringed. The real ground of opposition is the non-payment of the fees: he must shew a fee is due. *Maidman* v. *Malpas* went on that principle.

In *Littlewood* v. *Williams* (6 Taunt. 277) it was held that no fees were due to churchwardens unless upon immemorial custom, a case which **[168]** it is almost impossible to meet with or to prove. If the fee is not established by custom, the vicar cannot sue for it here; and even if it were, it is doubtful whether he could.

It cannot be said that this faculty would be injurious to the parishioners, for the repairs are on the impropriator: he, then, is the best judge of the fitness of burials and tablets therein, and the freehold is in him. In *Francis* v. *Ley* (Cro. Jac. 367) it was held that the law gave the right of consent to the parson, because the freehold and soil are in him.

Per Curiam. Whether the ordinary can grant a faculty in respect of the chancel without the consent of the lay rector is one question; but whether the lay rector can make a vault in it or put up a tablet without the sanction of the ordinary (and that, according to the rejoinder in the Act, seems to be the claim here) is another question.

Argument resumed. The case of *Francis* v. *Ley* has been commented upon by Prideaux (Prideaux on Churchwardens, p. 78), who ascribes the power of granting leave to be in virtue of the freehold. But we do not entirely rely on that case: we admit the expression is too wide, for the rights of the owner of the soil are subject to the discretion of the ordinary, and very properly, since the lessees of the great tithes, who are often mere farmers, are in fact the rectors, and require the control of the ordinary. But it is clear that neither the ordinary nor the vicar could authorise burials in the chancel without the leave of the lay rector. If the vicar is entitled to a fee, **[169]** the grant of the faculty would not preclude his demand for it.

Per Curiam. And possibly if his consent to interments in a vault in the chancel were necessary he might refuse it till his fees were paid.

Argument resumed. The vicar is not entitled to a fee for the erection of tablets: his consent may be dispensed with. The ordinary is the first judge on such occasions, and will grant the permission if the consent is improperly withheld. 1 Burn, tit. Church, p. 372-3.

Judgment—Sir John Nicholl. The act on petition alleges, on the part of Sir Charles Rich, "that he is lay rector, and as such sole owner and proprietor of the chancel, and bound to repair the same;" and he has cited the vicar and others to shew cause "why a faculty should not be granted to him to make a vault for burials, and to erect tablets in the chancel, for himself and his family." No plans, no statement of the dimensions, nor of any particulars are exhibited: nothing to shew the extent of the vaults or tablets, or the manner in which they are to be erected.

On the other hand it is alleged, on the part of the vicar, "that he is patron and incumbent of Beenham; that the benefice is a vicarage; that he possesses the glebe land and tithes of beans, peas, vetches and hay; that Sir Charles Rich is not sole owner of the chancel, but that, as vicar, he (Rev. J. Bushnell) possesses a pew in the chancel which he is bound to repair; and that the chancel is small." He does not deny that Sir **[170]** Charles Rich is the lay rector, and bound to repair, nor does he suggest that, as vicar, and as proprietor of part of the tithes, he contributes in any degree to these repairs. He further alleges "that no person can be buried in the church or in any part thereof [it is not very clear whether he means to include the chancel] without the consent of the incumbent, and that the vault for which a faculty is prayed ought not to be made without the consent of the incumbent;" and, further, "that tablets ought not to be affixed in the church [under which term, I presume, he means to include the chancel] without consent of the incumbent; who is to judge in each particular case whether it will occasion inconvenience or deformity, or be otherwise improper:" and he finally submits that "for his consent he is entitled to a reasonable payment." For Sir Charles Rich it is replied "that, being the lay rector, he is the sole proprietor of the chancel, and entitled to the faculty."

These are the sole grounds stated on either side. One asserts that he has a right to the faculty; the other, that he has a right to refuse his consent; and if he consents has a right to a reasonable payment for such consent. The question then is which, or whether either, party has the right; or whether there are not two other parties, namely, the parish and the ordinary, whose rights are concerned.

Though the freehold of the chancel may be in the rector, lay or spiritual, as by a sort of legal fiction the freehold of the church is in the incumbent, and though the burthen of repairing the chancel may rest on such rector, yet the use of it belongs to the parishioners for the decent and convenient celebration of the holy communion,

[171] and the solemnization of marriage; and, by the rubric, that portion of the communion service, which forms a part of the regular morning service, is directed to be read from the communion table which is appointed to stand in the body of the church, or in the chancel.(*a*) If, indeed, the churchwardens and inhabitants have no right nor interest in the question, why are they cited?

In the next place, the consent of the ordinary is necessary; he is the protector of the rights not only of the existing parishioners, but of succeeding inhabitants, and is bound to take care that neither their present nor their future convenience and accommodation are unduly prejudiced. If the rector is the sole proprietor and has this absolute right, why does he apply for a faculty at all? I am therefore of opinion that the lay rector is not entitled as a matter of right either to make a vault under, or affix tablets on the walls of, the chancel: and if the ordinary is to exercise any discretion upon the grant with a view to the protection of the convenience of the parish, that discretion cannot be soundly exercised without a plan, dimensions, and particulars on which the Court can form a correct judgment. A vault for burying in the chancel is altogether objectionable, though in many parishes such a practice has too much prevailed. Burying in the church or chancel, particularly where they are small, is inconvenient and offensive: it is an interference with the use of the building, is happily getting much out of use, and ought to be discouraged. In this very case it may interfere with the convenient occupation of the vicar's pew.

[172] Whether the faculty ought to be granted at all may be very doubtful; but at present no particulars are stated to warrant such grant, or to enable the Court to form any judgment on its propriety or expediency. In other respects, the application coming from the owner of the freehold undoubtedly comes in as favourable a shape as possible; unless indeed the vicar can convince the Court that his consent must precede the leave of the ordinary. If any other parishioner wanted to make a vault in the chancel the consent of the lay rector must be had; he must be called before the Court not merely because the freehold is in him, but because the burthen of repair is upon him.

The fixing a tablet against the wall is far less objectionable; and indeed is rather to be favoured. The necessity for the leave of the ordinary is admitted; and consequently plans and dimensions must be submitted to guide his judgment. That the vicar is entitled to shew cause against such leave being granted, if he shall so be advised, is also admitted. But what cause does the vicar shew against the faculty that is prayed? He does not object to the tablet as inconvenient to the parishioners, or as injurious to the fabric, or even detrimental to its beauty; but he states that he is the sole judge of that, and that his consent is to be purchased by a reasonable payment. It may be doubtful whether the consent of the vicar is necessary to the construction of a vault, or to the affixing of a tablet even in the body of the church, or whether he has in such a case a claim to a fee unless when established by a special custom; but that is not the question here: here, the question relates solely to the chancel. Even if the consent of the vicar to the actual interment of bodies were [173] required, or his right to a fee in such case were conceded, it would not necessarily follow that a faculty for the construction of a vault, or the erection of a tablet in the chancel, must be refused unless he consented to the grant. The grant of the faculty would not preclude the vicar from enforcing his fees if he were legally entitled to them.

That it belongs to the vicar of common right arbitrarily to consent or dissent in such cases seems to me extremely questionable. It is difficult to find out any principle upon which this right could appertain to him. The opinion of the vicar against the expediency of such a grant would have its due weight with the ordinary; but if the cause shewn by him be not something better than his mere will and pleasure, it will be insufficient to stay the issuing of the faculty: still more so, if his consent be matter of purchase and barter. If, as is stated in the act on petition, "he is to judge in each particular case whether it will occasion inconvenience or deformity, or be otherwise improper," that judgment must be formed, not "by a reasonable payment," but without money and without price. If the vault were allowed to be constructed and

(*a*) By the rubric before the present Common Prayer Book, the morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel, except it shall otherwise be determined by the ordinary of the place.

the vicar's consent to interments therein were necessary, he might object on proper grounds, such as that the party were not fidelis; but it cannot be tolerated that his decision, on the moral fitness of the individual to be buried in the chancel, should be guided by the amount of the fee paid. This strange notion of payment for consent seems to spread, and to meet with no unwilling assent in some quarters, whereas no fee of the kind is due of common right; it can only be due by special **[174]** custom, and the amount must be limited by the same custom. If such a custom could have a reasonable foundation it must at least be strictly proved, and this Court would not carry it one step beyond such proof; the introduction of such a practice would be most dangerous: and it would require very strong authority, much stronger than any I have heard cited in this case, to satisfy me that the vicar could, by custom, possess a right of refusing his consent to an interment in the chancel, à fortiori, to the grant of a faculty for a vault or a tablet, unless not a fixed but a reasonable fee is agreed to be paid.

Upon the whole, both parties seem to have mistaken their rights. The lay rector is not, on the ground that the chancel is repaired by him, entitled to a faculty without laying before the ordinary such particulars as will afford the vicar and parishioners an opportunity of judging of it, and as will satisfy the ordinary that what is proposed to be done may be carried into execution without interrupting the parishioners in the use and enjoyment of the chancel; in which case the Court would pay due attention to the application. On the other hand, the vicar has not a positive right of refusal, though he may very properly shew cause against the grant of the faculty by stating the grounds of his objection: but in this case he has not made out any legal ground of resistance.

Whether the parties choose to enter into the merits in order to shew that a faculty ought or ought not to be granted, is for their consideration. Vaults, either in the chancel or in the body of the church, are not, in my judgment, to be encouraged: they are far better made in the church-yard; yet, if all parties are consentient, the Court **[175]** may be induced to grant the faculty. Tablets, I repeat, stand on a much more favourable ground; and if shewn not to be injurious to the convenience, the beauty, and the stability of the fabric, a faculty for their construction would probably be granted. At present, however, no ground either for making or refusing such a grant having been shewn on either side, I shall refuse the faculty, and dismiss the case, without costs, unless the parties desire to proceed.

Faculty refused.

The cause was not further prosecuted. See *Clifford* v. *Wicks*, 1 Barn. and Ald. 498. *Hopper* v. *Davis*, 1 Ecclesiastical Cases temp. Sir George Lee, 640. *Seager* v. *Bowle*, 1 Addams, 541. *Bardin and Edwards* v. *Calcott*, 1 Hagg. Con. 14.

[176] BURTON *v.* COLLINGWOOD. Prerogative Court, Hilary Term, By-Day, 1832.—A will, written eighteen years before the testator's death, containing this passage, "Lest I should die before the next sun I make this my last will;" admitted to probate, the Court holding the disposition not contingent, and adherence shewn by careful preservation.

[Discussed, *In the Goods of Spratt*, [1897] P. 31.]

On admission of an allegation.

Thomas Burton died at Andover on the 19th of January, 1832, leaving Maria Burton, his only child, and William Collingwood, his grandson, together entitled in distribution, under an intestacy. His property was under 9000l. The daughter propounded the following paper:—

"March 5, 1814. Morning, near One.

"All men are mortal, and no one knows how soon his life may be required of him.

"Lest I should die before the next sun I make this my last will and testament, in thankfulness to God that I have any thing left to devise.

"I leave to Maria Burton, my daughter unmarried, 1000l. sterling, which she will as she thinks best, either lay out in an annuity, or live upon the interest of the principal.

"The sum of 448l. 15s. Navy five per cent. standing in my name, I bequeath in equal portions to my daughters-in-law, Alice Cape and Katherine Wingrave, and to my daughters, Margaret Collingwood, and Maria, unmarried; **[177]** provided always, that

this distribution shall not be made until the death of Mrs. Wade, of Richmond, Yorkshire; and that the dividends due upon the said stock be paid half-yearly to Mrs. Wade, if she survive me, until the conclusion of the half-year preceding her death.

"Further I at present give no directions. "THOMAS BURTON."

The allegation, in support of this paper, pleaded "that it was written by the deceased himself; that Mrs. Wade died in November, 1814, and that the testator thereupon distributed the principal sum of 448l. 15s. Navy five per cents. among the several persons to whom the same stood bequeathed in reversion in his will. That after the death of Margaret Collingwood, in June, 1828, the testator often expressed himself as if his surviving daughter, Maria, who resided with him, would be entitled to and would take at his decease the whole of his property. It further pleaded the testator's death at the age of eighty-five, after a week's illness, during which his memory became exceedingly defective; that on the day before his death he told his daughter 'that he had not made his will, but that she would take as he intended the whole of his property, and that it would perhaps have been as well if he had put his intention into writing, though that was now too late;' that the testator did not thereby mean to depart from his said will as far as it would effect his intentions in favour of his said daughter, but that he had then entirely forgotten it: that the will was found carefully deposited and locked up in a drawer in his bed-room, in which drawer the testator kept his cash and papers of moment and concern."

[178] Dodson and Haggard opposed the allegation, on the grounds that the paper propounded was contingent and conditional, and that the circumstances pleaded were not sufficient to entitle it to probate.

Addams and Matcham contrà.

Per Curiam (Sir John Nicholl). The Court, being of opinion that the will was not contingent as to the disposition of the property,(*a*) and that the careful manner in which it had been preserved manifested such an adherence to it that it was entitled, valeat quantum, to probate, admitted the allegation.

The allegation being admitted, no further opposition was offered.

[179] IN THE GOODS OF THE REV. B. J. WARD. Prerogative Court, Easter Term, 1st Session, 1832.—An unattested letter purporting to dispose of realty and personalty, and conditional on the deceased's dying during a visit to Ireland, not admitted to probate in common form (the parties prejudiced being minors), the deceased having returned from Ireland and having subsequently executed a will, attested by three witnesses, disposing of land (purporting to be bequeathed in the letter), appointed his wife executrix and guardian of his children, but not referring to the letter, nor to his personalty.

On motion.

The deceased, while at Liverpool with his brother William, on the 12th of March, 1831, in his way to Ireland to attend his father's funeral, wrote to his wife respecting several family concerns, and thus proceeded: "I mention these matters thus particularly to serve as a memorandum for you in case it should be the Lord's will to call me hence by any fatal event in the voyage or journey before us, and for the same reason will add the following of my worldly goods not directed in our marriage settlement: viz. I wish you to have the use of the 3500l. left out of the settlement, and of all my personal property of whatever nature which may happen to be in my own power to dispose of, likewise of an estate in land in the county of Wicklow, which I find my father has left me by his will. I wish that you should have the use of all this for your life; and that after your death the Wicklow estate, if not previously disposed of, should go to Robin, and the 3500l. should be for the benefit of our children in whatever proportions you may think right. William tells me that such a declaration of my wishes as the above with regard to my possessions, will have all the effect of a formal will and may possibly be of great utility and importance."

The deceased soon returned to England; and **[180]** by several interlineations exclusively in the early part of the letter, as to private matters, it was evident that the letter was under his consideration on the 19th of October. In January he was dangerously ill, and at his brother's suggestion he wrote as follows:—"I give and

(*a*) See upon contingent wills, 1 Williams' Executors, pp. 92-3.

devise all my lands at Knockanode or elsewhere in the county of Wicklow in Ireland (*a*)[1] to my eldest son Robert Ward and his heirs; my dear wife having the use of it for the term of her natural life. Witness my hand and seal this 19th of January, 1832.

"B. J. WARD.

"I do likewise appoint my dear wife sole executrix of this my will and testament, and likewise sole guardian of my children. "B. J. WARD" (L.S.).

The above was attested by three witnesses; and endorsed by the deceased in pencil, "My will as to Knockanode, &c. Stanton, 19th of January, 1832."

The deceased, a few days afterwards, died, leaving his wife and four minor children, and a personalty under 5000l.

W. Ward, the brother, stated in affidavit that the testamentary part of the letter of the 12th of March was written at his suggestion, and was intended to operate as a will: and Mrs. Phillips, on affidavit, deposed (in substance) as follows:—"The deceased was taken ill about July: during his illness I mentioned to him that I had received a letter from his brother William, then in Ireland, advising that he (deceased) should dispose of his estate in Wicklow by will: that it should be at-**[181]**-tested by three witnesses, and that he should appoint a guardian of his children: the deceased replied 'he had done all that was necessary in a letter to his wife, which his brother had said would have the effect of a will.' I forbore to press it: but on the 19th of January renewed the subject, and the deceased wrote out the paper devising the Wicklow estate, and gave it to me to read: I told him he had omitted guardians or executors; he added them and then observed, 'I have purposely said nothing about personals, as I have done all that before in the letter, and it might make confusion.' I urged that it would be better if it were all written on the same paper, as it would be necessary to send the letter to be proved: he replied 'that he did not think that of any consequence.'"

The King's advocate moved for probate of the letter, and paper of the 19th of January, as together containing the will.

Per Curiam. The disposition, as contained in the letter, was written with the declared intention that it should operate only in case the deceased did not return from Ireland: (*a*)[2] he returned, and executed a paper duly attested to pass his real estate; and the alterations in the letter, in pencil, shew that he did not regard the disposition in it as final. The wife will, under the executed instrument, take the real estate for life. I cannot, however, to the prejudice of minor children, grant probate, in common form,(*b*) also of the letter on mere affidavits **[182]** as to the deceased's intention, though the eldest son may take a share of the personalty which apparently was not contemplated.

Probate of the letter rejected.

IN THE GOODS OF ALEXANDER JOHNSTON. Easter Term, 1st Session, 1832.—Administration of a domiciled Scotsman granted to an agent appointed, by the Court of Session, factor loco tutoris to the infant children.

On motion.

The deceased, a domiciled Scotsman, died at Edinburgh intestate and a widower; leaving property of various descriptions and large amount. The Court of Session, at the petition of two aunts (the only next of kin) of the children (infants) of the deceased, appointed his late agent to be factor loco tutoris to the infants.

Administration of the effects in England (upon a copy of the above petition and appointment being exhibited) was now prayed by Lushington to be granted to the agent.

Per Curiam. Let the grant pass.

Motion granted.

(*a*)[1] It was stated that the deceased had no other freehold.

(*a*)[2] See *Burton* v. *Collingwood*, supra, p. 176.

(*b*) The Court will on a proxy of consent grant probate of papers when the facts stated in affidavit would, if proved in solemn form of law and in a contested case, entitle the papers to probate: but in a case where minors are concerned, and where such proxy of consent cannot be given, the papers must be regularly propounded, and the witnesses be examined in solemn form.

[183] ELSDEN *v.* ELSDEN. Prerogative Court, Easter Term, 1st Session, 1832.—A testator, having executed his will disposing of realty and personalty and duly attested, subsequently wrote, signed, and dated a paper complete in disposition, but unattested, having the appearance of a draft, and spoken of in a memorandum subjoined, as intended to be settled and transcribed by his attorney, but "if he should have no opportunity, to be acted upon if it could be done fairly; if not, the former will to be resorted to;" the testator having the opportunity of completing such paper, which, if admitted to probate, would have been inoperative totally as to the realty, and partially as to the personalty, must be presumed to have abandoned it, and to have reverted to the regular will.(*a*)

On the admission of an allegation.

Edmund Elsden, Esq., died on the 12th of January, 1832, aged forty-three, at his house in Lynn, leaving a widow, two uncles—Henry Elsden, Esq., and Scarlett Everard, Esq.—and three aunts. His real estate was worth about 12,000l., and his personal about 25,000l.

On the 24th of July, 1824, the testator executed a will (marked A) duly attested to pass real estate, whereby he gave his freehold house in Lynn to his wife for life, and after her death to his uncle, Henry Elsden, his heirs, &c. He also gave all other his real estate to his said uncle and his heirs for ever. He gave the furniture and effects in his house to his wife absolutely, save the plate and books, which were, after her death, to go to his said uncle; he also gave to his wife 100l. and an annuity of 500l. secured by his said uncle's bond. This provision was to be in addition to what she was entitled under her marriage settlement, but in bar of dower. The residue he gave to his said uncle, and appointed him sole executor.

Paper B was headed: "Mr. H. E. is requested to present ten guineas each to the undermentioned friends in lieu of rings, with my best regards." **[184]** Then, after ten names, followed "100 guineas to Mrs. Henry Goldsmid, and twenty guineas to Simpson and R. Cook." This paper was also dated on the 24th of July, 1824: it was subscribed by his initials only and had no witnesses.

Paper C was to this effect—

"Out of my personal property I bequeath the following legacies free of duty:—

"An annuity of 25l. to Peter Fitt, if in my service at my decease.

"To all my domestic servants, 5l. each.

"To all the clerks in my service, each 19l. 19s.

"To the following persons, in lieu of rings, 19l. 19s. each."

Then followed nine names, six of which had been enumerated in B.

This paper was without date, signature, or initials; but as Mr. Simpson, a legatee of a ring in B, died in 1829, and his name was omitted in C, it was conjectured to have been written subsequently to the death of that legatee.

Paper D, the unexecuted will, began thus—

"This is the last will and testament of me, Edmund Elsden, of King's Lynn, in the county of Norfolk, made this twenty-second day of November, in the year of our Lord one thousand eight hundred and thirty-one. I give my messuages, lands, estates, &c. &c. in certain parishes, to Henry Elsden, Esquire, his heirs and assigns for ever. My freehold house at Lynn, in which I reside, to my wife, Isabella Elsden, for life; and after her death to Henry Elsden and his assigns, he and they keeping the same in good repair: my furniture, linen, china, wines, and all other articles in and about my dwelling-house (except my plate, prints, and printed books, as well as **[185]** Bank notes, money and securities for money, and such other things as I may hereafter except in an inventory attached to this my will) unto my wife for her own use and benefit: and I give my plate, prints, and printed books to my said wife for the term of her natural life; also 100l. All the real property (not before disposed of) that I may now or hereafter be in possession of, I desire to be retained, or sold and re-invested on other real security, or on mortgage of land, as may be deemed most advisable by my executors. My personal property not before disposed of to be invested on mortgage of land. The income arising from my real, and from the investment of my personal, property (after payment of debts, legacies, &c.) I desire may be paid to my wife during her life: and until my executors can satisfactorily invest my property, I give to my wife one annuity or clear yearly sum of five hundred

(*a*) See *Gillow and Orrell* v. *Bourne*, infra, 192; and *Tudor* v. *Tudor*, infra, 199, in notis.

pounds, payable quarterly. The provision made by this my will for my said wife is in bar of all dower or thirds of and in my real estate, but in addition to what she may be entitled by her marriage settlement. If my uncle, Henry Elsden, survives my wife, I desire the income may be paid to him during his life. After the decease of both I request the property may be transferred into the names of [the owners for the time being of four specified properties], and of the Mayor of Lynn, for the time being, as trustees; and, wishing to make my property conducive to the public good, I direct the trustees to dispose of the income in the purchase under, or at par, of the Lynn paving bonds." [The bonds were particularly specified; and minute directions given as to their cancellation, and the appropriation of the proceeds, together with **[186]** the income of his property. 2000l. worth of such bonds, first, in ease of the paving and water-rates in Lynn: in the erection of a public hospital at Lynn, its maintenance or enlargement, deducting 100l. per annum for the chaplain.]

The will, after giving directions as to the governors of the hospital, proceeded: "The undergraduate of the University of Cambridge who shall compose, recite in the Senate House, print and publish the best English essay in support of the cause of public liberty and good government in the term immediately preceding commencement day, or on commencement day, shall be entitled, upon presentation to the trustees and governors of the hospital of a printed copy signed by the vice chancellor of the University, the public orator, and the professor of political economy, to receive a gold medal of the value of 50l., or 50l. in money." Then, after a similar provision for the University of Oxford, "subject to the payment of my just debts, &c. &c., I give the entire property I may die possessed of, real or personal, to the under-mentioned persons, for the uses and trusts previously recited in this my will, subject to such legacies as I may hereafter specify; and I also nominate and appoint the same as executrix and executors of this my will—viz. Mabella Elsden, Henry Elsden, Esq., of Congham, in the county of Norfolk, and Samuel Hinde, Esq., of Lancaster. To the latter a legacy of 100 guineas. Hereby revoking all former wills by me made, and declaring this only to be my last.

"In witness, &c. &c. "EDMUND ELSDEN.

"I intend to have this settled and transcribed **[187]** by an attorney as soon as convenient; should I unfortunately not have an opportunity, I should wish it to be acted upon, if it can be done fairly and according to the true meaning of the expressions; if not, my will of the 24th of July, 1824, must be resorted to.

"E. ELSDEN."

This instrument of the 22d of November, 1831, was unattested: it was written by the deceased on twelve sides of foolscap, bookwise, leaving corresponding blank sides: it was propounded on behalf of the widow.

The allegation pleaded the factum of the will of the 24th of July, 1824, and codicils; it also pleaded that on the 10th of October, 1831, the testator was taken ill; that he so far recovered as to leave Lynn on the 5th of November, where he returned on the 19th, after having paid, with his wife, visits to his uncle Elsden, to Mr. Pratt and Mr. Rolfe: it then, after pleading the factum of paper D on the 22d of November, alleged "that on the said day he was unable to leave his room from illness; that by the 15th of December he was convalescent; and on Monday, the 26th, he went with Mrs. Elsden on a visit about nine miles from Lynn, whither he returned on Saturday; that on the 4th of January, 1832, he drove a few miles into the country, when he caught a severe cold, by which he was confined to his bed on the following day, and continued to get worse till he died, on the 12th." It then pleaded declarations to his wife on or about the 22d of November "that he had been making his will; that he offered it to her to read; that he thought he **[188]** could not do better than leave his property to erect a hospital; that he would consider whether it should be on the plan of the Norwich hospital, shortly afterwards observing that he very much doubted whether he could so leave it, on account of the statute of mortmain; but that when he went to Norwich he would consult some professional man upon it. That the testator had for many years very much interested himself about the welfare of Lynn, and expressed a desire to benefit its inhabitants. That A, B, and C were found enclosed in an envelope, not sealed, but locked up in the deceased's desk; that D was also found there, but without an envelope."

Lushington and Haggard opposed the allegation. The paper of 1831 is clearly unfinished, and that by the deceased's own act; secondly, if it were admitted to

probate no material object contemplated by the paper could be attained. It was principally intended to benefit the town of Lynn; but all the bequests for that purpose fail, because the personal estate is directed to be invested on mortgage of land, thus proposing to give a future interest in land upon trust for charitable purposes. The bequest for founding a hospital being void, the university exhibitions would seem also void, as the conditions in respect to them cannot be complied with. The deceased's intentions under this paper failing, the concluding sentence of the memorandum, at the end of the paper, amounts to a republication of his executed will.

The King's advocate and Dodson contrà. If it were not for the clause subjoined to the **[189]** will propounded, the other side would have no case. It is said that the latter will cannot operate as to one kind of the testator's property; but admitting that the testator was aware of the necessity of witnesses to pass his real estate, the question still is, whether the will of 1831 is not a good disposition of the personalty, and whether he did not contemplate its operation to that extent. The fact that he knew that the will, when he signed it, was not duly executed to convey his realty, primâ facie, may be considered as shewing that he fully proposed and was aware that it would take effect as to his personalty. The paper is not imperfect, the allusion in it to an inventory and to legacies, which are not supplied, is nothing more than the sort of saving clause frequently inserted as to codicils, which the testator, though he may not then intend to make, contemplates the possibility of making at some subsequent time.

Addams for the Mayor of Lynn, as one of the residuary legatees in trust under the will of 1831, and one of the parties cited. A Court of Probate, in looking at a conditional will, is not in the habit of tying a party down strictly: and what is the purport of the clause inserted at the foot of the will of 1831? When the testator used the language "should I unfortunately not have an opportunity," he meant "a convenient opportunity;" so when he added "my will of 1824 must be resorted to," he did not propose that that will should be substituted for his later will, but that the former should be resorted to for explanation. It is not clear that the purchase of the paving bonds, directed by the later will, would come within the statutes of mortmain.

[190] *Judgment—Sir John Nicholl.* The property in this case is considerable, the personalty being stated at 25,000l., and the real estate at 12,000l. If then I felt any difficulty on the case I should allow the allegation to go to proof; but I can entertain no doubt whatever upon it. The deceased in July, 1824, duly executed a will to pass real estate; he afterwards wrote two papers of a codicillary nature, the latter pleaded to have been written in 1829 or later. The first consideration is the appearance and character of the paper propounded: it is clearly unfinished, and can, I think, be regarded only as a draft for a future will: for though it is true that the instrument contains this clause—"hereby revoking all former wills by me made and declaring this only to be my last"—and then is added "in witness, &c., &c.," yet those expressions would equally be inserted in a draft, as in a will intended to operate. To my mind the paper is manifestly only temporary and deliberative, and it is quite inconsistent with the deceased's habits as a man of business, and with his prior existing will, that he should think this unexecuted draft would operate. Something further was intended, and was necessary to be done in order to carry his wishes into effect.

What, too, is the purport of the memorandum? That the paper was intended as a draft to be fairly transcribed, and that even if sudden death had interrupted the progress of the paper, and had deprived him of an opportunity of consulting his professional adviser, it was the deceased's wish that the former will should remain in force, unless the whole disposition contained in this unfinished instrument, both as to the realty and personalty, **[191]** could be carried into execution. So that even if completion had been clearly prevented by the act of God, still it would be difficult to establish the title of this paper to probate.

It is clear, however, that he had abundant opportunity to complete a new will, and no grounds are stated in the allegation to account for the delay. Though in a precarious state of health when the paper bears date, and prior to that time, he was sufficiently well to be absent from home on a visit to his friends, and to occupy himself in writing this paper consisting of several sheets, and embodying a new disposition of his property, and though he was unable from illness to leave his room on the 22nd of November, he subsequently, viz. before the 15th of December, became convalescent, went out on a visit for some days, again drove out into the country on the 4th of

January when he caught cold, which on the following day confined him to his bed; and though he gradually grew worse till his death on the 12th, yet he makes no subsequent reference to this paper, expresses no anxiety about it, nor takes any steps to give it full and final effect. The law therefore regards the paper as deliberative, and presumes that the deceased had abandoned it, and reverted back to his executed will of 1824, which alone can act upon his real estate.(*a*)[1] I, therefore, reject the allegation; but considering that the papers were left by the deceased himself so as to make it necessary to bring them before the Court, I decree the costs of all parties out of the estate.

Allegation rejected. Costs out of estate.

[192] GILLOW AND ORRELL *v.* BOURNE. Prerogative Court, Hilary Term, 4th Session, 1831.—The deceased in 1812 regularly executed a will, and in 1818 two codicils, to carry real estate; he, in February, 1828, gave instructions for a new will disposing both of real and personal estate: the will was prepared for execution, read over to him and altered; the sheets altered, recopied, and the will again read over, after an interval of some days; the deceased postponed the execution, and in March the will was again read over to him; pencil alterations of slight importance were then made; on the 14th of November, 1829, further alterations were alluded to; the deceased said he would call and "finish" it on the 19th: he died suddenly on the 17th. The Court refused probate of this instrument, holding final intention not proved.

Thomas Westby died on the 17th of November, 1829, a bachelor, aged seventy, possessed of personal property valued at about 44,764l., and of real property valued at about 33,500l. His cousins, Thomas and Mary Westby, were alone entitled in distribution under an intestacy. Thomas Westby was also heir-at-law. The testamentary papers were, a will dated the 28th of January, 1812, with two codicils, dated respectively the 24th and 30th of November, 1818, all duly executed to pass real estate: and an unexecuted instrument (contained in twenty-three sheets of paper) dated 1828.(*a*)[2]

[193] To establish this unexecuted instrument, Gillow and Orrell, the executors named in it, pleaded the factum and due execution of the will of 1812, and codicils thereto; they then pleaded the intimacy of the deceased with, and his confidence in, his solicitors, Messrs. Pilkington of Preston; and that being very ill, he on the 23d of January, 1828, was attended by Mr. Richard Pilkington, to receive directions for his new will.

The remainder of the plea was to the effect of the following evidence:—

(*a*)[1] See *Gillow and Orrell* v. *Bourne*, infra, p. 192; and *Tudor* v. *Tudor*, infra, p. 199, in notis.

(*a*)[2] Comparative abstract of the chief parts of the paper propounded, dated 1828, and of the will of 1812, and codicils of 1818.

Will of 1812 and first Codicil of 1818.

*** By the second codicil the testator devised certain lands, purchased subsequent to the making of his will, to the same uses as the lands devised by his will.

By will of 1812, the same, except that the power, in favour of a wife, was limited to 200l. per annum.

Same by codicil.....

By will of 1812, a rent charge of 500l. per annum, and, after his death, 250l. also charged on the real estate, to his wife.

——— Legacy of 200l.

By Codicil, 15l. per annum.

——— Same.....

By will, 3000l.....

——— To Worswick (dead) and Bourne, executors, 100l. each.

——— Same.....

Unexecuted Paper, dated 1828.

The testator, after devising his real estate in trust to the use of George Westby (eldest son of his cousin Thomas), for life, and then to his heirs with remainder, with a power to charge the estates with 250l. per annum to the wife of any heir, gave to—

Mary Westby an annuity of 50l.

Thomas Westby an annuity of 300l. and after his death to his wife.

Mary Latchford, 30l. per annum.

Mary Brotherton, 20l. per annum.

John Brotherton, 10l. per annum.

Edmund Westby, 5000l.

To his executors, Bourne, Gillow, and Orrell, 100l. each.

Richard Carus, 10 Guineas.

Mr. Richard Pilkington deposed: "I had been **[194]** intimate with the testator for thirty years: on the 23d of January, 1828, he was very ill; expressed his fears to me that he should not recover; said 'he had talked of making his will with me very often, but that now it must be done.' I was engaged with him, with intervals of rest, from about nine in the morning until four p.m. about the instructions; and when I took my leave he said 'he was anxious to have the matter completed as soon as possible;' but I told him it would occupy two or three days to prepare his will." The witness, after deposing to the preparation of the draft by Mr. Addison, a barrister at Preston, and to its engrossment for execution, then proceeded: "Early in February I took this engrossed copy to the deceased at Whitehall, twelve miles from Preston: I read the greater part to him, contenting myself with explaining to him the powers to grant **[195]** leases, and clauses of that description. He approved of the will generally, but some alterations were made by his suggestion and at his direction. The deceased's will was again settled by Mr. Addison; and the altered sheets being recopied, and the whole will made complete for execution, I again in February attended the deceased with it. I found him very considerably better. I read the will over to him as altered; I read the whole of it as before, explaining the technical and legal clauses, but reading the other parts word for word: it occupied a considerable time; for the deceased made his observations as I proceeded; it was the business of the whole day: he declared his approbation of the whole will, and said 'he was satisfied with it, and should call at my office when he came over to Preston, and execute it there.' I pressed him to execute it at the time, but he said, 'Why, you don't think I am going to die,' or something to that effect, and concluded by saying 'that he should be over at Preston very soon, and then he would do it;' meaning, as I understood and believe, that he would then execute it. Early in March, 1828, the testator came to my office, said he would dine and sleep at my private residence, and requested me when I came home to bring his will with me that we might talk it over together. After dinner I read and explained the whole thereof again to him; we talked it over again, and as we went over it I made some alterations at his request, and as I proposed to make these alterations afterwards in ink, and to have the sheets in which they occurred recopied, I did not then ask him to execute his will. After this I had many interviews and conversations with him on the subject of his will; **[196]** he used to talk of finishing it, but never appointed a time for so doing, and therefore I did not have

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Will of 1812 and first Codicil of 1818.

——— 1000l. to each absolutely.

——— 100l. to Robert only.

By codicil, 500l. in like trust.

By will of 1812, the testator gave the residue of his personal estate, if any, to George Westby, absolutely.

Unexecuted Paper, dated 1828.

3000l. in trust for Mary Ann Westby and children; 3000l. on like trust, for Julia Westby. If no issue, &c. then to sink into the residue.(*a*)

1000l. in trust for children of Robert Moore.

800l. in trust for Mary Maudesley for life, then to her children.

The testator gave the residue of his personal estate in trust to his executors to pay therefrom the debts, funeral expences, charges of probate, and the legacies; and to invest the surplus in the purchase of land to be settled under the like limitations as his real estate; but subject, if his personal estate appropriated thereto be insufficient, to the discharge of his debts and legacies.

Power to trustees to advance and pay to tenant for life 5000l. towards building a house on the estate.

*** On the paper of 1828 was endorsed, "Mr. Carus 100l. and a mourning ring. Mrs. Carus, his wife, 100l."

(*a*) In the margin, in pencil, was written, "If Mary Ann and Julia die unmarried to have power to dispose of the 3000l."

it completed for execution. I believe when he talked of finishing it he meant executing it, and nothing more; for no remark ever escaped him to give me reason to believe but that he adhered to the will as he had directed it to be altered. It never occurred to me that he had any idea of making any alteration in his will; it appeared to me that he had some apprehension that by executing his will he should hasten his death, and that he had not resolution to fix a day for executing it. No other reason ever occurred to me for his not executing it, or fixing a day for the purpose before he did so, which was on Saturday the 14th of November, 1829: on that day he called upon me at my office at Preston, and I had not seen him in apparently better health for some time before; he was passing through Preston on his return from Manchester, having been there to see Miss Westby, a legatee in his will: in allusion to her, he said 'she must be taken care of; that he would finish his will;' and then named Thursday, the 19th, as the day on which he would come to me for that purpose, and execute it at my office; he asked, 'Could it be completed on that day?' I told him 'it could; and that I would take care to have every thing ready for him:' he then replied that he would complete his will or finish it (meaning he would execute it) on that day." . . . "Before he left me he reminded me of the death of Mr. Carus, a legatee in his will, and that it must be altered in that respect: he was particular in asking me if it could be finished (meaning 'executed') on Thursday, if he came; and I told him 'if he wished it, it should be:' he replied, **[197]** 'Then it shall be finished before I return home.' This was the last time I saw him; and I am quite satisfied that he had then fully determined to execute the said will; and that he had before then fully made up his mind with respect to the said will, and had no intention of altering it. The testator was extremely parsimonious and reserved."

On interrogatory. "I cannot say how many conversations I had with the testator between March, 1828, and the 14th of November, 1829: they were so numerous. He had fully and completely made up his mind to execute the engrossment with the alterations requisite according to the pencilled minutes, and without any further alterations in any of the legacies; and he would actually have executed the will on the 19th, if it had not been for the intervention of his death. I considered my instructions complete, and that the deceased had made up his mind as to what should be the final disposition of his will: the expressions which he used to me on the 14th of November were spontaneous; it was his own appointment; he named his own day, Thursday, to finish his will. It was not in answer to any observation made by me that he expressed himself as he did. I do not believe that it was the testator's intention to give the annuity of 300l. to Thomas Westby, and after his death to his wife, in addition to the annuity (under the will of 1812) of 500l. to the said Thomas Westby, and 250l. to his wife if she survived her husband."

The second witness deposed to the testator's sudden death.

Mr. Bourne, the surviving executor under the will of 1812, denied, in his answers, that the deceased, by the expressions "he would finish it," **[198]** meant that he would execute the paper propounded on the 19th of November, 1829.

Gostling and Lushington for the unexecuted paper. The case turns upon the consideration of two questions: first, whether the deceased's mind was finally made up to execute the paper propounded; and, if the Court is satisfied of the affirmative of that position, then, secondly, whether the contents of the paper itself prevent a grant of probate. On the first point the proof is conclusive. Had the testator died on the night after the will, as revised, had been read over to and approved by him, a doubt as to his final intention could not have been raised. The deceased, however, procrastinated, and the paper being unexecuted, he made in it some alterations; they are of small and quite subordinate importance. Secondly, the general effect of the will of 1812 and its codicils is the same as of the unexecuted will. In both the real estate is strictly entailed. The chief variation is in the disposition of the residue. In the first will the testator did not contemplate a residue; in the latter, he directs it to be laid out in land, and gives it in trust in the same manner as an original fund. The two bequests to Thomas Westby may be said to conflict; but the latter is clearly a substitution, and Thomas Westby would be bound to make his election.

Per Curiam. Where probate is granted of two papers as together containing the will, then a legacy in the latter paper is in substitution: but in this case, should probate be granted of the later instrument, there will be one will for the real, another for the personal, property.

[199] Argument resumed. Where there is proof of intention that a paper should operate, a single difficulty ought not to supersede it. This Court is sometimes called a "Court of Intention," difficulties of construction form no ground for refusing probate; they belong to the Court of Chancery. In the recent case of *Tudor* v. *Tudor* (*a*) the later instrument was pronounced [200] against, because the personalty was mixed up and blended with the realty: here there is no objection of that sort. The personalty much exceeds in value the fee simple of the real estate: the debts and legacies are not charged on the real estate; and the personalty, after payment of all the demands upon it, will yield a considerable surplus. The execution was ultimately prevented by sudden death.

The King's advocate and Haggard contrà. First, the evidence disproves final intention, and on that ground alone the case must fail. The question is not between an unexecuted paper and intestacy, but between an unexecuted paper and a will and codicils executed to pass real estate: "Facilius testamentum sustinetur si aliud non præcedat quam si præcedat." Secondly, the later instrument purports to dispose of real and personal property; and can it be supposed or inferred that the testator would have wished, or that he intended, such instrument should take effect as to his personalty when his real estate would be governed by the will of 1812? The paper propounded was intended as a perfectly new disposition of all the testator's property; it cannot operate in conjunction with the executed will: the real and personal estates are connected together. *Cobb* v. *Cobb*, Prerog. May, 1803.

Judgment—Sir John Nicholl. The testator, Thomas Westby, died on the 17th of November, 1829, leaving considerable property, both real and personal. In January, 1812, he executed a will; and in November, 1818, he exe-[201]-cuted two codicils, disposing of his real and personal estates. This will and these codicils remained unaltered and unrevoked till January, 1828, when, for the first time, he gave instructions for a new will; at least there is no proof, nor any appearance of an intermediate testamentary act. It is true that his property had increased; that some of the parties benefited under his will were dead, among them, one of the executors; and that the deceased was parsimonious; yet still, notwithstanding these circumstances, he either, from indolence, procrastination, or unfixed and wavering intentions, suffered the will of 1812 and the codicils of 1818 to remain in force.

(*a*) Hilary Term, 1st Session, 1831.—In *Tudor* v. *Tudor*, Sir John Nicholl, after hearing Curteis in opposition to an allegation, and Phillimore contrà, observed, in rejecting the allegation:—

The will of 1826 disposing of real and personal estate must operate on the real estate: the instructions of the 9th of May, 1830, and now propounded, were intended as a new will blending together both the real and personal estate: against such instructions the want of due execution is conclusive; for where an unexecuted paper can only operate on the personal, and not on the real, estate, if the disposition of the former arises from, and is dependent upon, and induced by, the disposition of the latter, the Court will not interpose to give even a partial operation to such a paper, for by so doing it would defeat the testator's intention. That was stated by Sir William Wynne in *Eyles* v. *Eyles* † to be the doctrine of these Courts. That learned Judge said in that case, "There are many instances where a testator having intended to dispose of real and personal estate, the Court has given effect to the disposition as far as it can, and pronounced for the one part conveying the personalty, in other cases it has refused so to do; the distinction is this, where the devise of the realty is perfectly independent of the disposition of the personalty, then by giving effect to the unexecuted will the deceased's intention pro tanto is carried into effect; but where one part appears to depend on the other, when a testator gives to A. because he has given to B., then it would defeat the intention, and be injustice to give effect to the one unless you could to the other."

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† 1792, Hilary Term, By-Day. See *Jekyll* v. *Jekyll*, 1 Cases temp. Sir George Lee, 419. Also *Douglas* v. *Brown*, June, 1833, in the Privy Council, on an appeal from the Island of St. Vincent, where, in a case of real and personal estate blended, the Court, reversing the sentence, gave probate to the executed will alone.

Lushington and Addams in support of the executed will, Dodson and Mr. J. Parker for the unattested paper of later date.

It is necessary, first, to consider what is the paper propounded. It is, upon the face of it, unexecuted; it is not even ready for execution; it has no date, either of a day or month: it has the date of the year 1828, but the deceased did not die till November, 1829. But more than this, the paper was intended to be altered; for there are notes in pencil in the margin of two of the pages, and also on the back: these alterations are not perhaps of any great weight, but still they are alterations. The instrument is very long, intending to convey both real and personal property, and that of considerable value. Upon the face of the paper, then, there is every presumption against it; it is not only unexecuted, but unfinished; it is to alter a former executed will which, at all events, must operate upon the real estate, although the latter paper was itself intended to operate both upon real and personal estate; and if intended to be executed at all, such intention existed as early as the year 1828—at least ten months before the deceased's death.

[202] Still, however, all these adverse presumptions may be repelled: but it must be clearly shewn that the testator had finally made up his mind, and that the execution of the instrument was prevented by the act of God, as it is termed, and that the disposition of the personalty was in no degree induced by, or dependent upon, the disposition of the real property, which must, in the present case, I repeat, be governed by the will of 1812 and the codicils of 1818, and cannot be affected by this latter instrument.

It is hardly necessary to quote authorities in support of these principles, for they are of every day's occurrence; but as the case of *Cobb* v. *Cobb* (Prerogative, 1803, Easter Term, 2nd Session) was quoted, I will, for the satisfaction of the Bar, read my own note of Sir William Wynne's decision in that case; it is as follows:—"Paper unexecuted—completely prepared: must be satisfied had finally resolved to execute, but prevented by act of God. The allegation states instructions, draft, will prepared, delivered to deceased: he kept it several months—called on the drawer in order to execute it about a fortnight before his death. On reading, approved, but said, had omitted to ask his wife whether she was satisfied with her annuity, would let it stand over till she returned. It is not alleged that his wife did not return before his sudden illness and death. With such a degree of indecision I could not pronounce that the deceased would have executed, if not prevented by act of God. But there is a former will in 1794, disposing of real and personal property, and confirmed in 1798. Dispositions in both very material and very different. Deceased did **[203]** not intend they should operate together. I reject the allegation."

The case, which I have just read, applies pretty directly upon all points to the present. Here is not only a former will, but both it and the instrument propounded were intended to dispose of real and personal property, and there are material differences in the disposition. By the former he gives an annuity of 500l. to Thomas Westby, and that charged on the real estate; by the latter, an annuity of only 300l., and that out of the personalty. By the former the residue is given, absolutely, to George Westby; by the latter, it is to be laid out in land, and George Westby only takes as tenant for life. But the first point, viz. whether there was a fixed and final resolution and intention to execute, and that the deceased was prevented, is the most important point; and as the evidence upon this first point may dispose of the whole question, I will proceed to consider it.

In January, 1828, the deceased is taken unwell; he gives instructions to his solicitor and confidential friend, Mr. Pilkington, for a new will. Mr. Pilkington goes home; extends the instructions; a rough draft is prepared, and it is settled by counsel. So far the matter is in regular progress: the solicitor reads to the deceased the copy engrossed for execution; some alterations are made in it; they are also settled by counsel; the altered sheets are substituted, and the whole is prepared for execution. The solicitor again reads the will very carefully and deliberately to the deceased, and presses him to execute it; but he declines, saying "that he will call at the office and execute it there;" and adds, "Why, you don't think I am going to die;" probably making this remark to **[204]** satisfy Mr. Pilkington that there was no necessity for an immediate execution.

The Court cannot construe the conduct of the deceased, on this occasion, than as an intimation that he wished to pause and further deliberate (though at that time he approved); he would otherwise have executed the instrument, for it was then quite ready: he could not have postponed the execution in order to avoid expence,

for the expence had been incurred; nor from the vulgar prejudice that it would hasten his death, for he had executed a former will and codicils many years before.

But what is his subsequent conduct? Does he, when he goes to Preston, fulfil his promise and execute the will? On the contrary, Mr. Pilkington says that in the following month, which is March, the deceased comes to Preston; the will is again read over to him, and further alterations are made: so that, instead of doing in March what he had been pressed to do in February, and what he had then engaged to do, he revises, he reconsiders, and again makes alterations. It turns out, therefore, that in February the deceased had not finally made up his mind. But were the alterations in March final? Mr. Pilkington's conduct shews that he did not so consider them; for he does not even have the draft altered and prepared for execution: the pencil memoranda in the margin and on the back remain till the deceased's death—a year and eight months after they were made. What takes place in the mean time? Mr. Pilkington states that he had several subsequent interviews with the deceased, who "used to talk of finishing it;" thereby, in Mr. Pilkington's opinion, meaning "that he would execute it." **[205]** This may be the correct inference; but in what manner did he mean to execute it? Not in the form in which the instrument then stood, but after alterations; for though Mr. Pilkington goes on to depose that nothing passed to induce him to believe that the deceased, after the reading over in March, 1828, contemplated any further alterations, yet there are some alterations made; and the suggestion of the witness that the deceased postponed the execution from an apprehension that it would hasten his death is mere conjecture, and not at all borne out by the evidence.

The business thus drags on for upwards of a year and a half, during which time no step is taken—nothing whatever is done except deliberation. However, on the 14th of November, 1829, the deceased, in passing through Preston, called upon Mr. Pilkington, and that gentleman thus deposes to what occurred at this interview: "The deceased had been on a visit to Miss Westby, a legatee in his will; and, in allusion to her, he said, 'She must be taken care of' [but how? whether by what the deceased had already done for her, or by a further legacy, did not transpire]; 'that he would finish his will;' and then named Thursday, the 19th, as the day on which he would come to me for that purpose, and execute it at my office; he asked, 'Could it be completed on that day?' I told him 'it could; and that I would take care to have every thing ready for him:' he then replied 'that he would complete his will or finish it;' meaning he would execute it on that day." The witness then, after stating that the deceased said he would dine with him on that Thursday, proceeds: "Before he left me he re-**[206]**-minded me of the death of Mr. Carus, a legatee in his will, and that it must be altered in that respect: he was particular in asking me if it could be finished (meaning 'executed') on Thursday, if he came; and I told him 'if he wished it, it should be;' he replied, 'Then it shall be finished before I return home.'"

These are all the facts to which Mr. Pilkington can depose; and I am satisfied from the conversation which passed on the 14th of November, and from the expressions of the deceased on that occasion, that something more was meant, when he used the words "finish it," than the mere bare execution of his will. Mr. Pilkington gives it as his opinion that the deceased had fully determined to execute the will; but it is clear that it was to be revised before the execution; and I see no greater reason to conclude that he would have "finished" his will on the 19th of November, had he lived till that day, than at any of the former interviews during the preceding nineteen months; with still less reason can I conclude that the will would have been executed in its present form and shape; and the conduct of the solicitor himself shews that he was not convinced that it would so be executed, for he had not even prepared the instrument for execution; since, at all events, the alterations that now appear in pencil were to be made in ink.

Upon the whole, then, I am not satisfied that the deceased had ever finally made up his mind: he was still, I think, deliberating and indecisive: and on this ground, without referring to other objections and difficulties which would probably be found insuperable, I must pronounce that this in-**[207]**-strument is not entitled to probate; and I decree probate of the will of 1812, and the codicils of November, 1818.

Gostling asked for costs out of the estate. This application was not opposed and was granted.

Costs out of estate.

IN THE GOODS OF CATHERINE NOEL. Prerogative Court, Easter Term, 1st Session, 1832.—A husband, resident abroad, directed, on the application of creditors, to give justifying security resident within the jurisdiction of the Court, on taking a grant of administration to his wife.

An application was made, on behalf of creditors, that the Court would direct a husband, resident abroad, in taking letters of administration to his deceased wife, to give justifying security, and that the same should be resident within the jurisdiction of this Court.

The application was resisted on the ground that the husband was the only party entitled.

An affidavit, of which the substance follows, was before the Court:—

Philip Smith Coxe, solicitor, and James Wood, Esq., a partner in the house of Child and Co., bankers, deposed: first, Mr. Coxe, that C. Noel (wife of ———) died on the 11th day of February, 1832, intestate; that the deceased and her husband had, for a considerable time before and to the time of her death, lived separate under a deed, of which he, Coxe, was sole trustee, wherein it was agreed that she should receive a certain income, independent of her [208] husband: that as such trustee he, Coxe, now has about 148l., which is, he believes, the only property of which she died possessed in her own right, and it is not sufficient to pay her just debts; that the husband, now applying for administration to the deceased, is, he believes, in very embarrassed circumstances, residing abroad, and out of the jurisdiction of this Court. Mr. Wood deposed that the deceased was, and now is, justly indebted to Child and Co. in 76l. for money lent and advanced for her use, after her separation from her husband; that Child and Co. have not any security for the payment of the said debt, and are desirous that the husband should give justifying security before administration be granted to him.

Per Curiam. By the practice of the Court a husband taking administration to a deceased wife enters into bond with one surety. I direct that the surety, in this instance, shall justify and be resident within the jurisdiction.

[209] IN THE GOODS OF MARY KEETON. Prerogative Court, Easter Term, 2nd Session, 1832.—Probate, in common form of an unattested will, granted on the affidavit of one person only to hand-writing, and the consent of the sole person in distribution.

On motion.

The deceased, a spinster, died in August, 1831; she left about 300l., and a will written and subscribed by herself: there was no witness to it. Mr. Lawford, a solicitor, and her intimate acquaintance, could alone verify the hand-writing.

Haggard moved for probate, upon Mr. Lawford's affidavit; the sister of the deceased, her executor, sole next of kin and in distribution, also deposing that, from the deceased's retired habits and infrequency of writing, no second affidavit to hand-writing could be supplied.

Per Curiam. The affidavit of Mr. Lawford is very full and satisfactory; and the statement of the sister, who would be more benefited under an intestacy, may be taken, in proof of the hand-writing, as equal to a second affidavit. The deceased too, having been dead nine months, and no other application made, I direct the probate to pass.

Motion granted.

[210] IN THE GOODS OF ELIZA ELDERTON. Prerogative Court, Easter Term, 2nd Session, 1832.—Administration, with the will annexed, granted to the wife of a residuary legatee, as his attorney under a memorandum in his hand-writing.

Mrs. Elderton died in January, 1832: her property consisted of 800l. three per cents., and 500l. due on a note of hand. By her will (the executor of which she survived) she left several legacies, and appointed her son, Colonel Elderton, residuary legatee; he was with his regiment in India; his wife and six children were in England, the former of whom had paid the funeral expenses, and the only debt left by the deceased, and now applied for administration with the will annexed, under a memorandum, in the hand-writing of her husband, as follows:—

"Should property of any kind be bequeathed or given to my wife, Mary Elderton, during my absence from England, it is my wish that the same may be permanently settled upon her, for her sole use; but as my legal consent may be deemed necessary,

I leave this document to be considered such legal consent, and beg it may be acted upon without any reference being made to me. It is also my wish that all property left to me may in like manner be delivered over to and settled upon my said wife in any way she may wish. "C. A. ELDERTON.

"27th April, 1828."

It appeared, upon affidavit, that Colonel Elderton was not likely to return soon to England; that he had no agent or attorney in this country qualified to take the administration, and that in a **[211]** recent letter to his wife he had repeated the same wish as expressed in the memorandum.

Haggard moved for the administration with the will annexed to be granted to the wife of Colonel Elderton, as his attorney.

Per Curiam. I do not recollect an instance of a grant to a wife, in the absence of her husband from this country, as his agent: but here is a very full authority, and a large family to be maintained; and I see no reason why the grant should not pass. The securities will justify.

Motion granted.

HATTATT *v.* HATTATT. Prerogative Court, Easter Term, 2nd Session, 1832.—An entry in an account-book, containing a full disposition of the property, appointment of executor, dated eight months before the testatrix's death, which was sudden, subscribed, and carefully preserved, pronounced for, though containing these words. "I intend this as a sketch of my will which I intend making on my return home."

[Distinguished, *Whyte* v. *Pollock*, 1882, 7 A. C. 411.]

On the admission of an allegation.

The allegation, in substance, pleaded that Martha Hattatt, a spinster, died on the 7th of December, 1829, leaving a brother, several nephews and nieces of different stocks, and property exceeding 4000l.; that she lived with her brother, but in the autumn of 1828 went to Falmouth for change of air, being in a consumption; that while at Falmouth she wrote her will in an account-book; signed it, dated it the 30th of May, 1829; that in June she returned to her brother's; preserved the book, and wrote memoranda in it; and a few days before her death declared (upon one of the legatees saying to her "that on her death she **[212]** should not have a friend") "Yes, you will have a friend," thereby meaning her said brother, the executor, and the benefit that the legatee would take under the will; that her death was sudden, and that the paper, after her death, was found locked up in her private desk.

The paper commenced thus: "My watch and three gold rings to my brother Henry, who I appoint executor." It contained a complete disposition of her property; and at the conclusion repeated the appointment of her brother as executor. Just above the deceased's signature were these words—"I intend this as a sketch of my will, which I intend making on my return home."

The allegation was opposed and admitted; evidence was taken upon it, and the answers admitted, generally, the contents of the allegation.

The King's advocate in support of the paper.

Lushington contrà, cited *Mathews* v. *Warner*.(*a*)

Judgment—Sir John Nicholl. The paper is a complete disposition of the property; and though it is described "sketch of a will I intend to make," yet it is signed and dated. Such an instrument must, under the circumstances here admitted, be presumed valid, and intended to take effect, in case the deceased did not make a more formal paper. In *Mathews* v. *Warner* the deceased himself did not con-**[213]**-sider the instrument final; here, however, there are circumstances shewing adherence of intention, and I pronounce for the paper and decree probate to the executor.

Costs out of the estate.

RUTHERFORD *v.* MAULE, SHARD, AND BEASLEY. Prerogative Court, Trinity Term, 3rd Session, 1832.—A paper—not found in the deceased's repositories, never traced into his possession, never recognised, nor alluded to, by him by declaration or act, but transmitted anonymously to the parties interested in 1820 (the deceased having died in May, 1819), treated by them at that time as a forgery,

(*a*) 4 Ves. jun. 200, n. See also *Mitchell* v. *Mitchell*, 2 Hagg. Ecc. 74.

but propounded as her will in 1831—rejected, evidence of the probability of the disposition and of similitude of hand-writing (which moreover was contradictory) being insufficient to support such a paper, and the other evidence leading to the conclusion that the deceased had not written, and could not, from bodily infirmity, have written such a paper at the time it purported to bear date: and a claim of relationship, by a party asserting himself to be cousin-german and next of kin, resting upon no documentary proof, but upon evidence of declarations, contradictory in themselves, and inconsistent with the real facts of the case, pronounced against, but without costs: and an administration—granted to the Crown, as of the deceased being dead intestate—without known relations—confirmed.—It is a rule of the court that, in cases of pedigree, a party has no right to see the adverse plea till he has set out his own pedigree.

Frances Mary Shard, late of Torbay House, Devon, widow, died on the 16th of May, 1819. George Maule, Esq., as nominee of his Majesty, after the usual proceedings by advertisements and by decree to find a will or discover her next of kin, obtained, on the 26th of April, 1820, letters of administration of her goods for the use and benefit of the Crown. After four memorials to the Crown, supported by affidavits and letters of recommendation, setting forth that the deceased had left no relation, nor any will, and enumerating a variety of persons as the declared intended objects of her testamentary bounty, the Crown, by warrant bearing date the 31st of December, 1823, made the grants which will hereafter be specified.

On the 16th of December, 1830, a proctor exhibited for John Rutherford, an alleged cousin-german and only next of kin of Mrs. Shard, deceased; the administration was consequently brought in; the interest of Rutherford propounded, an allegation admitted, and evidence taken, both on his behalf and also on behalf of the Crown; when on the first session of Trinity Term, 1831, a proctor intervened for Charles Shard, Esq. (nephew of the deceased's husband), **[214]** and for Thomas Beasley, as surviving executors of Mrs. Shard's will, bearing date the 20th of April, 1819. This instrument, which is printed in the judgment, was opposed.

Phillimore and Dodson in support of the paper propounded.

Lushington for John Rutherford, claiming to be next of kin.

The King's advocate and Addams for the Crown.

Judgment—Sir John Nicholl. This case involves two questions—first, the validity of a paper propounded as the will of the deceased; secondly, the relationship of a party claiming to be next of kin.

The deceased, Frances Mary Shard, died on the 16th of May, 1819, at the age of sixty, intestate, and without relations as it was then supposed: her property amounted to about 24,000l. The usual steps to discover relations having been in vain taken, administration was granted to Mr. Maule, his Majesty's nominee, and shortly afterwards applications for grants of parts of the property were addressed to the liberality of the Crown by Mr. Bowring, a solicitor at Exeter, on behalf of himself and others, viz. Mr. Beasley, Mr. Shard, Mrs. Bishop, and the deceased's old servants.

This memorial, as far at least as it seems to bear materially on the present case, stated that for upwards of thirty years Mr. Bowring had been one of the most intimate friends of Mrs. Shard, and for more than twenty years the solicitor of her and of her **[215]** husband while he lived; that as Mrs. Shard could not discover her relations she had often declared that she would leave the memorialist, his wife, and children, a considerable property, and appoint him an executor; that by a will duly executed by her, in her husband's life, she had largely benefited the memorialist, &c. &c., made provision for her servants, and other objects of her bounty; that two or three years before, her death she asked him, "whether he had her will;" and on his informing her that he had returned it to her, she replied "that she did not know what could have become of it, and that she wanted it to make a new will;" and she communicated to the memorialist her intentions as to the disposition of her property; that Mrs. Shard completely educated Thomas Beasley, gave him the superintendence of her house, treated him in all respects as an adopted child, and frequently declared "that she would leave him by her will sufficient to enable him to live as a gentleman and to support a wife and family," and that he continued to reside with, and enjoy the confidence of, Mrs. Shard to her death. The memorial then, after stating testamentary declarations in favour of Mrs. Cumming, Mrs. Chissem, Mrs. Bishop, Mrs. Deller, Charles Shard, Esq., the nephew and heir-at-law of her late husband, set forth that

in January, and again in April, 1819, Mrs. Shard expressed to the memorialist her intentions of making a will, at the same time requesting him "not to alarm himself, as she had no doubt she would soon get better;" that she shortly afterwards became worse, and experienced great difficulty in speaking from a soreness and swelling in her mouth, which alone, as the memorialist believes, prevented her **[216]** making her will as she intended; that during the whole course of her illness and on her death-bed she treated Thomas Beasley and the memorialist with the utmost kindness and affection: it then stated that after the most diligent search by the memorialist, by Charles Shard, Esq., and Thomas Beasley, no will could be found.

These are the material parts of this memorial. An affidavit made by Bowring in support of this memorial bears date on the 16th of June, 1819; and on the 23d the Treasury referred this memorial to the King's proctor, and afterwards signified its refusal to make any such grant, assigning as a reason that so short an interval had elapsed since the decease that relations might still probably be discovered: but neither in the original application, nor upon the refusal, nor in a memorial presented by Beasley (which bears date on the 28th of September, 1819, and is similar to that presented by Bowring) was there any suggestion that the deceased left any will, nor that any testamentary instrument had been subducted, nor that any such suspicion was entertained; the whole representation was that the deceased died intestate.

In February, 1820, a paper, purporting to be a will in the hand-writing of the deceased, was sent in an anonymous letter to Mr. Charles Shard, one of the executors therein named jointly with Mr. Bowring and with Beasley. The letter bears the Exeter post-mark, and is in these terms:

"Sir,—When I got possession of the enclosed paper I did not intend to give it up to you; but I have been ill, and as I do not know how soon I may be called to give up my account I would not **[217]** have this burden on my conscience, therefore though I am ashamed to acknowledge my name I send it to you, and shall be glad to find it is not too late to those interested in it, which I am sorry to say I am not. I have no right to ask a favour of you, but I should be much obliged if you would not say publicly how you got this: you might find it at the house. I would have replaced it there if I could without being found out."

This letter bears an endorsement as follows:—"13th of June, 1820, received from Mr. Shard."

The paper, purporting to be a will, alluded to in the letter which I have just read, is in these terms:

"I, F. Shard, of Torbay House, Devon, widow, finding my health decline, do make this will, that is to say, I hereby appoint Wm. Bowring, solicitor, Chas. Shard, Esq., and Thos. Beasley to be my joint executors, except that I give to Thos. Beasley four thousand pounds more than my other executors. I give to my friend Mrs. Bishop one hundred a year for her life, to Mrs. Chessem sixty pounds a year for her life, and to her sister Mrs. Ryder ten pounds a year for hers; to Mary Ann Cumming I give three thousand pounds, to Fanny Good I bequeath one thousand pounds, to the three daughters of my friend Wm. Bowring I bequeath five hundred pounds each, and the same sum each to the two daughters of Wm. Lee; to the widow of my faithful servant Thos. Deller I give twenty-five pounds a year for her life; to the servants in my family at my death, if they have been fifteen years in my service, I bequeath twenty pounds a year for their lives; to any one who may have been ten years with me I give ten **[218]** pounds a year for their lives, and to any one who have been a shorter time than that I give five pounds a year for theirs, and I desire that my clothes and jewels may be equally divided between Wm. Bowring's three daughters, M. A. Cumming, and F. Good. 20th of April, 1819. I would not forget the poor of this parish, to whom I bequeath twenty pounds a year to be distributed as my executors think proper. "F. SHARD."

The letter and the document it enclosed, coming in this mysterious way, were treated at the time by Mr. Shard either as a forgery or a trick, and he made no attempt to set up the paper: however, in June, 1820, when all the deceased's papers were delivered up to the administrator—the nominee of the Crown—this paper was transmitted among them; but up to that moment all the papers had been in the possession of the parties benefited under this document, during which time there was ample opportunity to frame a will, and to imitate the deceased's hand-writing.

But this at least is clear, that after a careful examination, as I must presume, by

Bowring, the deceased's solicitor, by Shard, and by Beasley, no attempt was made to set up this instrument; no notice even of it was given to Mr. Maule, the nominee of the Crown; for if notice had been given he would have produced it to the King's proctor before he took the oath that the deceased was to the best of his knowledge intestate; and both he and the King's proctor would have thought it their duty to give information to all the parties interested under the paper; they would not have ventured on their own responsibility to sup-**[219]**-press such an instrument; but the parties, instead of bringing this paper under the observation of Mr. Maule, place it without remark among a bundle of papers delivered up to him on the 13th of June, 1820; and they rely on the grants which they hoped, by memorial, to obtain from the Crown.

In June, 1822, no relations having been discovered, further memorials of considerable length were presented to the Treasury by Bowring and by Beasley on behalf of themselves and others, again representing the deceased as intestate. These memorials were supported by various affidavits sworn in 1822, and by recommendatory letters, particularly in favour of Beasley. The affidavits are by Bowring, by Beasley, by Mr. Eastley, by Mr. Thompson, who attended the deceased as a surgeon, and by Webber, Morris and Farris, three of her late servants. Bowring, in his memorial referring to his former petition, states that diligent but fruitless inquiries in America were commenced in 1800 and carried on for several years at the desire and expense of Mrs. Shard, in order to discover her relations; and details with great minuteness the bequests of Mrs. Shard's will, made in her husband's lifetime, and again sets forth her testamentary declarations to Bowring, and her intentions quite to the close of her life of making an ample provision for him and his family, for Beasley, for Mrs. Bishop and for others; but "that by reason of the said Frances Mary Shard having omitted to make her will as she intended, the entire prospects in life of the said Thomas Beasley are destroyed, the said Ann Chissem and several other persons, for whom she purposed to provide, are left totally destitute, and **[220]** they, together with the petitioner, his family, and divers other persons, will be deprived of those parts of the property of Mrs. Shard which she meant to bequeath them, unless the Crown in the exercise of its bounty shall direct a distribution according to her intentions." Beasley's memorial and affidavit in confirmation are to the same effect. Still no suggestion is made of the existence of any will, though these individuals at this time had full knowledge of the document bearing date the 20th of April, 1819, and now before the Court.

In consequence of these applications and no relations having, now that three years had elapsed since the death, been discovered, considerable grants were made to those persons whom, from the statements in the several memorials and affidavits, it was deemed probable that the deceased had intended to benefit: but, as usual, when the grants were paid, security was taken from the grantees to refund in case any persons should appear and make good their claim as relations or under a will; for in either case the Crown would be a mere trustee for them.(*a*)

For several years, viz. up to 1830, matters remained in this position, when a person, the party, James Rutherford, called in the administration, alleging himself to be a relation not more distant than a cousin-german; but averring that, being a **[221]** soldier and quartered in different remote places, he had never heard of the enquiry made after the relations. He gave in an allegation on which several witnesses were examined in Ireland, and a requisition, taken out to examine others in America, was about to be there executed, when, in the middle of the year 1831, the King's proctor, in looking over the deceased's papers with a view to frame his answers to Rutherford's allegation, discovered the paper propounded as the will, and also the anonymous letter which accompanied it. That discovery was immediately notified to all the parties interested; and the executors then thought proper to set up the paper. What had worked this change in their opinion of its authenticity? Length of time could not, under the circumstances, have invested it with any greater authority; on the contrary,

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(*a*) The grants were—to Mr. Lee, of Exeter, 4500l.; to Thomas Beasley, 4500l.; to Mrs. Bishop, 500l.; to Mrs. Cumming, 1000l.; to Charles Shard (the nephew of the late William Shard), 1000l. in trust for Ann Chissem; to Mrs. Deller, 200l.; to Webber, Winser, Morris, and Farris, living with Mrs. Shard at her death, 50l. each; to Miss Shard (niece of the late William Shard), 2000l., also the reversion of the 1000l. in trust for Chissem; and to William Bowring, 1000l.

it surrounded it with great difficulties. If they thought it a forgery in 1820, why did they think more favourably of it in 1831? It was not originally produced till February, 1820, nine months after the death; there had been then abundant time to fabricate it. According to their own statement it remained for three months in their possession before they delivered the papers to the administrator; there was then also abundant time to satisfy themselves if there were any grounds to think it genuine, or any truth in the pretended subduction. It was in the hands of the persons most competent to judge both of the hand-writing and of its probable authenticity.

Bowring, who had been for twenty years the deceased's confidential solicitor, must have been well acquainted with her hand-writing: he is now dead; his evidence, therefore, is lost. If Mr. Shard was **[222]** not acquainted with her hand-writing, at least he was well able to judge of her real intentions, and had the means of consulting those who were acquainted with her hand-writing—with her ability to write—with the fact whether she was ever seen or suspected to write. Joan Cock was living in Mr. Shard's service; he shewed the paper to her in February, 1820, and he was in communication with the persons affected by it. He himself had a strong interest to enquire and must have enquired; yet he treats it as a forgery. Beasley too, the deceased's inmate—her adopted son—her amanuensis—who was constantly with her, particularly during her last illness, and the others who were much about her at that time, all treat it as a forgery. These persons were not only well acquainted with her hand-writing, but in possession of all her papers for upwards of a year after her death, and therefore had ample means of satisfying themselves respecting this document by a comparison of it with genuine documents. If they suspected that this document had been subducted and again from conscience restored, as the letter suggests, then was their time to have produced the paper and to have made exertions to discover the person who had subducted it. Then, recenti facto, all the witnesses would have proved with much greater effect the circumstances, if there were any, to support and establish its validity; the lapse of eleven years has greatly enhanced the difficulty of ascertaining the authenticity of the instrument, of proving the hand-writing, of substantiating subsidiary facts, and, above all, of accounting for their own conduct in treating the instrument as a forgery at the time, and in concealing their knowledge of its existence from that hour.

[223] It is quite unaccountable, then, if the story be true, and the paper genuine, why it was not brought forward in 1820: however, from some reason or other, the parties did not venture at that time to produce it. On the contrary the memorials and the affidavits, both in 1820 and 1822, treat the matter of Mrs. Shard's property as one of intestacy, and tell a story quite inconsistent with the present case. And not only in the memorials, and on oath, but in a confidential letter from Beasley, in August, 1819, he speaks as if no will existed, still less does he suggest that any suspicion had entered his mind that it had been subducted. If, subsequently, the person who had subducted it, and who had written the letter, were ascertained by satisfactory and competent evidence, the mystery might have been solved, but no explanation is afforded. In 1831 the transaction is quite as mysterious and improbable as it was in 1820; indeed, when the detached facts are investigated, still more mysterious and improbable. The reason, however, why, in 1831, the parties assert that to be genuine which, in 1820, they treated as a forgery, is far from inexplicable. Many of the parties (not indeed Mr. Shard, but still he had a strong interest) had received grants from the Crown; now, therefore, that a claimant as a next of kin had appeared, if his relationship were established, the monies granted must have been refunded either by the grantees or their securities. To escape from that obligation they would catch at any straw, they would take any chance however desperate; they, and some of their witnesses, had every possible inducement to endeavour to sustain this paper in 1831—inducements which did not exist in 1820.

[224] What, then, are the grounds relied on to support the authenticity of this paper? First, similitude of hand-writing. Secondly, the probability of the disposition. But one great ingredient is wanting—a connexion of the paper with the deceased. There is nothing whatever to connect it with her: it was not found in her repositories; it has not been traced into her possession at any time; there is no recognition of, or allusion to, it by her, either by declaration or by act; not even any one witness who deposes that she was seen writing about the time it bears date, or in any way engaged on a paper similar in appearance.

It has always been the doctrine of this Court—a doctrine founded upon sound

reason, alike important to the security of property, and to the protection of the rights of relations—that similitude of hand-writing, even with a probable disposition, is not sufficient, without something to connect the document with the deceased. From this doctrine, which is to be found in *Crisp and Ryder* v. *Walpole* (*a*) and in other cases, I am not disposed to depart, though I accede to the proposition that the Court must look into, accurately distinguish between, and ultimately decide each case upon its own circumstances.

Similitude of hand-writing is at best the weakest of all evidence as a foundation of proof. Evidence to it depends on mere opinion; there is no fact like an act of execution. Hand-writing can be imitated with such perfect exactitude as to deceive even the most practised eye, and the most minute **[225]** examination. True it is that the imitation of an holograph is far more difficult than of a mere signature, but here were abundant time, and plenty of holograph papers—old letters of the deceased—in the possession of the parties, by the help and study of which they might acquire a power of imitating her writing with all its peculiarities, the introduction of which would give to the instrument the semblance of genuineness. For example, if sometimes in the name of Bowring she did not insert an "e," and sometimes in the same letter she did interpose the "e," the introduction of that mistake would be an ingenious mode of imitating her writing. The persons in possession of these documents were good penmen, and had, in 1820, the strongest interest for fabricating such a paper; for they were then uncertain whether any grants from the Crown would be made, or whether relations might not appear. The Court must not be understood as intending to express any suspicion of those persons Beasley and Bowring, and still less of Mr. Shard. Though they had possession of the deceased's papers, though the fabrication is not an impossibility, though they all, from February to June, 1820, treated the instrument propounded as a forgery, and never afterwards suggested its genuineness till 1831, yet the Court does not charge them with the fabrication of it, that is not a question which this Court is called upon to decide.

Again, as to the probability of the disposition. It is true the deceased had a great regard for Beasley, for Bowring, for Mrs. Bishop, and for others of the parties benefited; and it is highly probable that if she made any will these persons would be objects of her testamentary bounty. **[226]** If then the act had been connected with the deceased, and the question had turned on her capacity, volition, or on fraudulent imposition, the high probability of the bequests would have had much influence on the decision; but as proof that the instrument is not a forgery, the probability of the bequests is of very little weight; for any person sitting down to forge a will would introduce into it probable bequests, and also bequests to those persons who would be best able to prove it a forgery, in order to conciliate and quiet them. Probability of disposition is, therefore, consistent either with the supposition that the paper is forged or that it is genuine. Even then, if there was nothing opposed to those two ingredients, I should hardly venture to pronounce for this paper, unless the third species of proof were supplied, viz. the connection of the instrument in some manner with the deceased; as, for instance, either by being found or seen in her possession, or distinctly recognized and referred to by her as her act; but what would be a sufficient connection must depend upon all the circumstances of the particular case.

What, however, is the proof of hand-writing, and what is there opposed to it? In the first place, the deceased did not write much for twelve years before her death, since from the time Beasley left school, viz. from 1810, he wrote everything for her. But how is the affirmative of this part of the case sustained? William Court, who lived with her as a servant in her husband's life-time (and he died in 1806), states that while in her service he frequently saw her write, and he has produced two letters written by Mrs. Shard to him in 1794 and 1796; he had not seen the deceased for twenty years, and he is himself of the age of seventy-nine, **[227]** yet he has no doubt that the paper is all in his late mistress' hand-writing. Pierce also was in her service, during her husband's life-time, viz. from 1796 to 1804; still, although his acquaintance with her writing has so long ceased, he has no doubt that the paper is genuine: and Mrs. Bishop, who undoubtedly had better opportunities of forming a correct

(*a*) 2 Hagg. Ecc. 531. See also *Constable* v. *Steibel and Emanuel*, 1st ibid. 60. *Headington* v. *Holloway*, 3 ibid. 280. *Machin and Tyndall* v. *Grindon*, 2 Cases temp. Sir George Lee, 406. *Saph* v. *Atkinson*, 1 Add. 212.

judgment, "does not hesitate" in her opinion. I shall see hereafter what weight is due to the opinion of this releasing and refunding witness. Horn, a carpenter, and a very old man, knew the deceased from 1786; and he fully believes that the paper is in her hand-writing. John Webber is also a releasing witness, but expects compensation, and trusts to the generosity of the parties if the will is established. Even Davies had not seen her write for many years. Affirmative evidence of hand-writing less satisfactory has seldom been produced. Many old letters are before the Court; some of them differing a good deal from others; but several of them are in a loose, broad, scrambling, coarse hand, easily imitated as to general character. However, as to judging by comparison, the Court never ventures to proceed on any such unsatisfactory ground. In respect to the evidence against the writing being that of the deceased, I do not much rely on the witness Joan Cock, though she had great means of judging; and if she be worthy of any credit her evidence would be deserving of some attention; she is a married woman, and has been examined both on behalf of the asserted next of kin and of the Crown. In answer to the eighth interrogatory, on her examination upon Rutherford's allegations, she says that the will was shewn to her by her master, Mr. Shard, in 1820, and she then declared that **[228]** it was not the deceased's writing. She has again carefully observed the writing, and she assigns, as the reasons for her disbelief of its genuineness, the deceased's incapacity to write, from bodily infirmity, and besides that the figure of 8 does not resemble that figure as made by the deceased. Now this may be a trivial circumstance, but it is singular that there is no instance in any of the letters produced, where the deceased has made that figure in the form in which it appears in the will, viz. with the up-stroke to the left. This fact gives considerable weight to the observation, the accuracy, and correct memory of the witness, unless indeed she has been tutored, and the evidence was preconcerted, for that is the explanation attempted. The difference is pointed out by her, as far as would seem, from memory, from observation, and not from comparison. It does not appear that she had ever seen those exhibits, which so strongly confirm her testimony; and they were not produced for the purpose of shewing how the deceased made the figure of 8. The circumstance of the difference was not pointed out till the evidence of Cock was published: it is not a difference pleaded; it is not a difference, as far as appears, that she comes prepared to depose to; for it is not mentioned in her deposition in chief, it is brought out from her on interrogatory. If she had been tutored, would she have waited till the interrogatory? How was she to know that any such interrogatory would be put to her? It is just possible, but not probable, that she was tutored; but, on the other hand, forgeries are frequently detected by little oversights of this sort, establishing not only the dissimilitude but the diversity. Yet, still **[229]** I do not rely on her opinion: but the coincidence strikes me as very singular.

This, however, is not the only circumstance against the hand-writing. The opinion of all the executors, and all others to whom the writing was shewn, as deduced from their conduct, is evidence against the hand-writing; it is evidence of persons well acquainted with the deceased's writing, of persons interested in believing the authenticity of the paper, and yet abandoning it as a forgery. A still more important circumstance is, that the parties have not attempted to support the paper by any extrinsic fact, such as that the deceased was seen writing at or about this time by those around her. Even Beasley does not pretend that he ever saw her so engaged about the time of the date. There is no declaration that she intended to do, or had done, a testamentary act; no wish expressed that materials should be brought her; no step taken towards a testamentary act, either in her own hand or by the assistance of others, is attempted to be proved. On the contrary, any such fact is negatived by the statements contained in the memorials on oath of Mr. Beasley, one of the alleged executors.

That this instrument was written by the deceased on the 20th of April is also negatived by a subsequent application to Dr. Blackall, on the 28th of April, or beginning of May, to propose to the deceased to make a will, and Bowring was even offended because she had not been sufficiently pressed. No suspicion that she had made a will on the 20th of that month could then exist. This is not all; it is pretty strongly proved, first, that she had no opportunity, on the 20th of April, of writing this instrument without being seen; and, secondly, **[230]** that from bodily infirmity she was incapable of writing it.

As to the first. What were the condition and circumstances of the deceased at the time this instrument bears date? She was a widow, having buried her husband about fifteen years before. The husband had left her his estate for life, and she was possessed of considerable personal property at her own disposal. She had adopted Beasley when a child—the son of a sister of one of her servants—she had put him to school, taken him into her house, declared her intention of providing for him, and he was her amanuensis. For some years Mrs. Bishop (the wife of a watch-maker, in Portland Street) had resided with her as a rather humble companion. The deceased had a house in Harley Street, and also a residence at Torbay; she had a pretty large establishment of men and maid servants, but for the last three or four years of her life, being subject to gout, she had resided in a very recluse manner at Torbay House, where she inhabited two rooms on the first floor, one as a sitting room, the other as a bed-room, but none of the servants, except her own maid, had access to her; Cock and Mrs. Bishop alone attended her. The other persons who occasionally had access to her were Mr. Beasley, Mr. Bowring, Mr. Shard, and her apothecary, Mr. Thompson. During her last illness, on the 27th of April, Dr. Blackall was called in, and for the last two nights her old servant, Harris, came to assist in attendance upon her; but at that time she was insensible. Mr. Shard visited her in March, and after that visit she had a severe attack of gout, from which she was considerably recovered on Easter Sunday, the 11th of April, and in the early part of that week she was **[231]** so delighted at the improvement in her health that the servants had a merry making on the grass plot, and while she sat at the window looking on, she was so much pleased and laughed so that some of the witnesses thought her intellects must have rather failed her.

It is not surprising that witnesses, who are brought to depose to these circumstances after a dozen years, differ in some of the details, and in some of the dates; but there are dates and details on which most of the witnesses on both sides agree. They agree that this merry making was at latest on Easter Tuesday; they agree that she had been ill before, and became ill again—the date of this second illness I will presently enquire into. The will is dated on the 20th of April; it is a pretty long instrument. Bishop admits that the writing of it would at least have occupied the deceased an hour, the writing and composition probably more. The deceased was in a very weak state, almost constantly attended by some of the persons I have mentioned; even at night her door was left open in order that Mrs. Bishop might hear if she wanted any thing, and yet neither Bishop, nor Dolly Cock, nor Beasley, nor Bowring, nor Thompson (if he was in attendance), nor any one person in the house had the least knowledge or suspicion that the deceased had written the will, or had been employed in writing at all; nor that any will had been written for her. True it is that in consequence of her declaration of an intention to provide for Beasley, and for Mrs. Bishop, and for her servants, an impression prevailed that she had left a will, but all her declarations apply not to a will made on the 20th of April, but to a will "long agone," or to a wish "to go to town and alter" **[232]** her will. When Mr. Shard visited her in March she said "he would find a will to his satisfaction in that drawer."

This belief, then, that the deceased had made a will, tends in no manner to support the will dated the 20th of April, as the act of the deceased. The question is not, whether it is probable that the deceased intended to die intestate; nor whether it is probable that if she did leave a will it would have disposed of her property just as this paper does: but the fact to be proved is, whether she did actually write this very instrument, thus mysteriously produced nine months after her death. Even without supposing an actual inability to write at all, it seems next to impossible that she could have had an opportunity of secretly writing this paper herself, and of putting it away without any one circumstance of corroboration, or the slightest suspicion in the mind of any person around her, that such a transaction had been in progress.

It is, however, on the other hand, alleged that from her bodily infirmities she was actually unable to do such an act as this by herself, in this secret manner. It may be hardly necessary to examine this fact with minute accuracy. To support that allegation Joan Cock firmly deposes; and in contradiction Mrs. Bishop is as positive. In respect to the relative credit of these two witnesses, it may be observed that Joan Cock has no connection with the parties; she is so far respectable that she was taken into Mr. Shard's service, and continued therein a considerable time; she is deposing against her own interest, and positively denies any promise or understanding that she is to receive any compensation. On the other hand, Mrs. Bishop is not merely a releasing

witness, but she has [233] received a grant from the Crown, which must be refunded if the will be set aside, and the relationship established: she has every possible bias in her mind to support the will, and her deposition contains strong marks either of the influence of that bias, or else of her total want of memory—take one fact as an example. There is nothing more clearly established than this merry making on the green in Easter week; it is spoken to by witnesses on both sides, who state that the deceased was at the window, and that Mrs. Bishop was supporting her; and yet Mrs. Bishop has no recollection whatever of any such circumstance. On the other hand, Joan Cock is in some measure confirmed by the other servant, Sally Godbere, and by Newman; who, though they did not see the deceased at this time, yet, from the representation both of Joan Cock and of Mrs. Bishop, fully understood at the time that the deceased was in so infirm a state as to be helpless. Again, Mrs. Bishop attempts to fix the commencement of the deceased's last illness after the 20th of April, viz. on the 25th or 26th; but was not Mrs. Bishop's memory here also treacherous? Did not the deceased become ill and suffer a relapse on the 17th or 18th, a week sooner? Their own witnesses say the relapse was in Easter week, and as if she had caught cold by looking out of the window on the Easter Tuesday. The other evidence is to the same effect; but the very entry in Dr. Blackall's book, minutely detailing the general appearance of Mrs. Shard, her age and symptoms of disease, tends strongly to shew that her illness was of some standing when he was sent for on the 27th of that month; and that such was the case is much more in accordance with probability and with general conduct than that Mr. [234] Bowring should send away to Exeter for Dr. Blackall, merely because she was "a little sick" on Sunday, as Mrs. Bishop relates, instead of first seeing what Mr. Thompson, the apothecary, could do for her. All this evidence assists in satisfying the Court that the deceased had neither the opportunity nor the ability to make this will at the time it bears date. If so, the executors have failed in proving that it is the will of the deceased. This might even have been the result if the instrument had been found in her repositories. The facts and evidence might possibly have led to the conclusion that it had been fraudulently placed there. But it is not necessary for me to consider the evidence with reference to such a state of circumstances; here are the original additional mystery and suspicion hanging over the case: it is not proved that the paper was in the deceased's possession, or that it was ever referred to, or recognized by her.

Who should have taken it from her repositories? Who had any inducement? Not Bishop—she was benefited by it: not Cock—she was provided for: not Farris—she could not even write, and here is her oath in support of an intestacy. This fact is proved and not denied, that the evening before the deceased died, when she was insensible, Beasley did open her repositories, took out some papers, and sent them to his own room. That is admitted: whether they were sent by Cock or Farris he doubts, and it is immaterial. One of the witnesses states that papers were also sent by Farris after the death—on the Sunday—and were deposited in the butler's pantry. Both stories may be true. The Court does not join Cock in casting any suspicion on Bowring and Beasley, that they subducted and destroyed any will: if any [235] will were found there, it could only have been subducted because it did not sufficiently provide for them, or because it was supposed not to be valid from an insufficient execution. But the Court is not warranted in forming any conjectures or expressing any suspicions tending to unravel this mystery. I am only called upon to decide whether the executors have succeeded in establishing the instrument in question to have been written and signed by the deceased. The manner in which it was produced appeared at first to create very great difficulties: these difficulties have not been removed by the evidence; the parties themselves in 1820 considered these difficulties insurmountable. They are not less insurmountable at present. Upon the whole result of this part of the case I must pronounce against the paper propounded, and that the deceased, so far as appears, is dead intestate.

The next consideration is whether the deceased has left any known relations.

The case set up is that the common ancestor was one James Rutherford, a wheelwright, at Moira, in Ireland, who in 1720 married Dolly Wait, and died in 1748; that Dolly survived and died in 1785; that they had issue of this marriage five children, Margaret, James, John, Samuel, and Robert. Margaret married Henderson, but died without issue. James, who was of no trade, and was idle, lame, and imbecile, lived and died a bachelor in Ireland. John, a whitesmith, at Lurgan, married and

left a daughter, but she is dead. Samuel, a wheelwright, married, in 1750 or 1751 Mary Mercer, and was the father of John Rutherford, the claimant, and three other children, who died [236] without issue. Robert enlisted in the Dragoons in 1740, was wounded in Germany in 1743; returned to Ireland in 1747, married Mary Brine at Dublin in 1752, had three daughters, Sarah, Margaret, and Agnes, all born in Ireland: from Ireland Robert went to America in 1755, kept an inn at Trenton, where he had two other children, Frances Mary, the deceased, and a son, who died young. Of none of these links is there any public documentary evidence, no entries of baptisms, marriages, or burials, and the excuse is that they were Presbyterians, and that no registers of that sect are made or kept; that the transactions are very remote, and are sufficiently proved by reputation and acknowledgment: and so indeed they may be, if the evidence is clear of all doubt and suspicion, but there is no documentary evidence of any other sort; no marriage settlements, no entries in family books, no testamentary acts, no correspondence between any of these parties, still less of Robert, either with his parents, brothers, nephews, or any other persons: all depends upon parol evidence of declarations. There is indeed one entry—the entry of the baptism of Margaret, daughter of Robert and Mary Rutherford, on the 7th of March, 1755, but there is nothing to fix the identity; the name is not uncommon; there can be no difficulty in finding corresponding names, but the name of the deceased's mother was Margaret, not Mary: the diversity of the parties then is proved rather than the identity.

The administration granted to the Crown in 1819 was not called in by the present claimant, John Rutherford, till 1830. This was the more extraordinary, because he asserts his relationship to be as near as a cousin-german, and that he is one of a [237] numerous family; some of whom and their connexions were living in no very remote part of Ireland, in the county of Down: nor was it the less extraordinary, as it appears that the deceased herself for three or four years, viz. from 1798 to 1802, was using every possible means to discover relations, and if Caldwell, one of the witnesses, is entitled to credit, both the claimant and the deceased had made enquiries some years before for information respecting Robert Rutherford; yet neither these first enquiries, nor the enquiries by the deceased herself, nor by the advertisements after her death, nor the subsequent claims of relationship by others in 1823, bring forth any claim for any of these parties till this John Rutherford launches his claim in 1830. Under these circumstances, more especially the relationship being so near, and the property so large, clear and indisputable proof that the claim is well founded is requisite, because there has been time and inducement to trump up a false case.

The main point is whether Robert, the son of James, actually went to America, there settled at Trenton, and was the father of Mrs. Shard, which point I will now consider.

Assuming John to be the grandson of James, the wheelwright, and of Dolly Wait, and son of Samuel, the wheelwright, and nephew of John, the whitesmith, at Lurgan —assuming also, and of which there is no doubt, that Mrs. Shard, the deceased, was the daughter of a Robert Rutherford, of Trenton, in America—is there satisfactory evidence that Robert Rutherford, of Trenton, was the son of James the wheelwright? The only proof is the evidence of three witnesses who swear that they heard Robert Rutherford at Trenton [238] make declarations bearing that inference. This, at the best, would be most dangerous evidence, under such circumstances as have taken place in this case. These three witnesses are deposing to declarations made forty or fifty years ago, with a large property at stake; no living person to contradict, no document whatever to support, their testimony. Discrepancies and variations there are between these witnesses such as shake their credit, and which have been fully and minutely pointed out by counsel, and though the replies given to the objections have been ingenious, they are not sufficient to satisfy my judgment.

But the testimony of these three witnesses is falsified by better evidence—by documents written many years ago, irreconcilable with the present case. Fortunately a wholesome rule obtains here, that in cases of pedigree a party has no right to see the adverse plea till he has set out his own pedigree: the documents, then, to which I have just alluded, were not seen till the allegation setting out the claimant's pedigree had been given in. Now, it appears that about 1776 or 1777, if not earlier, the deceased, when about 15 or 16 years of age, eloped from America with Mr. Fortescue;

he died about 1781: in January, 1788, she married Mr. Shard, a gentleman of fortune, and, having no children, she subsequently became very anxious to discover her relations. Upon quitting America she had left at Trenton her father, then a widower, and three sisters, but, owing to the circumstances under which she had quitted America, she does not appear to have kept up any correspondence with her family; when, however, she became desirous of ascertaining what relations she had, she employed her confidential solicitor, **[239]** Mr. Bowring, to write to Trenton for information respecting them; and she furnished him with all the particulars she could recollect; and not having left America till she was 15 or 16, she, from the conversation of her parents and elder sisters, must have learnt every thing that her parents might think proper to disclose respecting themselves. From her statement it is quite clear that she had never heard any mention made of her grandfather James, the wheelwright, or of her uncle Samuel, the wheelwright, or of John, the whitesmith, or of the town of Moira, or Lurgan, or of this marriage at Dublin, or of her mother Mary: she was doubtful whether her family came from Ireland or Scotland: she understood her father had been married in London; she understood, and she could hardly be mistaken by possibility, that her mother's name was not Mary but Margaret; she understood that her elder sister, and her elder sister only, was born in England, and was also named Margaret, like her mother; she understood her father's family were not wheelwrights and smiths, but persons of some consideration, and that though her father had enlisted in the Black Dragoons, yet that his colonel procured him a commission.

These and other circumstances are stated in the deceased's letter of 19th December, 1798, and in Mr. Bowring's letter of 28th December, 1798, addressed to Mr. Kilpatrick, or his successor, the minister of the congregation at Trenton; so that when the deceased came away from America Mr. Kilpatrick was the minister. It is impossible then that the Court can venture to place the least reliance on the pretended declarations deposed to by King, M'Ginley, and Davis, which are quite at variance with the circumstances stated in the letters of 1798. Other circumstances, if more were ne-**[240]**-cessary, falsify the story of these witnesses. They speak of Robert having attended Armstrong's chapel, and of Armstrong having baptized his children; but here is Armstrong's answer to Bowring, that he had done duty at Trenton for fifteen years only, viz. from 1784 to 1799, had not only no recollection of the family of the Rutherford's, but that after a considerable enquiry he could obtain no information respecting them. Two of these witnesses speak of the brother James being at Trenton, and of one of Robert's daughters residing with him. Now this James Rutherford of Trenton was quite a different person from the uncle of the party in the cause; for James, the son of James, and uncle of the party in the cause, who was lame, fond of painting, and was non compos, died a bachelor in Ireland, and never was in America. Upon the whole I cannot venture to give any credit to witnesses deposing to declarations in the manner that they have done. Without, therefore, going more minutely into this case, I am not satisfied that there is proof of the claimant's interest, and I must pronounce against it.

The King's advocate prayed costs; at least a sum nomine expensarum. *Matthias and Others* v. *Maule and Farmer*, 1829, Trin. Term, 3d Session.

Per Curiam. There is property in the hands of the Crown sufficient to meet the expences of this suit. The case set up is one of much suspicion, but, unless I were quite satisfied that it is a complete fabrication, I should not accompany a sentence in favour of the Crown with a condemnation in costs.

No costs.

[241] BOWLES *v.* HARVEY. Prerogative Court, Trinity Term, 4th Session, 1832.—A party having, after a lapse of thirty-five years, called for an inventory and account of an insolvent estate, the executor, who appeared under protest, dismissed with costs.

Ann Bowles died in 1797, a widow, leaving three children; and in the same year her executor, Harvey, took probate of her will under 600l.: the estate was insolvent, and the creditors accepted 10s. in the pound under an arrangement made with them at the time by a solicitor and an auctioneer, when the affairs were settled; the solicitor was dead, and the documents were lost. Henry, one of the children, now nearly forty years of age, called upon the executor for an inventory and account. The executor appeared under protest.

Addams in support of the protest. When there are fair reasons to induce the Court to conclude that the estate has been duly administered, it will dispense with an inventory and account. The estate was insolvent, and the son, who now applies, attained his majority in 1813.

The King's advocate contrà. An appearance under protest is irregular, the usual and regular course is to appear absolutely and pray to be heard on petition. It is part of the executor's oath, in taking probate, to render an inventory and account.

Per Curiam. This seems to me a very vexatious proceeding. It is impossible now to make out an inventory: the papers are all lost—the transaction is by-gone; [242] and there is no reason to suppose that the executor is in possession of any of the testatrix's property. That the executor in this case was not liable to be called upon is, I think, a fair ground of protest. I am of opinion that these proceedings ought not to have been commenced, and I dismiss the executor with costs.(*a*)[1]

Protest sustained.

HIGGINS *v.* HIGGINS. Prerogative Court, Trinity Term, By-Day, 1832.—In a case of inventory and account brought by a legatee, a declaration (instead of an inventory) setting forth desperate debts due to, and larger debts due from, the estate, but annexing no vouchers nor accounts, held sufficient after a lapse of seventeen years. In such a suit the Court cannot decide whether debts alleged to be due from the estate are a legal set off. Semble, that in a cause of subtraction of legacy the legatee, on giving security to refund, would be entitled to recover his legacy.

On petition.

This was a case of inventory and account brought by Joshua Higgins, a nephew and legatee in 100l. The petition, in substance, alleged that Benjamin Higgins died on the 11th of January, 1815, and on the 11th of March his widow proved his will as executrix; that the petitioner's legacy had not been paid; that in the declaration, instead of an inventory, the executrix alleged various debts due from officers to her late husband while in the Commissariat department, but that, save as to a few names, she was unable to specify them; and that the whole of such debts were desperate; that the deceased died indebted in upwards of 600l., no part of which debts (which were set forth) had been paid; but "the accountant craved leave to retain sufficient assets to pay the same, if entitled by law so to do." The petitioner further stated that there were no vouchers nor accounts in proof of the alleged debts, which he denied to exist; but that even if there were debts, it was not compe-[243]-tent for the executrix, after seventeen years had elapsed without any steps taken by the creditors to recover against the estate, to retain assets for an indefinite period and thus defeat the legatee's claim, wherefore he prayed the judgment of the Court to that effect, prior to the institution of proceedings in the Court of Arches.

On the other hand it was prayed that the Court, on reference to the declaration as an inventory and account, would dismiss the executrix.

Addams for the legatee.

No counsel was heard for the executrix.

Judgment—Sir John Nicholl. The Court cannot interfere in this matter. The testator died in 1815, and now, after an interval of seventeen years, an inventory and account has been called for, and I am of opinion that the demand has been sufficiently complied with; for although this lapse of time is not an absolute bar to a disclosure of the deceased's assets, yet after a delay of so many years a full and particular inventory and account cannot reasonably be expected or required, and therefore a declaration has been substituted and produced. It is not alleged that there are any omissa in the declaration; some debts are stated as yet due to the estate, but they are averred to be desperate; it is also stated that debts of the testator far exceeding the assets are yet unpaid, and on this account the executrix claims a discharge from the present demand. She has made a disclosure, and, under the circumstances, a sufficient disclosure, of [244] the testator's estate, and that is all that this Court can do to enable a legatee, if he be so advised, to take further measures. An administrator may be compelled to proceed to make distribution,(*a*)[2] but this is a different case, and the

(*a*)[1] See *Pitt* v. *Woodham*. 1 Hagg. Ecc. 247.
(*a*)[2] See *Younge* v. *Skelton*, 3 Hagg. Ecc. 780.

party is not entitled to call upon this Court to decide whether debts not yet paid but alleged to be due can properly form a set off to the present claim. Even if I were to give an opinion upon the matter, the Court of Chancery might be resorted to, and that Court might give a different opinion. Were there, indeed, a mutual consent and agreement between the parties, then this Court might be induced to enter into a consideration of the point and give its decision upon it. Being, however, of opinion that this petition is quite unnecessary and for a purpose not to be decided in this Court, I shall dismiss the executrix; the legatee might have applied, in a cause of legacy, to the Arches Court or to a Court of Equity; but I may go so far as to say that the executrix is bound to pay the legacy upon condition that the legatee gives security to refund, in case the amount of his legacy is required in discharge of debts.

Executrix dismissed.

[245] WARGENT *v.* HOLLINGS AND OTHERS. Prerogative Court, June 28th, 1832.—Where a will is not traced out of the deceased's possession, but is not forthcoming, the presumption of law is that he destroyed it (though that presumption may be rebutted by proof), and the presumption requires stronger evidence to rebut it when a charge of spoliation is made. The evidence establishing that the deceased had possession of, and access to, his will, and might have destroyed it, and the presumption of law not being rebutted, a copy pronounced against.

This suit respected the will of William Pennell, late of Yarkhill, in the county of Hereford, yeoman. He left property, real and personal, amounting together to about 5000*l*. His will was not forthcoming, and in order to propound a copy thereof a decree to see proceedings, at the instance of a nephew and two nieces of the deceased, and as such three of the residuary legatees under the will, was served in January, 1831, upon the executor, and upon Mrs. Wargent, widow, Mrs. Gammond, and Mrs. Hollings, the deceased's sisters, the parties entitled in distribution under an intestacy.

An appearance having been given for Mr. Hollings and his wife, an allegation propounding a copy of the will, and in effect charging that the original had been wilfully destroyed or suppressed by Hollings, was admitted, and eleven witnesses were examined upon it; an allegation responsive was also admitted, and upon it were examined thirteen witnesses. On the 5th of July (the by-day after Trinity Term, 1831) "publication was decreed, the cause assigned for sentence, on the first assignation, on the caveat-day in August, both proctors declaring they gave no allegation, unless exceptive to witnesses. On admission of such exceptive allegation, if any, the same time."

This assignation and the certificate of the de-**[246]**-cree to see proceedings were continued (at the petition of the respective proctors) on the several caveat-days to the first session of Michaelmas Term, when the proctor for Hollings tendered an allegation exceptive to two witnesses, and prayed to be heard on admission thereof the next Court; this was objected to by the other side, on the ground that the period had gone by within which it was competent to bring in an exceptive allegation. "The Court permitted the allegation to be brought in (which was done accordingly), reserving the consideration, as to its admission, to the hearing of the cause; and assigned the cause for informations and sentence on the next session."

From this decree Hollings appealed to the Court of Delegates. An appearance was given under protest, alleging (after setting forth the assignations of the 5th of July, and subsequent thereto) "that the exceptive allegation was permitted to be brought in, subject to, and only upon, the express condition that the question as to whether the same should be admitted to proof should stand over until the hearing of the cause; that the proctor for Hollings having taken the benefit of the said order, by bringing in his allegation, was not at liberty to complain by way of appeal from the express condition upon which only the allegation was permitted to be brought in, wherefore it was submitted that he had perempted his appeal and was not at liberty now to prosecute the same." To this it was replied, on the other hand, that the allegation (not being precluded by any law or regulation whatever) was duly tendered **[247]** and brought in without being subject to any condition as alleged.(*a*)

On the 30th of May, 1832, before Mr. Baron Bayley, Mr. Justice Patteson, Mr.

(*a*) The substance of the minute of Court made on the occasion referred to, viz. on first session of Michaelmas Term, is printed above.

Justice Alderson, Doctors Burnaby, Gostling, Dodson, Blake, and Haggard, this protest, after argument by Lushington and Addams in support, and by the King's advocate and Phillimore contrà, was overruled.

The question as to reserving the admission of the exceptive allegation was next argued; and the Court were prayed, on behalf of Hollings, to retain the cause and assign a time to hear as to the admission of the allegation. The Court, however, pronounced against the appeal, Mr. Baron Bayley observing: "Such a reservation, as forms the present ground of complaint, may be very convenient and advantageous to both parties; the object of it is to prevent delay and expence, and the Court of Appeal must be cautious not to infringe, in such a matter, on the discretion of the Court below. Should the Prerogative Court, at the hearing of the cause, think the exceptive allegation material, it will direct it to be debated, and should it then be rejected, then the Hollings's will have the liberty of exercising a power of appeal from that decision."

The cause was remitted without costs; and it was argued without the exceptive allegation being debated.

[248] *Judgment—Sir John Nicholl.* The question in this case arises on the will of William Pennell, who died on the 4th of July, 1829, leaving three sisters, co-heiresses of his real estates and the only parties entitled in distribution to his personal property if he shall have died intestate.

The will, a copy of which is propounded, bore date on the 11th of June, 1829; its contents need not be stated in minute detail, but it gave to Samuel Wargent, one of the deceased's nephews, a very preponderating interest. The original will was deposited, together with the probate of his father's will, in a desk in the deceased's sitting room. On a search being made after his death, the probate of the father's will was found in the desk, but the deceased's will could not be discovered; and Mr. Hollings, the husband of one of the sisters, declared that it had been burnt by the deceased in his presence on the 16th of June. A copy of the will had however been made by the solicitor the day after the execution. Proceedings were instituted at common law against Hollings on a charge that he had destroyed the will without the knowledge of the deceased. The bill was found by the grand jury; but it must always be remembered that this is on ex parte evidence only. The indictment was traversed, and the case was ready for trial when a compromise was entered into: Hollings was acquitted as a matter of course, no evidence having been offered on the part of the prosecution: by that compromise it was agreed that administration should be granted to the three sisters as if the deceased were dead intestate, but the administration was not actually **[249]** extracted. At length other legatees (who were not legally bound by the compromise) set up the copy of the will alleging that it was destroyed without the knowledge or privity of the deceased. I have adverted to these circumstances in order to account for the late period at which this investigation was commenced, viz. the latter end of 1830 or the beginning of 1831, but in no other respect do they bear materially on the matter to be decided by the Court, which decision must be guided solely by the evidence before it, and must be determined upon the principles of law applicable to such a case.

The question is whether the will was destroyed by the deceased himself, or whether it was destroyed without his privity or approbation. In the former case the paper is revoked, in the latter a copy may be established.

In case the will was in the custody or power of the testator, or rather, unless it appears that it was not in his custody or power, the presumption of law is that the destruction was his own act: and that presumption must be repelled by the party setting up the copy; he must shew negatively that the deceased had no opportunity, or that he was incapable of destroying it, or he must establish a strong combination of circumstances leading to a moral conviction that he did not himself destroy it; or he must shew positively that the instrument was in existence since the deceased's death, or that it was destroyed in his life time by some person without his privity or approbation.(*a*) An additional presumption is brought to bear against the paper, if any individual is charged with the **[250]** guilt of a fraudulent spoliation —in such a case the charge must be clearly established; and if the proof remain doubtful the presumption of innocence must turn the scale.

(*a*) See *Lillie* v. *Lillie*, and cases there cited and referred to, 3 Hagg. Ecc. 184.

In the present case it will appear that the party propounding the copy must rebut this double presumption; first, that the deceased himself destroyed the will; secondly, that Hollings, the party charged, has not been guilty of a fraudulent spoliation. In this view of the case, and if these principles be correct, the evidence presents no great difficulties.

That the deceased executed the will in question on the 11th of June is not denied, and the time of its destruction is fixed on the 16th, in the presence of Hollings and of no other person. There are some circumstances not wholly undeserving of attention which shew a change of mind in the testator, and a departure from his original intention as to the disposal of his property. He had attained to a considerable age—upwards of sixty—and had never before made a will; he had been ill for some days and yet had not expressed any anxiety to make a will, nor any wish to settle his affairs. The state of his family, consisting of three sisters, for neither of whom, if he was not on exactly equal terms of intercourse with all, had he any decided preference or disaffection, raised no very strong wish, obligation, or duty to die testate. The law would not make an inequitable distribution of his property. The parties about him—the Wargents and the Hollings'—were both anxious to prevail upon him to make a will, in the hope of securing to themselves a larger share than the law would allot. This is proved by Mr. Abell, a witness examined on the part of **[251]** the legatees. This witness, who is perhaps the strongest witness in favour of the sister, Mrs. Wargent, was particularly intimate with the deceased, and was one of the trustees under his will. On the 12th interrogatory he thus deposes: "I have said that Mary Wargent, before the will was made, asked me to recommend her brother (the deceased) to make a will, and that the fact was that Mrs. Wargent wanted a will made her way, Hollings one his way, and the others the same, and that the old man (the deceased) would consequently have had no will himself."

So that it clearly appears from the evidence of this confidential friend of the deceased that both parties were anxious to obtain a will, each in his own way, but the deceased being close and uncommunicative, both were afraid to propose it, lest by a personal application they should defeat their own purpose. Again, the Rev. Mr. Powell calls on the deceased and finds him very ill—"a dying man." On this occasion Mrs. Wargent induces him to mention to the deceased the propriety of settling his affairs, but the deceased declined; "he said, No, no, I can't yet, I must leave it till after Christmas." The witness then proceeds in this manner: "I added, 'I am afraid you will not live till Christmas. Who is your attorney?' He replied, 'Mr. Owen.' I said, 'Shall I send for him, as I would do any service to you or the family?' He said, 'No, I will put it off till Christmas.' I again said, 'You had better not, better do it at once, to prevent disputes; shall I send for Mr. Owen?' He replied, 'No, I will think of it.' I went to Mrs. Wargent and told her I could not prevail on her brother to make his will. I did not see the deceased again."

[252] Here there is no wish to make a will: though urged he declines, and will not allow his solicitor, Mr. Owen, to be sent for, but says he will defer it till Christmas; the deceased then was not originally anxious to do any testamentary act, the wish does not originate with himself. Even to Abell, his confidential friend, his executor and trustee, he seems scarcely to have mentioned the subject. On the 4th article he says: "The deceased never told me but once that he had an intention of making his will, and that was on the 9th of June [two days before the execution], and then he did not say particularly that he did not mean to die intestate, but merely that he had sent for the lawyer to make his will."

Mrs. Wargent, who was constantly in the house, has frequent opportunities of getting persons to suggest to the deceased to make his will, and it is her son who on the 9th of June requests Mr. Owen's attendance to make the will. The making of it is one single transaction, it is "beat out at one heating," the instructions are taken, the draft is prepared, the will ingrossed, executed, and attested before the solicitor leaves the house on the 11th of June. The deceased was perfectly capable: there is nothing to affect the validity of the instrument as then made; but a will thus prepared and executed is much more to be reconsidered, to be altered, and to be departed from, than an instrument the result of long previous consideration, confirming former dispositions of the same import, and sustained by previous declarations of intention. These circumstances tend to remove any strong improbability that the testator should afterwards alter or wholly revoke the paper.

[253] The will is certainly very much in favour of the Wargents. The real property, whether he possessed it in fee or in tail, would under an intestacy go between his three sisters as co-heiresses. The gift of it then principally to Samuel Wargent is, pro tanto, a disinherison of the three sisters. It is not extraordinary, therefore, that Hollings, who is one of the executors and trustees—the husband of one of the sisters and who had several children—should be dissatisfied. It is probable enough, and might almost be affirmed, that he or his wife would have represented to the deceased that the disposition deprived them of their fair share of his property; and some of Hollings's declarations, spoken to particularly by Abell, are not creditable to him and may have tended to excite suspicion. On the 10th article Abell thus deposes: "After the will had been executed and Mr. Owen had gone away, Hollings asked me to ask the deceased how he had made his will. I said I would do no such thing, that he might go himself, for he was the properest person, as he was Mr. Pennell's brother-in-law: he did go up: we left the house together, and on our way home I asked him if the will were to his satisfaction; he said 'it was not, that he did not like it at all, and that it ought to be burnt:' he was very angry, and numbers of times said it ought to be burnt, 'and that it should be burnt if ever he got hold of it;' he told me that he had learnt from the deceased that he had left all the property which he had got from his father to Samuel Wargent, and he vowed that 'he would destroy the will if ever he got hold of it,' over and over again."

These declarations infer that Hollings was dis-[254]-satisfied, and that at the moment of disappointment, and when much irritated, he would not be very scrupulous as to the means he should resort to for the purpose of getting rid of this obnoxious paper. Such declarations may affect his character, but they do not fix on him the intention of committing spoliation; for had he entertained any such purpose he would not have communicated it to this witness. Fraudulent acts are generally done secretly and clandestinely, and Hollings must have known that it would have been no less the duty than the inclination of Abell to defeat any such attempt.

But had the deceased an opportunity of destroying the will after it was made? Owen, in his deposition on the 2nd article, gives this account of what followed. "I folded up the will in an envelope, endorsed it, sealed it, and asked the deceased what I should do with it; he desired me to place it in his great coat pocket which was close by; I did so, and something passed between us as to his keeping it with the probate of his father's will, and I recommended him to place it in the desk he had below in the parlour, where I knew he kept his money, and he said he should do so."

The will was accordingly deposited with the probate of his father's will by the deceased himself in his desk in the parlour: this is admitted in the answer to the 5th article, and in that desk the probate of the father's will was found, but the deceased's own will was not there.

It results, then, from the observations already made, that no great improbability exists that, upon his own reconsideration, or upon the solicitation of Hollings or his wife, the deceased might resolve either to alter or destroy his will.

[255] It is not denied, indeed it is admitted in the answers, that the deceased came down several times afterwards into the room where this desk stood, and shut the door after him: all that is denied is that he was seen to open the desk. Indeed, if one witness, Savagar, is believed, he was down on the 15th, the very day before, according to Hollings's account, he destroyed the will. She says on the 5th article: "I recollect well Mr. Pennell's coming down on the Monday after the will was made [this clearly was on the 15th]; Mr. Hardy on that day gave him the sacrament in the morning, in the evening he came down: I saw him go into the parlour, and I heard him unlock and lock his desk, and I saw him come out at once and go upstairs; as he passed I could see that he had somewhat in his hand, it looked like a memorandum book, and I thought it was some accounts he had to settle with Price, whom he was expecting, but who did not come till the next day. I do not remember seeing him go to the desk about that time only that once."

Here is evidence not only that he was able to have access but had actual access, on the 15th of June, to the place where the will was deposited, and though there is no precise identification of the will, yet it is clear he had an opportunity of carrying it upstairs on that day. If he removed it for any purpose, whether to revise or to alter, that removal is the strongest confirmation of the presumption of law that the destruction was his own act, unless it could be clearly shewn that Hollings had destroyed the

will without the deceased's knowledge, or unless Hollings' declaration could be falsified by shewing its actual existence after the [256] 16th, the time when he says it was burnt in his presence. And is that declaration falsified?—quite otherwise. Savagar's evidence, which I have just read, tends to support the declaration of Hollings; and her account is corroborated by Price, who, on that very day, was engaged with the deceased in settling some accounts—therefore he was able to do such an act as the destruction of his will on the 16th.

Price says: "On Tuesday morning, the 16th of June, I found the deceased sitting in a chair in his bed-room; he was dressed as I usually saw him, I thought him better; he had a fire and complained of cold; he said to his sister, Mrs. Wargent, 'Fetch me my book, it is upon the top of my desk' [and having been down stairs at his desk on the evening before, it was very probable that he should remember exactly where the book was]. She presently brought up the right book, the deceased then calculated on the back of my bill how much I owed him, and he me, the balance was in his favour and I paid him 2l." The deceased then was able to have destroyed the will on the 16th, and the account is quite in consonance with Savagar's evidence.

Mr. Gregg, Hollings' solicitor, says on the 11th article: "It was on the 22nd of June [and he speaks from an entry in his day-book] that Hollings was at my office and informed me that the deceased had, in his presence, burnt his will. Hollings then went on to say the deceased was induced to destroy his will from what Counsellor Poole had said to him (Hollings), viz. that the law would make the best will for him and divide his property equally among his three sisters; that [257] Hollings told this to the deceased, who in consequence burnt his will in his presence; that neither Mrs. Wargent nor any one else knew about it, and that Mrs. Wargent would be much disappointed when she should hear of it. I told Hollings this might occasion disputes, and that it would be much better if some paper were signed by Mr. Pennell, or some recognition made by him in the presence of some disinterested person of such destruction; but Hollings replied 'that could not be done without Mrs. Wargent knowing it, which Mr. Pennell guarded him against, as, if Mrs. Wargent found it out, he should have no rest from her and her family until he had made another will.'" It is unnecessary now to state more of this gentleman's deposition. Hollings's communication, thus made, is certainly no evidence of the fact that the deceased himself burnt the will (and no evidence of that is required—it is the presumption of law), yet it accounts for other parts of the case, and takes off the effect of the non-disclosure either by the deceased or Hollings of this destruction of the will to Abell, who was favourable to the Wargents.

I must here notice that the truth of Hollings's story is confirmed to a certain extent by Mr. Poole, a barrister and chairman of the Herefordshire Quarter Sessions. This gentleman was acquainted with the deceased; he states that as the deceased frequently asked his opinion, he conceived it had some weight with him; he further deposes on the 7th article that on the 15th of June (previous to Mr. Pennell's death) Hollings was at his house paying him some rent, and in the course of conversation about Mr. Pennell's state of health and of his affairs "Hollings expressed dissatisfaction at the deceased's will, and also said that the deceased [258] was dissatisfied, and my reply was, 'If Mr. Pennell is dissatisfied with his will, he need not have any, the law will make a very good will for him,' and I stated in what manner. I believe I added, 'If he is really dissatisfied with his will, you had better get him to destroy it, and then the law will take its course; and you may tell him so from me;' to which Hollings replied 'he would.'"

Hollings, therefore, was with Mr. Poole on the 15th, the day on which the latter informed him how the deceased's property would go under an intestacy, and he authorized Hollings to tell the deceased, in his name, that the law would make the best will for him. What is more probable than that the deceased, having the will in his room, should, on Hollings' communicating to him (after Price was gone on the 16th) what Mr. Poole had said, have thrown his will into the fire. It is equally natural that he should not disclose to Abell what he had done, but should keep up the appearance of retaining him as his executor, and that Hollings should do so too, as Abell states he did on the 25th of June, although previous to that time he had communicated to Gregg that the will had been destroyed. This deception might be blameable, but, under the circumstances to which I have referred, it is not improbable nor inconsistent with the supposition that the deceased himself destroyed the will on

the 16th. The subsequent conversation with the Rev. Mr. Hardy on the 18th is quite consistent with the deceased's having burnt his will. The witness states that on that day, at the request of the medical man, he spoke to the deceased upon the expediency of settling his affairs, and adverted to the disposition of his property which the law would make; that the deceased bowed his head [259] and made no answer; "but Mrs. Wargent, who was in the room, and was the only person with them, said, 'My brother has made his will: Mr. Owen did it.' The deceased neither affirmed nor denied that he had made his will; the witness apologized for introducing the subject, and, after a short time, went away." The deceased's silence upon the subject is in no degree inconsistent with his having destroyed his will; he wished not to have the act known either to Mrs. Wargent or to those who might officiously interfere to induce him to make another will; he avoids the discussion; he might now be satisfied with that disposition which the law would make—an equal division between his three sisters.

Under these circumstances, and upon this branch of the evidence, so far from the presumption of law being repelled, it is proved that the deceased had possession of his will, and full opportunity of destroying it, and no strong improbability exists that he should have resolved on that step.

But on the other branch of the case, is the charge of a fraudulent spoliation established against Hollings. On this point the presumption of law—that the party is innocent—is far stronger; and the fraud must be proved by far more stringent evidence.

The circumstances already noticed may be sufficient to dispose of this part of the case, but it is due to the memory of Hollings (for he is now dead) that although, Abell being entitled to credit, Hollings may have afforded some grounds for suspicion and created prejudices in the mind of Abell which may account for the tone of his evidence, yet there is no fact to fix such a fraud upon Hol-[260]-lings, but rather the reverse. There is not the slightest proof he even had possession, or attempted to get possession, of the will; he was never seen at the desk, or found shut up in the room, or in any other situation so as to create any suspicion that he was endeavouring to obtain the will. If he ever had possession of it at all, it was probably before the 22nd of June, that is, before his communication with his solicitor, Mr. Gregg. Long after that time it is admitted in the answers that the key of the desk was in the deceased's possession under his pillow, and inaccessible to Mr. Hollings without the knowledge of those about the deceased. The result of the evidence then is to negative the spoliation by Hollings. Even if it were a case of grave suspicion, if it were doubtful, he would be entitled to the benefit of that doubt in favour of his innocence against such a charge.

Upon the whole, the Court is of opinion that the presumption that the deceased himself destroyed and thereby revoked this will is not repelled; but, on the contrary, is rather confirmed by the evidence; I must therefore pronounce that, so far as appears, the deceased is dead intestate; and I decree the administration to the sister Mrs. Hollings, but I shall give no costs.

Administration was finally granted to Mrs. Gammond and Mrs. Hollings.

[261] OWEN *v.* OWEN. Consistory Court of London, Mich. Term, 1831.—In a suit for restitution of conjugal rights brought by the wife the husband pleaded her adultery, proved gross impropriety of conduct, absence from home (unaccounted for) on two nights; letters from her containing admissions of guilt, and endeavours to induce individuals to give false representations as to where she slept.—Separation decreed. Quære, whether the rule that a separation cannot take place on a mere confession of guilt applies to a confession in unsuspected letters to third parties.

This was a suit of restitution of conjugal rights brought by the wife, in which a defensive allegation pleading her adultery was proved.

Haggard for the husband.

Dodson and Addams contrà.

Judgment—Dr. Lushington. The charge against the wife is completely substantiated. It is unnecessary for me to inquire whether the adultery—alleged to have been committed at the husband's house, when, during his absence, the asserted paramour slept there—is fully established; but that the wife was, on the occasion to which I refer,

guilty of high impropriety of conduct, is clearly proved. It is also clearly proved that on the night of the 29th of April, and of the 20th of May, 1830, the wife was absent from her husband's house, and these absences are wholly unaccounted for. If then the case of the husband rested here, the Court would be entitled to ask why, if conscious of innocence, the wife had not pleaded and proved it? Again, her own letters contain distinct admissions of guilt, and the strongest endeavours, by a subornation of perjury, to induce different individuals to make such a representation as might satisfy her husband that on the nights in question she slept where no sus-[262]-picion could reasonably attach. There can be no doubt but that these letters are perfectly genuine; and although it is a well established rule—a rule that may, perhaps, be extended to a confession by unsuspected letters to third parties—that the Ecclesiastical Court will not, on a mere confession of guilt, pronounce for a separation,(*a*) yet the principle upon which the rule is founded is a fear of collusion between the husband and the wife; in this case, however, there is not the slightest idea of collusion. The letters were written by the wife (while under a friend's roof) with the view of the same being secret, and in which she was exercising her ingenuity how to account for her absence, and thus allay her husband's well founded suspicions. But, independent of the wife's confessions of guilt contained in her own letters, the main circumstances of the case—her extreme impropriety of conduct while her husband was absent from home; her absence on the two nights I have already mentioned: her refusal to give any explanation as to where she passed them (it being proved that she was not with the friends with whom she had previously stated herself as engaged to visit); her anxiety also to clear herself by a subornation of perjury—are facts established by unexceptionable testimony. Every thing but the exact place where the adultery was committed (and that is not of importance) is proved. No presumption in favour of the wife's innocence remains. I am then of opinion that the allegation of the husband is established by evidence, and accordingly sign the sentence of separation.

[263] NEELD *v.* NEELD. Consistory Court of London, Mich. Term, 4th Session, 1831.—In a suit for separation by the wife for cruelty, where the Court is convinced that her personal safety is in jeopardy, or where it may see reasonable ground to apprehend such a consequence, it is bound to protect her: but the Court can only interfere where there is actual personal ill-treatment, or such threats as would reasonably excite in a mind of ordinary firmness a fear of personal injury. The Court—being of opinion that all the circumstances pleaded would fail, if proved, to establish that the wife could not return to cohabitation without risque to life or limb—rejected the libel.—The rule of taking the libel as true applies only to averments of fact, not to inferences which ought to be sparingly introduced.—Letters of the husband exhibited by the wife are evidence against him, and explanations therein contained of his conduct, with respect to the matter charged, are to be taken into the Court's consideration, but other statements therein are not evidence for the husband, at least in debating the plea.—A suit for restitution of conjugal rights strongly infers that at the time of instituting such suit the party had no reasonable ground to apprehend personal violence, but it does not amount to an absolute bar to a sentence of separation for antecedent cruelty; à fortiori, it would not exclude the wife from pleading acts of harshness and severity previous to such suit in conjunction with acts of cruelty subsequently.—An interdict of intercourse with her family is not cruelty to a wife, though, under circumstances, it might tend to illustrate the temper of the husband.—The contents of or extracts from written documents must not be pleaded without annexing the same; and even if the adverse counsel do not object to the non-annexation, the Court must take the objection.

[Discussed, *Russell* v. *Russell*, [1897] A. C. 395.]

This was a cause of separation promoted by Lady Caroline Mary Neeld against her husband, on the ground of cruelty.

The parties were married on the 1st of January, 1831: on the 29th of June, in the same year, a citation in a suit for restitution of conjugal rights, at the instance

(*a*) See *Burgess* v. *Burgess*, 2 Hagg. Con. 223. *Mortimer* v. *Mortimer*, ibid. 316. *Williams* v. *Williams*, 2 Hagg. Con. 304. *Crewe* v. *Crewe*, 3 Hagg. Ecc. 131.

also of the wife, was returned into Court; a libel in the usual form was admitted on the 11th of July, and on the 14th an affirmative issue was given to it, whereupon Mr. Neeld was assigned to take his wife home, to treat her with conjugal affection, and to certify the same on the Court day—on the 4th of August. On that day it being alleged that Mr. Neeld had complied with the assignation of the 14th of July, and no objection being made on the part of the wife, the Court on the 4th of August dismissed the husband from the suit.

On the 11th of August the citation in the present cause issued, and was on the same day personally served on Mr. Neeld. A libel of forty articles was given in; this was opposed, and on the third session of Michaelmas Term the Court, after argument, directed several letters, in Lady Caroline's possession, which were not annexed to the libel, but of which extracts were inserted in the different articles, to be brought in. Nine letters were accordingly produced, and the admissibility of the libel and exhibits was further debated.

[264] The King's advocate and Phillimore for Mr. Neeld, opposed the admission of the libel.

Dodson and Addams contrà.

Judgment—Dr. Lushington. There are two points for my consideration: first, whether the libel is admissible at all; and secondly, whether, if admissible, its substance ought in any way to be altered or reformed. The suit is instituted by Lady Caroline Neeld, praying for a separation from Mr. Neeld, on the ground of cruelty, and the admissibility of this libel depends upon the solution of the question whether the facts, as set forth, which are to be taken as true, would prove cruelty. I wish it to be most distinctly understood that the only question is whether the charges laid in the libel are sufficient to justify me in eventually admitting it to proof; it being no part of my duty to comment upon the conduct of one party or the other, except with reference to the particular charges in this stage of the proceedings. I shall adhere to the example of my predecessors, in not attempting to give a definition of what is, or what is not, legal cruelty, because I think it exceedingly difficult, and it may be dangerous, for any one to lay down, in terms sufficiently clear and comprehensive, the nature of an offence which might, under different circumstances, assume so many and such varied shapes. For all practical purposes the leading principles in suits for cruelty which ought to govern the judgment of this Court have been laid down in terms sufficiently distinct.(*a*)

[265] The main test which I must apply to the consideration of this libel is whether all the facts, assuming them to be true, with which Mr. Neeld is now charged, are of a nature and description to satisfy my mind that cohabitation can no longer subsist between the parties without personal danger to Lady Caroline Neeld. Where there is a strong conviction in the mind of the Court that the personal safety of the wife is in jeopardy, or where even it may see reasonable ground to apprehend such a consequence, it is its bounden duty to protect the wife from risk and danger.

In these suits the species of facts most generally adduced are—first, personal ill-treatment, which is of different kinds, such as blows or bodily injury of any kind; secondly, threats of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury. For causes less stringent than these the Court has no power to interfere, and separate husband and wife: it is necessity alone which has conferred on the Ecclesiastical Court that power, and in a regard to self-protection alone must the exercise of that power be guided. Under any other circumstances the Court cannot put asunder those whom God has joined. This is the wise and prudent rule; were it otherwise, the time of the Court might be consumed in mere domestic quarrels. The Court has no right to consider whether a separation might not, in point of fact, be for the happiness of the parties, nor whether one party or the other has been guilty of misconduct, nor whether there has been a want of that affection which ought to subsist in the matrimonial state: for it must not be forgotten that marriage is in this **[266]** country considered of that sacred and binding force that parties who enter into such a connection are not for slight and unimportant reasons to separate themselves from the duty of cohabitation.

(*a*) See *Evans* v. *Evans*, 1 Hagg. Con. 35. *Oliver* v. *Oliver*, ibid. 351. *D'Aguilar* v. *D'Aguilar*, 1 Hagg. Ecc. 773. *Westmeath* v. *Westmeath*, and the cases there cited, 2 Hagg. Ecc. "Supplement."

When facts of the description to which the Court has adverted are admitted to proof, it is perfectly consistent with the principles already mentioned that minor circumstances should be also admitted; because, on many occasions, they may illustrate other facts; they may afford information of importance, and where the witnesses do not speak with precision, or where the evidence is not clear, they may influence the amount of alimony (if the suit be successful) to be allotted to the wife. But these circumstances must not be light or trifling; they should be of the same character as the principal charges, though not to the same extent.

It has been urged most properly that the contents of the libel are to be taken, for the purpose of argument, as true. To that position I entirely accede; and, in practice, I conceive it to be, when rightly understood, exceedingly beneficial to the suitors. This principle, however, does not go the length of supposing every syllable stated to be true. Averments distinctly pleaded as facts must be assumed to be proved; while averments of an inferential and argumentative character, and which should not be too lavishly introduced, are to be taken only as true to the extent that the inferences themselves can fairly be drawn from the circumstances pleaded as facts. In considering, therefore, the facts assumed to be true, I do not in the least anticipate what may be the answer of the husband to this libel, for, in this stage of the proceeding, I repeat I have nothing **[267]** whatever to do with any possible defence or explanation. I am bound to form my judgment upon the libel and exhibits.

Much discussion has taken place as to the degree of consideration the Court should give to the letters of the parties: they are annexed in supply of proof of different articles; and I apprehend that to the extent to which they support the articles they are evidence against the husband. If, in some of the letters, there are passages explanatory of his conduct, they must justly form matter for my consideration, but if there be in them circumstances not appertaining to the charges, whatever may be their effect in a future stage of the proceedings, I do not think that the Court is justified in considering, at present, those parts as evidence in favour of Mr. Neeld. I will now state as much of the case as it is necessary to advert to.

This marriage, which has turned out so unfortunately for both parties, took place in January, 1831. The cohabitation was very short, for in February of the same year a separation (the account of which is not very clearly stated in the libel, nor does it appear a matter of much importance) took place;(*a*) and the consequence was **[268]** that at the latter end of June a suit for the restitution of conjugal rights was brought by Lady Caroline herself. Mr. Neeld was assigned to take Lady Caroline back, and treat her with conjugal affection; and he submitted to the decree of the Court. From this suit for restitution the presumption is inevitable that Lady Caroline would not have sought to compel a return to cohabitation if she had had reasonable ground to apprehend personal violence. Had therefore the circumstances, alleged to have happened prior to the restitution suit, been of deeper importance and denoting personal violence, I doubt exceedingly whether any reliance could be placed on them when the conduct of the party setting them forth was so incompatible with their existence; but, however, though improbable, still it is not altogether impossible that extraordinary cases might occur in which a wife would hazard her personal safety for the sake of ulterior objects, rather than separate. I am not inclined, therefore, to say that even where legal cruelty has been committed prior to a suit for the restitution of conjugal rights, the institution of such a suit would be an absolute bar to a sentence of separation; à fortiori, I am not disposed to say that if acts happening anterior to the suit for restitution, but which are brought forward at a

(*a*) This part of the case was first noticed in the 5th article of the libel, which, after pleading that from the 30th of March to the 11th of April Lady Caroline was at the house of her father, who, during such time, interfered, but without effect, to put an end to the differences between her and her husband, alleged "the said J. Neeld proposing, on the contrary, that they should live in future separate, and insisting that such proposal first emanated from Lady Caroline, contrary to the fact, save inasmuch as on one occasion during their visit at Warwick (viz. in February) the said Lady Caroline did say, in a fit of momentary irritation, when the said J. Neeld had quarrelled with her without any cause, and had used very opprobrious language towards her, that a separation would be preferable to the misery which she experienced from his conduct."

subsequent period, are not precisely in the nature of legal cruelty, yet still denote considerable harshness and severity on the part of the husband, they ought to be altogether excluded.

But do the circumstances set forth in the libel as occurring between the 4th and the 11th of August amount to legal cruelty? If the facts were all proved, could the Court entertain a judicial conviction that it was impossible for Lady Caro-**[269]**-line, with safety, to return to cohabitation? I mention the 4th of August, because on that day it is stated that Mr. Neeld certified that he had taken his wife home, in obedience to the commands of the Court; and unquestionably, if Lady Caroline had then to complain of grievances, even though of a minor description, and not amounting to legal cruelty, it would have been perfectly competent to her to have alleged them.

Among the charges to which I shall advert it is pleaded that Lady Caroline was interdicted from certain intercourse with her own family: but the Court does not consider itself called upon to pronounce any opinion respecting that prohibition, because although, taken in conjunction with other circumstances, it might tend—supposing there was no adequate excuse for it—to illustrate the temper of the husband, yet I cannot hold that, standing alone, it is a substantive act of cruelty. Then with respect to Mr. Neeld's conduct on the evening of the 9th of August, in slamming down the wooden apron of his cabriolet when Lady Caroline had taken her seat, to her personal injury, and to her great terror and alarm, as set forth in the thirty-first article, it is not pleaded that this was done with the intention of personal violence. But, before determining upon the real effect which this act ought to have upon the mind of the Court, I will advert to other articles. The 32nd article pleads that on the evening of the 10th of August Lady Caroline expressed a wish to pass that evening at her father's, whereupon Mr. Neeld said that she should stay at home, and that "unless Lady Caroline Neeld would promise so to do, he would lock her up." This, unless there was a strong provocation on the part of Lady **[270]** Caroline, of which the Court knows nothing, might justly call for reprobation. Lady Caroline declines to give any such promise; and this proves to my mind that she did not entertain any fear of personal violence from her husband. In consequence of this refusal on her part he leaves her at Coulson's Hotel, in the sitting room with the door locked: and in the 34th article it is pleaded "that on the same evening, after two hours' absence, Mr. Neeld returned, and that Lady Caroline, upon hearing his voice, withdrew into the bed-room, and bolted the door, and that he endeavoured, but without effect, to break it open." This, though very inconsiderate, does not carry with it any personal violence. The article then proceeds to state "that soon after, Lady Caroline came out into the sitting room, expressed to Mr. Neeld her determination to go to her father, and proceeded towards the door of the sitting room, which was open at such time, when one of the waiters took hold of her and pushed her back, and, on her telling him that he had no business to touch her, he replied that he did so by order of Mr. Neeld; that Mr. Neeld then came to the door and dragged his wife back to the sitting room with great force and violence, saying she might take herself off the next day where she pleased, but she should not go out that night."

The 35th article alleged that at eleven o'clock the same evening (10th of August) Lady H. Corry came to Coulson's Hotel, and remained some time; that, on Lady Caroline accompanying her said sister to the door, Mr. Neeld again caught hold of her, pulled her back with such force and violence as occasioned her great pain, and that the marks and bruises created thereby were seen by many **[271]** persons, and were visible for several days. It is from this article that I have entertained a doubt whether, assuming that the whole libel was established by evidence, without the possibility of excuse—except such excuse as might proceed from the statement of Lady Caroline herself—I can arrive at this conclusion, that Lady Caroline cannot return to cohabitation without risk of personal violence. The consideration of this article opens a wide field of argument. It is not alleged that Mr. Neeld excluded Lady Harriett Corry from having access to her sister Lady Caroline; it is not alleged that there was any threat of personal violence, nor any intentional blow. It does then appear to me, upon mature consideration, that, assuming the whole to be proved, I cannot come to a conscientious conviction that Lady Caroline Neeld may not return to cohabitation without risk to life or limb; and if I cannot arrive at that conclusion, giving as large a latitude as possible to the effect of this plea, it is my bounden duty

—a duty from which I must not be deterred—to reject this libel. Short of personal violence, or reasonable apprehension of it, I have no authority to interfere; the law has given me no such power; and, as I think, upon the wisest principle has restricted and limited the authority which I exercise; and in the exercise of that power I am satisfied that this libel ought not to be admitted.

This being the opinion which I entertain, I am relieved from the irksome and painful task of entering into the minute particulars which have been set forth with so much detail in the prior parts of this case; and I readily spare myself a labour which, as it cannot benefit the parties, need be no part of my duty; but I think **[272]** that I should shrink from discharging that duty if I did not say that I lament that some of the most important rules of pleading in this Court have not been adhered to with that degree of strictness which is most beneficial to the cause of justice and to the interests of the suitor. I cannot help thinking that many circumstances have been introduced into this case of a nature so trivial that it is impossible they could have any weight. Too great a liberty also has been indulged in in pleading inferences and arguments, for without pretending to say that they could be altogether excluded, I must observe that the argumentative parts of this plea are longer and more extended than I ever remember. So as to the necessity of annexing written documents,(*a*)[1] the conviction of my mind of the extreme importance of adhering to the rule that where there is a written document it shall be produced, has acquired additional strength from the present proceedings: and it is not, whether the counsel on the one side or the other takes the objection—the Court itself takes the objection, for it cannot adjudicate a case on that which is not legal evidence.

It remains for me now only to say, and to make myself most distinctly understood in this last observation, that I decide nothing between these parties, save that in my judgment the charges brought forward in this libel do not amount to legal cruelty; that, if true, they would not justify me in making a decree of separation. The conduct of either party—the blame to be attached to one or the other—are circumstances which it is not my province to consider. I abstain from all observation upon the conduct of either; I give no opinion upon it; and I wish it again to be distinctly under-**[273]**-stood that, in rejecting this libel, I impute no blame either to Mr. Neeld or to Lady Caroline. I feel it my duty to dismiss this suit; and, though I have bestowed upon the question much painful consideration, I cannot bring my mind to think that in adopting this course there are any grave reasons to make it doubtful that I am acting most in accordance with the established law of these Courts, and eventually for the benefit of all parties; since nothing can be more injurious to them than a suit which should, unnecessarily, be the subject of a protracted public discussion.

Libel rejected.

NEIL *v.* NEIL. Consistory Court of London, Mich. Term, 3rd Session, 1832.—The reduction of the husband's income, by unprofitable speculations, is no ground for a proportionate reduction of permanent alimony allotted twenty years before.

[Distinguished, *Hall* v. *Hall*, [1915] P. 109.]

On petition.

This cause respected a reduction of permanent alimony. It was originally a suit for separation by reason of the husband's cruelty and adultery. In July, 1813, a sentence of separation, on both grounds, was signed. The husband was a tailor, and upon an income from his business of 967l. per annum, permanent alimony, at the rate of 200l. per annum, was allotted to the wife. It was stated, in the present proceedings, that this alimony had been constantly in arrear, and had occasioned frequent litigation; and that in March, 1832, when the monition for payment of alimony was served, there were due to the wife 270l., and on the fourth session of Trinity Term the Court decreed, with the usual monition, 100l. to be paid **[274]** on account of alimony. The prayer of the husband's petition was that the original allotment of permanent alimony might be moderated.(*a*)[2]

Addams for the husband.

Dodson contrà.

(*a*)[1] See *Croft* v. *Croft*, 3 Hagg. Ecc. 317.

(*a*)[2] See *De Blaquiere* v. *De Blaquiere*, 3 Hagg. Ecc. 322.

Judgment—Dr. Lushington. It is admitted, on the part of the husband, that all arrears and costs should be paid; the only question is whether any reduction in the general alimony should take place. In decreeing alimony in 1813 I have some recollection that Lord Stowell, upon being pressed to give a larger sum, observed that if he could think that the wife would be able to obtain it, he would make a more ample allowance, but that the allotment of 200l. a year he considered would be most beneficial to her: and the difficulties she is stated to have experienced in respect of her alimony seems to bear testimony to the propriety of that decree. This order of alimony was made in 1813, and I am not prepared to say that after such an interval, on account of a mere reduction of the husband's income, there should be necessarily a corresponding reduction of the alimony of the wife.

How has the reduction of income, on the part of the husband, been occasioned? It is manifest that he was, at one time, in possession of a large capital; and if he has thought fit to enter into speculations, purchasing Mexican bonds, and shares nearly to the amount of 7000l., it becomes a matter of grave consideration whether, because **[275]** these investments happen for the present to be unprofitable, the wife—who is now increasing in years, and who, it must be remembered, is quite incompetent to contradict the statements of the husband as to his property—should suffer a reduction of alimony. Taking the husband's income, without making an allowance for the profits of his business, to vary from 350l. to 450l. per annum, I see no reason to moderate the original allotment of alimony; the husband has still the power of continuing it; and if he chooses to speculate he must, if unsuccessful, bear the inconvenience. I direct the arrears and costs to be paid; and shall not make any alteration in the decree of 1813 for the allotment of permanent alimony.

SMITH AND MOZE *v.* KEATS. Consistory Court of Rochester, March 7th, 1833.—The governor of Greenwich Hospital, founded in 1694, and part of an ancient royal demesne, to which an unconsecrated chapel, chaplains, and a burial-ground are attached, but the officers of which occasionally bury, christen, marry, have pews at, and resort to, the parish church, and vote at the vestry, is liable to be assessed to church-rate for premises in his beneficial occupation as governor, these premises having never been so rated before, but no valid ground of exemption being shewn to found a prescription.

This was a suit brought by the churchwardens of Greenwich against Sir Richard Goodwin Keats, for a church-rate assessed upon the house, garden, and premises, in his occupation as governor of Greenwich Hospital. The rate was made according to the assessment to the poor-rate.(*a*)

On behalf of Sir R. Keats an allegation, in opposition to this demand, pleaded, in substance, that from time immemorial the manor of Greenwich was a royal demesne; that the palace, formerly standing there, was a royal residence from the time of Edward IV. to **[276]** Charles II.; that the apartments occupied by Sir Richard Keats formed part of a palace begun by Charles II., and which, with the ground adjacent, was in 1694 conveyed by King William and Mary, by letters patent, to certain grantees, their heirs and assigns, for ever, to be holden of the Crown, in free and common socage, and without rent, as a royal hospital for seamen; that commissions of the same tenor were granted by successive sovereigns; and in 1775 the commissioners and governors became, by letters patent, a body politic and corporate, and so remained till dissolved by 10 Geo. 4, c. 25, which vested the corporation estates in certain commissioners, and the general control over the hospital in the Lords of the Admiralty. That the hospital, whilst used as a palace, and ever since, has had a chapel, two chaplains, and a burial ground; that no rent is paid by the officers, or occupiers of apartments in the hospital, nor had any rate for the repairs of the parish church ever been assessed upon such occupiers prior to May, 1829; that the house and premises for which Sir Richard Keats is assessed are situated within and form part of the royal hospital.

The responsive allegation, in substance, pleaded that Sir R. Keats, as having the beneficial occupancy to his own separate use of apartments in the hospital, was, by law and custom, rateable to church and poor in common with other parishioners, and that

(*a*) As to the adoption of a poor-rate to regulate a church-rate, see *Lambert and Simpson* v. *Weall*, supra, 96.

his allegation furnished no ground of exemption; that the chapel, not built until 1752, was not consecrated; that the officers and others of the hospital marry and christen at the church; occasionally attend divine service there; have had pews allotted to them in the body of the church, and vote at vestry; that the burial ground [277] was not attached to the hospital till 1707; and notwithstanding it, that officers of the hospital have been buried in the parish cemetery on payment only of customary fees for parishioners; and have at all times been and are in the exercise and enjoyment of all the rights of parishioners; that Greenwich church was one of Queen Ann's churches; was built of stone, and, until of late years, the church-rates had not been sufficiently burdensome to render it peculiarly incumbent on the parish officers to look for contributions to the church from every species of property liable to be rated. That from 1760 to 1807 the hospital, by agreement, paid an annual sum in lieu of poor and highway rates due in respect of the several officers' apartments and other buildings, grounds, and premises situate within the precincts of the hospital; that from 1807 till 1829 the hospital compounded for those rates by paying in one sum a seventh of the whole monies to be collected from the parish, generally, in respect of such rates; and that partly owing to these arrangements, the officers' apartments not being inserted in the other parochial assessments, were, till 1829, omitted to be inserted in the church-rates. That by the 3 Geo. 4, for building a new church at Greenwich, the rates for the support and service thereof are made chargeable on every person assessable for and towards the relief of the poor of the parish; that such rates were made according to the act; and that Sir R. G. Keats, and other officers of the hospital occupying apartments therein to their separate uses, have duly paid their respective assessments.

The admissibility of these allegations was argued in Michaelmas Term.

[278] The King's advocate and Dodson for Sir Richard Goodwin Keats.

Phillimore and Addams contrà.

Judgment—Dr. Lushington. I have thought it necessary to take a considerable time to deliberate upon this case with a view to ascertain whether there are any authorities that bear upon the question, and I have anxiously investigated the reports and all institutional writers that might be expected to touch upon the subject; but the result of this investigation has been that I find myself without any material assistance. I cannot discover, either of principle or of decision, any thing that more than very remotely and imperfectly affects the present case.

The question I have to decide is whether or not Sir Richard Keats is liable to be assessed to a church-rate of Greenwich parish, in respect of premises in his occupation as governor of Greenwich Hospital, viz. for a house rated at 150l. per year, a coach-house and stables at 20l., a garden at 5l., and a gardener's house and green-house at 20l. I desire it to be distinctly understood that in the observations I may deem it necessary to make it is my intention to confine myself exclusively to the point I have to decide, and that any expressions which may fall from me are not to be carried beyond the strict circumstances of the present case.

Looking to the general principles upon which questions of church-rate depend, there can, I think, be no doubt or difficulty in assuming that church-rate has existed in this country from time imme-[279]-morial; for there is no evidence that it was introduced at any particular period; nor can I find any distinct notice of its commencement.

The question, then, which I have to determine is whether the property in this case is exempted from the ordinary liability on any of the special grounds set forth in the first allegation. It is clear that all property of this description is, primâ facie, liable to church-rate, unless there be some legal ground of exemption.(*a*) The present is a question of exemption standing on its own grounds: and that there may be legal exemptions founded on specific legal grounds cannot be doubted. The property of the church itself is not rated by reason, as is generally alleged, that the rector is liable for the repairs of the chancel.(*b*) It is also stated that there are cases (though I know

(*a*) Upon the liability generally of all parishioners and all property to be taxed to a church-rate, see Degge's Parson's Counsellor, p. 207; also *Miller* v. *Bloomfield and Slade*, 1 Add. 499.

(*b*) See Prideaux on Churchwardens, pp. 50-58. *The Bishop of Ely* v. *Gibbons and Goody*, supra, 156.

of no instance) in which a patron, possessed of lands, may allege that the same are by prescription exempt from church-rate, his right thereto being derived from the founder of the church. Again, it has been said that certain portions of a parish may be exempt by reason of immemorial usage, and the maintenance of a parochial chapel, though, to establish such an exemption, I incline to the opinion that something more would be required.(*c*) Another ground of exemption supposed to exist, though I cannot find that it has been specifically treated of in the books, is where property is held by the Crown jure coronæ.

Where property is in the King's own occupation, directly or indirectly, there can be no [280] doubt, I think, that it is exempt from church-rate. I have endeavoured to trace this part of the subject with greater accuracy, not because it bears directly upon the present case, but as an illustration of the point I have to determine, and in the hope that it might lead to some clue for my decision; but on looking to the liability of the property of the Crown, I find that a series of statutes has introduced so many alterations into the common law principle of exemption, that it is not easy to ascertain what were the privileges of Crown lands by the common law prior to the passing of the statutes. This principle, however, is clear, that property actually in the possession of the Crown is honoris gratiâ, exempt from church-rate. How, indeed, could payment of rates be enforced against the Crown? Not by distress on the personal estate of the Crown. But whatever may be the distinction as to different kinds of land, whether held jure coronæ, or otherwise, it may be a question whether the same principles and distinctions would be applicable to the circumstances of this case.

What, then, are the special grounds of exemption set up by Sir Richard Keats? Looking at the contents of his allegation, I must say that, if there is any privilege of exemption in favour of Greenwich Hospital, by reason of the property, which now forms its scite, having belonged to the Crown, it stands exclusively on the ground of its being parcel of a royal demesne. It seems necessary, therefore, to consider whether such privilege of exemption, assuming it to have existed, continued after the property had passed from the Crown to the hands of the commissioners; and whether the peculiar circumstances of its appropriation to public use make any and what difference. I feel [281] considerable difficulty in holding, as a general principle, that the privilege of exemption from church-rate, which undoubtedly attaches to a royal demesne so long as it continues in the occupation of the Crown for its own use, subsists and continues upon the transmission of the property from the Crown. I lay out of present consideration the peculiar mode of appropriation: I am dealing with the general proposition—whether property of royal demesne transferred to another party ought to retain its privilege of exemption from church-rate. That the exemption would continue has not been attempted to be very strongly argued; and when I look at the consequences, if the affirmative could be maintained, I should view it with a considerable degree of alarm, for it would necessarily follow that all the lands in the country which had ever been royal demesnes, and which had been from time to time transferred to individuals, to bodies corporate, or to sole corporations, would be exempt from church-rate. The consequences of such an exemption would be most injurious to the public at large, for it would throw an additional burden upon those who have to contribute to church-rate. I cannot find any position of law which tends to sustain so injurious a proposition; on the contrary, I think it clear that the moment the property passes from the Crown to other hands the privilege of exemption is lost.(*a*)

If, then, I have arrived at this point, that royal possessions lose their privilege of exemption upon a transmission to the hands of individuals, the next consideration is, ought the exemption to continue upon its transfer to commissioners for the [282] purpose of a royal and public hospital, by reason of the peculiarity of its appropriation. In considering this question, the Court is absolutely and altogether without authority to guide its decision, and it therefore becomes necessary to decide it by reason and analogy. I must, however, recollect, that if I am to found my opinion upon reason and analogy, and to hold, on such principles, that the buildings and

(*c*) Degge, 208; Prideaux, 58, 59; Gibson, 197.

(*a*) *Old Windsor,* or *Rex* v. *Mathews,* 1 Nol. P. L. 178, 192-4. *Ld. Bute* v. *Grindall,* ibid. 174-9, 194.

premises in question are exempt, the reason and the analogy, as bearing on the present case, must be sufficient to justify me in making an exception from a common law obligation and burthen.

What is the state and condition of the hospital itself, and how far is it consistent with justice and equity, that it should claim entire exemption from the payment of a general church-rate? That the inhabitants of this particular hospital, consisting of disabled seamen, the objects of the charity, inmates only because they are otherwise incapable of maintaining themselves, should be rated to a church-rate, cannot be maintained. To rate them would be almost as absurd as to assess paupers in poor-houses, or maniacs in St. Luke's. All the analogies, drawn from the poor-rate cases, tend to the same conclusion: I advert to this fact because I am strengthened in my view of it by the opinion of Lord Mansfield.(*a*)[1] Then, if I consider analogy, so far as respects the persons received into the hospital, there is a ground for exemption: but the case assumes a different aspect when I have to determine on the liability of officers of the establishment—persons holding houses or apartments, not only for the discharge of their official duties, **[283]** but for the accommodation and convenience of themselves and their families. It appears from the rate itself that Sir Richard Keats occupies a house, with stables and appurtenances, garden, and green-house, the occupation of which is not merely for the discharge of his duties as governor of the hospital, but for the domestic accommodation of himself and family. In this state of things I must also assume that Sir Richard Keats and his family may resort to the parish church and partake of its rites. Assuming that Sir Richard Keats had a beneficial occupation, the law infers an ability to pay the rate: and on reason I cannot satisfy my mind that he ought to be exempted. Nothing can be more clear than that all the decisions of courts of the highest authority in respect to poor-rates and highway rates support, by analogy, the rateability of the party in this case.(*a*)[2]

But other grounds of exemption are alleged. It is said that there is a chapel and chaplains belonging to the hospital. Granting this, I am at a loss to understand that the existence of a private chapel is a ground of exemption from the church-rate. I know of no authority in law for that position, nor am I aware that the books furnish any case in which the mere existence of a private chapel exempts a person from the obligation of contributing towards the repair of the mother church. Again, it is pleaded that no rate has been made until 1829. I entertain some doubt whether this is to be considered a legal exemption by prescription, unless it can be supported by some valid reasons, viz. as the scite being on former church lands, or on lands belonging to the founder; or exempted in **[284]** some mode recognized by books of authority; but in the present case, to the year 1694, the scite had been royal demesne in the occupation of the Crown, and then, therefore, not liable to church-rate; and, supposing that no rate has been levied since 1694, one hundred and thirty-five years is not a sufficient length of time to found a prescriptive exemption: and if I were to look to the responsive allegation, I might find, in what regards the building of the new church, some clue to this non-claim upon the governor and officers of the hospital for a church-rate during the period I have mentioned; but I decide the present question without availing myself of the inferences arising from that consideration. As far, however, as the circumstances set forth in that allegation seem to me to bear, they assist my view of the case, and support the justice and reasonableness of the rate. It is, I think, quite agreeable to equity that the officers who occupy apartments in this institution, and who, as inhabitants of the parish, enjoy as such all the privileges and rights connected with the parish-church, viz. of pews, of marriage, of baptisms, and of burials, and who are themselves able to contribute towards the repairs and maintenance of that church, should be liable to assessment in their just proportions; and I must presume that the legislature, when it passed the statute for the erection of the new church, did not deem the rating of the property in question illegal, because it made the whole of it liable to assessment.

Taking, therefore, all the circumstances into consideration, I am of opinion that Sir Richard Keats is rateable for the premises occupied by him as governor of Greenwich Hospital.

(*a*)[1] See *Rex* v. *Occupiers of St. Luke's*, 2 Burr. 1053; *Rex* v. *St. Bartholomew's the Less*, 4 Burr. 2439. And dictum per Lord Alvanley in *Holford* v. *Copeland*, 3 Bos. and Pull. 139.

(*a*)[2] See *Ayre* v. *Smallpeace*, 1 Nol. P. L. 154, 178.

[285] The King's advocate then stated that it was not the intention of Sir Richard Keats to offer any further opposition to the rate; but he had thought it necessary, in the first instance, to take the opinion of the Court before the property of a public institution was burthened with the rate.

Per Curiam. The governor, as guardian of public property devoted to most useful and charitable purposes, has acted very properly in resisting the payment till the opinion of a competent jurisdiction had been ascertained upon the point.

The Court admitted the pleas; and the King's proctor, on behalf of Sir Richard Keats, declared that he proceeded no further in the cause.

Rate established.

SAMPSON *v.* SAMPSON. In the Commissary Court of St. Paul's, December 4th, 1832.

—Under a citation for cruelty only in a suit for separation by the wife, adultery by the husband—occurring prior to the institution of the suit, but sworn to have come recently to the wife's knowledge—may be pleaded, even though publication of the evidence on the libel and on a responsive plea is about to pass.

This suit, originally for cruelty, was brought by the wife against her husband. The marriage took place in 1810, four out of six children were living; cohabitation ceased on the 3rd of January, 1831, and on the 16th of February following the husband was cited in a suit for cruelty, and appeared. The libel was debated, and, generally admitted; when in December, the cause having in the inter-**[286]**-mediate time stood over under a treaty of agreement, alimony was allotted at fifty guineas per annum. On the 19th of June, 1832, a defensive allegation—denying the charge of habitual marital cruelty, explaining the specific charges, and imputing to the wife general violent and irritating conduct towards her husband—was admitted upon being reformed. Answers were taken, and witnesses examined upon these pleas, when on the 7th of November publication, at petition of the husband's proctor, was decreed to pass on the next session, unless, three days before, a copy of an allegation asserted by the wife was delivered. An allegation consisting of ten articles, pleading adultery committed by the husband in the years 1827, 1828, 1829, was accordingly brought in, accompanied by an affidavit on the part of the wife, setting forth that until this present month of November she was not informed of the fact of adultery therein pleaded; and the Court having assigned to hear on admission thereof, the allegation (together with an affidavit on either side) now came on to be debated.

Phillimore for the husband.

Dodson for the wife.

Judgment—Sir Herbert Jenner. In this suit the wife's libel, pleading cruelty, was admitted in Hilary Term, 1831. The cause was then suspended by a negotiation between the parties, which, in some measure, accounts for its not having long since been judicially determined. The present allegation, charging the husband with adultery in 1827, and subsequently, is opposed on **[287]** two grounds, first, that it is offered at too late a period, and that the affidavits explanatory of this delay, and in support of the allegation, are insufficient; secondly, that in a suit founded upon a citation for cruelty, a party cannot plead adultery.

Some part of this allegation is admissible as strictly responsive to the husband's plea; but another part opens a new case against the husband. It is, however, quite clear from the affidavits, both on the one side and on the other, that the wife has for some years past entertained a sincere suspicion of her husband's infidelity: this is also apparent from the libel, which in the 10th article pleads, "that on the 2nd of January, 1831, Mary Sampson having stated to her husband certain information she had received concerning him, he abused her, and called her a liar." This article refers to the criminality now imputed to the husband, and thus lays the foundation for the present allegation; the wife, however, states that the fact of adultery did not come to her knowledge till in the course of last month. Upon this part of the case it is objected that the wife has not used due diligence; and certainly, did the present matter rest upon her affidavits alone, I might have considerable difficulty in saying that they are perfectly satisfactory in that respect; yet, upon a consideration of what is disclosed in the affidavits on both sides, and has otherwise transpired in these proceedings, I am not inclined to hold that the wife is barred, by laches, from offering this allegation; and, in that view of the case, it would be of no advantage to the husband to reject it, since the charge is such that she would at least be entitled to bring it before the Court upon a new citation in a direct suit for adultery.

[288] But it is further objected that on principle the allegation is inadmissible in the present suit; such a position, however, cannot, I think, be maintained. In *Best* v. *Best* (1 Addams, 411) it was held that in a suit against the husband for cruelty a defensive allegation pleading, distinctly and substantively, adultery by the wife, was admissible without a separate citation on the part of the husband; and this practice has been since acted upon in cases which bear some analogy to the present.

In *Barrett* v. *Barrett* (1 Hagg. Ecc. 22), which has been cited, the wife was permitted, in a suit instituted against the husband by reason of cruelty, to give in additional articles to the libel pleading acts of adultery. That case is certainly distinguishable from the present, inasmuch as in *Barrett* v. *Barrett* the adultery was subsequent to the commencement of the original suit, and no witnesses had been examined. It, however, clearly disposes of the quotation from Oughton, cited by Dr. Phillimore, to shew that the citation must necessarily contain the whole charge—"causa ob quam lis instituenda sit" (Oughton, tit. 20, s. 1), since that cannot be considered as the rule of practice at this time. Upon a consideration therefore of that case, and of the doctrine in *Best* v. *Best*, to which I have referred, I see no reason why in principle Mrs. Sampson's allegation, although offered in the present stage of the proceedings, should not be admitted.

[289] REPORTS OF CASES ARGUED AND DETERMINED IN THE ECCLESIASTICAL COURTS AT DOCTORS' COMMONS; AND IN THE HIGH COURT OF DELEGATES.

IN THE GOODS OF MARY POUNTNEY. Prerogative Court, Michaelmas Term, 1st Session, 1832.—Administration to a feme coverte (after the death of her husband who survived but took no grant) decreed to her next of kin, entitled by settlement to her property.

On motion.

Mary Pountney died in 1825, without issue: her husband died in January, 1832, without having taken administration to her: on his death her only property reverted, under the marriage settlement, to her own family.

Gostling moved for an administration of Mary Pountney's effects to be granted to one of her next of kin.

Per Curiam. In the case of *Fielder* v. *Hanger* (3 Hagg. Ecc. 769) I directed [290] that, in the grant of an administration of the effects of a married woman, the representatives of the husband should be preferred, even though the husband had died without taking administration to his wife; that direction, however, was founded on the assumption that the beneficial interest vested in those representatives, and on the principle that the grant ought to follow the interest; but here, the property of the wife being in strict settlement, she left nothing to which the husband could be entitled as her representative; and accordingly, though he survived her seven years, he took no administration. Acting, therefore, in strict conformity with the principle adopted in *Fielder* v. *Hanger*, of uniting the administration to the beneficial interest, I decree the administration, in this case, to the wife's next of kin.

Motion granted.

THEAKSTON *v.* MARSON. Prerogative Court, Mich. Term, 3rd Session, 1832.—Where a paper is unfinished the party setting it up must satisfy the Court, first, of fixed and final intention; and, secondly, that its completion was prevented by the act of God. The strength of evidence required varies according to the progress which the paper has made towards completion. A pencil memorandum written by, and in the pocket-book of, the person who produced it, but sworn to have been written down from the instructions of the deceased, at a single interview, three days before his sudden death by apoplexy, not signed, nor ever seen or afterwards referred to by the deceased, nor led up to or confirmed by conduct, declarations, or affections, but resting solely on the evidence of the writer, pronounced against with costs; the Court holding final intention not proved, even if the evidence of the only witness, whose credit was much shaken, had been fully believed.—Quære, whether the evidence of a single witness, omni exceptione major, but unsupported by any circumstances, makes legal proof of a testamentary act.

Edward Theakston died at his house in Newmarket on the 7th of November, 1831, aged 58. His widow alleged that he died intestate, and prayed administration; while, on the other hand, a pencil writing of the following tenor was propounded:—

"Theakston's Will. Nov. 4th." "Theakston wished me to make his will, and bring it for execution on Tuesday next. His wife to have 100l. a year. Marson to be executor and R. L. with the whole of the property. Myself trustee to secure the annuity. Read this to him when I took it down. Appd."

[291] Probate of this document, as of instructions for a will, was applied for on behalf of Charles Marson, the executor and residuary legatee therein named: and its history was thus set forth in the fourth article of the allegation which propounded it: "That the testator, for about two years before his death, was in a declining state of health, but was not confined to his house, nor incapable of attending to business; that in the course of that time the Reverend William Pochin, rector of Great Cornard, Suffolk, and a magistrate for that county, occasionally, when at Newmarket, occupied apartments at the testator's house; that the testator having, on divers occasions, consulted and advised confidentially with Mr. Pochin on his, the deceased's, private affairs, and Mr. Pochin having observed the declining state of the testator's health during the last year or year and a half of his life, several times recommended him to settle his affairs, and make his will. That Mr. Pochin was at the said testator's house on Friday, the 4th of November; and the testator, having a mind and intention to settle his affairs, and make his last will and testament, went into the room occupied by Mr. Pochin, in which he was alone, and after some conversation observed that he was not well, and that he had been thinking of that bit of paper that he and Mr. Pochin had often talked about, the deceased thereby meaning the will which Mr. Pochin had several times advised him to make; and he then said 'that he hated lawyers,' and asked Mr. Pochin 'if he could make a will for him:' that Mr. Pochin said 'he could,' and taking out his pocket-book inquired of the testator 'how he wished to settle his affairs;' upon which the testator replied, 'I should **[292]** like mistress' (thereby meaning his wife) 'to have a hundred a year, and Charles Marson all the rest.'(*a*) That Mr. Pochin then advised the testator to appoint a trustee in respect of the annuity, and the testator replied 'he would leave that to him.' That Mr. Pochin then wrote down with a pencil on a leaf of his pocket-book the said instructions, meaning by the letters 'R. L.' in the **[293]** tenth line of the page 'residuary legatee,' and whilst writing the same made an offer of being himself the trustee, to which the testator readily assented. That Mr. Pochin, when he had finished writing the instructions, read or stated the same, or the substance thereof, to the testator, who expressed his approbation thereof, and said 'it was all right, and that, as it was too late to do it (viz. for Mr. Pochin to prepare a more formal will) on that day, and as Mr. Pochin, who intended to return home the next day, was coming over to New-

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(*a*) The paper, it will be observed, also gives the property to Marson only; and Mr. Pochin, upon the fourteenth interrogatory (see page 308), says that such were the instructions, and thus supports the paper and the plea; but in his examination in chief (see note, p. 306) Mr. Pochin deposes that the wife was to have an annuity of 100l., "and Charles Marson and his children all the rest:" while Mrs. Leach deposes (page 319) that Mr. Pochin had told her that the property was left to Mrs. Theakston for life, and then to Marson's children. Mr. Pochin, in his examination on Marson's second allegation, in answer to the second interrogatory, gives the following explanation, when interrogated as to the discrepancy between the paper and the declaration deposed to by Mrs. Leach:—"In saying that the deceased had left Charles Marson and his children all the rest, I meant that if there was any residuum, it would be for the benefit of Marson and his family, and I adopted those words because they were the precise words the deceased had made use of when he gave me the instructions; as the deceased had said, after giving instructions in respect to his wife's annuity, that 'Charles Marson and his children should have all the rest,' meaning that it should be for the benefit of him and his family—not of his children in particular, but of his wife and the whole of his family. I had no instructions to name the children in the will. If the will is pronounced for, Marson will take all the rest of the deceased's property absolutely; I took that to be the deceased's intention, and, as a consequence, his, Marson's, family and children would be benefited, and it was the deceased's intention; because when I read over the instructions, as they are written in the pocket-book, to him, he never desired me to alter them. I did not state to Mrs. Leach that the deceased would 'have left all his property to his wife for life, and after her death to Charles Marson's children, as interrogate.'"

market again on the following Tuesday (the 8th), he might be able to finish the business then.' Whereupon Mr. Pochin promised to prepare, from the instructions, and bring with him on that day, a formal will for the testator to execute." The remaining pleadings and facts will appear sufficiently from the judgment.

Lushington and Haggard in support of the testamentary schedule.

Adams and Nicholl contrà.

Judgment—Sir John Nicholl. This case, though not involved in much evidence, raises several points necessary to be separately considered and discussed. It respects an instrument set up as the will of Edward Theakston, a training groom and stable-keeper at Newmarket: he died on the 7th of November, 1831, at the age of fifty-eight, leaving a widow, but no child, nor any known relations; indeed he was supposed to have been illegitimate. His real property is stated, by the party setting up this instrument, to be worth 600l., and his personal, 5000l.; but the widow, in her answers, fixes the value of **[294]** the real estate at 400l., and the personal at 8000l. The paper propounded is pleaded to have been written at the deceased's house, at Newmarket, by the Reverend Mr. Pochin, in pencil, upon a leaf of his own pocket-book; and it is in these terms: "Theakston's Will, Nov. 4th. Theakston wished me to make his will, and bring it for execution on Tuesday next. His wife to have 100l. a year. Marson to be executor and R. L. [residuary legatee] with the whole of the property. Myself trustee to secure the annuity. Read this to him when I took it down. App[d]."

Such are the contents of the paper. The allegation in support of it, after giving the history which I have already stated, pleads the deceased's affection for Marson; that while employed as a training-groom in the north, the deceased had Marson as a lad under him for about eight years; that he took a fancy to him, treated him as an adopted son, and said he would leave him his property, or a considerable portion of it. The third article pleads disaffection on the part of the deceased for his wife, that she was addicted to excessive drinking, and that he wished a separation. The fourth, that he was in declining health for nearly two years, during which the Reverend William Pochin, who was much in his confidence, advised him to settle his affairs; that on Friday, the 4th of November, he gave Mr. Pochin instructions for his will, that Mr. Pochin wrote these instructions in his pocket-book, and read them to the deceased, who approved of them; and that it was then arranged that on Tuesday, the 8th, Mr. Pochin should bring over to Newmarket a will, prepared from these instructions, for execution. The fifth pleads that on the evening of Saturday **[295]** Mr. Pochin returned to his house, at Cornard, near Sudbury; that on Sunday, the 6th, the deceased was in better health than usual, but that on the morning of Monday, the 7th, he was seized with apoplexy, and died about two o'clock in the afternoon of that day.

The responsive allegation of the widow contradicts the charge of disaffection, and pleads that the deceased had full confidence in her; that both Marson and Pochin had long urged the deceased to make a will, but did not succeed; that the deceased trained running horses for Pochin; that on Saturday, the 5th of November, Pochin entertained a party of friends at the deceased's; that after Theakston's death on the 7th a message was sent to Pochin to inquire what should be done with his horses, when he wrote back a letter of condolence to the widow, but in it made no mention of a will or instructions. That on Thursday, the 10th, Pochin had a conversation with Mrs. Leach, the mother of the widow, but did not speak of any instructions for a will, though he stated that the deceased had, on the Friday evening preceding his death, informed him he intended to leave the whole of his property to his wife for life, and at her death to Charles Marson's children; and on that occasion Pochin declared that he had made no memorandum as to such testamentary intentions, and that he very much regretted it. That on Friday, the 11th, Pochin had an interview with the widow; offered her his assistance; looked over some of the deceased's books and papers, and proceeded to tear up some securities (representing them to be of no value) given by him in favour of the deceased, till he was stopped by Mrs. Leach: that during this interview Pochin made no men-**[296]**-tion of a will, nor of instructions. That, upon the widow refusing to allow the horses, the joint property of Pochin and Henry Williamson, to be removed from the deceased's premises till the account respecting the horses was settled, Pochin, on the 22d of November, wrote to Mr. Seaber, her solicitor, and then first intimated to the widow, or to any one on her behalf, the existence of the pretended will; that

on the 28th the accounts were examined with Seaber, when Pochin and Williamson gave, in favour of Mrs. Theakston, a joint note, payable in six months, for 561l. 18s., as due from them to the deceased's estate; that Pochin, on the occasion of this arrangement, entered upon an explanation of his having torn the securities. It further pleads declarations of Marson, on the 12th of November, to Seaber, that Pochin had told him of the deceased's intention to leave his property, after his wife's death, either to him, Marson, or to his children; and that Pochin then also informed him that there was no memorandum in writing made on the 4th of November.(*a*)

A second allegation on the part of Marson denies and contradicts the declarations attributed to Pochin, and pleads that on Monday, the 7th, Pochin had told one Edwards of the existence of the memorandum in the pocket-book.

Such is the general outline and purport of the [297] respective pleas; and on the evidence taken upon them the case now comes on for my decision; presenting, as I have already stated, several points necessary to be accurately considered.

The first consideration is, What does the law require to establish an instrument of this description? The second, How far its validity is supported by probability in the disposition? The third, How far the act itself is led up to, confirmed, or corroborated by any circumstances? The fourth, Whether, if such an act be supported by only one witness, without other circumstances, that evidence will satisfy the demands of the law? The fifth, What degree of credit is due to the essential, if not the only, witness—the Reverend Mr. Pochin?

I. In the first place, then, looking at the instrument which I have already read as an unfinished and imperfect paper, written in the manner stated in the plea, there are two requisites essentially necessary, first, that the circumstances of the case, taken together, shall satisfy the mind of the Court that the instrument contains the fixed and final testamentary intentions of the deceased as to the disposition of his property: the proof of this, the first requisite, may arise, not from any one particular fact, but from all the circumstances taken together. The next requisite is, that the deceased, having the firm intention to give effect to the instrument in a more formal state, had no opportunity of proceeding to complete that intention, inasmuch as his further progress was arrested by the act of God, by death, or by some other supervening inability. These two requisites are in some degree connected together. Thus, if the internal evidence of final [298] testamentary intention is strong, if the instrument has arrived at its last stage of maturity—merely wanting the testator's signature—if there have been instructions, and a draft prepared and engrossed for execution, in such a case slight intervening circumstances, preventing the act of execution, are sufficient from whence to infer a continuance of intention and to repel any presumption of abandonment: but, on the other hand, if the instrument is in its very first stage—mere heads and outline of a will hastily given—in its first concoction—then, before the Court can come to the conclusion that the instrument contains that disposition to which the deceased had made up his mind, and is entitled to probate, not only does it require more extraneous evidence of final intention, arising from the state of the deceased's affections, from testamentary declarations, and from subsequent recognitions; but it requires more stringent and direct proof that the deceased had no opportunity of proceeding further, and that the unfinished state of the paper results from that want of opportunity, and not from any change or infirmity of purpose. In all cases the burthen of proof lies on the party setting up an imperfect instrument: the presumption is against it; that presumption varies indeed in strength according to the state of maturity at which the instrument has arrived; but still the Court can only upon clear evidence supply the want of completion.

Such are the doctrines always held by this and by other courts; and, in proof of that position, without referring to any one case, I shall state what is laid down, very correctly, in a recent publication, in which all the reported decisions [299] are collected

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(*a*) The letters, note of hand, and securities, instead of being annexed, as usual, in supply of proof to the allegation, were referred to in it, as annexed to the interrogatories, administered on behalf of the widow. When the allegation was debated this was objected to as a novel and inconvenient practice; and the Court accordingly directed that these exhibits should, in conformity with established practice, be disannexed from the interrogatories, and annexed to the responsive allegation.

and referred to. Mr. Williams says,(*a*) "Where a paper is imperfect (manifestly in progress only), not only, as in cases of unexecuted papers, must its being unfinished be shewn to have been caused by the act of God, or to be justly ascribable to some reason other than any abandonment of intention by the testator, but it must also be clearly proved by the party setting up the instrument, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes. Moreover, the presumption of law against such an instrument, instead of being slight, as in the case of a merely unexecuted paper, is very strong, and hard to be repelled. When there is a mere want of execution in a paper which is complete in other respects, the Court will presume the testator's intentions to be expressed in such a paper, on its being satisfactorily shewn that the non-execution did not arise from abandonment of those intentions so expressed; but where a paper is incomplete in the body of it, the Court must be completely satisfied by proof: first, that the deceased had finally decided to make the disposition of his property expressed in the imperfect paper; secondly, that he never abandoned that intention, and was only prevented by the act of God from proceeding to the completion of his will." It appears to me that the doctrine and principles as to imperfect papers are here accurately laid down, and to them it is the duty of the Court to adhere.

II. In order to support this instrument, probability in the disposition, grounded upon affection **[300]** and disaffection, has first been resorted to; but in judging of their effect upon the deceased and their bearing upon this case, it is not sufficient to consider those feelings loosely and generally; they must be accurately compared with the testamentary disposition itself, and applied to the particular transaction. In this point of view, the proof of the deceased's regard for Marson goes no further than this, that if he made a will, Marson would probably be remembered in it. Marson had lived under him as a lad, and was then a favourite; he had become training groom to Lord Exeter; he was still a favourite, and in the deceased's confidence; he had married Mrs. Theakston's sister, and Theakston himself had no family nor any known relations. It was then likely enough that, if Theakston set about a will, Marson would be considerably benefited. But even giving full credit to the witnesses deposing to hints to this effect, those hints are loose, distant, and unspecific; there is no declaration that Marson should be his executor and residuary legatee, and should have all his property, except an annuity to his wife; there is nothing precisely applying to the present disposition: the whole consists of general expressions of affection and regard.

Again, disaffection to the wife has also been relied upon: but is this proved? The deceased had been married about seven years, and his wife is represented as a clever, intelligent woman; she managed his household, which was large, as he boarded his stable-lads, and occasionally accommodated his customers with lodgings: she kept his books, made out his accounts, wrote his letters, and appears to have been a useful and valuable wife: she had a failing—**[301]** she occasionally indulged in too much liquor: she is described as naturally of a weak constitution, and it seems that occasionally after the fatigues of the day she would refresh herself, and being easily overcome, her speech betrayed her; but on the result of the whole evidence I am satisfied that some of Marson's witnesses greatly exaggerate the extent of this failing. The head lad, Hornsby, who lived many years with the deceased, and had opportunities of judging, gives, on the 7th interrogatory, this account: "Mrs. Theakston managed the deceased's household affairs, and his books; she made the bills out, and superintended his business concerns for him till his death. They lived on happy terms so far as this, he seldom or never said any thing to her, for he was a man that never quarrelled, and could not bear noise, but I do not think he was happy with her; he treated her kindly. I cannot say any thing against her treatment of him, except in regard to getting drunk: she generally had bad health, and since Christmas twelvemonth has kept her bed a good deal: her illness was all through drunkenness." This is the opinion of an adverse witness: and though the failing, to which he entirely ascribes her illness, may in some degree have occasioned it, yet the fact, to which Hornsby deposes in chief, of sleeping separately is accounted for by other witnesses from other causes, and does not mark disaffection. The deceased, when he observed

(*a*) On the Law of Executors, &c. p. 53.

this failing, probably and naturally was vexed and hurt that so good and useful a wife should ever be subject to it; but the weight of evidence is, that they lived in a state of mutual kindness and regard. There is nothing to shew, or to make it probable, that he, possessing pro-[302]-perty worth 6000l., or possibly more, should leave his widow only an annuity of 100l., scarcely the interest of one-third, though the law, in case of an intestacy, would give her one-half absolutely. The probability, a priori, is, from all the circumstances, that he would give her for life the whole of his property, however he might dispose of it afterwards, and from Pochin's declarations in the first instance that would seem to have been the disposition intended; but, by these instructions, not a legacy for her immediate wants, not the furniture nor any part of it, not the use of the house even for a time, is given to the widow. She is liable to be immediately turned adrift at the mercy of the executor and residuary legatee, till the first payment of the annuity becomes due. An examination then of the testamentary disposition (as contained in the pocket-book) of the state of the deceased's affection and disaffection I cannot by any means think tends to support this instrument as his fixed and final intention; the circumstances, to my mind, bear the contrary way.

III. In the next place, what is there to support the making of any will at this particular time and in this mode? It may be probable enough that the deceased did not—few people do—intend to die intestate; but such a probability is far too loose and distant to sustain a transaction of this kind, and contributes very little support to the present instrument. The deceased was in ill health; he had been ailing for two years; he had a dangerous disorder—water on the chest; he had been attended by Sir Lachlan Maclean—a physician, brought from Sudbury, above twenty miles distant from Newmarket; but still there is no trace of any [303] testamentary act made or wished, or even hinted at, by the deceased himself. There were persons around him—his friend Pochin, his friend Marson—who wished, advised, nay, even pressed, him to execute a will; and, if Pochin is to be believed, Mrs. Theakston herself desired it; so that there could be no occasion for concealment if he had been willing to make a will. Whether Pochin and Marson acted in concert is not quite clear, but it admits of little doubt that both had the same object; and, as I have stated the former not only wished and advised, but even pressed, the deceased to make his will. That is a necessary inference from the evidence of one of Marson's own witnesses, Peck, who on the eighth interrogatory thus deposes:—

"Above a year before Theakston's death I met the Rev. Mr. Pochin at the Rutland Arms at Newmarket, in company with Sir L. Maclean, a physician of Sudbury, in whose temporary absence Mr. Pochin told me 'that he believed he had at last got Theakston's consent to make his will:' I remember well his expressions, and I understood from them that he had been pressing the deceased to make his will." Here, then, it appears that, a year before the deceased's death, Mr. Pochin had been urging him to make a will, and yet without success, though at that time the deceased was so ill that a physician had been brought over from Sudbury to see him; that physician also admits that Pochin wished and was anxious that the deceased should make a will, although he does not recollect that Pochin requested him to apply to Theakston on the subject, nor does it seem that he did apply. Maclean thus confirms the testimony of Peck as to this anxiety of Mr. Pochin, and Hornsby also, [304] on the same interrogatory, deposes to the same effect.

Marson, too, is equally anxious to induce the deceased to make a will; for how otherwise can his application to Mr. Seaber be explained. On the third article Mr. Seaber says: "In July or August, 1831, Marson brought me some deeds from Theakston for my opinion, which having obtained, Marson observed, 'Theakston tells me he means to come to you shortly to settle his affairs—perhaps to-morrow, but at any rate he will not be long,' or to that effect. He led me to expect him at most in a day or two: however, the deceased never came. I saw and spoke to the deceased within a day or two, but he never said a word in corroboration of such his alleged intentions, and I never had any instructions from him on the subject of his will, any more than relative to another matter on which Marson had represented that the deceased was coming to me, viz. to consult me about separating from his wife." Now, looking to Theakston's conduct, Marson could hardly have stated all this to the witness, unless he had been anxious to get the deceased to make his will; nor unless for some reason or other he thought Theakston's separation from his wife desirable.

Theakston, however, made no will, and took no steps towards a separation: he did nothing in either respect to confirm the truth and authority of what Marson had said. He not only saw Seaber, and took no notice of Marson's communications, but the fact is, that he never set about a will; though in ill health, and advised, he never expressed a wish upon the subject; and, except from Pochin and Marson, there is not a single declaration that he ever **[305]** was going to make or wished to make a will; there is not a scrap of paper of a testamentary tendency; not a letter referring to any testamentary intention or act; no step towards testacy, until the evening of Friday, the 4th of November, when the instrument now propounded is stated to have been written. Here is nothing to lead up to such an instrument; no previous extrinsic circumstance to support it; the deceased's conduct negatives intention; the transaction, ultimately, is begun and ended at the single interview deposed to by Pochin, pretty much in the terms of the allegation; and the whole stands on his own unsupported representation.

Mr. Pochin begins his account by deposing that he told the deceased he looked very ill, to which the deceased answered, "I am very ill;" (*a*) **[306]** and some of the witnesses, examined on behalf of the widow, do say he was looking ill: nor is it improbable that, at the end of a Newmarket October meeting, a person (who was previously ailing) keeping training stables, in which were many horses, would, from attendance and much anxiety, look ill and worn: but it is quite clear that there was

(*a*) Mr. Pochin's evidence upon this part of the case was given on the fourth article as follows:—"I reached Newmarket on the 4th of November about half-past seven. I dined alone at Theakston's house; as soon as the cloth was taken off Theakston came into the room to talk about the match [Mr. Osbaldeston's match to ride 200 miles in ten hours] and several races, in which he was particularly interested, that were also to take place on the next day. After discussing these matters, he sitting very near the fire, and appearing dejected and ill, I observed to him, 'You are looking very ill, Theakston:' he said, 'Sir, I am very ill, and I have been thinking of that little bit of paper that we have so often talked about.' That was his phrase, and I understood him to refer to his will which I had so often suggested to him the propriety of making. Then I said, 'Really you ought to think of it, and settle your affairs:' he asked me if I could make a will: I told him, 'Oh, certainly; I can make a will, and pass all Newmarket very shortly to any one you please, provided it was your property.' I remember well those were my expressions, and he observed thereupon, 'It is too late to-night, and as you are coming on Tuesday we can do it.' It was at that time fully understood by us both that I was to go away on the next day, and come again on Tuesday to arrange some matters with him. My pocket-book, in which I had been writing a trifling memorandum, was at that moment by me on the table, and I opened it and said, 'Now, how will you settle your affairs?' he said, 'I should like mistress' (thereby meaning his wife, whom he generally called mistress in my hearing) 'to have a hundred a year, and Charles Marson and his children all the rest.' I wrote down on a blank page in my pocket-book, with a silver pencil attached, a memorandum to the effect that Theakston desired me to make his will, and to bring it over for execution on Tuesday next; his wife to have one hundred pounds a-year (meaning an annuity of one hundred pounds a-year to the deceased's wife for her life, which the deceased intended by his said expressions), and Charles Marson to be executor and residuary legatee; and I put the date, 'November the 4th.' The words I abbreviated, and as I was writing them I observed to the deceased, 'You must have a trustee; for it will not do to leave your wife to the mercy of Charles Marson;' to which the deceased replied, 'You will do for that,' or something to that effect; and I accordingly put myself down as a trustee to secure the annuity to the wife; and I added a memorandum that I had read the memorandum of such the deceased's instructions to Theakston, and that he approved of it, also abbreviating the words, for the page was so small that I merely made a rough memorandum. Immediately after writing it I read the whole of what I had so written over to the deceased, just as I had put it down, and he nodded assent, and said, 'Be sure you come on Tuesday;' I promised him that I would, and bring a will for execution by him. The deceased was a man of very few words, and nothing more than what I have related took place at that time; it was then between eight and nine o'clock at night, and he soon after left the room. No person was with us during the time."

no particular attack of illness which should alarm and induce him at that time to set about making a will—an act which, though [307] pressed, and at times in a dangerous state of health, he had so constantly postponed. On the morning of the 4th of November he was out and about as usual; and Hornsby, on the seventh interrogatory, gives this account of him.

"The deceased had bad health; for the last two years of his life he generally had a doctor to see him every evening. I did not notice any particular alteration in him during the last month of his life: I think, however, the last two months he was better. On the day before he died he was on his pony, exercising with his horses, as usual; he never missed a morning (until that of his death) some months before he died."

From the evidence, then, of this adverse witness, there seems to have been no special circumstance rendering it probable that he should at this precise period have decided to give instructions for a will.

Taking, however, the whole of Pochin's account to be true, does it satisfy the demands of the law that there was a fixed and final intention? On the contrary, is there not very much of haste and suddenness about the transaction? Is it not a mere first sketch—a mere outline and skeleton to be afterwards considered, revised, filled up, and matured? Mr. Pochin had come to Newmarket to hear the result of that day's sport, and to prepare for the next: he arrived between seven and eight o'clock; eat, at Theakston's, some cold dinner; Theakston came into the parlour and sat with him; he had several horses again to run on the next day, and Mr. Osbaldeston's noted match against time was to take place. They had these matters—to both of them very interesting—to talk over; they were both rather tired, and sepa-[308]-rated, about nine o'clock, for bed; and it is just before parting, in the last ten minutes or a quarter of an hour, that the whole of this important testamentary transaction takes place. Pochin's own account, as given on the fourteenth interrogatory, is as follows:—"The whole conversation on the subject of his will, and the writing of the memoranda, did not occupy, I suppose, more than a quarter of an hour; I am sure it did not; he was not five minutes giving the instructions, he merely saying, 'I should like mistress to have a hundred a year, and Charles Marson all the rest.' It was immediately before we parted; he went to bed, and I did the same, being tired, soon after nine o'clock. He had not at any previous time requested me to make or procure a will to be made for him; he said nothing at all upon the subject of making Marson his executor. I cannot exactly say whether, in taking down the instructions, I wrote as he dictated, or from his language, or whether I put them down in my own form of words; I should think the words were my own. I kept reading as I wrote, and he assented; and I explained to him that if he gave Marson 'all the rest,' as he called it, he must make him residuary legatee as well as executor, which he agreed to."

In this short space of time the memoranda are written in the pocket-book. Supposing that they were read over to, and approved of by, the deceased; supposing even that Pochin was requested to draw out a will from them, and bring it on the Tuesday following to Newmarket for execution, is it possible that the Court could be satisfied that they contained the deceased's fixed and final intention? That is the primary requisite of [309] the law; and I should have great difficulty, under the circumstances, in making up my mind that such a paper, so prepared, with so limited a provision for his wife, without any legacy for her immediate wants, was not written as subject to further deliberation and revision. Here seems to be, I repeat, a failure of the very first requisite—fixed intention. There is nothing that leads up to such an act of injustice to his wife; no previous declarations of it; nor is it followed by any subsequent recognition. Even, then, giving Pochin credit for the truth of what he has stated, yet considering that these instructions are written in pencil, and the other circumstances connected with them, I should not be satisfied, if the case rested here, that the Court could pronounce for the validity of this instrument.

But how far does Pochin's conduct confirm his evidence that he was actually to prepare a will, and that the memoranda were read over to and approved of by the deceased? Was there, on the evening in question, no opportunity of doing something more in this business? And if the parties had considered the disposition as finally settled, would not something more have been done? Pochin has described himself as a skilful will-drawer; he had been for two years wishing, advising, and pressing Theakston to make a will; and, if he had now got him into the humour, would he

not have asked for pen, ink, and paper—have written down instructions, and obtained the deceased's signature to them? Pochin, surely, could not have been too much fatigued for that, nor was he an ignorant person, for he professes to be a ready man of business, acting very extensively as a magistrate. Pochin's conduct, there-**[310]**-fore tends to shew that he did not consider Theakston's mind so made up as that his will was to be drawn subject to no revision: and, as to Theakston being tired and going to bed, if Mrs. Payne is correct (and the fact comes out incidentally, and she mentions circumstances from which I think she cannot be mistaken either as to the day or to the time), he, on that Friday night, sat up an hour after the time deposed to by Pochin. She says, on the fifth article, "I sat an hour after supper with Mr. and Mrs. Theakston in their parlour: Mr. Pochin was then gone to bed. The next day (Saturday) was Mr. Osbaldeston's great match." Not a word, however, appears to have transpired about the will during this hour.

The deceased, then, was not on that night so fatigued or ill but that he could have given more formal instructions for his will, if his mind had fully been made up. On the next morning what took place? Theakston was up and about his yard as usual. Mr. Pochin, however, did not renew the subject; he did not ask Theakston if he continued of the same mind, or whether he wished to make any alteration or addition to the memoranda; no reference whatever is even suggested by Pochin himself to have been made to them. Again, on this morning there was an opportunity to write some more formal testamentary paper, for the business of the heath did not begin so early as to preclude such a matter of business; yet nothing was done; the subject was never mentioned. Pochin remained at Newmarket all the day; dined at five or soon after, but did not set off on his return home till between nine and ten o'clock. In the whole of this time the will was never adverted to; for the deceased's expression, **[311]** "Remember Tuesday," does not necessarily refer to it, since the arrangement that Pochin would come to Newmarket on that day had been settled before the conversation about the will, and it was upon other very important business—to have a trial of some horses.

There is, then, nothing in the conduct either of the deceased or of Pochin, as long as they continued together, to shew that they considered the will as finally settled, and that it only remained to be drawn out and executed. Indeed their conduct seems to infer otherwise, for here was, as I have pointed out, an opportunity, both on the Friday night and on the Saturday, to have done a more formal and complete act, yet nothing was done. Such being the case, would it be safe to rely upon a pencil writing—by another person in that person's pocket-book, remaining in the possession of that person, never seen by the deceased himself, without anything in affirmance of the act, not merely without anything in writing, but without anything even in conduct, in declaration, recognition, or of any description whatever confirmatory of the paper?

What, however, is the further conduct of Pochin? Does he subsequently act as if he considered that he had received final instructions to prepare a will for execution on the Tuesday? He arrived at Cornard about midnight on Saturday; he was at home all day on Sunday; and hereafter, on reference to his general conduct, it will be seen how far he was likely to regard the Sabbath so hallowed as not to do upon that day any thing of a temporal nature—he was also at home on Monday; for Edwards, who left Newmarket about one, finds Pochin, about three in the after-**[312]**-noon of that day, in his field, and they went to the house together. Up to that time it is not pretended that Pochin had taken any step to prepare the will—not even a rough draft or sketch had been made; the memoranda remained in his pocket-book; and yet I should infer that he was to return early on the following morning to Newmarket. Could, then, Mr. Pochin have considered (for that is the only way to view the case when the Court is examining his conduct) that the will had been finally settled, and only remained to be drawn out and executed? His conduct infers the reverse, even if his own statements are true.

Again, the account that Edwards gave to Pochin was not that Theakston was dead, but that he was not expected to live. The messenger that brought the account of his death did not arrive till about eight in the evening. Edwards deposes that Pochin, after being informed by him of Theakston's illness, exclaimed "Good God! I hope the poor old gentleman will live till Tuesday, for I am then going over to Newmarket to settle his will for him, the instructions for which I have in this book"—a little pocket-book he had in his hand—"I took them last Friday. It will be an unlucky

job for Charles Marson if the old gentleman should die before to-morrow, for he intended to leave him all his property." Pochin's impression then was, not that life was quite hopeless, for his words are, "I hope that the old gentleman will live till Tuesday." Here, again, his conduct is inconsistent with the instructions being final, and implies that he must have considered something further was to be settled; for otherwise he would instantly, upon hearing that Theakston was **[313]** so dangerously ill, have drawn up a short will—it would have been done in half an hour—and either have gone himself or sent Edwards back to Newmarket in order to have got it signed, taking the chance of Theakston being able to execute it. In accordance with his own wishes for a will, and in justice to Marson and his family, it was Pochin's duty to have made this attempt, and if he had thought that he had received final instructions, he must, I think, have taken this course. His conduct, then, in this respect, seems to negative final instructions.

On the part of the deceased himself there is a total silence as to the business; for it is not suggested that between Friday night and Monday, when he died of apoplexy, he ever alluded in the slightest degree to his having communicated with Pochin about his will. As before the evening of Friday, the 4th, so after that evening, in the intermediate space till his death, there is not the most trivial circumstance, from the deceased or any other person, to recognize a testamentary act of any sort.

If the case then rested here, supposing all the facts stated by Pochin to be credited, I am disposed to hold that those facts and circumstances would not be sufficient to establish a paper of this sort, and that the proof of final intention would be wanting.

IV. But, at all events, that proof appears to stand on the single testimony of Mr. Pochin; and the Court cannot wholly pass over without notice the point of law—whether the evidence of one witness, unsupported by any circumstances, makes legal proof of a testamentary act. The recognition of the sufficiency of such evidence seems to be big **[314]** with all the dangers against which the statute of frauds (29 Car. II. c. 3, s. 19) was intended to guard.

By the general law of these Courts one witness does not make full proof; (*b*) not that two witnesses are required to each particular fact, nor to every part of a transaction, for it often happens that to the contents of a will or to instructions there is only one witness—the confidential solicitor or other drawer—but there are and must be adminicular circumstances to the transaction—such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions, some extrinsic circumstances in short shewing that a testamentary act was in progress, and tending to corroborate the act itself: but in this case there is nothing except Pochin's own account of the occurrences of this quarter of an hour, not acknowledged by the deceased, nor even declared, while the deceased was yet alive, by Pochin himself, nor confirmed by his conduct. I am strongly inclined to think that these Courts have never held that such evidence of such an act, by a single witness, is alone sufficient to sustain it; and I should be unwilling to make such a precedent.

V. Supposing, however, that the evidence of a single individual, if fully credited, would be sufficient in law, still it must be beyond suspicion: and this consideration drives the Court very reluctantly to the unpleasant necessity of examining **[315]** the credit due to Mr. Pochin. Presenting himself with the title of "Reverend"—a beneficed clergyman with a living of considerable value, if I may judge from the number of his tithe tenants—Mr. Pochin comes, primâ facie, with a character above exception: but if his general conduct be inconsistent with his sacred profession and its duties, that very profession only serves to render his morality more questionable: a disregard for the decencies, and an indifference to the proprieties, of his station, as a beneficed clergyman, infer a general laxity of principle, and an absence of correct moral feeling. It appears that Mr. Pochin and Mr. Williamson were at the time of this transaction partners in several race horses, kept at the deceased's training stables—a fact which is carefully disguised in Mr. Pochin's deposition in chief, and which is only extracted by the interrogatories, and even then comes out reluctantly; for he first answers, "he (Theakston) had horses of mine to break and try, not always, but at times," which, looking to the real facts, is rather a prevaricating answer, for upon a further

(*b*) See Williams on Executors, vol. i. p. 195. *Re Keeton*, supra, 209. *Kenrick* v. *Kenrick*, supra, 130, 136. Also *Crompton* v. *Butler*, 1 Hagg. Con. 460.

interrogatory he cannot escape from avowing that they were not horses "to break and try," but to train for the race-course: and it appears that these two gentlemen sometimes ran three or four horses in a day—not entered in the name of either party, but in that of "Henry." Mr. Pochin also lived in great intimacy with Theakston, his trainer, and with other persons—stable lads and jockeys—in that line.

Again, what occurred in the early part of the week preceding Theakston's death is not without importance. Pochin's history of that week is to this effect: On the Monday he went to Newmarket, taking with him a round of beef, a hare, **[316]** pheasants, and other provisions to entertain a party of friends at Theakston's on the following Saturday; he stayed till Wednesday, then returned to his living at Cornard; on Friday came back again in the evening, when it is alleged these memoranda in the pocket-book were written; on the Saturday was on the heath, having three or four horses to run; after the races he entertained at Theakston's eight of his tithe-payers at dinner, quitted the table between nine and ten, got into his carriage, and returned home to his living, a distance of twenty-five miles. This history does not excite in me the most favourable opinion of his regard to his moral duties, or to those sacred obligations he had undertaken at his ordination, and on receiving preferment. Again, on the Monday, Edwards, the jockey, who came over in great haste from Newmarket to Cornard, to solicit being Theakston's successor in the training of Pochin's horses, dined with Pochin in his own private room, and after remaining with him in conference five or six hours, departed about nine in the evening. The subjects of conference may be surmised, they could only have two subjects common to both, viz. horse-racing and Theakston's affairs.

To be in the secret and confidence of jockeys and trainers might not be inconvenient to this gentleman on the turf, if he ever made bets: whether, however, Mr. Pochin sometimes betted against his own horses, or whether he won money though his horse lost—a circumstance suggested by his own declaration, which is spoken to by Seaber—is a point to which it is not material now to advert. On the fifth article Seaber deposes to this effect: On Saturday, the 5th of November, I drove a friend of mine, Mr. Fitch, of **[317]** Great Cornard, upon the heath; while there he introduced me to the Reverend Mr. Pochin; and I recollect Mr. Fitch saying to him, "Why, Pochin, you got beat," to which Mr. Pochin replied, I did, but I don't mind it, for I gained seventy pounds by it. I remember this well, for I remarked to my friend "what a pretty sort of clergyman he was, for he must have betted against his own horse." Whether this was a fact or not, or mere rhodomontade, cannot be ascertained upon the evidence before me: Pochin certainly contradicts and positively denies both the fact and the declaration.

The circumstance, most favorable to shew the existence of some paper, is a declaration which Pochin says he made to Edwards on the Monday: this is stated in Pochin's answer to the twentieth interrogatory—an interrogatory calculated to bring out every thing in regard to this paper: "In talking with Edwards on Theakston's affairs I said he had left his wife 100l. a year, and Charles Marson all the rest, but that I was afraid that Charles would not get any thing, for that I was doubtful about a will, and I believe I said to him that the instructions were in my pocket-book, or that I had the will in my pocket-book, but was afraid it would not do." And upon Marson's second allegation Pochin deposes to the same declaration, and his statement is confirmed by Edwards.

A declaration coming out in this way, upon interrogatory, and afterwards confirmed, is, primâ facie, certainly strong, to shew, first, that such a declaration was made by Pochin, and next, that, if made, some writing was then in existence: still it is not conclusive even on the first point; and it is no more **[318]** than Pochin's own declaration, at the utmost, as to the existence of any memoranda. These two persons had a very long conference together on that Monday; Theakston's death and Marson's hoped for benefit was canvassed; it is possible that something might have been said on the Friday evening about making a will, for Pochin was anxious to obtain one, and often for falsehood there is some foundation of truth at the bottom. But here was, at least, an opportunity when Pochin and Edwards might have cooked up a story. At all events, Edwards, who comes forward to support it, does not prove the identity of the instrument in its present, or indeed in any, form: it was not seen by him; the pencil writing was not shewn, but only the outside of the pocket-book: there might be some other memoranda, for there is a leaf torn out; part of the present

memoranda may have been written on this Monday, and other material parts, such as "read over and approved," may have been since added. The Court must look to Pochin's subsequent conduct and declarations, in order to consider the truth of this account.

On the evening of Theakston's death Pochin wrote a letter of condolence to Mrs. Leach, the mother of the widow, but in it there was no mention, not the slightest hint, of any instructions for a will, nor of any testamentary intentions. Pochin went to Newmarket on the Thursday morning, and had an interview with Mrs. Leach, but in that interview he gave no hint of any memorandum or instructions in writing: he said to Mrs. Leach, according to her evidence, that he (Pochin) was to have made Theakston's will, but he then gave a different account of the disposition, for on the seventh article she proceeds to depose in **[319]** this manner: "Mr. Pochin said the deceased's wishes were to give all his property to his wife for life, and at her death to the children of Charles Marson, the husband of my other daughter, and to whose family I always thought the deceased would leave some property. I then asked Mr. Pochin whether he had, according to Mr. Theakston's wish, written his will or any memorandum of his wishes, and he answered that he had not—that he had made none whatever."

On Friday, the 11th, Mr. Pochin met Marson on Newmarket heath, had a private conversation with him, and says he then told him "the whole particulars;" but he does not assert that he shewed him the pocket-book at that time. On the same day he visited the widow, he offered her his kind assistance, said he would be her friend, and looking over the deceased's papers, advised the widow to burn some, and he himself (as he admits) tore one of his own securities, given by him to Theakston, but any further destruction was prevented by the interposition of Mrs. Leach. In answer to the 18th interrogatory Pochin says, "I tore the cheque for 100l. in half, and left it in the drawer, telling Mrs. Leach that there was nothing in the deceased's possession that I was answerable for, save a promissory note for 350l., and a cheque for 17l. 10s., which I had given to cover a year's interest upon the note." I may here remark that this bill for 350l., which was to cover all other securities, was dated in June, 1831, and this torn draft in the October following. In this interview the widow declined any further assistance from Pochin, informing him that she had consulted Mr. Seaber, her professional adviser, and it was settled that Pochin's horses were not to be allowed to be **[320]** removed from the deceased's stables till the accounts should be settled. Here, again, upon this occasion there was no mention of any instructions or of memoranda.

On the next day, Saturday, the 12th, Marson had an interview with Mr. Seaber, and in his communication to that gentleman he expressly confirms Mrs. Leach and contradicts Pochin. "Marson informed me," says Mr. Seaber, on the 10th article, "on the evening of Saturday, the 12th of November, that Pochin told him he was with Theakston on the Friday night before he died, and told him that he meant his wife to have his property as long as she lived, and after that it was to come to my family,"—a much more probable disposition than what appears in the paper. "I asked him, Did Theakston give any memorandum, or did Pochin write any thing, or did Theakston sign any thing? Pochin replied 'No.' I said, Are you sure that no writing passed? He answered, So Pochin told me. I said, It is a very odd thing that Pochin should have made no memorandum of this; to which Marson replied, 'Oh! it was not necessary, as Pochin knew so well what Theakston meant, particularly as he was to be with him with a will the next Tuesday.'" And considering that the instructions were only to serve from Friday night till Tuesday, and were at the time merely intended for Pochin's own information, there seems to have been no occasion for the insertion at the close of them of "read and approved." Mr. Seaber then suggested whether any effect could be given to Theakston's intentions as a nuncupative will, but finding from Marson that Pochin was alone with the deceased, and that nothing was yet reduced into writing, the conversation closed by his remarking, "I don't **[321]** think you have any chance at all," to which Marson replied, "That is exactly what I thought, only to satisfy my friends I have come to you."

This conversation, agreeing with Mrs. Leach's testimony that no memorandum was made, passed upon the very day after that on which Pochin states he had communicated to Marson "the whole particulars," and it goes far to raise a doubt as to the truth of what is said to have taken place between Pochin and Edwards on the

preceding Monday, and of the declaration that Pochin had the instructions in his pocket-book.

Mr. Pochin has been twice examined in chief, and also upon very long interrogatories; and it is extremely difficult to reconcile some parts of his evidence with others: it is more difficult to reconcile his conduct or his evidence to fairness and to truth. If he has conducted himself in a secret and suspicious manner, and suppressed certain clandestine behaviour till it is detected, his credit cannot go for much. I will proceed, however, to follow up the further account that Pochin gives of this testamentary instrument.

About the 14th of November Marson went over to Mr. Pochin at Cornard; Pochin says that he then shewed to him the pocket-book, but what was in it at that time is not proved; and here again was an opportunity of writing, or of adding to this memorandum. On that occasion they went together down to Sudbury to consult Mr. Ransom, Pochin's solicitor; but, strange to tell, they did not take the pocket-book: Mr. Ransom was not shewn it, Pochin had left it locked up at home; and, according to Pochin's account, Ransom must have supposed it was some inquiry about a nuncupative will, for Ransom said, "as **[322]** it was nuncupative, and not signed, it was not good;" to which Pochin replied, "he thought so too." This, however, is only Pochin's account, for Ransom has not been examined. It is possible that Ransom might have thought it a nuncupative will, because it was not signed, but it is more probable that he considered it nuncupative because nothing was written in Theakston's life-time; for that is the more correct and ordinary construction, agreeing, too, with Marson's account to Seaber, and with the opinion expressed by the latter, that the memorandum was not good as a nuncupative will, because only one person was present at the nuncupation.

Mr. Pochin's further account has strongly the appearance of fraudulent suppression: he mentions that Marson, after this conversation with Ransom, went to London —the necessary inference from which is, that he, Pochin, did not go to London; "that he gave himself no further trouble about the matter, never made any inquiries, nor again consulted as to the validity of this memorandum: he considered the business altogether in Marson's hands." Such is the result of his first examination; and yet it comes out upon the production of documents, and upon his subsequent examination, after seeing those documents, that he is bound to admit that he received letters—sent the pocket-book to London—came twice to London—made inquiries; and it appears that he has been throughout active in promoting Marson's interests, in endeavouring to establish the paper propounded. He says "he cannot remember dates, for he puts down nothing:" he ought then to have a better memory; for here are letters which have dates and contents, but which were not shewn **[323]** to the witness till a subsequent part of his cross-examination. One letter, which shews that he was going to London, and bears the post-mark of the 15th of November, is addressed to Theakston's widow, and is in these terms: "Dear Mrs. Theakston, I am sorry I cannot come over to Newmarket this week, as I am going to town. I have made enquiry as to the law respecting Mr. Theakston's affairs, and you must let them remain as much as possible as they are, till letters of administration are taken out."

There is, then, in this letter, nothing of any memorandum in writing, though in it Pochin speaks of an administration to be taken out. On the 22d he wrote to Seaber, and his letter begins thus: "I was in London last week, and have an appointment to be there again to-morrow, respecting some memoranda I took at Newmarket on the Friday night before Theakston died, for making a will." This letter then contains a reference to a second journey to London, and is the first suggestion appearing upon the evidence of any written testamentary memorandum having been taken down by Pochin in the deceased's life-time. On the 10th of November he had declared to Mrs. Leach that there was no memorandum in writing; again, on the 11th, he made the same declaration to Marson; on the 12th Marson repeated it to Seaber; and on the 14th Pochin held out to Ransom that the instructions were nuncupative: but now, having been in London, he for the first time suggested written instructions.

On Pochin's second examination, after he had seen, as I have observed, the letters annexed to the interrogatories, he could no longer deny that he had been in London, and made enquiries re-**[324]**-specting the memoranda; but still he will disclose as little as he can help, and persists in asserting that he took no interest in the matter. It is on the fourth interrogatory that he thus answers: "I have not, either prior to

the commencement of this cause, or during its dependence, been actively or otherwise engaged in procuring evidence to sustain the validity of the will propounded. I never spoke to any body on the subject, not in the way of procuring evidence. I have very seldom seen the producent, and when I have done so, it has not been in respect to this cause, only on public occasions. I was in London, and asked privately the opinion of a friend in respect to such testamentary instruments as the one contained in the pocket-book; but I did not myself take or cause to be taken any counsel's opinion as to the will, or further, than as stated, interest myself on the subject. I considered the business in Marson's hands, and I did not go to London particularly, at any time, for the purpose of obtaining legal information as to the law of wills of personal estate, though I certainly did, when I was in London, shortly after deceased's death, write to Lord Exeter to interest himself on behalf of Marson. I only came to London once on the subject of Theakston's will: I cannot positively say the date of that journey; it was soon after Theakston's death; as I have heretofore deposed, I considered the business altogether in Marson's hands."

It was on the 28th of November that Pochin settled his account with the widow's solicitor, and gave her in his own and Williamson's name a joint note for 561l., in order to get their horses released. Upon that occasion he did not disclose **[325]** that there was any valid testamentary instrument of the deceased's in existence, nor did he make the least mention of the memorandum which he had obscurely referred to in his letter of the 22d to Mr. Seaber. Now in what way is that to be accounted for? The fact is, he had not then heard that the memorandum was in a shape to afford hopes of establishing its validity, notwithstanding he had been in London, and made inquiries of a friend (who was that friend does not appear), and notwithstanding he had been in communication with Mr. Walford, the solicitor who had been consulted in London upon it. Mr. Walford's letter, informing him of the possible validity of the memoranda, had not then arrived—it is not dated till the 29th of November. Its contents, however, again falsify that passage in Pochin's evidence in which he says, "As I have heretofore deposed, I considered the business altogether in Marson's hands:" for Mr. Walford writes direct to Pochin, informing him of the result of the opinion taken upon the instructions; states what course must be adopted to support them, and requests him to be at Newmarket in the following week, and arrange about the evidence. All this seems to me to prove that Pochin had been in close communication with Mr. Walford and with Marson in the whole preliminary consideration and arrangements of this business; and that his original suppression of his own going to London, and even his subsequent suggestion that he took no interest in the matter, but left it to Marson, is colourable prevarication.

It was asked, what inducement could Pochin have to commit fraud and falsehood in any part of this transaction? It was truly answered that **[326]** he was indebted to the deceased's estate. A letter of Pochin's to Seaber shews that he was embarrassed in his circumstances; his horses were detained till the accounts were settled, and he was indignant at their detention. Again, as trustee under this paper, he might acquire a great influence over the widow, a sickly woman, and over Marson, an ignorant training groom. And here is this fact, that he was extremely anxious to induce the deceased to make a will, and he is detected in taking an active part in endeavouring to establish the instructions; and if Pochin thought Marson illegitimate, he might have, in a case of intestacy, to contend with the Crown in a settlement of accounts, which he would probably be desirous of avoiding. The Court, however, is not to pronounce the parties guilty of forgery and perjury; that is not the issue to be tried; that is not the correct mode of viewing the question. It is incumbent upon Marson to prove these instructions by witnesses deserving of full credit. There has been in this case an abundant opportunity to fabricate them; and there is no evidence that they existed in their present form till after Pochin had been in London, and probably had learned what sort of instrument would be valid; and in his inquiries might even have been asked, Was the paper read over and approved? which words would be a very useful addition to the instrument in question.

That the paper propounded was written in the deceased's life-time, Pochin is the only witness; and he is wholly uncorroborated. His declaration on the Monday to Edwards is no corroboration of the fact; and it is only his assertion, not upon oath. Indeed, the date of the writing of any part **[327]** of the paper is not fixed by any confirmatory testimony; in its language it bears strong marks of having been written

at a subsequent time. "Theakston's will, Nov. 4," is not the language of memoranda as instructions. So also, "Theakston wished me to make his will," as if recording a past transaction. "Read this to him when I took it down," again recording something past; for otherwise he would only have said "read:" and the word "approved" is written in an abbreviated form, and has much the appearance of being added. This language, coupled with the whole conduct of Pochin in not mentioning any instructions, and his declarations to Mrs. Leach and to Marson, as related to Seaber, create strong inferences that it was an ex post facto instrument, written after Theakston's death. But let it be distinctly understood that the Court does not decide that the instrument is fabricated; it only decides that the evidence of its authenticity is not omni exceptione major, and that to establish such an instrument the party setting it up must furnish unsuspected proof.

It is unnecessary for me to examine minutely other circumstances tending to discredit Pochin. The tearing of some securities, or at least, as he admits, of one draft for 100l., affects his general character. Again, he stands positively contradicted by Mrs. Leach and by Seaber; and, as to portions of his evidence, even by his own party, Marson. And yet it is upon Pochin's single testimony, in a case requiring the fullest and clearest proof, that the Court is asked to pronounce for this instrument.

It is not necessary for the Court to recapitulate the several points to which it has adverted: the **[328]** principles applicable to the instrument in question have been correctly pointed out in the authority already referred to. Looking then to the nature of the instrument, and to the evidence, even if true, adduced in support of it, the proof of fixed and final intention is by no means established. The disposition, as contained in this document, is, under all the circumstances, not probable; the act itself is in no degree led up to or confirmed: it rests mainly, if not solely, upon the testimony of Pochin, and upon his evidence I cannot venture to rely. The Court must, therefore, pronounce against the paper and for an intestacy: and considering the whole complexion of the case, the sort of links by which Pochin and Marson have connected themselves; the common object of both; and considering also that the widow, in case of an intestacy, will acquire only one-half of the property, and that she has been exposed to great expense and inconvenience, I think it will be short of justice not to decree her costs to be paid by Marson unless the Crown will allow them out of the moiety of the property to which it becomes entitled.

WICKWICK *v.* POWELL AND BRYANT. Prerogative Court, Mich. Term, By-Day, 1832.—Certain alterations and interlineations being pleaded in a will to be forgeries, the Court, on the evidence of one witness that she had seen the testator make such alterations, on probability arising from the state of his affections, and on a balance of evidence of handwriting, pronounced for probate of the will with such alterations, and condemned the opposing parties in costs.

Joseph Wickwick died on the 21st of July, 1831. His will, as propounded by the widow, claiming to be sole executrix, bore date the 25th of March, 1830, and was in substance as follows:—

The Winterbourne estate, given to his wife by Hester Evans, the testator devised upon trust, for **[329]** the sole use of his wife, her heirs and assigns. His Whiteshill estate he devised to his wife for life, then, together with all other his freehold estates, to his issue, and in default thereof, in such manner as he, by any codicil or writing in the nature of a codicil, might direct. To his two sisters, respectively, twenty-four shillings per month out of his personal estate, during their lives. Legacies to some of his relations and other persons, and, amongst others, 50l. to his relation John Powell, "as a gratuity to him for his active and friendly services in and about the execution of the trusts of this my will: and 25l. to my old and esteemed friend William Bryant, my other trustee." The will then declared, "I give, devise, and bequeath all the residue and remainder of my real and personal estate and effects to my said dear wife, and I hereby appoint the said John Powell and William Bryant trustees of this my will, and I appoint them, the said John Powell and William Bryant, and my said wife, sole executrix of this my will."

The words "devise," "real and personal" were interlined in the original will; and the word "sole" and letters "rix" were written on erasures, the former having been originally written "joint," and the latter "ors." These interlineations and erasures were the matters in dispute.

Lushington and Nicholl for the widow.

Addams contrà.

Judgment—Sir John Nicholl. This question arises on the will of Joseph Wickwick, which is duly executed and attested, and its validity is in no degree disputed. By the **[330]** will the wife is principally benefited; a small interest, about 800l., is given to the deceased's relations. His own freeholds, if there should be no issue of his marriage, are reserved to be disposed of by a codicil, or other writing purporting to be a codicil. Trustees are interposed, and a legacy of 50l. is given to Mr. Powell, one of the trustees, and of 25l. to Mr. Bryant, the other trustee. There is no reason, from the will itself, to suppose that the deceased intended to give his real estate to his heir at law, in case he had no children; he might propose to give it to his wife, or to his friend Powell, or to some other person. The external appearance of the will is not undeserving of notice: it has been, seemingly, folded up into different forms, and ultimately into the shape of a small square letter. The outsides are soiled and dirty; the paper has been sealed up, and it bears the following endorsement:—"The last will of Mr. Joseph Wickwick." This endorsement to me appears to be in the deceased's handwriting, but when it was written is not quite clear; it might possibly have been done before the will was folded and sealed; but it might have been, and it is rather more probable that it was, written after it was sealed: this point, however, is too uncertain to venture to deduce any inference from it. When the will was first produced and read after the funeral it is not in answers denied that there were some alterations in it, viz. from joint executors to sole executrix, and the question is whether these alterations were made by the deceased, or with his privity, or fraudulently, either in his life-time or since his death. That is the sole question. But that question, whichever way it is decided, will not affect the validity of the **[331]** will; and how some of the relations, who are legatees, and have been examined as witnesses, should have had it impressed upon their minds that the validity of the will, and their right to the legacies bequeathed to them, depended upon Powell and Bryant being held to be executors, and upon their success in this case, it may be difficult to account. The will is certainly entitled to probate; the bequests in it must all be valid; and the only question is whether probate should be granted to Powell, Bryant, and to the widow, Mrs. Wickwick, jointly, or to Mrs. Wickwick solely.

As originally executed, these three individuals were appointed executors jointly, but when the will was produced and read after the funeral, executors "jointly" had been altered to "sole" executrix; and the widow would have taken probate as sole executrix if Powell and Bryant, who had entered a caveat, had not opposed the grant. The widow has propounded the will as it now appears, and has alleged that it was altered by the deceased himself in May, 1830, in the presence of Ann Amos; that it was then sealed up by him, kept in his possession till his death, was produced after the funeral with the seal entire, and that then, for the first time, the seal was broken, and the will immediately read in the presence of Powell and Bryant and of other parties. Powell and Bryant, in their answers, deny most of this allegation; but they do not deny that the instrument was produced after the funeral with the seal entire; they do not deny that at that time the alteration to sole executrix was as it now appears; but they deny that the interlineations "devise" and "real and personal" were then in the will.

[332] I see no reason even to suspect that the interlineations were not also at that time in the will; for what passed at the reading over? Seventeen or eighteen persons were collected after the funeral to hear the will read. Washbourne, as the writer of the instrument, was employed to read it; he read it once or twice; Powell noticed and objected to some alterations, and made some remarks which gave offence to Washbourne—a talkative, self-important, irascible old man. He and Powell got into altercation. Powell asked for the will; Washbourne refused to give it to him; delivered it to the widow; and soon after, but separately, the widow and Washbourne left the room. Powell was very angry. Mrs. Wickwick's mother, Mrs. Amos, offered to fetch the will; it was fetched down, and Powell or Bryant read it. This is the general history of what occurred at the reading over after the funeral. The suggestion now is, that the interlineations were made between the first and second reading; and, as a proof of this suggestion, two or three of the relations—low, ignorant persons—depose that when the will was read by Washbourne, he neither read the names of Powell and Bryant nor the interlineations as to the real and personal estate. It is impossible to rely on such recollec-

tion; the omission imputed to Washbourne is highly improbable; even if it were made, it would be of no consequence; it might, indeed, shew absurdity in Washbourne, but it would not shew that the interlineations were not at that time there; moreover, it is proved to my satisfaction by two witnesses, Mrs. Rickards and Mrs. Marsh, that the alterations could not have been made between the first and second reading of the will; indeed, such **[333]** a suggestion is inconsistent with the case set up, viz. that the word "devise" was inserted by Washbourne, and the words "real and personal" by Charles Amos, the brother of Mrs. Wickwick, at the dictation of Washbourne. I am satisfied, then, that the whole alterations, by whomsoever made, were in the will when it was first opened and read after the funeral.

The question however is, by whom the alterations were made, whether by the deceased himself, as the widow has pleaded; or whether by the fraud and forgery of some other person—for that is the necessary alternative—and, further, that fraud and that forgery have been attempted to be supported by a mass of gross perjury.

The law does not presume fraud, and forgery, and perjury; they must be especially proved, or satisfactorily established by just and necessary inference arising from facts. The main alteration, at least as far as the present case is concerned, is the substitution of the words "sole executrix" instead of "joint executors," and the great inducement is, not a pecuniary benefit to any one, but only that the widow, as executrix, should not be disturbed by others, particularly by Mr. Powell, being joined with her in the executorship; for both he and Bryant still remain trustees.

What, then, is the account given by Ann Amos, the sister to Mrs. Wickwick? This witness is an unfortunate young woman, a cripple, living at home with her family, who are hat-makers, giving some little assistance to them in preparing the hats for sale, and receiving a small payment for such her work: this occupation was partly her amusement, and partly, as I have stated, a source of small profit. In looking to the account which **[334]** she gives, it will be the duty of the Court to consider how far it is supported by probability arising out of the other circumstances of the case, or how far it is so highly improbable as to become incredible, and to warrant the Court in concluding it to be a mass of gross perjury. She is a witness on whose testimony the case much depends, and I must therefore examine her evidence accurately. The account she gives is to this effect: "I am sister to Mrs. Wickwick. I knew deceased from the time I was a child; he was a collector of tithes and taxes, and used to be often in our house. He married my sister about two years ago. In May, 1830, they were about to go to Exeter to settle some accounts there, and they wished me to come and stay with them a few days before, and also to remain in the house, during their absence from home, with deceased's two sisters, who lived in the house, but took their meals in the kitchen. In the course of searching for some papers connected with the accounts—the object of his journey—on the afternoon of the 3d of May, the day before their journey, Mr. Wickwick and I were alone, and he took out of his pockets a number of papers, some in a pocket-book, and others loose, and among the latter was a paper folded up, on looking at which he exclaimed, 'Oh! this is my will; I want to make some alterations in it;' and added, 'some alterations respecting Mrs. W.' (so he called my sister); 'I wish to leave her sole executrix.' I recollect his words quite well. Just as he had spoken them my sister came into the room, when deceased said to her, 'I want to make you sole executrix, Mrs. W., if it won't be too much trouble for you.' I never wrote the words **[335]** down, but I recollect them as well as if he had said them only yesterday. My sister replied, 'As you like.' He then asked her for a candle, and while she was bringing it he began scratching something out with a penknife; it was at the back of the will, which was on a good sized sheet of paper, and written on the back and front too. When he had scratched out what he wanted, which was only in one place that I recollect, he wrote in the same place where he had scratched out; I did not notice what he wrote, but I did observe that when he had written there he wrote something more in another place of the will, but on the same side. Before he had done Mrs. Wickwick brought the candle and left it. He did not read the will when he had done, but I now recollect, and which makes me more sure that the alteration was on the back of the will, that the deceased on opening it, and looking over the first side, observed, 'No alteration there.' He folded the will up, and with a piece of red sealing-wax then on the table sealed it up, and put a plain seal which he carried to his watch-chain on the wax. When he had done this he took the will up and left the room: the other papers he had put into his pocket."

Now I see no improbability in any part of this account; the reason assigned for the presence of the witness at the particular time is probable; her sister and the deceased were about to take a journey; and though two of the deceased's sisters—persons of inferior station, who lived in the kitchen—were to remain, he might not choose to leave the house without the superintendence of some more confidential person under his roof. No attempt, indeed, has been made to [336] shew that the witness did not reside in the house during the absence of Mr. and Mrs. Wickwick. Again, the deceased was searching for some papers connected with the business which was the object of his journey—he carried a parcel of papers in his pocket, the instrument itself is dirty and bears traces of former foldings; the wife did not urge nor press the deceased, nor take much notice of his inquiry; her answer is, "As you like," and this upon her accidentally coming into the room. The witness, it is true, deposes that she recollects, a year and a half afterwards, the exact words and expressions; and this accuracy of memory is said to be quite incredible. But the strength of memory is very different in different persons; nothing varies more. This person is, on one account, very likely to be accurate: she mixed little in the world; her occupation was sedentary; few circumstances passed through her mind; she had no hurry of business, no moving about, to distract her; nothing, in fact, likely to divert her thoughts. I see, therefore, no incredibility, in this respect, in the narrative of the witness. That the deceased himself should have made and should have adopted this mode of making the alteration is not inconsistent with his character; Hooper describes him as an intelligent, busy, active man, a collector of rates and tithes, and clerk to magistrates; thus he might have become something of a lawyer himself. Washbourne, too, the drawer of the will—a talkative man, and who prided himself on his knowledge—is likely to have mentioned to the deceased the distinction between "devise" and "bequeath." It is not, therefore, in my opinion, improbable that the testator in altering his [337] will, when his object was to give away the undisposed part of his freehold property, should himself have inserted the word "devise," which had been used, as applied to realty, in the former parts of his will. Whether any or what effect is to be given to the words, forms no part of the present question: but the main circumstance, as far as regards my decision, is the exclusion of Powell and Bryant, who before were joint executors, from that office, and the substitution of the wife as sole executrix. Powell and Bryant were both the deceased's friends; they still remain trustees; Powell was the greatest friend, as appears from his having the largest legacy; he is described by his own witnesses as "the bosom friend," almost always at the deceased's house; and it is alleged that even after this date of May, 1830, and down to his death, the deceased's intimacy and friendship with Powell continued, and that he spoke of him as an executor as late as on a particular day in April, 1831. Such is the substance of the second and third articles of their plea.

But how is this part of the case supported, and what says their principal witness, Webley? Upon the second and third articles he thus deposes: "For the last fourteen or fifteen years of deceased's life I was on intimate terms with him; next to John Powell, I was deceased's most intimate friend. Powell was his bosom friend. Deceased often told me that Powell was the person he relied upon in all matters which required advice; more than twice or three times he told me that Powell was his executor and trustee. I frequently passed the evening with Powell at the deceased's, but not after deceased's marriage. To [338] the best of my recollection he did not mention Powell to me but once, and that was on the day of the horticultural meeting. The first show last year (1831) was on the 19th of April; the deceased was there, and spoke to me of Powell, and said how sorry he was he had not been able to find him, for certain things had been told him as having been said by Powell of him which he did not believe, and it was of importance that he should see him, as he (Powell) was his executor and trustee: this he said more than once. He did not say that he wanted to advise with Powell about his affairs, but that certain things had been told him as coming from Powell, and that he wanted to know whether all friendship was to be at an end between them, and he must see him, for he was his executor and trustee."

This conversation the witness states to have occurred in April, 1831. Now supposing that there is no error as to the date, and that it was after the horticultural meeting in April, 1831, that the deceased spoke in terms of friendship of Powell, and as his executor, the circumstance is of little weight, and no great reliance is to be

placed on the mere recollection of expressions thus passing in conversation. Powell had been his intimate friend, his trustee, his executor; he might still retain a regard for him, and might still wish to see him, and to know "whether all friendship was at an end between them;" whether still he would act as his trustee, or whether it would be necessary to appoint a new trustee. Supposing all this to be so, it does not follow that the deceased had not made the alteration in his will and appointed his wife sole executrix. He might think that Powell would not act kindly and cor-**[339]**-dially with her; for what is the fact—not depending on loose expressions, nor upon the recollection of witnesses; and what are the dates?

The deceased had married a second wife; there was between them a considerable disparity of years, he being sixty-nine, she twenty-nine; she was a respectable person, and rather of a sedate character; she had lived as companion with a Mrs. Evans, who had left her some freehold property, now restored to her by this will. The marriage was in February, 1830, the will is dated in March following; the horticultural meeting took place in April; the alteration of the will in May, before going to Exeter. Here, then, comes the fact that nearly forms the basis of the whole business. Powell, formerly his "bosom friend," from the date of this second marriage never came near to the deceased: why this was does not exactly appear; he was, perhaps, dissatisfied with the marriage, and hence thought proper to resent it, because of the disparity in years. At first the deceased did not regard this absence as intentional, for in March he made Powell a trustee and executor; till then he may have supposed the absence accidental. But the horticultural meeting was in April; and up to May, above three months after the marriage, Powell had never called or seen the deceased. Here, at once, is a reason for the alteration in the will, it gives an appearance of truth to the transaction, and renders it and the account deposed to by Ann Amos perfectly probable. Nay, never from February, 1830, till the deceased's death did Powell call upon him, nor did the deceased and Powell—his best, his bosom, friend—ever meet. The allegation on this part of the case, **[340]** then, is not true. I do not rely on a slight variation, still less upon a mere difference of expression between the plea and the deposition which generally occurs, but on the substantial averment "that the deceased continued to be on terms of friendship and intimacy with John Powell and William Bryant to the time of his death; that he at all times entertained and expressed a great regard for them, and particularly for the said John Powell."

The alienation of Powell from the testator then renders the alteration itself, as well as the account given of it by the witness, perfectly natural and probable. Her evidence, therefore, thus far, is not in my mind in any degree shaken. But it is further confirmed by the similitude of the handwriting; for though there is conflicting evidence upon this part of the case, and the Court does not much rely on it, yet the weight of testimony appears in my judgment, without travelling through the observations made on each witness, to be in favour of the similitude. The deceased wrote differently, according to what he was writing: when in a hurry and bustle—in writing a receipt for rates and tithes—he wrote hastily and loosely; at other times he wrote more formally. Some of the witnesses differ as to which words are most like; some think the interlineation, others the alteration. But though the interlineation and the alteration were written at the same time, the substratum is different; the one is on a fresh part of the paper, the other on an erasure; and every person writing on an erasure does it more carefully and formally. There is something, though it is slight, in the alteration itself not entirely unworthy of notice. The whole of the word "joint" is not erased: the j, and it seems the o, are not **[341]** erased; the j serves for an s by adding a top or loop to it, the o serves as the second letter in sole, and the other letters are not erased, but are written over "rix." Now this is more likely to have been the course taken by the deceased himself to save time and trouble, than by persons who were fraudulently altering the will for the purpose of deception.

The same observation and reasons apply to not striking out the names of Powell and Bryant. The fraudulent persons would have proceeded with more correctness and deliberation; but the deceased, according to Ann Amos's account, made the alterations in a hurry, sealed up the will, and put it away; and so it remained till the funeral. I have made these observations certainly without attributing much importance to them, yet they tend to support the testimony of Ann Amos.

Another ground of falsification is set up. It is said the question about the handwriting and the alteration was immediately raised—how happened it that it was not

immediately declared that Ann Amos was present? and, further, how did it happen that Ann Amos did not immediately disclose all she knew about the transaction? Interrogatories, calling for explanation on these points, have been put; if the explanations are satisfactory, they have the greater force thus elicited by interrogatory, and will confirm, not destroy, Ann Amos's credit. She is examined in chief and on interrogatories on the same day. To the second interrogatory she answers, "I did not tell the producent (Mrs. Wickwick) of the alterations in the will, because she knew of them as well as myself; and I did not tell any body else about it till after Mr. Wickwick's death. I did not think any **[342]** thing more about the matter till the dispute arose about it; that was after the funeral. I was not present on that occasion, but when the friends came home I understood there was a dispute about the will. I did not say any thing about it then, because I did not understand the rights of the dispute; and it was late. The first time I spoke of it to any body was after my sister put the business into the hands of Mr. Tanner; I think it was about a fortnight after the funeral. My brother Charles came home and said he had been to see the alterations in the will, and really believed them to be in Mr. Wickwick's handwriting; and I then said, 'You believe it to be in his handwriting—I know it is, for I saw him do it.' I did not till that moment know what was the particular cause of dispute in the will; and therefore I had not spoken to any body of it. My brother spoke sharp to me about it, and asked 'why I had not mentioned it before?' and I said, 'I never gave it a thought.'"

This seems a very natural and probable account. The witness was a mere by-stander when the alteration was made: at the reading of the will after the funeral she was not present, she was confined by her infirmity, and by an attendance upon her business. She would hear little about the handwriting of the interlineations; she could not mix much, if at all, in what was going forward at the widow's house; and it seems fairly accounted for that she should not know any thing of the dispute in respect of the will till the matter of it was brought to her knowledge in the way in which she has described, a fortnight after the dispute had occurred. In this explanation she is confirmed by her brother, who was examined before **[343]** her; by her mother, who was examined after her; and by the widow's answers; and the witnesses state that they have not disclosed their depositions nor their answers to the interrogatories. The widow's answers were not given in till after these witnesses were examined. Their evidence, therefore, could not assume a colour from them; and unless the three witnesses are perjured, the account given by Ann Amos must be true.

There is, however, it is said, this further difficulty, that the widow should not have recollected that her sister Ann was present when the deceased altered his will: but the explanation of that also is by no means improbable or unnatural; it comes out quite accidentally in answer to an interrogatory. The twenty-fifth interrogatory put to the sister is in these words: "By whom, and when, and where were you applied to, to become a witness in this cause? What passed at the time you were applied to, and who was or were present? State the same fully and at large." To this interrogatory she answers, "It was my sister who asked me to be a witness; she came to me a few days after I had told my brother that I was present when the deceased altered his will, and asked, 'Could I recollect the circumstance of Mr. Wickwick's altering his will?' I said I could, and I told her all I have now deposed. My sister remarked she had quite forgotten that I was present, but when I called to her mind that she came in, and about the candle, she recollected that I was, and said she was glad I remembered it, and that I must give evidence of it."

There is no improbability I think in this account. How often does it happen that people **[344]** forget a transaction until some particular circumstance is brought back to their remembrance, and then the whole facts in connexion with it revive in their recollection, and rush back into their memory. Here was nothing particular to make Mrs. Wickwick recollect that her sister was with the deceased at the time of the alterations in the will; she herself was in the room scarcely more than a minute; the deceased merely asked her whether she had any objection to be sole executrix; she answered only "As you like;" and when she brought in the candle she put it down and went out again directly—probably busy in making her arrangements for her journey on the next morning; taking, therefore, no part in the transaction, nor, as far as appears, exchanging a word with her sister at the time, who was a mere looker-on, and would probably be silent, seeing that the deceased was busily engaged.

I see, then, not the least improbability that the widow should have forgotten that her sister was in the room at the time of the alterations in question, and that her presence should have been only recalled to her recollection in the manner explained upon the interrogatory.

Many minute and ingenious observations have been made on other points, which seem unnecessary to be further examined and discussed by the Court; for being of opinion that the positive evidence given by Ann Amos, of her seeing the alterations made, in the natural manner in which she has stated it, and those alterations being supported, in point of probability, by the fact that Powell, from the time of the deceased's marriage, wholly withdrew himself from his society—the **[345]** deceased being strongly attached to his wife, and wishing to relieve her in some degree from the adverse feelings of Powell, who had not paid her even common attention—and being also of opinion that the genuineness of the handwriting is confirmed by the weight of evidence, I pronounce that in my judgment the widow is entitled to probate, as sole executrix of this will.

In respect to costs, it has always seemed to me, and the Court, I believe, before intimated as much, that this must be a case for costs, on one side or on the other. Probate to the wife has been resisted on the ground of forgery and perjury; and the case has been characterized as of that description, to the very last stage of the argument. If the case were so proved, the words introduced and interlined must be expunged, the will restored to its original form, and the widow be condemned in the payment of the costs. If, however, the alterations are proved to be the deceased's own act, then the widow has been unjustly charged with very gross fraud, crime, and perjury, and with offering a mass of perjured evidence in support of her case: these are no light imputations. But, besides this, the Court must remember that, though the deceased intended that the widow should have the immediate enjoyment of the bulk of the property, and the poor relations of their legacies, yet that the whole property has been tied up for a year and a half by this unfounded resistance to the probate. Thinking, therefore, that the parties set up these charges at the peril of costs, I am bound to condemn Powell and Bryant in those costs; though even such a decree will be but poor amends to **[346]** the widow for the anxiety and inconvenience to which she has been put by these proceedings.

The Court directed probate to pass to the widow as sole executrix, and condemned the other parties in costs.

MOORE *v.* DARELL AND BUDD. Prerogative Court, Mich. Term, By-Day, 1832.—The deceased (the son of a British subject who resided for several years up to his death in Ireland, and had purchased property there), though occasionally claiming the privileges of a British subject and visiting England, but who was born, educated, established as a merchant, and who died in Spain, held to be clearly domiciled in Spain, and consequently that the law of Spain was to govern the disposition of his property.

[Explained, *Maltass* v. *Maltass*, 1844, 1 Rob. Ecc. 79.]

Thomas Moore, a widower, died at Alicant on the 18th of February, 1830. He left, in his own hand-writing, a testamentary paper, a copy of which (the original being deposited in one of the Spanish legal tribunals) was propounded, as entitled to probate, on behalf of Mr. Budd, an executor.(*a*) The will commenced thus: "In the name of God. Amen. I, Thomas Moore, born at Alicant, in the kingdom of Spain, but a subject of his Britannic Majesty, make this my last will and testament:" and in the concluding clause was this sentence—"This is my last will and testament, written with my own hand this 27th of September, 1828." The will directed his executors to convert all his property (save his house and premises at Alicant) into ready money, invest it, and pay to W. H. Budd, eldest son of his late beloved wife, an annuity of 73l. sterling, or 365 hard dollars. It left also six separate annuities of 18l. 5s. (with a provision for doubling **[347]** them) to the Budds, descendants of his late wife, with an additional sum of 500l. sterling to a grand-child; and directed that, to entitle W. H. Budd to his annuity of 73l., he should reside at Alicant, in the house in which his mother died, and preserve the same and the garden in their present state,

(*a*) Mr. Darell, another executor, had originally appeared, but he declined propounding the paper offered for probate: he, however, was not dismissed from the suit.

and that his brothers and sisters should have a room in the house, and board therein, in the manner expressed in a separate paper.(*a*)[1] It further directed that, after the death of the testator's late wife's children, grand-children, &c., the house and premises at Alicant should go to the younger brother of the then possessor of Moore Hall, Mayo, Ireland; or in default of such brother, to his younger son or daughter, preferring the one who will reside therein. The residue was placed at the disposal of Mrs. Taylor, who, with W. H. Budd, Mr. Darell, and Mr. Evans, were appointed executors. There was an attestation clause in these words: "Signed, sealed, and declared by the testator as his last will and testament, in presence of us." But there was no signature nor attestation. The will was enclosed in a separate half-sheet of paper, sealed up and endorsed: "This is my last will and testament. Thomas Moore." There was also a copy of this will, signed by the deceased, and verified by him as an exact copy, which was found among his papers, and annexed to Mr. Budd's allegation. The deceased left two brothers—his only next of kin—the persons entitled in distribution under an intestacy. It appeared from the allegation, setting up the copy of **[348]** this will, that the deceased's property in England consisted of his distributive share of the proceeds of the estate and effects of his late mother,(*a*)[2] and was valued at 7000l.; that he was also possessed of property to a considerable amount in Spain: that in 1813 he married Mrs. Budd (who died in September, 1827), the mother of one of the parties in the cause: in 1821 made a will (a copy of which was annexed), bequeathing her the whole of his property; that his affection and regard for her, her children by a former husband, and her grand-children, were unabated.

On behalf of George Moore, one of the brothers, it was pleaded that the deceased was son of George Moore, the principal in an eminent mercantile house at Alicant, was there born in 1775, and after passing his childhood in Spain was educated at Thoulouse and Liege, ultimately became the head of the house at Alicant, and continued, to his death, to be there domiciled: that in 1817 he ceased to have any connexion with mercantile or other business; that he never visited the British dominions, save in 1797, 1800, 1803, 1807, 1815, 1821, to see his relations and connexions, and that in 1821 he was in England for about six weeks only: that by the law of Spain a will or testamentary paper of a person dying there domiciled, not executed in the presence of a notary public, and two, three, or more competent witnesses, or the execution whereof should not be attested by the subscription of a notary public, and such number of competent witnesses, was null and void; and that accordingly it had been pronounced, by the proper tribunal at Ali-**[349]**-cant, that the brothers of the deceased were his heirs, as dying intestate.

Five witnesses were examined in support of this allegation; three were Spanish lawyers, who deposed to the law of Spain; the other two were merchants, who knew the deceased in Spain. Mr. Wallace, in his evidence, deposed: "I considered the deceased to be what I was myself, a British subject, resident for mercantile purposes in Alicant; but I was not born in Spain. As far as I know, he was always treated by the Spanish authorities as a British subject." Mr. Saumarez Carey, of Alicant, deposed: "The deceased never claimed, and would not take, the character of a Spanish subject; on the contrary, he claimed British protection as a British subject, and his name was always included in the list of British residents in Alicant kept by the consul there."

It was pleaded in a responsive allegation that the deceased's father was a natural-born British subject; that he died in Ireland in 1797, where he had resided for several years on an estate he had purchased, and which had descended to his son, the party in the cause: that the deceased's mother, though born in Spain, was the daughter of a British subject, and died, in 1813, in a house in Montagu Square, London, which she had purchased: and that the deceased was, in right of his father, a natural-born subject of this kingdom, and entitled, by the law of this kingdom, to all the rights and privileges to which he would be entitled had he been born within the British

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(*a*)[1] The will referred to separate papers, written and to be written, relating as above, and to his funeral, &c.; but there were none produced, or stated to have been written.

(*a*)[2] See *Moore* v. *Moore*, 1 Phill. 375.

dominions.(*a*)[1] That, in 1797, he, the deceased, **[350]** returned to Alicant, and continued to reside in Spain on account of trade, and divers law-suits in prosecution at his death: and that as a British subject he was entitled, under the existing treaties of amity and commerce between this country and Spain, to all the rights, privileges, and advantages granted by them to British subjects.(*a*)[2] That the **[351]** deceased was in this country from 1807 to the middle of 1812; from the beginning of 1813 to the latter end of 1818; and that when he quitted this country in 1821 he intended to return; and that he frequently so declared to his death. That the British consul locked up and sealed the doors of the rooms in which were the deceased's papers, invited the British subjects to his funeral, and afterwards inspected his papers, testamentary and others, in the presence of certain British and Spanish merchants, and of the agent of George Moore, the party in this cause; and subsequently again sealed up the rooms officially, in conformity with the provisions of the treaties between this kingdom and Spain. It further pleaded that in the proceedings before the tribunal at Alicant, the domicil of the deceased, or the question as to whether he was a British or a Spanish subject, was not put in issue, and that the sentence given therein declared only that, according to the laws of Spain, the deceased had died intestate, and that G. and P. Moore, being his next of kin, were his heirs; that an appeal from this sentence was still pending, in which it was pleaded that the deceased had died a British subject, and not domiciled in Spain; and that **[352]** the executors were not parties to the suit at Alicant.

This allegation was supported by extracts from the treaties, by official documents,

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(*a*)[1] 25 Edw. III. st. 2. 7 Ann. c. 5. 4 Geo. II. c. 21. 13 Geo. III. c. 21.

(*a*)[2] Extracts from treaties between Great Britain and Spain.

By the 9th article of a treaty, signed at Madrid 13 May, O. S. 1667, it is provided that the subjects of the King of Great Britain trading, buying, and selling in any of the kingdoms, governments, islands, ports, or territories of the King of Spain shall have, use, and enjoy all the privileges and immunities which the said King hath granted and confirmed to the English merchants that reside in Andalusia, by his royal orders dated the 19th of March, 26th of June, and 9th of November, 1645. His Catholic Majesty, by these presents, re-confirming the same as a part of this treaty between the two Crowns.

33d article. That the goods and estates of the people and subjects of the one King that shall die in the countries, lands, and dominions of the other, shall be preserved for the lawful heirs and successors of the deceased, the right of any third person always reserved.

34th. That the goods and estates of the subjects of the King of Great Britain that shall die without making a will, in the dominions of the King of Spain, shall be put into inventory with their papers, writings, and books of account, by the consul, or other public minister of the King of Great Britain, and deposited in the hands of two or three merchants, that shall be named by the consul or public minister, to be kept for the proprietors and creditors; and no judicatory whatsoever shall intermeddle therein, which also in the like case shall be observed in England towards the subjects of the King of Spain.

35th. That decent and convenient burial-place be granted and appointed to bury the bodies of British subjects dying in Spain.

38th. That British and Spanish subjects shall have and enjoy, in the respective territories of Great Britain and Spain, the same privileges and immunities which have been, or shall hereafter be, granted by either King to the states general of the United Provinces, the Hans Towns, or any other kingdom or state whatsoever, in as full, ample, and beneficial manner as if the same were particularly mentioned and inserted in this treaty.

Extract from the treaty (referred to in the preceding article) between Spain and the United Provinces of the Low Countries, made at Munster, 30th January, 1648.

By the 62d article it is provided that the subjects and inhabitants of the countries of the said lords, the King, and the states, of whatever quality or condition they be, are declared capable of succeeding to one another as well without as with a will, according to the customs of the places; and if any successions of legacies have formerly fallen to any of them, they shall be maintained and preserved in their right thereto.

and letters from the deceased, some to the British minister at Madrid, shewing that he considered himself, and claimed to be considered, as a British subject. It was opposed, on the ground that the facts, if all proved, would be inadequate, after the case of *Stanley* v. *Bernes* (3 Hagg. Ecc. 373), to establish that the deceased was not domiciled in Spain.

The King's advocate and Curteis for Mr. Budd.

Lushington and Addams for Mr. Moore.

Per Curiam. In *Stanley* v. *Bernes* Mr. Stanley was naturalized in Portugal; here, though the deceased made a long residence in Spain, yet it is alleged that he always lived there, and was recognized there, as a British subject. Mr. Stanley took all the advantages of a Portuguese subject. Here it is said that the deceased resided abroad under the faith of special treaties. Cases of domicil do not depend on residence alone, but on a consideration of all the circumstances of each particular case. Reserving all questions, I admit the allegation.

The allegation being admitted, Mr. Moore's answers were taken, but no witnesses examined: and when the cause was opened, at the final hearing, upon an inquiry by the Court whether, according to the principles recognized by the Courts of this country, there could be a doubt that the deceased was domiciled in Spain, the King's advocate declined further arguing the case.

[353] *Judgment—Sir John Nicholl.* Thomas Moore died at Alicant, in Spain, in Feb., 1830; he left two brothers, one of whom is a lunatic. In 1813 the deceased married a widow, Mrs. Catherine Budd, the mother of one of the parties in this cause; she died in September, 1827, leaving several children by her first husband, and also grand-children. It is alleged that, after his wife's death, the deceased made a will in his own hand-writing, dated the 27th of September, 1828; this will is set up by Mr. Budd, one of the executors; it is not signed, but it is pleaded to have been sealed up in an envelope endorsed in the deceased's handwriting—"This is my last will and testament, Thomas Moore." Upon the death of Mr. Moore, this will being found among his papers by Mr. Waring, the British vice consul, was officially deposited by him in Spain. In order to try its validity, proceedings were instituted in the Spanish tribunals at Alicant; they decided that the deceased was intestate: however, it is alleged that an appeal from this decision is now depending before the Superior Court at Madrid.

It is admitted that the deceased's father was, by birth, a British subject; that he went to Spain, there married a Spanish lady, and engaged in business; that he afterwards retired from business, returned to the United Kingdom with his wife, purchased property in Ireland, and finally died in that country. His son, the party in the cause deceased, was born in Spain, was at his father's expense educated abroad, became, first, a partner with him in trade in Spain, and afterwards the principal of the same mercantile esta-**[354]**-blishment; married, and took his wife to Spain, and there he and his wife died. The deceased may have been a subject of both Great Britain and Spain; but the question is, where was he domiciled at his death? For though he might occasionally visit England, and make a considerable stay here; though, under a special act of parliament,(*a*) his father being a British subject, he was entitled to certain privileges, and to be considered for certain purposes, as a British subject (and when it was convenient to him he certainly appears to have claimed that character); yet by birth he was a Spaniard, and by education, by trade and commerce, by residence at his death, he was domiciled in Spain. Is, then, the law of England or the law of Spain to govern, after his death, the disposition of his property, and in what forum is that question to be decided? If the law of Spain, there seems little doubt—indeed it is not attempted to be argued to the contrary—that by the law of that country he is dead intestate. If the law of England, what proof is there of the instrument propounded, either as the act of the deceased, or that, being unexecuted, it is valid. I entertain considerable doubt whether the mere inscription on the envelope and the finding would be sufficient to give the paper effect. But it is not necessary for me to entertain that question. The lex domicilii must govern this case; and I accordingly pronounce that the deceased is intestate, and decree administration to the brother.

(*a*) 7 Ann. c. 5, explained by 4 Geo. II. c. 21.

[355] IN THE GOODS OF LORD RIVERS. Prerogative Court, Mich. Term, Caveat Day, 1832.—Administration (to the nominee of the remitter of a bill of exchange payable to the order of the deceased, but not endorsed) limited to receive, and to give a discharge to a third party for, the said bill, and to apply the same to the use of the remitter, refused.

On motion.

In January, 1831, William Lord Rivers died intestate: his widow and children having renounced the administration, a limited grant was made to Mr. Young, as Sir William Rumbold's nominee, to attend some proceedings in Chancery. No further administration had been granted. In September, 1830, Sir W. Rumbold remitted from Calcutta, to the deceased, under cover to Ransom and Co., his bankers, a bill of exchange for 500l., drawn by Mackintosh and Co., of Calcutta, on Messrs. Rickards, of London, and payable six months after date to Lord Rivers or his order. This bill was accepted by Messrs. Rickards; but previous to its arrival Lord Rivers had died. In November, 1830, Sir William Rumbold wrote from Calcutta to Ransom and Co. "that he wished the whole 500l. to be placed to his account (unless Lord Rivers should find it necessary to deduct from it 270l.) to pay to Mrs. Rigby, to whom he was indebted much beyond 500l., on account of his children, who were under her care, all such sums on his account as she might require, and that he should consider himself bound by any arrangements she might make in his name." As the bill had not been endorsed by Lord Rivers, Messrs. Rickards refused to pay the same save to his legal representative, or to the order of such representative.

[356] Lushington, upon affidavits of the above facts, and stating that if any consent were required from Lady Rivers, notwithstanding her renunciation, she was ready to give it, moved for an administration to be granted to Mrs. Rigby, on behalf of Sir William Rumbold, and limited to receive and give a discharge to Messrs. Rickards for the 500l., and to apply the same to the use of Sir W. Rumbold.

Per Curiam. As this bill of exchange was not paid to the order of Lord Rivers, Sir William Rumbold, who remitted it, was a debtor to, not a creditor of, Lord Rivers's estate; and as application for a limited administration to be granted to the nominee of a debtor is quite novel, I must reject it.

Motion rejected.

SHINGLER *v.* PEMBERTON AND OTHERS. Mich. Term, 1st Session, 1832.—Administration, with a deed of assignment (to take effect on the death) annexed, granted to the assignee as universal legatee in trust, on consent of all parties entitled under an intestacy.

Timothy Pemberton died in August, 1829, leaving a widow and two sisters, viz. Susannah Burroughs (formerly Joy), wife of William Burroughs, and Martha Lloyd, widow, his only next of kin; and John and Thomas Meares (children of Ann Meares, a sister of the deceased, who died in 1826) the only persons entitled in distribution to his personal estate and effects undisposed of by deed or will.

By indenture, dated the 24th of February, 1821, made between Timothy Pemberton (the deceased); his said two sisters; Thomas Meares; **[357]** Susan Joy, widow; and Peter Shingler; it is recited "that Martha Lloyd and Ann Meares were entitled to a leasehold farm for the life of the said Pemberton; that Pemberton, in pursuance of such agreement between the said parties, and in consideration of natural love and affection for his said three sisters, and of ten shillings paid to him by Shingler, assigned to Shingler, his executors, &c. &c. the household goods, farming-stock, and all other the personal estate and effects whatsoever which he (Pemberton) then had, or should be entitled to, or possessed of, at his decease, upon trust, to permit him (Pemberton), during his life, to enjoy the same, and after his decease to convert all into money; to pay £100 to Mrs. Joy, and pay the interest of one-third of the residue to Mrs. Lloyd for life, and after her death to divide the said third part equally between her children; and to pay the interest of one other third part to Mrs. Meares for life, and after her death to divide that third part equally between her children, John, Thomas, and Ann, wife of Henry Whitford; and to pay the interest of the remaining third to Mrs. Joy for life, and at her death to divide that third equally between the children of Mrs. Lloyd and Mrs. Meares; that Mrs. Lloyd and Thomas Meares, in consideration of the said assignment, covenanted that they would permit Pemberton, during his life, to occupy the farm, subject to the lease; and Pemberton

covenanted that Mrs. Lloyd should reside with him during his life without paying for her board and maintenance."

This deed was signed, sealed, and delivered by Timothy Pemberton, Thomas Meares, Martha Lloyd, and Susan Joy, in the presence of John Walford.

Mr. Shingler, the trustee, acted in the execu-[358]-tion of the trusts of this deed; paid, both in Pemberton's life-time and since, some of his debts, others being unpaid; and also paid the expenses of Pemberton's funeral.

Henry Whitford, the husband of one of the deceased's nieces (who died in his life), filed a bill in Chancery against Shingler, as trustee for the execution of the deed; and in June, 1831, it was referred to a master to take an account of the monies received by Shingler under the deed; when the plaintiff's solicitor objected to allow Shingler any sums (whether debts of the deceased or otherwise) paid since Pemberton's death; but did not object to payments made by him in the deceased's life; the master, however, objected to allow any of these payments, whether made before or after the death.

Shingler was not a creditor of Pemberton at his death. No question as to the validity of the deed was raised in the Court of Chancery.

Lushington, after stating that he should not press a decision in the Court of Exchequer,(*a*)[1] because the soundness of it was doubted, holding that property passing under a deed was liable to legacy duty, moved, upon a proxy of consent from the parties entitled in distribution under an intestacy, for administration, with the deed annexed, to be granted to Shingler, as universal legatee in trust, on the ground that the deed was not effectual at its execution, and that the case came within the principles upon which instruments, having the form of deeds, but being wills in substance and [359] effect, had been admitted as testamentary in a Court of Probate.

Per Curiam. The present application is that a deed of assignment, the validity of which deed is said to be questionable, may be proved as testamentary. It is well known that there are many instances in which instruments executed as deeds have been allowed to be proved as wills.(*a*)[2] The primary consideration, in all such cases, has always been whether the instrument was intended to operate in the life-time of the party deceased, or be consummated only on death.(*b*) Here the deed reserved to Pemberton all the beneficial interest in the property till his death; that event on which the whole was to be consummated has now happened. The parties entitled under an intestacy consent to this application; and, under all the circumstances, I am of opinion that the administration, with this instrument annexed, may be granted to Mr. Shingler, as the universal legatee in trust.

Motion granted.

[360] IN THE GOODS OF JAMES CASSIDY. Prerogative Court, Mich. Term, 4th Session, 1832.—Administration, with a will annexed, granted to an attorney of the executor who was abroad, not revoked, but pronounced to have ceased and expired on application of the executor for probate, and on affidavit that no suits were pending. Future grants, durante absentiâ, to be further limited, until the executor, or party entitled to administration, duly apply for and obtain a grant.

[Referred to, *Webb* v. *Kirby*, 1856, 7 De G. M. & G. 381; *Rainbow* v. *Kittoe*, [1916] 1 Ch. 316.]

On motion.

In 1825 administration, with the late Mr. Cassidy's will, was granted "for the use and benefit of J. Cassidy, the son, and one of the surviving executors (the other having renounced), then at sea," to Mr. Ashley, his attorney.

The son—being now in England, and desirous of probate, and the administration with the will annexed having been brought in by the attorney, with the usual affidavit "that no action at law or suit in equity has been brought by or against him as administrator"—had been sworn as executor; and now prayed that the administration should be declared to have ceased and expired, and that probate be granted to

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(*a*)[1] *Attorney-General* v. *Jones and Bartlett*, 3 Price, 368. See this case commented upon in Sugden on Powers, 5th ed. p. 225, in notis.

(*a*)[2] See *Masterman* v. *Maberly*, 2 Hagg. Ecc. 235. *The King's Proctor* v. *Daines* 3 ib. 218.

(*b*) See *Glynn* v. *Oglander*, 2 Hagg. Ecc. 428.

him. The application, in respect of the letters of administration, was objected to in the registry, on the ground than in some similar cases the administration had been expressly revoked.

The King's advocate in support of the motion. The administration, having been rightly granted, ought not to be revoked. A revocation which is unnecessary may possibly be injurious; for it may render some of the administrator's acts void: and would certainly be inconvenient; for the probate would be considered at the stamp office as an original, and consequently probate duty required to **[361]** be paid as for an original grant, and the duty, already paid on the administration, could only be recovered upon a special application to the commissioners, supported by affidavit: whereas if the administration be declared to have ceased and expired, the probate will pass at the stamp office upon a free stamp.

Per Curiam. The Court declared the administration cum testamento annexo to have ceased and expired; and directed that, in future, grants, durante absentiâ, to attorneys, should be limited "for the use and benefit of resident at ," and until the executor (or the party entitled to the administration) should duly apply for and obtain probate or administration.

Motion granted.

COPPIN *v.* DILLON. Prerogative Court, Hil. Term, 1st Session, 1833.—Deceased died on the 19th of October, 1831, having made a will in 1820, and three codicils, all formally executed and attested to carry realty; he destroyed the will, but on each of the codicils was written, "June 18, 1830, my will, John Plura," and other endorsements at a subsequent date, inferring that he considered that at such time he had no will. In 1830 he executed a new will and a codicil, the latter subsequent to June, 1830, which will and codicil were not forthcoming, and in 1831 he executed a settlement. Three codicils, the settlement, and its envelope were propounded as together containing the will, the Court holding, first, that the destruction of the will of 1820, primâ facie, revoked the codicils, that the words written on the codicils were not conclusive of an intention that they should operate as substantive papers, that evidence dehors the papers was therefore admissible, and on such evidence that the will and codicil of 1830 must be presumed to have been destroyed by the deceased, but though destroyed, would, primâ facie, have been revocatory of the former will and codicils, and that the settlement was intended as a substitution for the codicils, pronounced for an intestacy, and refused costs out of the estate.—The Court granted administration to the unsuccessful party (though the younger daughter), the minors, grand-children, joining in the prayer for such grant, and, on the application of the other daughter, directed the securities to justify in respect of her interest.

John Plura, a widower, died on the 19th of October, 1831; he left two daughters, Mrs. Coppin and Mrs. Dillon, and two grand-children (minors), the issue of Mrs. Gray, a deceased daughter. His property, freehold, copyhold, and personal, was, at the very lowest, estimated at 45,000l.

Five papers, viz., three codicils to a will destroyed by the deceased, a deed of settlement, and the envelope to it were propounded as together containing the deceased's will, on behalf of the husband of Mrs. Coppin, as the executor **[362]** thereof. They were opposed by Mrs. Dillon, who insisted that the deceased had died intestate. Mr. Gray, the father of the minors, intervened and opposed the deed of settlement and envelope. The instruments themselves, the material parts of the history of the deceased, and the particulars of his property, with the facts of the case, are set forth in the judgment.

The King's advocate and Addams for Mrs. Coppin.

Phillimore for the children of Mrs. Gray.

Lushington and Dodson for Mrs. Dillon.

Judgment—Sir John Nicholl. John Plura died on the 19th of October, 1831, a widower, at the age of seventy-eight years, leaving two daughters, Mrs. Coppin and Mrs. Dillon; and two grand-children, the issue of a deceased daughter, Mrs. Gray. His property amounted to 45,000l. or 50,000l., of which about 10,000l. was freehold and copyhold; the rest was personalty.

The deceased acquired this property as an auctioneer, a calling which probably afforded opportunities of advantageous purchases; and possibly may account for the

varied nature of his property. He had retired some years from business, and his fortune seems to have suffered some diminution. On two of his daughters he had made considerable settlements at the periods of their respective marriages. 5000l. 5 per cents. on Mrs. Gray in 1816; and 10,000l. 3 per cents. on Mrs. Dillon in 1820; but he made no settlement on Mrs. Coppin's marriage. He had sustained losses by Mr. Gray, and had also made an unsuccessful speculation in a vessel in conjunction with Mr. Coppin. Hence it is probable that at **[363]** one period he was a richer man than at the time of his death.

Towards his family he was an affectionate father, for though he might have greater confidence in Mrs. Coppin, and might occasionally be angry with Mrs. Dillon, yet there is no reason to conclude that he intended to make an unequal, and (what would seem to be) an unjust, distribution of his property. To his grand-children he was particularly attached: two of the Grays and two of the Coppins were resident with him for considerable portions of time.

It should have been noticed that for some years he had lived apart from his wife, who died in 1826; and that in early life he had had a natural daughter by Mary Deson, then a servant of his mother. After the death of that natural daughter Mary Deson continued to live as housekeeper, and in considerable favour with the deceased's mother; and on the death of the latter, Deson became the deceased's housekeeper, and so continued till his death. She was intrusted with the care of his grand-children, and was treated with respect by all the family, with the exception, possibly, of Mrs. Dillon. In June, 1829, the natural daughter married Mr. Bullock, a wine merchant at Bath, and in September, 1830, she died.

These are some of the facts and dates relating to the deceased's history, his property, and family, which may be material in the investigation of the present question. The remainder will appear as the Court proceeds to detail the testamentary and other acts of the deceased in relation to the disposition of his property.

It is alleged that in 1817 he executed a will, **[364]** but its contents are not before the Court. On the 31st of March, 1820, he executed another will, which has since been destroyed; but the drafts and instructions for it are produced. In that will he seems to have arranged his property specifically into three portions; one he gave as a provision to his wife for life, and then to his grand-children—the issue of Mrs. Gray; another portion he gave to his daughter Elizabeth, afterwards Mrs. Dillon; and the third to his daughter Ann Coppin; and Mr. Coppin was one of the trustees and executors of that will. If Elizabeth died without issue, her portion was given over to the grand-children by the other daughters, and the same provision was made with respect to the other portions; so that by the will of 1820 the property was secured finally on the grand-children.

To this will were added the several codicils, A, B, and C, now propounded.

Codicil A is dated on the 13th of December, 1827; it begins thus: "Whereas I, John Plura, &c., have duly executed my last will and testament the 31st of March, 1820, I declare this to be a codicil to my said last will." The codicil then gives a freehold house, No. 2 Gay Street, Bath, with appurtenances, to Mrs. Coppin for her life, and at her death to his grand-daughters, Elizabeth and Sarah Coppin; and it recites that he had made no settlement on Mrs. Coppin at her marriage, nor subsequently thereto, and directs the executors of his said will, viz. Charles Coppin, Ford, and Rogers, to pay Mrs. Coppin 200l. within a month after his death, free of legacy duty, and in case of her death before his said grand-daughters are 18, it directs his executors to manage the house for their advantage; it gives cer-**[365]**-tain linen and all the testator's apparel and printed books to Mrs. Coppin, and to his son-in-law, Coppin, his favourite violin. This paper was executed as a codicil in the presence of three witnesses.

The amount of the property bequeathed by this codicil is nearly 2500l. There are these words at the top: "June 18, 1830.—My will, John Plura." And there are these words at the bottom: "My will is revoked and destroyed. This is my will and desire, John Plura. June 18, 1830."

Codicil B, dated on the 29th of February, 1828, the deceased declares to be a codicil to his will of March 30th, 1820; but in the attestation clause it is stated to be a codicil to his will of 31st of March, 1820. By this codicil he disposes of property to the value nearly of 10,000l., of which 2000l. is realty. This disposition is principally in favour of his two grand-children, the Grays, with directions also to

apply part of a fund arising from the sale of his prints, paintings, and articles of sculpture, towards the maintenance of his grandsons, John Coppin and Francis Gray, at college. This codicil was attested in the presence of three witnesses. It has these words at top: "June 18, 1830; my will, John Plura:" but there is nothing at the bottom of this instrument.

Codicil C bears date on the 4th of July, 1829, and, as it originally stood, was declared to be a codicil to his will, dated 31st of March, 1820. It gives to Mary Deson his household furniture, plate, &c., for life, or as long as she is unmarried, and a leasehold house. At the top, the words: "June, 1830, my will, John Plura," are struck through. At the top of the paper near the margin is written, "August 20th, 1831," and op-**[366]**-posite to this date in the margin are these further words: "This deed and testament, in the fear that being without a will at this time, my health may not allow me to make another." So that on the 20th of August, 1831, he speaks of himself as being without a will. There are, however, these words at the bottom: "My will of March 31, 1830, is revoked and destroyed, as not at all applicable to my estate and affairs, yet the purport of these two codicils I intend fully to form part of another will.—Jno. Plura. June 18, 1830." Whether the reference to the date of the will is erroneous or not, the Court has no evidence before it, but the attestation clause refers to a will of one thousand eight hundred and twenty-nine. This instrument has many alterations in the body, and particularly at the beginning.

These three papers are propounded as valid, and as in conjunction with two others, G and H, together containing the deceased's will. G, which is not testamentary in form, but is a deed of settlement dated on the 25th of August, 1831, is in effect as follows. It recites that no settlement was made on the marriage of Mr. and Mrs. Coppin; that Plura (the deceased) was possessed of a freehold house, 7 Queen's Parade, Bath, which Coppin was to hold on trust for his wife, to her separate use, and if he (Coppin) should survive, to his use, and on the death of the survivor, to their children. It further recites that the deceased had assigned to Mrs. Coppin, her executors, administrators, and assigns, 1904l., East India stock, and thirteen shares in the Globe Insurance Company, respectively, with the interest and dividends for her separate use, and on her death the interest and dividends to her husband, **[367]** if he survived, and afterwards the principal to their children; and directs his (Plura's) real and personal representatives to complete the necessary deeds and transfers of the said property; and in the mean time to pay the said rents, dividends, and interest to the persons for the time being entitled to receive the same. The amount of property so settled is under 8000l., of which nearly 2500l. is realty. This deed is executed in the presence of two witnesses, and its manifest object is to make a settlement upon Mr. and Mrs. Coppin and their children, as he had before done upon his other two daughters. The amount is not very different, considering the other daughters had the benefit of their settlements some years earlier.

H is the envelope, sealed with the deceased's seal, in which this deed of settlement was enclosed; a memorandum, as follows, was endorsed upon it:—"Papers concerning Mr. and Mrs. Coppin and their children, in regard of there being no settlement made on them at their marriage, and to be given up to Mrs. Coppin at my death, and immediately. Drawn by Mr. Evans, solicitor, Bath. Dated August 25th, 1831."

It may be proper also to notice that there is proof of other acts relating to the disposition of his property. The deceased, from the immense length of the will of 1820, which was prepared by a conveyancer, seems to have become inclined afterwards himself to be the framer of his testamentary acts. Codicils A, B, and C, though of considerable length, framed with much care, and regularly executed and attested, are of his own handwriting.

Again, in the early part of 1830 he executed a new will, also prepared by himself, consisting of several sheets of paper, and regularly attested by **[368]** three witnesses. One of the witnesses, Mr. Tull, an intimate friend, suggested to him the expediency of professional assistance, and still more strongly urged the precaution of a duplicate; and in a few days the deceased brought over a duplicate, or what he held out to be a re-copy, on account of an error, and this he formally executed in the presence of the same three witnesses. In the month of October in that year, upon the death of his natural daughter, Mrs. Bullock, as he stated it, he executed before the same witnesses a codicil recognizing his will. In August, 1831, having made the deed of settlement on Mrs. Coppin and her family, which deed was prepared by his solicitor, Mr. Evans,

he in September executed a settlement or deed of gift prepared by the same solicitor, and making a provision for Mrs. Deson. That deed is not propounded, nor indeed produced, and Mrs. Deson seems satisfied of its validity and legal operation. Whether this is the deed alluded to in the margin of paper C is not proved; that memorandum is of an earlier date than the execution of either of the deeds; but at that time he considered himself as without a will, and the will executed early in the year 1830, and the codicil of October in that year, are not forthcoming, and must be presumed to have been destroyed by the deceased himself.

After this period and the execution of these deeds he was evidently making preparation in his mind for a new will; it does not appear that he ever committed any instructions to writing, for none are preserved; yet he repeatedly mentioned to Mr. Evans his intention of coming to him to make his will, but he procrastinated, saying he was not yet ready, till at length he was unexpectedly **[369]** attacked by a seizure, which rendered him incapable, and in a few days ended in his death. These appear to be the several facts relating to the deceased himself in his lifetime.

At the time of the deceased's death Mr. Coppin was at Bath, and coming to his house the next morning, he, together with Mrs. Deson and Mr. Bullock, opened the iron chest or safe, in order to see whether the deceased had left any directions about his funeral. Finding A and B, which were only codicils, and lying uppermost, rolled up together, the idea occurred that, as other parts of the family were absent, it might be proper to wait for the presence of some indifferent persons. Accordingly, two very intimate friends of the deceased, Mr. Bally and Mr. Rogers, the latter one of the executors in the will, were sent for, and by their advice the repositories were sealed up, and so remained till after the funeral. Mr. Coppin certainly did not, at the time, mention to these friends that he had opened the iron chest in this cursory way, and for the purpose already stated; but this omission is far too slight a circumstance to raise even a suspicion of fraud, and much less to found a charge of spoliation, perjury, and forgery.

The question then comes back to this—whether assuming that these codicils, A, B, and C, are in the same plight and condition as they were left by the deceased they are valid as a testamentary disposition, or whether the deceased is dead intestate.

Primâ facie, as originally executed, they can have no testamentary effect. A and B are expressly codicils to a will of 1820; that will was revoked and destroyed, and, primâ facie, that revocation and destruction put an end to the codicils. On A he writes, "My will is revoked and de-**[370]**-stroyed;" and on C the same at the bottom, and at the top, at a still later period, namely, in Aug. 1831—"being without a will at this time;" and codicil C, as I have before noticed, refers in the attestation clause to a will of 1829, not merely in figures but in words. Whether that was a blunder of the deceased (for he had then become far advanced in years, and was not in good health), or whether there was a will executed by him in 1829, may be uncertain; but if there were a will in 1829, the execution of that will would be a presumed revocation of the former will, and of these codicils, as originally executed. Can it be contended, from what is written on each of the papers of the date of "18th June, 1830," that the Court, looking to all the circumstances, is to conclude that this old gentleman had finally determined that these papers should now become his operative will, and that these memoranda should be a re-execution of them as his will? Why, this is negatived by what at a later period, viz. in August, 1831, he writes on codicil C, "being without a will at this time." What was passing in his mind it may be difficult to conjecture—it is at least so far doubtful as to open the case to the admission of circumstances, in order to arrive at the deceased's intention.

It is said the words "my will" can bear no other construction; but no words could be stronger than the concluding part of the instrument in *Mathews* v. *Warner*,(*a*) "I appoint my good friend Mr. Edward Lepine, and my good friend Mr. Edward **[371]** Johnson, my executors, to see this, my last will and testament complied with." Dated at Deptford, 2d October, 1785, and signed "William Mathews." True it is that at the commencement Mathews states he was only framing the "plan of a will, to be afterwards drawn out in a more formal manner;" yet at the end he might have

(*a*) 4 Burn, Ecc. Law, p. 107, d.; 4 Ves. jun. 186. See also this case commented upon in *Fawcet* v. *Jones and Pulteny*, 3 Phill. 477; in *Beaty* v. *Beaty*, 1 Add. 160, in notis; in *Mitchell* v. *Mitchell*, 2 Hagg. Ecc. 75; *Hattatt* v. *Hattatt*, sup. 212.

intended to convert it into his will, at least for a time. No words, I repeat, could be stronger than the passage I have quoted, to shew that he meant that very instrument to operate. The Prerogative Court (in deference to a decision of the Supreme Court in a former case) and the Court of Delegates held that affixing his signature was a permanent execution, and that that was conclusively established on the face of the paper. The Commission of Review, however, held that this description, "a plan to be afterwards drawn out," opened the case to the admission of evidence as to the intention with which the signature was affixed, and the continuance thereof at the death. If the deceased, Mathews, had died suddenly, immediately after writing this plan, it is possible that its validity would have been established, for then the inference might have been that the more formal drawing out was only prevented by the act of God; but he lived long after, and the paper was ultimately pronounced, by the Commission of Review, not to be his will. So, in the present case, if the deceased had died immediately after he had, on 18th June, 1830, written "my will," and subscribed his name, the construction might possibly have been that he meant at least that so much of his intention as the papers conveyed should be carried into effect, and that he had written these words to guard against the accident of immediate death; but, having lived fifteen **[372]** months afterwards, it is impossible to hold that he intended to set up and adhere to these papers as his permanent will duly executed—at least it is open to the Court to look into all the circumstances to ascertain whether they warrant such a conclusion.

What, then, are the circumstances of this case? In the first place, these papers apply only to a small part of the deceased's property, and only to certain branches of his family; but, by his will of 1820, he had most carefully disposed of the whole of his property—a very considerable one—taking care that it should ultimately all centre in his grand-children, but providing for his two surviving daughters during their lives. This will of 1820 was adhered to for ten years, and confirmed by three instruments, originally executed as codicils, and which were regularly drawn up in his own hand-writing, and executed and attested in the most formal manner. The memoranda to which I have adverted on these instruments are to be regarded as merely formal and explanatory endorsements; they are not attested in order to operate as a re-publication of his will, or as a permanent substantive disposition of his property, but are mere precautionary memoranda, and expressions indicative of some future intention.

But, further, the deceased executed other formal testamentary instruments, not only subsequent to the dates of the three codicils, but even subsequent to the 18th of June, 1830. In the course of that year he executed a long and formal new will; whether in the spring before the 18th of June, or after, does not appear, for the witnesses have nothing by which to fix the exact date; but he also, after the 18th of June, 1830, with equal formality, executed a codicil, and of this the witnesses can fix **[373]** the date, as it was made in consequence of Mr. Bullock's death, and that event did not take place till the 9th of September in that year. This will and codicil of 1830, written by the deceased himself, both executed formally, and both in the presence of the same witnesses, appear to me wholly inconsistent with an intention or understanding on the part of the deceased that what he had written upon these old codicils would set them up as a substantive, valid, operative will. It is nearly incredible that he should so have considered these papers.

The matter, however, does not even rest here; for Mr. Plura seems to have taken other modes of effecting his purpose; and to have substituted other instruments in the place of these codicils. He had made no settlement on Mrs. Coppin's marriage; that is so recited in A, the first codicil to the will of 1820, and is the reason assigned for giving Mr. Coppin the benefit of a life-interest, in case he should survive his wife. The benefit to Mrs. Coppin is increased by the codicil of December, 1827. This was written after the death of the deceased's wife; but in August, 1831, he, considering himself as without any will, executed a deed of settlement, making this increased provision for Mrs. Coppin, then for her husband, if he should survive, and afterwards for their children; placing them, therefore, in some degree on an equal footing with the other two daughters, on whom a settlement, to a similar effect, had been made on their marriage. It may, then, be concluded that this settlement of August, 1831, was a substitution for the special benefit he had intended for the Coppins by the codicil A, and not an addition to it.

The same inference arises in regard to codicil C. The deceased, not attributing any effect to what [374] he had written upon that paper on the 18th of June, 1830, had, in August, 1831, taken the trouble to alter that instrument into something of a draft for a new will; but instead of carrying those alterations into effect by a testamentary instrument, he adopted the same course as in the case of the Coppins—he had a deed of gift prepared by his solicitor, which he executed in October in that year. This, again, was a substitution for C. That he should then regard the instruments A, B, C as his will is beyond all belief: and the marginal writing on paper C, as well as the writing at the bottom of it—"being without a will at this time" (viz., in August, 1831)—necessarily shewing that he considered that he had then no existing will, confirms the inference from the other papers. That opinion is further confirmed by the evidence of the solicitor, Mr. Evans, who states that the deceased was contemplating and preparing in his mind the arrangement of his new will, but he had not made up his mind; he was "not ready;" and as his property was of a variety of sorts, and if the deceased contemplated (as he probably might) the arrangement of it in specific proportions among the three branches of his family (as in his will of 1820), some time would be required for estimating the different values, and the different advances made to, and the circumstances of, the several members of his family. It is not, then, extraordinary that the deceased, at his advanced age, and in a state of indifferent health, had not quite prepared himself, and was "not ready" to give Mr. Evans detailed instructions for his new will: but that does not lead to the inference that he had not the intention to make an entire new will, still less that he considered the papers A, B, and C as his will.

[375] It so happens that intestacy will nearly carry into effect what appears to have been the principle, though perhaps not the exact detail, of the deceased's wishes —viz., that the property should be divided pretty equally among the three branches of his family: at all events, it is, in my judgment, the duty of the Court, upon grounds to which I have referred, and which it is unnecessary to recapitulate, to pronounce against the papers propounded; and that, so far as appears, the deceased is dead intestate.

The costs of the suit were respectively prayed out of the estate.

Per Curiam. In this case each party has an ample provision, and I shall leave them respectively to pay their own costs. The suit has been conducted hostilely. Charges, by no means necessary, and by no means established, have been alleged against Mr. Coppin; and the substitute of Mrs. Dillon's proctor, at Bath, the proctor himself being unable to attend, framed and caused to be administered nearly one hundred interrogatories. I shall not, therefore, direct the costs to be paid out of the estate; such an expectation sometimes induces expences which might well be avoided; and it is certainly not an application to be resorted to and granted as a matter of course. Were the Court, in this instance, to decree the costs out of the estate, they would, in some measure, fall on the grand-children, who are not parties to the expence.

Costs "out of the estate" refused.

3d Session.—On this day an application was made that the letters of administration should be granted to Mrs. [376] Coppin solely; the grand-children concurred in this application. On the other hand, the administration was claimed by Mrs. Dillon, as the deceased's eldest daughter, and as having successfully opposed the papers and established an intestacy.

Per Curiam. The Court never forces a joint administration; (*a*) and when it recollects the mode in which this suit was conducted on the part of the Dillons, it cannot be surprised that Mrs. Coppin should be disinclined to be joined in an administration with her sister: it is not likely that they could act cordially together. The parties are equally entitled, for though, cæteris paribus, the Court might decree the grant to Mrs. Dillon, as the eldest sister, yet that does not give her any very decided advantage; while, on the other side, there are two interests against one; and a majority of interests always has its weight. It is also manifest in this case that the deceased gave a preference to, and had greater confidence in, Mr. Coppin; he was always one of his executors: this intimation of the deceased's wish and of his confidence is a strong circumstance; and on that ground principally I decree the administration to Mrs. Coppin.

(*a*) *Dampier* v. *Colson*, 2 Phill. 64.

Lushington for Mrs. Dillon, prayed that the securities might be directed to justify.

Per Curiam. The application being made on behalf of a next of kin, I must grant it; but it will be sufficient for the sureties to justify, in respect of the share of the party excluded from the administration.

[377] BARNES *v.* M'BRIDE. Prerogative Court, Hil. Term, 1st Session, 1833.—A will was propounded on behalf of an asserted widow and children, and was opposed by a first cousin; the interest of the opposer was denied; the proxy was "to propound the will and to do all things necessary, and touching the validity thereof," no allegation propounding the will was given in, but witnesses were examined on an allegation pleading the marriage: the first cousin declared that she proceeded no further; the Court, under such circumstances, refused to pronounce the allegation proved; and, as no allegation propounding the will had been given in, decreed probate only in common form.

This was a cause of proving the will of Joseph Dawson, who died in Ireland in January, 1832. In early life he went as surgeon to Africa; he there became a merchant, and ultimately Governor of Cape Coast Castle. In 1807 he married at that station (according to the rites and ceremonies then in force in that part of Western Africa) Mrs. Mould, a native of Africa, and the widow of a governor of Cape Coast Castle. Mr. Dawson made several wills; the last was in duplicate, and was dated "Cape Coast Town, Africa; the 28th of February, 1825." By this will, after reciting that his son was in England, and that he (the testator) was about to return to this country with two of his daughters, and after providing for Sarah Dawson, "the mother of his four children," and recommending her to "the kind and friendly attention of his executors in Africa," he bequeathed the bulk of his property to his children; and appointed two executors in Africa, and Mr. Barnes executor in England.

Mrs. Dawson and the children survived the testator.

The deceased left 10,000l. and upwards in the English funds, besides property in Ireland, and on the coast of Africa.

The will of 1825 being opposed by Agnes M'Bride, spinster, it was propounded by Mr. Barnes. A proxy was exhibited for him, in virtue whereof his proctor admitted that M'Bride was the deceased's first cousin, once removed; but otherwise denied her interest. The proxy also [378] authorized the proctor "to propound the last will of the deceased, to give in an allegation propounding the same, and to do all things proper and necessary touching the validity of the said will, and the obtaining probate thereof."

No allegation propounding the will was given in; but an allegation, pleading the testator's marriage with Mrs. Mould, according to the forms used at Cape Coast, and also pleading cohabitation, birth of children, reputation and acknowledgment, was given in, and it was admitted without opposition. Upon this allegation three witnesses were examined, who proved the mode of marriage at Cape Coast, the cohabitation of Mr. and Mrs. Dawson as man and wife, the reputation and acknowledgment of them in that character, and the birth of children, but the fact of marriage was not proved.

On the caveat day in January the proctor for M'Bride exhibited a special proxy, and declared that he proceeded no further. Publication of the evidence was decreed upon the same day, and the cause assigned for sentence on the first session.

Phillimore and Lushington for the executor. The evidence establishes the validity of the marriage and the legitimacy of the children. The executor, therefore, is anxious that the Court should not merely decree probate of the will, but should pronounce that the allegation is proved, and prevent any question that might otherwise arise as to the payment of legacy duties.

Judgment—Sir John Nicholl. The Court is pressed to pronounce the allegation proved, which would, in effect, be to pronounce [379] the marriage proved: this would be an extreme irregularity. The whole tenor of the proceedings is to prove the will, and such is the form and extent of the proxies. As soon as the cousin, whose interest was denied, declared by her proctor that she proceeded no further, there was an end of the opposition, and the executor might instantly have taken probate: but he cannot call upon the Court to pronounce that this allegation, pleading the marriage, is proved; for there is no party before the Court denying it, nor even any party cited: more especially now that the validity of the will is not questioned, the marriage thereby

becomes immaterial in the present suit, since the will provides for the widow under the description of the mother of his children. The clearest proof of a marriage thus introduced into a testamentary cause would not bar an adverse interest; nor can I pronounce a sentence purporting to have an effect which it would not legally have. However, I will allow the matter to stand over till the next session.

2d Session.—Per Curiam. I have considered the application made in this case on the last session, but I am quite satisfied that I cannot pronounce the allegation proved; and as the will has not been set up in plea and been proved, I can only grant probate of it to the executor, in common form.

[380] ABBOT *v.* PETERS. Prerogative Court, Hil. Term, 2nd Session, 1833.—A paper beginning "This is the last will and testament of me, Charles Abbot, made this 25th of January, 1831," and concluding, "in witness whereof I have, to this my last will and testament, set my hand and seal, the day and year first above written," but which was not subscribed nor sealed (the deceased having lived sixteen months after the same was written), pronounced against as unfinished and abandoned.

Charles Abbot, a widower, was found dead in his bed on the 21st of May, 1832. He left 5000l., of which 1000l. was realty. Two sons and five daughters survived him. A testamentary paper (and there was no other) was found in his custody at his death: it was in his own hand-writing, pretty fairly written, and it contained a full disposition of his property. The paper commenced thus—"This is the last will and testament of me, Charles Abbot, of Longaston, in the county of Somerset, gentleman, made this twenty-fifth day of January, one thousand eight hundred and thirty-one." By it the testator gave 2400l. in trust to his eldest son, and to Mr. Peters, his son-in-law, to apply the interest for the maintenance and education of his four unmarried daughters, until the youngest should attain twenty-one, and then the principal to be equally divided; 300l. to his daughter, Mrs. Peters; 500l. to his youngest son; and the residue of his property to his eldest son, his sole executor, and appointed him and Mrs. Peters guardians of his said four daughters. The paper then had these words—"In witness whereof I have, to this my last will and testament, contained in one sheet of paper, set my hand and seal, the day and year first above written."

There was no seal nor subscription. At the foot of the paper the deceased had inserted the amount of the four legacies, and erased the word "pounds" after each, adding "This is written in different ink.—C. A."

[381] The allegation propounding this paper on behalf of the eldest son, the heir at law and executor, pleaded, in addition to the history already stated, that the deceased, soon after the death of his wife in July, 1830, declared to his father and mother that he had taken care of his daughters; and also that on the marriage of his daughter with Peters, in September, 1830, he had told him that the money, viz. 300l., which he had with his wife would be deducted at his death, and that all the girls would have alike.

Addams and Haggard for an intestacy.

Phillimore and Blake contrà.

Judgment—Sir John Nicholl. This is clearly an unfinished paper: it professes to dispose of real property and to appoint guardians; and the Court cannot read the contents of the instrument, and particularly the concluding part, without being satisfied that the deceased himself intended to do something more to it. The concluding clause is to this effect: "In witness whereof, &c., I have hereunto set my hand and seal;" but the deceased neither set his hand nor his seal. The paper is dated in January, 1831, and the deceased died in May, 1832—thus elapsed sixteen months after the instrument bears date. The Court, therefore, is bound to presume that the paper was abandoned—to pronounce that it is invalid, and, as far as appears, that the deceased is dead intestate. As, however, it was necessary to take the opinion of the Court upon it, I decree the costs out of the estate.

[382] SALMON AND BREESE *v.* HAYS. Prerogative Court, Hil. Term, 2nd Session, 1833.—An allegation, pleading a paper, beginning "Elizabeth Mary Hays" (dated at the top, six months before her death, and disposing of all her property), but not subscribed, and ending without a stop, written on a half-sheet very fairly, without erasure, interlineation, or abbreviation, but containing no

words to shew, on the one hand, any intention of doing any thing further; nor, on the other hand, that she had finished it—admitted to proof—the Court reserving all questions to the final sentence.—A feme covert having made a will of her separate property, but appointed no executor, the Court refused to grant a limited administration, with the paper annexed, to the legatees therein named, but according to the course of office granted a general administration, cum testamento annexo, to the husband.

Elizabeth Mary Hays, late wife of John Hays, had, under the will of her first husband, Jacob Breese, the interest and dividends of certain property secured to her separate use and benefit for her life; and from and after her decease the executors and trustees were directed to pay 500l. to his children, "in such shares and proportions, if to more than one, either absolutely or conditionally, and in such way, manner, and form, as his said dear wife should, by her last will and testament, in writing, or any writing, in the nature of or purporting to be, a will, give, direct, limit, appoint, or dispose of the same; and in default of such appointment, to pay the same to such person or persons, as at the decease of my said wife shall be my next of kin." Mr. Breese died in February, 1807, and upon the death of his widow (afterwards Mrs. Hays), on the 11th of September, 1832, there was found, in a letter-case in her escrutoire, together with a copy of Breese's will, the following paper in her own hand writing:—

"February 23, 1832.

"I, Elizabeth Mary Hays, give and bequeath to my two daughters, Clara Salmon and Emma Breese, equally, or the surviving one, all the property I possess in right of their late father. I leave my pearl necklace and bracelets, in the red morocco case, to Elizabeth Hays, my daughter; all my other jewels, of whatever description, to be divided equally between all my daughters, viz. **[383]** Clara Salmon, Emma Breese, Elizabeth Hays, Susanna Hays, and Matilda Hays; except my diamond brooch, which I bequeath to my son Albert Hays. Any other property I may possess, to be divided equally between all and every one of the surviving children of both marriages, unless those of the latter marriage, by John Hays, should not be so well provided for by him; in which case it is to be equally divided between his, the said John Hays', four children. Should the 500l. at my disposal be considered as my own property, it is to be shared equally by all the children of both marriages. My watch, chain, and seals to Clara Salmon, provided she has not got one; if she has, the watch to Susannah Hays, and the chain and seals to Elizabeth Hays."

This paper was propounded in an allegation as the deceased's will, and opposed by the husband.

Lushington for the husband.

Addams contrà.

Judgment—Sir John Nicholl. The paper propounded is not signed, and it ends without even a stop. The question then is whether it is a finished or an unfinished instrument; that is, whether the deceased intended to do any thing more to it, or to write out another; or whether she intended and considered that this instrument should and would operate in its present form. If it should appear that the deceased intended to do any thing further to this paper, it is invalid; for it was written above six months before her death, and there is nothing pleaded to account for the want of progress; and in such a view of the case it must be considered **[384]** as originally deliberative only, and at length an abandoned instrument. On the other hand, if it should appear that she had done every thing she meant to do to the paper, and that she considered it would operate in its present form, that would be sufficient; for the law requires no particular form for a disposition of personal property. Some of the circumstances lead to and bear opposite conclusions and inferences.

The instrument is upon half a sheet of letter paper: this looks more like a draft than a final dispositive instrument; but, on the other hand, it is very fairly and fully written, without a single erasure or interlineation, or abbreviation; there is not even an initial. It is true that she writes her name at the beginning of the paper, having dated it at the top; but writing a name at the beginning of a testamentary instrument, however it may serve to authenticate the writing, does not enable the Court to infer that it was a finished paper, and signed for the purpose of giving it operation and effect. Yet, on the other hand again, there are no words, either in the body or at the conclusion of the paper, to shew, as in the last case (supra, 380), that the deceased

intended to do any thing further to it: there is no reference to an executor to be appointed; there is no attestation clause, no words such as "in witness whereof," &c., nor even the single word "witness." It is far from being an uncommon impression that a disposition of personal property, in the handwriting of a deceased, will necessarily operate and take effect without any formality; and here the paper might have been left open, without a signature, in order [385] that the writer, who herself might not doubt of its validity, might add any little further bequests of memorials to her friends. The circumstance that this paper was found in conjunction with the will of her first husband only shews that when she composed it she set about making her will in a formal manner; but it will not shew that she had done all that she intended, and had finished it.

The paper certainly does dispose of all that she had a right to dispose of, and possibly, indeed, of somewhat more; as it may be that in respect to the bequest of the 500l. she had only a right of appointment among the children of the first marriage. Upon the whole, then, of the case, as at present before the Court, it is a matter of considerable doubt and difficulty to decide whether the deceased did intend this paper to operate. As far as any inference can be drawn from the disposition itself, it is favourable to the instrument. The probability is that the deceased would wish the property to go equally among the children of both, and not exclusively to her second husband, especially as it came from her first. On this last consideration the inclination of my opinion is that the paper may eventually be established. It has been truly observed that there is not a single recognition of this instrument pleaded; possibly something of that kind may hereafter be ascertained, or some further facts may come out which may solve the difficulties in which the case is at present involved, or some arrangement may take place between the husband and the daughters of the first marriage, which may, by consent, put an end to the question. Abstaining, then, from expressing any decided opinion as to the ultimate [386] result, and reserving all questions, I allow the allegation to go to proof.

The allegation having been admitted, the husband declared that he should proceed no further in his opposition to the paper; whereupon, at the petition of the daughters by the first marriage, the Court was moved to decree administration to them with the will annexed, "limited so far only as concerns all the right, title, and interest of the deceased in and to such effects as she had a right to dispose of and hath disposed of by her said will."

Addams in support of the act on petition. Mrs. Hays, by her will, has given all the property which she possessed, in respect of her first husband, to her daughters, Mrs. Salmon and Miss Breese; they are then entitled to be preferred in the grant of administration, with their mother's will annexed. Besides, Mr. Hays, the husband, has opposed the validity of the will.

Lushington contrà for Mr. Hays. The general rule is, where a feme covert makes a will in respect of property over which she has a disposing power, and does not appoint an executor, that administration, with the will annexed, is granted to the surviving husband, if he is willing to take it. In *Ross* v. *Ewer* (3 Atk. 160. See also 1 Williams on Executors, p. 245) Lord Chancellor Hardwicke states that such was the general course of practice in the Ecclesiastical Court; and so, I apprehend, it remains. This case offers no circumstances to induce the Court to deviate from this its usual practice. The husband opposed the paper to see whether it would be considered perfect or imperfect; but as soon as the Court intimated the [387] inclination of its opinion he withdrew his opposition. It is a mere assumption to state that the deceased has given all the property which she derived from her first husband to the children by him; I admit that the relative proportions to the legatees under the will may be a question of construction, but, for the purposes of the present question, the husband of the deceased, and the four children of their marriage (now minors) must be taken to be the parties principally benefited. It is not clear what property, either in extent or description, may pass under this will. But I principally ground my resistance to this application of the daughters on the general rule and practice of the Court.

Judgment—Sir John Nicholl. The practice of the Court has been correctly stated that where there is no appointment of an executor in a feme covert's will, the husband is, generally, entitled to the administration with that will annexed; and I see no reason for a deviation in this case from the ordinary course of practice. It was

necessary for the husband to take the opinion of the Court, in the first instance, on the validity of the paper, and upon that point the Court having intimated but a doubtful opinion, he yet withdrew his opposition, as soon as the allegation was admitted. Mr. Hays now, as the husband, and also as the father of four of the legatees, claims this administration, and why should he not take it? What would be the effect if the Court rejected him? It might lead to two distinct grants—the one limited to the two daughters, the other to the husband; because, if the wife has left **[388]** any other property than that over which she had and has exercised a disposing power, the husband will be clearly entitled to have a cæterorum grant.(*a*) But I see no reason to pass him over: a general grant to the husband, of administration with the paper annexed, will be conformable to the ordinary practice; he is a responsible person: no inconvenience or injury can result from such a grant to the daughters of the first marriage, and I therefore decree to the husband a general administration cum testamento annexo.

The proctor for the daughters applied for the sureties to justify.

Per Curiam. It is always the duty of the Court to take care that there is sufficient security. Let the sureties justify.

DINGLE *v.* DINGLE. Prerogative Court, Hil. Term, 2nd Session, 1833.—Allegation propounding instructions for a will, signed by the deceased, and written twenty months before his death, rejected, nothing being pleaded to shew that the completion of a more formal will was prevented; the presumption of law that the deceased had abandoned the disposition being strengthened by his conduct; and the alleged declarations of adherence being too loose to repel the presumption.

This was a business of proving a paper as the will of John Dingle, victualler, promoted against his widow by the guardian of Susanna Dingle, a minor, and one of the residuary legatees. The paper was drawn up in the form of instructions for a will; it contained a full disposition of the deceased's property; it gave 500l. extra to his daughter Susanna, above mentioned, appointed his two brothers executors, and concluded in the manner following:—"The above are Instructions for my Will. 7th April, 1831. (Signed) John Dingle." The personalty was about 3000l.

[389] The allegation in substance pleaded, first, the death of John Dingle on the 7th of December, 1832, leaving a widow and three daughters, minors, of whom Susanna was by his first wife.

2. The deceased's marriage to a second wife (now his widow) in August, 1823; frequent declarations of his dissatisfaction and disappointment at not receiving 1500l. with her, and that he thought it would be right, until such property was secured to him, to tie up a large part of what he possessed in favour of his daughter Susanna.

3. That on the 5th of November, 1823, the deceased, accompanied by his sister, consulted Mr. Hird, a solicitor, on the subject of benefiting his daughter Susanna to the extent of half his property, which he then estimated at upwards of 3000l., declaring, as pleaded in the second article; that Hird accordingly prepared from Dingle's dictation a will, which appointed Mr. Hill and Mr. Shears executors; that Dingle signed the will, and took it away with him; that no draft was made, and the will itself cannot now be found: that he desired his sister to keep the matter secret, adding, "if I get my wife's money, I can alter my will at any time;" that he informed Hill what he had done for Susanna, and also enjoined secrecy.

4. That in the spring of 1830, having several children (two infants died in May, 1831), he declared to Hill and to others that he must alter his will, but still that he should do most for his daughter Susanna.

5. That on 7th of April, 1831, he gave verbal instructions to Mr. Lydden, a solicitor, for a will; that the same being read over and approved were **[390]** signed by the deceased at the recommendation of Mr. Lydden, who stated that in case any thing should happen to him (Dingle) without his executing a more formal will, the paper would stand valid as a will; that on this occasion he talked to Mr. Lydden of his disappointment at not receiving the fortune he (Dingle) had expected with his then wife.

6. Pleaded the handwriting of the subscription.

(*a*) *Boxley* v. *Stubington*, 1 Cases temp. Sir Geo. Lee, 540. Also see 1 Williams on Executors, p. 212.

7. That in May, Mr. Lydden wrote to the deceased requesting him to call and execute his will; that this letter was received and opened by his wife; that the deceased never became acquainted with the contents of it, or, believing that the signed instructions would stand valid, did not call: that in November, in the course of an interview between Mr. Lydden, jun., and the deceased, upon other business, the subject of the will was mentioned, when the deceased saying that he supposed the paper, which he had signed, would stand valid, Lydden recommended him, in order to avoid a possibility of disputes, to execute a fair copy, but the deceased appeared to be satisfied in his own mind that the paper of the 7th of April would operate.

8. Declarations after the 7th of April, 1831, and in 1832, to several persons, particularly to his brother Robert (to whom before the 7th of April, 1831, he had applied to be one of his executors), that he had made his will, appointed his two brothers executors, and given his daughter, Susanna, 500l. more than to his other children; and that the deceased never departed from such intended bequest.

9. That no part of the property Dingle expected with his second wife was ever paid.

[391] 10. That the paper propounded, after it was signed, remained in Mr. Lydden's possession.

Addams for the widow, opposed the allegation.

The King's advocate contrà.

Judgment—Sir John Nicholl. This allegation is offered for the purpose of propounding a paper as the will of John Dingle, deceased: the paper is drawn up in the form of instructions; it contains a full disposition of the deceased's property, appoints executors, and concludes thus: "The above are instructions for my will, 7th April, 1831;" and it is signed "John Dingle." These instructions, then, were given in April, 1831, and the death of the deceased does not take place till December, 1832—a year and eight months after. The paper then is, upon the face of it, invalid, for although signed, yet the signature is only to authenticate the paper as instructions, or to give it validity in case of Mr. Dingle's death, before his will could with reasonable diligence be prepared; but a signing of instructions does not, primâ facie, supersede the necessity of executing a will (*Munro* v. *Coutts*, 1 Dow. P. C. 437). There are cases where, from all the circumstances, it has been collected that instructions were at all events intended to operate, if the deceased should not execute a will in a formal way, but that intention is to be collected from circumstances, and every case must, as to intention, rest on its own circumstances taken altogether.

To ascertain intention, conduct supplies the safest ground of inference; and here it was the **[392]** deceased's clear intention to do a further act—to execute a will; and he had abundant opportunity of completing his intention, for he lived a year and eight months after the instructions were drawn out; and no reason is pleaded to account for the non-completion of his original intention to execute a formal will.

This conduct of the deceased implies an abandonment of the disposition, in the same manner as when there is an attestation clause to a will and the testator gives no explanation why he does not execute the will in the presence of witnesses.

The solicitor understood that what he drew out in April were only instructions, and that a will was to be prepared; he accordingly did prepare a will, and wrote to Mr. Dingle, informing him that the will was ready for execution, yet the deceased took no steps to finish it; he never saw the instructions after they were first given, and consequently had no opportunity of revising them.

The legal presumption, then, confirmed by the inference from the deceased's whole conduct, is that he abandoned the testamentary disposition which he contemplated in April, 1831; and that these instructions are consequently invalid.

The question, then, is whether this presumption, arising upon the face of the paper itself, and confirmed by the deceased's conduct, is repelled by mere loose declarations; for the matters pleaded in the second, third, and fourth articles of the allegation are so remote in their history that if the allegation were to go to proof, they could not bear materially upon the case: and in respect to mere declarations, they are very unsafe evidence, being often misapprehended, misrepresented, or not ac-**[393]**-curately recollected, and are not unfrequently insincere. The Court at all times is very cautious of placing any reliance on them. The declaration of the solicitor pleaded in the fifth article, at the time he took the instructions, "that the instructions would stand valid as a will in case any thing should happen to the deceased, without his executing a more

formal will," could only mean "if any thing should shortly happen, and before a more formal will should be ready for execution"—it could not mean that the instructions were a substitute for a will, thus rendering a more formal execution of the disposition of his property unnecessary. This is the necessary construction of the observation of the solicitor, when coupled with his subsequent conduct, otherwise, why did he prepare a will? It would be dangerous to trust, then, to such a conversation, in order to rebut the presumption of law.

Again, what is further pleaded in the seventh article is still more loose: the deceased declined to execute his will, though told that it might avoid doubts; he appeared to be satisfied that the instructions would operate. The Court can only with safety rely on his conduct: the deceased is reminded of his will—of the risk in not executing it—and yet he takes no steps to execute it. The inference, therefore, is that he had either abandoned altogether his testamentary instructions, or that he was re-considering them. Again, the declarations in the eighth article are merely of a general nature, pleaded apparently in order to take the chance of any being deposed to by the witnesses: no person, except the brother, is vouched in this article, nor even with respect to him is there any satisfactory **[394]** specification as to time. The declarations, then, amount to nothing; and I repeat that the Court cannot be too cautious in attending to mere declarations when opposed to conduct.

In the present case the deceased gave instructions for his will, and lived a year and eight months without taking any further step to complete his testamentary act, and nothing is pleaded to shew that he was prevented: therefore the legal presumption is, that he was dissatisfied with the instructions, and had abandoned them; nor can this presumption be repelled by mere probability and conjecture.

Allegation rejected.

RIND *v.* DAVIES. Prerogative Court, Hil. Term, 3rd Session, 1833.—A sole executor and legatee in a pretended will, having been cited to propound the same, admitted to sue in formâ pauperis, though the paper was not produced till after a long lapse of time, and other circumstances of suspicion and vexation had appeared.—On the merits, the Court pronounced against the will, and condemned the pauper in costs; but intimated that it should not proceed to enforce a monition for payment thereof unless he ceased to be a pauper.

This case respected an asserted will of Thomas Jones, late of Llantisilio Hall, in the county of Denbigh, Esq., in which a preliminary point was raised regarding the admission, as a pauper, of the party setting up the will. The proceedings were as follows:—

Thomas Jones died on the 30th of November, 1820, a bachelor, possessed of real estate of 1500l. per annum, and of personalty valued at 18,000l. After various advertisements for the discovery of any will made by the deceased, administration, in February, 1822, as being intestate, was granted to Charlotte Evans, widow, his second cousin and only next of kin. In 1824, 1826, and 1827, respectively, further letters of administration of the deceased's unadministered effects were granted, until Mrs. Rind, widow, one of the **[395]** parties in the cause, as the daughter, and a residuary legatee in the will of Charlotte Evans, became the deceased's personal representative. A monition then issued on the part of Joseph Davies, calling upon Benj. Capper to bring into and leave in the registry of this Court the will of the deceased, dated the 12th of September, 1816, executed in the presence of three witnesses, and in which Davies was executor and sole legatee. In Easter Term, 1828, the instrument was brought in; and no steps being taken by Davies to obtain probate thereof, Mrs. Rind, in March, 1831, in order to enable herself legally to complete the administration of Thomas Jones' effects, caused a decree to issue, citing Davies to prove this will, or shew cause why the deceased should not be pronounced to have died intestate; whereupon Davies appeared, and prayed to be admitted a pauper: this being objected to, he was assigned counsel and proctor to support his application; and after an act on petition had been entered into, and affidavits exhibited on either side, the question came on upon the by-day after Trinity Term, 1831.

Lushington for Mrs. Rind.

Curteis contrà, was stopped by the Court.

Judgment—Sir John Nicholl. The only question at present is whether Joseph Davies is a pauper: he is called upon (at the instance of the party who objects to

such his admission) by the regular process of the Court to propound and prove, in solemn form of law, a certain paper, purporting to be a will, in which he is named the executor. He appears and **[396]** declares himself ready to propound it; but alleges himself to be a pauper, and unable to proceed in the suit except as a pauper. Is he, then, entitled to sue in that character? for all the conversations and letters referred to in the petition, and tending to shew that some other person is behind, supporting Davies in this matter, can hardly be gone into. The Court cannot, for instance, make Hiller (who is described as Davies's agent, and assisting him with money and advice) a party, nor condemn him in costs, if Davies should fail in his suit: and it must not be forgotten, if the point were material, that Davies throughout denies the privity of Hiller in this business. Again, it is admitted to be an absolute necessity that the claim of this man as executor should be disposed of; and in what way can he propound the will but as a pauper? He is the sole party to take that step; were it otherwise, and it should appear that, of several parties entitled to propound the paper, this man was put forward for that purpose as a pauper, the Court would strongly endeavour to defeat such an attempt, and prevent a contest upon such unequal terms. The will is not brought forward till after a long lapse of time; (*a*)[1] it also may make its **[397]** appearance in a very suspicious form—there may have been proceedings in other Courts tending to confirm that suspicion—the present proceeding to set up this will may be very vexatious—but the party is cited to propound, thereby admitting that at the date of the decree there was nothing to preclude him; and if he has not the means (and the affidavits on behalf of Mrs. Rind state that he has become paralytic, and is in part supported by the parish), the law must allow him the means. It is not very probable that he will ever be able to prove this will; but, there being nothing set up as a bar to his propounding it, the Court cannot, upon the mere improbability of the story, preclude him from the attempt.

The Court overruled the petition, and admitted Davies a pauper.

Allegations on either side were afterwards given in, and the evidence extended to a considerable length; and on the third session of this term the Court (after hearing Curteis in support of the will, and Lushington and Haggard contrà, that there was not only a failure of proof, but were also various circumstances from whence to infer that the will was a forgery supported by perjury) pronounced against the asserted will, observing: The evidence leads strongly to the conclusion that the signature to this instrument is not the signature of the deceased; and that no such transaction as has been attempted to be proved ever **[398]** occurred; in every step the history amounts to improbability—to incredibility. If Davies were not a pauper, I should have no hesitation in pronouncing against this paper with costs; but, though a pauper, the Court, in order to mark its view of the case, condemns him in the costs; it being a matter of discretion whether the Court, unless he should cease to be a pauper, would proceed to enforce a monition against him for their payment.(*a*)[2]

COE *v.* HUME AND THOMPSON. Prerogative Court, Hil. Term, 4th Session, 1833.—The Court rejected with costs a petition praying that a bond-creditor in a large amount should be joined or substituted in an administration decreed to a simple contract creditor—the deceased's confidential solicitor—who had entered into articles with sureties to pay the debts rateably, and who was approved, as such

(*a*)[1] Davies, in reply to the petition, stated that the will remained in his custody, sealed up, till 1824, when he heard by chance of Jones's death; that he (Davies) was at such time a journeyman carpenter at Deptford, and upon opening the packet he took the will out, and delivered it to his brother-in-law, with whom it remained till 1826, when, not being able to find out the subscribing witnesses, he delivered it to Capper, who stated that he would procure evidence to prove the genuineness of the signature. In Davies's subsequent allegation it was pleaded that Davies, in going from Welchpool to Shrewsbury on the 12th of September, 1816, met Jones; that in riding together they discovered that they were relations; that on arriving at Shrewsbury the deceased was taken ill at an inn, and on the evening of that day he made this will: that of the subscribed witnesses, one died in August, 1828, and another could not be found. Upon the evidence it appeared that the third witness was the ostler at the inn. A sister of the deceased, with whom he was on terms of friendly intercourse, was living at the date of this will.

(*a*)[2] See *Le Mann* v. *Bonsall*, 1 Add. 399; *Wagner* v. *Mears*, 2 Hagg. Ecc. 531.

representative, by the executors (who had renounced) and also by the bond-creditor.—The Court never forces a joint administration.

On petition.

Charles Ogilvie, late of the Custom House, died on the 14th of August, 1832. His executors having renounced, and the residuary legatee, who was resident in India, having been duly cited, letters of administration were decreed on the 22d of November to James Coe, who, as partner in the firm of Coe and Tippetts, solicitors, in London, was a simple contract creditor for 450l. On the 28th of November Mr. Hume, a creditor, prayed a joint administration: he afterwards waived his petition; and on the 12th of December the administration was directed to issue to Mr. Coe. On the 14th of December Mr. Coe gave in justifying security, and entered into a bond to pay the debts rateably. The administration, however, had not issued, when, on the 21st of Decem-[399]-ber, Mr. Thompson, a bond-creditor in 1000l., applied to be joined in the administration; or that it should be granted solely to him. An act on petition was accordingly entered into by Thompson.

On behalf of Coe it was alleged that Thompson was a solicitor, resident in Liverpool; that the deceased's effects were in London; and that of 1380l., in his late bankers' hands, an injunction as to 1078l. had been obtained by Mr. Hume; that in 1829 a bill was filed by certain subscribers to the Customs' annuity fund against the deceased; that Coe and his partner were, in respect of such suit (which it was necessary to revive), entrusted by him with numerous papers and accounts, and Mr. Coe had, with the approval of the executors, and knowledge and concurrence of Thompson, agreed to become the deceased's personal representative.

The knowledge and concurrence of Mr. Thompson, as set forth, were admitted; but it was alleged on his behalf that he was the principal creditor, and the party first, and to the greatest extent, interested in the deceased's estate; and that until December he was not aware of the proposed litigation by Coe (administrator) in consequence of the bill in Chancery by Hume; that upon hearing this he (Thompson) became alarmed, and considered that as bond-creditor he was entitled to have some controul in the conduct of the suit.

Addams for Mr. Thompson. As the testator only died in August, 1832, there has been no lapse of time to affect Mr. Thompson's claim. The prayer for a grant of joint administration being opposed, the Court, in [400] conformity with established practice, will not force it: but Mr. Thompson, being a bond-creditor, is preferably entitled to the administration; and in this case the declaration of the effects shews that there is no probability that any other creditor will be paid.

Lushington contrà. The lapse of time is not immaterial; because, in reference to the assets, Mr. Thompson's interest is of such magnitude that he had every inducement (and he had also ample opportunity) to investigate the whole of the testator's affairs. Yet how did Mr. Thompson act? He approved of the administration being entrusted to Mr. Coe. This very approval and concurrence, independently of other facts, establish that Mr. Coe is a fit and desirable person to represent the testator, and to administer the estate. The principle on which grants of administration to creditors proceed is that of insuring equal justice to all the creditors in their several degrees, according to priority: but the argument on the other side tends to shew this, that Mr. Thompson, if he is administrator, will take his 1000l. and leave the other creditors to get what they can. The administration should be granted, so that the estate may prove as beneficial and productive as it can be made.

Judgment—Sir John Nicholl. Charles Ogilvie died on the 14th of August, 1832: he left a will and two codicils; the executors renounced probate, and the residuary legatee, having been cited at the instance of Mr. Coe (a creditor in 450l.) to take the ad-[401]-ministration, has given no appearance; he is, it is stated, resident in India. An appearance, however, was given for Mr. Hume (also a creditor), who applied to be joined with Coe in the administration: this was objected to; but the petition in support of the application being soon waived, administration, with the will and codicils annexed, was directed to pass the seal to Mr. Coe, who was assigned to enter into articles to pay rateably—thus not to take advantage of his situation as administrator; and he was also assigned to give security to observe that restriction. On the 14th of December the articles were executed, and the bond entered into; when on the 21st of that month an appearance was given for Mr. Thompson, an attorney at Liverpool, as a bond-creditor in 1000l., praying a joint or sole administration.

Now it is truly stated, and admitted, that the Court never forces a joint administration: here the administration has already been granted to Mr. Coe, and he has complied with all the steps preparatory to his taking it. There must in every case be very strong grounds to induce the Court to rescind its decree; but in this case there is this additional fact to be overcome, that the administration has been granted to Coe, with the knowledge and concurrence of Thompson. This opposition, then, comes at a late period and not under favourable circumstances. It appears too, that the proceedings in Chancery, instituted against the testator in his lifetime, must necessarily be continued, and Mr. Coe was this gentleman's confidential solicitor for ten years, and is in possession of all his documents: the whole of the deceased's property is also in London: all the previous circumstances, therefore, tend to induce the Court to confirm the **[402]** administration. Thompson, as I have already stated, is a solicitor at Liverpool; but it is alleged, as the ground of his application, that he is the principal creditor, and on that account wishes to have a voice and control in the Chancery suit; but I am not aware that, either as joint or sole administrator, a solicitor resident at Liverpool would be more likely or more competent to conduct the proceedings in Chancery properly than the solicitor in London who has hitherto carried them on, and is already acquainted with the cause. Considering, then, this late application by Mr. Thompson after his consent, and there being no suggestion that Mr. Coe is an improper person to have the administration, nor that he does not take all the care of the estate, and that the administration of this insolvent estate has been stopped for nearly two months, I reject this petition, and decree that the costs of it be paid by Mr. Thompson.

Petition rejected with costs.

FULLERTON *v.* DIXON. Prerogative Court, Hil. Term, By-Day, 1833.—The proctor of an executor, cited to take probate, having alleged that he is ready so to do, the Court is bound to decree probate; nor is the proctor, though assigned, compellable to exhibit a proxy, as the act of taking probate would confirm the proctor's allegation.

Jacob Dixon, sole surviving partner of the Dumbarton Glass-work Company, died at Dumbarton on the 26th of September, 1831, having made and duly executed his will and codicils, or trust deeds and dispositions, according to the form of the law of Scotland: he named his three sons, Jacob, Anthony, and Joseph, and H. W. Campbell and A. Graham, Esq., executors or trustees, and residuary legatees in trust, and appointed his son, Jacob Dixon the younger, the beneficial re-**[403]**-siduary legatee. Anthony and Joseph alone of the five executors took upon themselves the administration of the estate: Jacob, the eldest son, died intestate in the life-time of his father, leaving a widow and four minors, viz. two sons and two daughters, who were entitled, by the law and practice of Scotland, to the residue of the estate of their grandfather, viz. Jacob Dixon the elder (*Anstruther* v. *Chalmers*, 2 Simons, 1).

By his death a suit in the Court of Session, brought against him by the representatives of some former partners in the glass-works, abated; and the Court of Session appointed (after opposition by Anthony and Joseph Dixon) Mr. Allan Fullerton manager or judicial factor of the estate and effects of the glass company, with power to take the same under his charge, and to manage and wind up the whole affairs of the company. This order was affirmed by the House of Lords in 1832. At the death of Jacob Dixon the elder the said company was possessed of divers goods, chattels, and credits in the hands of English agents, who refused to pay Mr. Fullerton, for want of a personal representative of Jacob Dixon the elder, under the authority of the Prerogative Court. In consequence of this, Mr. Fullerton cited the four surviving executors of the will and codicils of Jacob Dixon the elder, and the parties entitled as residuary legatees, "to accept or refuse probate of the same, or to take administration with the same annexed; or to shew cause why administration (with the same annexed) should not be granted to him, Fullerton, the judicial factor, limited as to all the right, title, and in-**[404]**-terest of Jacob Dixon the elder, as surviving partner of the Dumbarton Glass-work Company, on his giving sufficient security." An appearance on the first session of Hilary Term, 1833, was given for Joseph Dixon, one of the executors cited, and he prayed probate. This was opposed by Fullerton's proctor, who prayed to be heard on his petition, and he was accordingly assigned to deliver his act, in support thereof, on the second session, and the proctor for Dixon

to exhibit, at the same time, a proxy. On the second session, on the part of Fullerton, a proxy of the widow of Jacob Dixon the younger, as guardian elected of her four children, was exhibited, consenting to the grant of limited administration to Fullerton: and on the by-day no proxy having been exhibited by Dixon, the administration limited according to the tenor of the decree was prayed to be granted to Fullerton.

The King's advocate for Mr. Fullerton.

Lushington contrà, for Joseph Dixon.

Per Curiam. A decree has been served upon several executors, citing them to take probate. A proctor states that one of the parties cited is willing to accept probate. What need then is there of any proxy authorizing the proctor to allege this? It would be a singular thing for the Court to require such a proxy. The act of taking probate will be the best confirmation of the proctor's allegation. I am bound to grant probate to the executor, who is desirous of taking it; and I accordingly decree it.

[405] SPRATT *v.* HARRIS. Prerogative Court, Hil. Term, By-Day, 1833.—A. resident but not domiciled in France, makes a testamentary paper relating to personalty in France, and to personalty and realty in England; and a second paper solely relating to personalty in France, and disposing of the whole of it to a woman with whom he cohabited, but appoints no executor in either paper, nor residuary legatee, nor devisee of his property in England—his widow is entitled to administration with both papers annexed.

Alexander Hanna Spratt died at Soissons, in France, on the 20th of April, 1832: he left a widow and six children resident in England, and possessed at his death real estates in Kent. The present question arose on the petition of the widow to take administration with two testamentary scripts annexed.

Script A, after directing 1000l. to be laid out in an annuity for Sarah Harris, and a further sum of 1000l. to be invested for the benefit of his (the deceased's) then only child by Harris, went on: "I also give to Sarah Harris, my horse, chaise, and all such trifling effects of a personal nature as may be in her possession at Soissons. All my other real and personal property to be disposed of as the law commands. Done at Soissons, this 17th of January, 1825." This paper was in the deceased's handwriting; it was signed, and attested by three witnesses.

B disposed as follows:—"I give and bequeath to Sarah Harris, all the effects, moveable and immoveable, which I possess in France; all the sums and all the bonds which I have acquired, and which I possess upon Haiti, with the arrears due and to grow due, to Sarah Harris, residing with me; and these bonds are deposited with Mr. Holtinger, my banker, at Paris." The original instrument, in the French language, drawn up at Soissons, on the 20th of April, 1832, by a notary, and in the presence of four witnesses, was registered at Soissons.

It was alleged, on the part of Harris, "that **[406]** she was the universal legatee in such last paper, which was never meant by the testator to be taken in conjunction with his former will, as together containing a will of which probate was to be granted in this country, but that the same is and was meant by the testator to be a separate will limited to his property in France, and where the testator, at the time of making the same, if not domiciled, was resident, and ought and was meant by the testator to be dealt with, in respect of probate and otherwise, agreeably to the laws of France; and that as such will disposed of property wholly without the province of Canterbury, it was not within the jurisdiction of the Court to decree probate or administration thereof; wherefore she prayed that the administration to Mrs. Spratt might be limited to the will of 1825.

For the widow, it was alleged that the deceased's personal property, wheresoever situate at the time of his death, was liable to the payment of the mortgage debts on his real estate in this country; and that there was not sufficient personal property of the deceased's out of France to pay his mortgage and simple contract debts here: that the deceased was a British born subject and domiciled in this country; and that this Court had jurisdiction to determine the validity of all the deceased's testamentary papers relating to his personal estate, to grant administration in respect of the same, and that all such personal estate wheresoever situate must be administered according to the laws of this country; and that there being no executor in either paper, the widow was entitled to administration with A and B annexed.

[407] Per Curiam. Will the deceased's property in France be liable for his debts in England?

Addams for Miss Harris. I conceive that it will: but still as to how paper B itself is to be dealt with depends on foreign law; it is a foreign will over which this Court has no jurisdiction. I do not contend that the testator was domiciled in France.

The King's advocate for the widow. The latter paper must be considered a necessary part of the former; it will operate on the property that the widow and children are to take. If the disposition under the two papers had been quite separate and independent, and there had been two distinct executors, there would be some ground for a separate probate; but here there is no executor named, and the widow is entitled to administer, with the two instruments annexed.

Judgment—Sir John Nicholl. The testator died on the 20th of April, 1832, at Soissons; he left a widow and six lawful children, and freehold estates in the county of Kent. In 1824 Mr. Spratt formed a connexion with Sarah Harris, by whom he had three children: he was accustomed, it seems, to travel over different parts of Europe—in the winter because England was too cold, and in the summer for his amusement. When abroad, he cohabited with Harris, who with her children occupied lodgings at Soissons, or travelled with him; but in the spring and autumn he resided with his wife and family at Canterbury. In 1825 he executed at Soissons a will, in which **[408]** he provided for Harris and the child he then had by her; and directed "all his other real and personal property to be disposed of as the law commands." Of this paper he did not appoint an executor nor residuary legatee. On the 20th of April, 1832, the deceased had a testamentary disposition drawn up for him, in a notarial form, at Soissons; of this paper the only disposing part is to this effect: "I bequeath to Sarah Harris all the effects, moveable and immoveable, which I possess in France; all the sums and bonds which I have acquired, and which I possess upon Haiti, and which are deposited with my banker, Mr. Holtinger, at Paris." So far this is a disposition in favour of Harris of all the deceased's property in France; he however does not appoint an executor of this paper; if he had so done, such executor would have been entitled to probate.

At first the widow opposed paper A, but that opposition was withdrawn, and the question now is, how the administration should be granted. That the widow is entitled to administration with paper A annexed is not denied, but she applies for it with A and B: this application is objected to, inasmuch as B, the instrument drawn up in April, 1832, only relates to property in France. I apprehend that all personal property follows the person, and that the rights of a person constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property wherever locally situate. True it is a testator may appoint different persons for the representation and distribution of his property in different places; that would be the act and appointment of the party **[409]** himself, and not of the law; (*a*) but here there is no executor either in one paper or in the other.

There can be no doubt that the property in France, referred to in the instrument B, is part of the property of which the testator died possessed; and there also can be no doubt that creditors have a demand upon all personal property, even against a disposition by will. Mr. Spratt, therefore, by a bequest of all his property in France to a legatee, can only give it away subject to his debts: he cannot, by this instrument, defeat the just claims of his creditors; here are debts and mortgages to be discharged, and it is sworn that the personalty in England is not even sufficient to pay the debts; and, according to the law of this country, personalty is in some cases further chargeable in exoneration of mortgages (2 Williams on Executors, p. 1042, et seq.). This may be a hardship on the woman Harris, and a much greater hardship on the innocent children, but it is the law, and the Court cannot alter it. The property, then, in France being subject to such liability, what inconvenience or injury can accrue to the legatee, if the widow takes administration with B annexed. If the administration does not legally extend to the deceased's property in France, Harris will have her remedy in that country; and if there are no debts in England to which this portion

(*a*) Wentworth says: "The making of an executor may be partial or dividedly, and not entirely." Office of an Executor, p. 22-9, 14th ed.

of his property is liable, the administratrix will, in that respect, be considered a trustee. But I cannot do otherwise than grant administration, with the two papers annexed, to the widow.

Costs out of estate refused.

[410] BLEWITT *v.* BLEWITT. Prerogative Court, March 2nd, 1833.—The strong presumption of law is always adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instrument. To establish such a paper there must be the fullest proof of capacity, volition, final intention, and interruption by the act of God. Paper pronounced against.

[Referred to, *Whyte* v. *Pollock*, 1882, 7 A. C. 413.]

This cause respected a paper propounded as a codicil; it was a rough draft, not signed, and was dated this day of February, 1832. On the one hand it was contended that the testator was capable, and had fully and finally approved of the paper; on the other hand, that there was a want of capacity adequate to the act; or (supposing a sufficient capacity), yet that there was no free-agency, nor fixed and final intention.

Lushington and Addams for the paper.

The King's advocate and Nicholl contrà.

Judgment—Sir John Nicholl. The property depending in this case is of considerable magnitude, and although the evidence is not so voluminous as sometimes has occurred in this Court, yet the circumstances, necessary to be carefully examined and weighed, are many and important. Already twelve hours have been occupied in hearing the argument; and from the ample and full justice which has been done to each client, the Court has no reason to consider the time unnecessarily spent: however, I think it necessary for the satisfaction of the parties that I should state rather more in detail than in some cases of greater bulk the evidence on which the judgment of the Court is founded.

The deceased, Edward Blewitt, died on the 8th of May, 1832, at the age of sixty-nine; he left a widow, Rachel Blewitt, two sons and a daughter **[411]** by a former wife; a grand-daughter—the child of a younger son who was dead; an elder son, Edward, a lunatic; his second son, Reginald, one of the parties in this cause; and a daughter, Frances. By his second wife, the present widow, he had six children, all born before marriage; some are grown up, one is of age. The first wife died in 1808: about 1810 his first child by Rachel Rogers was born; and in September, 1830, he contracted his second marriage.

The property of the deceased consisted of a real estate, viz., Llanturnam Abbey, in Monmouthshire, estimated at 1500l. per annum, certain personal property, about 8000l., over which he had a power of appointment, and other personal property stated to be under 43,000l.; but the exact amount is not shewn. It appears that his real estate was entailed, by settlement before his first marriage, upon the male issue of that marriage.

The deceased executed several wills. Before the Court there is one will in the year 1814, that is cancelled; one in 1821; another in 1824, with a codicil to it in 1826; again a will in 1827; another in 1828; and a codicil in January, 1830. Most of these instruments appear to be in the hand-writing of the deceased, and are regularly drawn up and executed. The codicil of 1830 is in his hand-writing, but the writing is more defective and less clear than in the former papers. On the 12th of October, 1830, he executed his last will. In all these wills he had made a provision, which he increased from time to time, for Rachel Rogers and her children, and his last will is dated one month after he had married Rogers and that she had **[412]** become Mrs. Blewitt. This will is not opposed; it gives the property, over which the deceased had a power of appointment, among his children by the first marriage; it gives his widow 600l. a year for life, with benefit of survivorship to the six children, each of which is to have an annuity of 100l. with benefit of survivorship, and to each of the four sons there is a power given to the trustees of advancing 400l. for the purpose of setting them up in life; and the residue of the personal property is given as follows:—"To my son Edmund Blewitt, and in case of his death to my son Reginald James

Blewitt, and in case of his death to my daughter Frances Mary Ann Blewitt." This will was regularly executed, and it is attested by two witnesses, Mr. Gilbert and Mr. Dobinson, clerks to Messrs. Bicknell, Roberts, and Co., Lincoln's Inn. By the will of 1828 Rachel Rogers was to have only 200l. a year, but in the codicil of January, 1830, this sum is raised to 600l. a year, the deceased commencing the codicil in these terms: "Having taken into consideration the helpless state of my family, I do agree to allow Rachel Rogers, of Caerleon, Monmouthshire, 400l. a year in addition to every former bequest." Hence it appears that the principle of the disposition in the will of October, 1830, was not a hasty but a deliberate and uniform principle.

It is not immaterial that, in every one of the deceased's wills, the residue is given to his lawful children: in several his son Reginald is omitted; in the last will he is postponed to Edmund, which is not extraordinary, nor a mark of existing resentment; for as the eldest son was a lunatic, Reginald **[413]** would succeed to the real property at Llanturnam, and he is not excluded in any of the wills from an equal share of the property over which the deceased had a power of appointment, except in the will of 1821, in which he has only 200l. a year, this will being made at the time he was offended with his son Reginald, on account of his marriage. This son assisted in the preparation, if he were not the writer, of the will of October, 1830; he accompanied the deceased to the solicitor's office upon the occasion of its execution, and was present at that ceremony. Of this will, Mrs. Blewitt, the widow, Mr. Wightwick Roberts, and the deceased's son Edmund, are executors. In the month following the execution of this will the testator had a violent attack of paralysis, which deprived him of the use of his right side, of speech, and, no doubt, affected his faculties in a considerable degree; for the attack is described by both the medical attendants, not as spinal, but as an affection of the head. He recovered in some measure the use of his right leg, but not of his arm, for he was obliged to learn to make a signature with his left hand; and his recovery of speech scarcely amounted to more than monosyllables—with great exertion he could articulate short sentences.

Here, then, are three material dates—the marriage of the testator in September—his will in October—and the attack of paralysis in November, 1830.

It is alleged that in February, 1832, the deceased made a codicil, which has been propounded in this cause by the eldest natural daughter, Ann Rogers Blewitt, as one of the residuary legatees: and it is material to look at the form and **[414]** contents of this instrument.(*a*) In point of form, it is in a very incipient state; it is written on

(*a*) The codicil purported to revoke a bequest of the residue to the testator's legitimate children, and to give it in trust "unto and between his children by his wife, Rachel Blewitt." At the commencement of the suit Mr. Reginald Blewitt denied the interest of Ann Rogers Blewitt in this codicil, inasmuch as neither she, nor her brothers, nor sister, nor either of them, was or were christened, acknowledged, or known as the child or children of Edward Blewitt (the deceased), by Rachel Blewitt, his wife, and therefore it was submitted "that, even were the validity of the pretended codicil established in this Court, yet that Ann Rogers Blewitt was not, within the legal intent and meaning of the said codicil, one of the children of the said deceased by his said wife Rachel Blewitt, and was, consequently, not one of the persons designated as residuary legatees therein."

The widow alleged that, as executrix in the codicil, she would take probate of it, if pronounced for.

This question, as to the interest, was, upon the facts stated on both sides in an act on petition, debated on behalf of Ann Rogers Blewitt by Lushington and Addams; and on behalf of Mr. Reginald Blewitt by the King's advocate and Nicholl. (See cases on the point collected in 1 Roper on Legacies (ed. by White), vol. 1, c. 2, s. 2. Also *Harris* v. *Lloyd*, 1 Turn. & Russ. 310. *Bagley* v. *Mollard*, 1 Russ. & Mylne, 581.)

Per Curiam. The only question at present is whether the natural children have such a primâ facie interest in the residue bequeathed by this codicil as to entitle them, or either of them, to propound it. If the codicil be valid, it is impossible to doubt of the testator's intention: not all the refinements of argument, nor strictness of construction, could ever raise any doubt as to the persons intended: children may not generally mean illegitimate children, but illegitimate children were clearly here designated: a Court of Probate only in such a case considers whether there be an apparent interest. The question of construction does not properly belong to this

[415] three sheets of draft paper, which seem to have been previously used; and it is in the handwriting of Mr. Binns, who is himself a legatee—but in blank. There are erasures, interlineations, and some important alterations in the body of the instrument—a legacy or annuity to the granddaughter is struck out, which, it would seem, formed part of the original instructions: the effect of this would be to increase the residue. But the alterations, as affecting the executed will, are still more important, for this codicil proposes to appoint Mr. Binns—the drawer—guardian of the children, jointly with the widow, and also executor, instead of Mr. Wightwick Roberts; and in the disposition of the residue all the legitimate children, not merely Reginald, but the deceased's daughter Frances, and the issue of his son Edmund, who died in July, 1831, are struck out, and the illegitimate children substituted. This is a most alarming and important alteration.

Looking, then, at its form and contents, every possible legal presumption is against such an inchoate paper, arising, first, from its unfinished state, next from the condition of the deceased, and, lastly, from the great alteration in this most important disposition of the residue; a disposition to which he had so firmly adhered, in favour of the legitimate offspring, in all his former wills. To establish such a paper would require evidence—clear beyond all question—of full capacity in the testator; of ability to estimate and compre-**[416]**-hend the nature and effect of the transaction, of his perfect free agency—that the act was without fraud and circumvention being practised upon him; and, lastly, of fixed and final intention, and that the deceased was prevented, by an interposition of the act of God, from proceeding to complete the instrument It thus becomes necessary to enter briefly into the history of the two branches of the deceased's family.

Before the death of his first wife, in 1808—about eight months—Rachel Rogers, of the town of Caerleon, not far from Llanturnam, was hired as housemaid, the family then residing at Llanturnam Abbey; she may shortly afterwards have become his wife's own attendant, and have so continued to the time of her death: she remained in Mr. Blewitt's service till 1810, and then returned to Caerleon. Some suspicions were entertained of an illicit intercourse between Rachel Rogers and her master; but of that intercourse there was no child born at Llanturnam. The connexion, however, was clandestinely carried on for several years, for there was never any public cohabitation, nor any introduction of her and her children to his friends; and in all his wills the deceased describes himself of Llanturnam Abbey, and Rachel Rogers of Caerleon; although latterly they resided together at different places in and about London—still with some concealment; for his intimate friends were unacquainted with this connexion, and the children; for they did not make their appearance when his friends visited him. Even his brother-in-law, Mr. Osborne, first heard of Rachel Rogers when the deceased was living at Sunbury, and she was then only just alluded to by the deceased; and he saw her for the first time in January, 1832, six-**[417]**-teen months after she and the deceased had been privately married.

The deceased, after the paralytic stroke in November, 1830, was uniformly in the hands of this person and her children; they could prevent any person from having access to him: they had the management of his house and expenditure. However, from his enfeebled state of mind, and being, as I have mentioned, unable to write, except with his left hand, it was agreed between the widow and the son Edmund, who was living in London, that his drafts on his bankers should not be paid without being countersigned by his medical attendant; and that drafts should only be drawn for necessary house expences: this was a very proper limitation, for at his bankers

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Court. If even the intention of a testator were doubtful, and the construction of the instrument also doubtful, yet this Court would always allow a party claiming under it to attempt to establish its validity. To bar such a party, the authorities against the interest must be so clear as to admit of no doubt; and I cannot say, looking to the whole of this paper, that such is the case here. I am not satisfied why the widow, as executrix, has not propounded this paper; but were she now to propound it, the cause might be burthened with a presumption that the residuary legatees were, in this Court, supposed to have no interest. Anxiously, therefore, guarding against a prejudice to either party elsewhere, I overrule the petition denying the interest, and assign Mr. R. Blewitt's proctor to declare whether he will oppose the paper propounded.

there was, at his death, a balance of about 6000l. Such being the understanding, it was not necessary rigidly to examine every draft; and the deceased himself was sufficiently intelligent to take alarm, and withhold his signature, if any large sum had been attempted to be drawn. But before I examine the precise extent of his capacity, I will advert to the history of the other part—namely, the legitimate branch of his family.

The eldest son, Edward, was, as I have stated, an unfortunate lunatic: the second, Reginald, was bred to the law; he was articled to Stevenson and Co., and in 1822 became a partner in the house, the firm being "Bicknell, Roberts, and Blewitt," successors of Messrs. Stevenson: this partnership was dissolved in 1827. Reginald, aware that his marriage was disapproved of by his father, and had offended him, went abroad in 1827, and he there formed an improper connexion with another woman; this, with quitting his partnership, **[418]** and his going abroad perhaps, still more offended the deceased. The son became distressed, wrote to his father expressing deep contrition, promised he would submit entirely to his wishes, was forgiven, returned to England, settled himself at Gloucester, and afterwards at Monmouth. Of this forgiveness of, and reconciliation with, his son Reginald there is satisfactory proof; he was, in 1828, entrusted with receiving the rents, and with the management of his father's estates, an occupation which Edmund rather wished to give up.

In 1830 Reginald had a long illness; his father frequently called, and supplied him, while ill, liberally with money. But a better proof of full confidence is, that this son was privy to and assisted in making the will of October, 1830; he attended, as I have already said, at the solicitor's office at its execution, and on that occasion Gilbert, one of the attesting witnesses, deposes fully to the apparent cordiality between the deceased and his son Reginald. This transaction was only a few weeks before the paralytic attack, so that up to that time the reconciliation existed: yet the earlier offences to which I have adverted are laid as the foundation of the codicil by which Reginald is cut off from a share in the residue. It will be matter of inquiry whether he gave offence to his father after the paralytic attack.

The deceased's younger son, Edmund, seems to have been at the bar; he married a daughter of Mr. Prothero, a solicitor in Monmouthshire; and in July, 1831, died, leaving a widow with one only child—a daughter.

Frances, the remaining child, had been educated properly; but having no fit home to receive her, the deceased continued to board her at **[419]** school till she was twenty-one; she then resided in lodgings upon an allowance; and, finally, with her brother Reginald at Monmouth.

Up, then, to the paralytic seizure—six weeks after the execution of the will—the deceased was not alienated from his son Reginald; nor is it suggested that there was any offence given by the daughter, nor by Edmund, nor by his child: but, on the other hand, the deceased was in the custody of his wife and illegitimate children; and this codicil was obtained in the absence, and without the privity or knowledge of, the legitimate children, against whose interests a very material alteration is projected by it.

The first important point to be examined is the state of the deceased's capacity subsequent to the paralytic attack. The degree of capacity necessary to a testamentary act must depend partly upon the nature of the act to be done, and partly upon the other accompanying circumstances—that is a principle laid down by all Courts, and it is the principle of plain common sense and sound reason: and I can hardly conceive a case where the Court would require more clear proof of intelligence and firmness of mind than in the present. For notwithstanding the provision which the deceased had made for his illegitimate family just before his paralytic attack, notwithstanding in all former wills he had given the residue in favour of his legitimate children; yet by the codicil propounded a complete revolution of intention in this respect is set up. That circumstance is alarming, and demands a vigilant enquiry. Again, the nature of the deceased's paralytic seizure was not spinal—which sometimes does not materially affect the understanding—but it was an affection of the head, which tends **[420]** strongly to injure the mental faculties: this character of the deceased's disorder makes it the more necessary for the Court to trace the facts of the case step by step, and it will be the best mode of arriving at a just conclusion upon them.

I may observe at the outset of this enquiry that no foundation is laid, preliminarily, by the party setting up this codicil, either in respect of capacity or intention. There

is no one matter of business even alleged to have been transacted by the deceased after his paralytic stroke; though he had large estates; though leases were to be attended to; though he had mineral property; though there was a large sum at his bankers, yet there is no proof that, after his seizure, he was even consulted on any one act of business in the management of his own concerns, except as to the mere signing of drafts for the current household expences. And in respect to any intention of altering his will of the 12th of October, 1830, there is not a single declaration—no wish ever expressed—nor suggestion thrown out, not even on the death of his son Edmund—that he was in any way dissatisfied with that will. There is nothing of the sort till after the 11th of February, 1832. To trace, then, the facts as they appear in evidence.

Immediately upon the attack in November, 1830, Dr. Arnott and Mr. Carrick attended the deceased. Dr. Arnott attended three times only; Mr. Carrick from the time he was called in till Mr. Blewitt's death: both these medical gentlemen distinguish paralysis as to its effects, and describe the deceased's attack to be of the sort I have mentioned, and that it affected his mental faculties. The deceased, I have said, kept a considerable sum at his bankers; he alone could **[421]** draw upon them for it; money was wanted for the ordinary expences of the house; and as he had lost the use of his right hand, and the signature with his left would be obviously very defective, it became necessary to make some arrangement in respect to the drafts, and consequently an order, dated on the 27th of March, 1831, was served upon Messrs. Coutts's, the banker's, that upon the drafts being countersigned by Mr. Carrick they should be paid. This arrangement took place with the concurrence of Mrs. Blewitt and of the deceased's son Edmund: nor is this arrangement interrupted by the death of Edmund in July, 1831—an event of which the deceased did not seem to take any notice.

Mr. Roberts, who informed him of this event, thus deposes on the 10th article of the son's allegation: "Edmund Blewitt died suddenly at Gloucester early in July, 1831. Reginald wrote to inform me of it, and to request that I would inform his father of it: the day I received his letter (5th July) I called at Major Blewitt's to apprize him of this event; I saw Mrs. Blewitt, and told her the object of my visit; but she replied that the major had not been so well for a day or two, and that it would disturb him to see me: she made some excuse to that effect, and I, remembering what I had heard Edmund Blewitt say, looked upon what she said as a mere excuse, and pressed to be allowed to see the major. I pressed it as far as I could without rudeness, but without effect, and left the house without seeing him. Her excuse was, not that my seeing him in particular would disturb him, but that he was in that irritable state that it would distress him to see any one; she also informed me **[422]** that they had heard by that morning's post of Edmund Blewitt's death, and that it had been communicated to the major; and, upon my inquiring how he received the intelligence, she said that he had not taken any notice of it up to that time (two o'clock in the afternoon), and Mrs. Blewitt said she had received the letter some hours before."

Then, on this occasion, Mr. Roberts, an executor in the will, was not allowed to see the deceased, on the plea—not that he was overcome with grief—but that he was in an irritable state, and that the visit would disturb him; and that when told of his son's death he had taken no notice of it, though, in the argument, Edmund was described as his favorite son. The probability of this statement is confirmed by Mr. Prothero, the father of Mrs. Edmund Blewitt. This gentleman had come to town upon the occasion to confer with the deceased, and to see what provision he had made in his will for the infant child. Upon the eighth article he thus deposes: "Being told by the servant that I could not see him, I asked to see Mrs. Blewitt" (and no person seems to have had an opportunity of seeing the deceased without Mrs. Blewitt's permission); "her I saw; and I stated to her that, understanding Major Blewitt had made a will appointing the property over which he had a power, I was anxious, on behalf of my grandchild, to know how the child stood in the will; and Mrs. Blewitt promised that if I would send the next day I should have an extract of it: but on the following day I received a letter from Anne Blewitt, written for her mother, stating that her mother could not send the extract, as she had not the will in her possession. **[423]** From the manner in which Mrs. Blewitt treated my application, without any reference to Major Blewitt, or at all considering whether it was his pleasure

or not that I should have what I asked for, I inferred that every thing was under her management." And he further says: "My understanding at the time, knowing that Major Blewitt had a paralytic seizure, was, that he was himself incompetent to the management of his affairs, and that they were under the control of Mrs. Blewitt. What I had to do with him was through Mrs. Blewitt, and in the course of the conversation I had with her she spoke herself constantly of the major's making another will, in which my grandchild would be taken care of as far as having the share of the settled property which Edmund Blewitt would have had. She spoke all this as if it proceeded from herself, and rested with herself: that was my impression at the time—that it rested entirely with Mrs. Blewitt what the major would do."

Here, again, is Mr. Prothero, who gains no access to the deceased, but his impression is, that the deceased was incompetent to see any one upon business, and that he was under the entire control of the wife: her conduct indeed strongly denotes custody, and confirms that impression.

In the month of August, 1831, Mr. Carrick went to Scotland; he was absent about three weeks, and during that period his partner countersigned a draft for 250l.; but of this draft, it not coming within the understood terms, payment was refused; however, upon Carrick's return, he countersigned it, and the draft was paid.

At the latter end of 1831 transactions of more **[424]** importance began to take place. Thomas, the eldest illegitimate son, returned from France; he wished a commission in the army; the deceased was asked to give a draft for the money; it was obtained: and Sir Edmund Antrobus, of the house of Coutts and Co., in his evidence on the 12th article, thus deposes in respect to it: "On one occasion a young man, who, I think, represented himself as the son of Mrs. Blewitt, was introduced into the office in which Sir Coutts Trotter was, as well as myself, and I think he was the bearer of a larger draft than usual, and that it was not countersigned by Mr. Carrick; we demurred to the payment of it; and I think the young man stated it was for the purchase of a commission for himself." But this matter is more fully developed in the evidence of Mr. Carrick, on the 13th article: "I remember that Mr. Thomas Blewitt returned from abroad towards the end of December, 1831, and that the major, at several visits I paid him, was in a great degree of excitement; but whether that arose from Mrs. Blewitt's urging him to sign a draft for the purchase of a commission in the army, and his refusing to do so, I cannot say. It was at the same time that he was so much excited that I learnt from Mrs. Blewitt that he had promised to purchase this commission, and that he then refused, but that she urged him to do it." This excitement, the witness says, was on the 20th and 21st of December, and on the latter day he says "the deceased tried to make him understand that he wanted to remove to the Tavistock Hotel, where he had formerly been, and that he drew his fingers backwards and forwards across his throat, so that he was induced to believe that the deceased had an **[425]** intention of cutting his throat, and he cautioned Mrs. Blewitt not to allow him to be left alone." He further says: "When the deceased drew his fingers across his throat, it just floated in my mind, as he did this in the presence of his family, he might mean he was in danger from them and fearful of having his throat cut: but both upon this occasion and on the preceding day I considered that he was wandering, that there was an aberration of mind, and that his desire to go to the Tavistock and the signs he made of drawing his fingers across his throat were the effect of mental delusion."

Such was Mr. Carrick's impression: he appears to give his evidence in a fair way; and Dr. Macmichael admits that he is a man of much respectability.

Here, then, is this poor paralytic man, irritable from the very nature of his disorder, requested to grant money, which he refused, and for days is excited nearly to madness, till he is compelled to submit. Whether, when the deceased drew his finger across his throat, it was to denote a fear for his own life, or that, sooner than consent to such demands, he would (or that he might as well) cut his own throat, Mr. Carrick was unable to ascertain; he could not interpret the deceased's feelings at the time, and the deceased was not able very fully to explain himself: but whatever was meant, it shewed in the deceased an excited state of mind, and that he wished to leave his own house.

The circumstances, therefore, connected with this draft throw a strong suspicion upon all the transactions of Mrs. Blewitt and her children, **[426]** relating to the deceased's property, and the means used to obtain it.

As soon as Mr. Carrick was acquainted with this business he refused to countersign any more drafts; and on the 5th of January, 1832, he gives notice of this intention to Messrs. Coutts: it was not necessary that he should go to them immediately, as he was aware that no draft would be paid without his signature.

The funds for the house expences being thus suspended, it became a matter of urgent consideration among the deceased's friends how this embarrassment might be removed, and some arrangement made for present exigencies: accordingly, Mr. Roberts, the executor, and Mr. Osborne, the friend and brother-in-law of the deceased, go to him, and in a few days an arrangement is effected to obviate the difficulty. Mr. Roberts' account of this interview is, on the 14th article, as follows:—"I knew it was Mr. Reginald Blewitt's wish that there should be no unnecessary inconvenience experienced, and knowing that I was an executor of the major's will, I considered myself acting for him, and to remove any inconvenience he might be put to for want of necessary funds. On the 8th of January I and Mr. Osborne saw him at his house at Kensington; he was in the drawing room—sitting in an easy chair, in a paralytic state, very feeble, and with a vacant countenance: there was rather a wildness in his eye at first, but no expression of intelligence. Mr. Osborne shook hands with the major, who seemed to recognise him: whether he recollected me or not I cannot say. There was no kind of salutation to either of us. Mrs. Blewitt introduced us into the room. I, address-**[427]**-ing myself rather to her than to the major, but so loud that he heard what I said, informed them that Mr. Carrick had objected to countersign his drafts any longer, and therefore that Messrs. Coutts would not honour any more of his drafts; and I expressed my readiness at the time to attend to any suggestion of theirs to remove the inconvenience. Mrs. Blewitt briefly and rapidly repeated to Major Blewitt part of what I had said in this way—'Mr. Carrick won't sign your cheques, and Coutts won't pay them.' The answer the major made I could not construe; he turned towards Mrs. Blewitt and muttered something I could not make out; but Mrs. Blewitt interpreted what he said, 'Glad to see you, Mr. Osborne,' and upon her saying that, I thought there was something like Osborne in what he muttered." But there was no reference to the important subject they had come about. Mr. Roberts further says: "Major Blewitt took no notice whatever of my communication; he evinced no anger, no surprise; he made no observation nor suggestion; he was perfectly passive; nor did Mrs. Blewitt make any remark at the manner in which he received the communication; but she said, 'Reginald must be sent for;' and then she puts the question to him—'You will have no objection to see Reginald?' This was her own suggestion, and shews that at this time there was no dissatisfaction nor quarrel on the part of the deceased with his son Reginald: he muttered something to this, which she interpreted to mean 'None,'—that he had no objection to see him. What made her put the question I cannot tell; nothing had occurred to shew that there could be any difficulty in Major Blewitt's seeing his son: he had expressed no anger or **[428]** displeasure against him; Mr. Reginald's name had not even been mentioned: Mrs. Blewitt said she should write to him, or that he should be written to." Mr. Osborne gives the same description of the situation of the deceased at this interview, and confirms the truth of Roberts' statement.

This was the state of things on the 8th of January; and on Monday, the 9th, Mrs. Blewitt employs her daughter Anne to write to Reginald Blewitt what is certainly a very untrue representation of facts. The letter is in these terms:—

"26, Phillimore Place,
"Monday Morning.

"Dear Reginald,—I am desired to inform you that your uncle Osborne and Mr. Roberts called upon mamma yesterday, in consequence of hearing from Coutts and Co, that no more cheques would be paid, as Mr. Carrick thought papa not so well as he had been; and hope we shall hear from, or see you, as soon as possible, as something ought to be immediately done. There are several debts which must be discharged; such as school-books, housekeeping, Edward's board and annuities to Miss Macnamara, Mrs. Reece, &c. We consider papa quite in the same state; but papa not liking to take Mr. Carrick's medicines, it has made the Apothecary rather vicious, as he went to Coutts and made all this mischief. We hope you and Fanny are quite well, to whom we beg to present our kind love.—I remain, dear Reginald, your affectionate sister, "ANNE BLEWITT."

This letter is smooth and pleasant towards Mr. Reginald Blewitt; but it contains

a gross misre-[429]-presentation in stating that Mr. Carrick had refused to sign the drafts as usual, because the deceased had refused to take his medicines. Such is the statement in this letter written by Miss Anne Blewitt under the directions of her mother; while it is clear that the cause of Carrick's refusal arose from the deceased's excitement or delusion of mind.

Reginald was from home when this letter arrived, and before his return he had received from Mr. Roberts the real account of the deceased's condition, and of Mr. Carrick's reasons. It was not extraordinary, then, that he should have written a strong answer to Anne. This letter is dated "Monmouth, January 21, 1832," and is in these terms:—

"Dear Anne,—I have been absent for some days in a distant part of the country on business, and did not receive your letter till yesterday. In it you state that Mr. Carrick's refusal to countersign cheques arose upon my father's refusal to take his medicines. Mr. Carrick tells a far different story. I understand, from the statement made by him to Mr. Roberts, that some of you have been greatly pressing my father to give a cheque for purchasing a commission for Tom; that my father expressed to Mr. C. a desire of going to the Tavistock, which he would not hear of, whereupon my father drew his finger across his throat; in consequence of which Mr. C. desired all dangerous weapons might be kept out of my father's way; that the subject of going to the Tavistock being renewed, my father again drew his finger as before; Mr. C. then said—'Surely the major does not mean that he is in dan-[430]-ger here?'—and my father intimated that he did mean it. I also understand that not long since my father was taken with a very alarming fainting fit, not one word of which you have mentioned to me. What object you could have in pressing my father to give a cheque for a commission, which you all know Tom cannot get at present, I am unwilling to guess at; but it is perfectly horrible to think that you have so used a poor helpless parent as to make him wish to change his home, and to imagine his life in danger from your unnatural conduct towards him. I have often seen you treat him with more insult and disrespect than I could well brook to witness, but never did I think it would come to this. I should have thought that the generous provision he has made for you all would have impressed you with some little gratitude towards your afflicted parent. I should also have supposed that, after having made a will by which, but for Edmund's unexpected death, I should have been totally disinherited of any part of my father's property, I was entitled to some share of your consideration. I am sorry, however, to find that all I have done for you is being paid with ingratitude and hypocrisy. You ask me to come to London: recollect the last occasion when my father, at some of your instigation, refused to allow me my expenses, although incurred for the sake of a dead brother and his orphan child, and which I have been obliged to pay out of my own small income. If I hear of any further acts on your parts, to wrong my father, I shall certainly take him under my own protection. I have written to my friend Roberts to know what Coutts and Co. will require in order to honour my [431] father's cheques, and when I hear from him I will do what is just and proper."

This letter is strongly expressed, and may be overcharged in some respects; but it is the natural letter of an affectionate son, and there is nothing in it except what the circumstances were likely enough to produce: as regarded his father, it evinced respect and attention, and anxiety for his comfort; as regarded Mrs. Blewitt and her daughter, it was not improbable that it should give them, as it really did, much offence: however, the letter was not long unanswered, and the young woman proves that she was not a very unequal match in her reply. On the 23d of January she thus writes:—

"Sir,—How dare you write such an insulting letter—accusing me, my mother, and my brother, of treating my father ill? Know that we are not so likely to do so as yourself. Mr. Carrick says he never wrote to you what you have stated in your letter, and has promised to write and contradict your wicked assertions." He did not say he heard from Mr. Carrick, but from Mr. Roberts. "We never have one penny but what is necessary, but we understand you have had 200l. from Mr. Prothero, without Papa's knowledge, besides never paying a farthing out of the estate to the bankers. God knows what you do with the money! Papa would never have spoken to you, or allowed you to come under his roof, had not my mother begged of him to forgive you, and to send you a hundred pounds, as you said you were starving at

Paris. Look back to your own conduct; what folly and hypocrisy have you been guilty of! Long before Papa introduced me to **[432]** you he gave me to understand you were a liar, and other specimens of your conduct which I will not mention. We have you in our power more than you think for, and I will make you tremble when I see you. Recollect I have heard your conduct from a lady in France, which I am astonished at. We have asked Papa if he would like to live under your protection, and he says 'No;' and looks with horror at the idea: he has often and often said he hated you, and disliked the idea of your seeing him;"—notwithstanding the kindness which the deceased had shewed to him in 1830, and had intrusted to him the preparation of his will, and that he was present at the execution of it. "Indeed he was quite angry at the thought of sending for you." The account given by Roberts is quite the reverse. "Mamma says she shall consult physicians and Mr. Bings (Binns), as you have nothing to do with us or Papa. I suppose you wish to have every thing under your own direction; but I assure you it will not be so, as what the physicians say will be sufficient. You talk of taking Papa under your protection: mention it to him, and see what he will say to you. Your letter has been read to Dr. Carrick, and he says they are your own inventions what you have asserted; and to-morrow Mr. Osborne and Mr. Roberts shall hear your language to a defenceless girl." She was in some respects able to defend herself, and with a considerable degree of spirit. "You are an unprincipled fellow, and I am certain you would deprive my poor mother and her family of bread, if you could get us in your power. I should have been ashamed to present such an account to Papa as you did, taking advantage of his situation to **[433]** get every penny you could: you do something or other with the money, for no one sees the money but yourself. You say you pay for Edmund's child: you assert an abominable falsehood, as Papa allows a hundred a year to Edmund's widow for its maintenance. However, we never wish to have any thing more to do with you. Thank heavens we know your character before too late. Dare to write! Should you do, your letter will be returned unopened."

Now this letter, and particularly the passage "we have you in our power more than you think for," pretty strongly marks dominion over the deceased, and that the probable use to be made of Reginald's letter would be, in the exercise of such power, to work a false impression on the deceased. Indeed, various parts of the letter tend deeply to shew the sort of impression which had already been attempted in order to alienate the deceased, and to prejudice him against his son Reginald, and to make the deceased a mere instrument in the hands of his wife and her children.

What was now to be done? The first thing was to go to Messrs. Coutts, and induce them to waive the necessity of having the drafts countersigned by Carrick; for if that attempt should have succeeded, Mrs. Blewitt would have obtained a complete command over the property. On the 26th of January, 1832, this attempt was made, and Sir Edward Antrobus gives the following account of what occurred on that occasion:—"I only recollect to have seen Major Blewitt once after his paralytic attack, and then he was disabled from using his right side; he walked with the assistance of a person to lean upon, and his speech was so indistinct that none but persons accustomed to it could **[434]** understand him: he was unintelligible to me, and I took some pains to understand him, because it was of importance to us that I should understand him, the object of his visit to the banking-house being, as Mrs. Blewitt stated, to cancel the order we had, not to honour his drafts unless countersigned by Mr. Carrick. Mrs. Blewitt stated as much to me, and put it to him in my presence whether that was not his object; but he shook his head, and uttered some indistinct sounds which I did not understand. I understood from the shake of the head that he did not mean to cancel the order; he appeared irritable at the time, and Mrs. Blewitt did not explain what he meant, nor press the matter further; nothing was done; and I was very glad to see him go away without cancelling the order; for, from what I observed of him, I considered he was not in a fit state to manage his affairs himself."

This attempt to get the order cancelled having thus failed, the next step was to persuade Carrick again to countersign the drafts: and though Reginald Blewitt was unable to come to town, yet he had sent to Mr. Roberts full power to act for him, and in the kindest manner had expressed a strong wish that every facility should be given to provide for the comfort and accommodation of his father. Accordingly Dr. Arnott, who had attended the deceased when attacked with paralysis, was again called in;

and he gives this account of the state in which he found the deceased on that occasion. "I saw Major Blewitt again on the 2d of February (1832), I was called in by Mrs. Blewitt, and met Mr. Carrick, to give my opinion whether Mr. Carrick would be justified in countersigning drafts drawn by Major Blewitt, as he had done. **[435]** I examined the major to ascertain his state, and how far he was fit to act for himself; the result of my examination was that there was more of muscular energy; he was not so languid; he did not drop his head so much, he could take his meals, and move from one room to another with assistance: in these respects there was a slight improvement, and perhaps the same degree of improvement in the state of his mind: but there was still that slowness, that inability to combine more than the very smallest number of ideas, or to review or compare past occurrences; he was incapable of making present to his mind any complex subject, and I came to the conclusion that he was clearly incompetent to the management of his own affairs, but that, under the circumstances of the family, Mr. Carrick would be justified in countersigning the drafts for the ordinary household expences: but I told Mr. Carrick and Mrs. Blewitt that, for any thing beyond the ordinary household expences, the concurrence of the members of the major's family, who were interested in his property, should be had. Mrs. Blewitt had informed me that it was wished to advance money to place out some of the children, and I advised her that a sum for such a purpose should only be taken with the consent of the parties interested, and I recommended her, as she told me that a gentleman authorized to act for the other branches of the family was expected in a few days, by all means to wait till then." Mr. Carrick's evidence is much to the same effect.

Such, then, is the account of the state of the deceased's capacity on the 2d of February. In consequence of what passed at this interview Mr. Carrick again undertakes to countersign the **[436]** drafts: he informs Osborne and Roberts of this arrangement, who agree to see the deceased on the 8th of February; and it is material to notice what occurred at their interview. Mr. Roberts gives the following account:—"We were with the deceased about an hour; Mr. Osborne and myself talked on the subject of our visit, on the appearance or health of the major, putting questions occasionally to him, which he sometimes answered by a monosyllable, sometimes by an inclination or shake of the head: simple questions, such as related to his health, and of that kind he seemed to understand and answer. On this occasion Mrs. Blewitt spoke of Reginald Blewitt's letter, in answer to the communication to him that Mr. Carrick had refused to countersign the drafts, and she certainly expressed herself with great violence against Reginald, and said that she would never overlook his letter. She denied that she had ever pressed the major to sign a draft for the purchase of a commission in the army, or that she, or any one in the house, had behaved unkindly to him; and she appealed to him whether it was so or not in this way, 'Now has any one in the house behaved unkindly to you, or have I or any one in the house behaved unkind to you?' He made no answer, and took no notice whatever of what she said: she repeated it, and again he took no notice: upon which she left him, and went to the window in tears. I told Mrs. Blewitt that Carrick had informed me of Dr. Arnott's opinion, that the major was not competent to the management of his affairs; she admitted it to be true, not in words, but she did not contradict it." Again, "I said on the behalf of Mr. Reginald that he **[437]** would do any thing that was right to relieve the family from inconvenience, and I undertook to draw up the request, which was agreed upon, and to forward it to Mr. Reginald for his signature. Of this arrangement, and the conversation concerning it, all which passed in the major's hearing, he took no notice—no part in it whatever by word or sign; he evinced no interest; he expressed neither surprise nor resentment against his son Reginald, myself, or any other person, and Mrs. Blewitt came into the arrangement without referring to him in any way. And when I mentioned to her the annuities, for payment of which application had been made to Coutts and Co., and suggested that, as they were charged upon the Monmouthshire estates, they had better be paid out of the rents of them by Reginald Blewitt, she assented to that without consulting the major: he was in a state of complete listlessness and apathy throughout; I did not think of addressing myself to him alone on any point of business, for he was evidently incapable of attending to it."

Here ends the interview of the 8th of February; and such is the account given

of the deceased's state, and of Mrs. Blewitt's conduct. In consequence of what then passed, Roberts wrote to Carrick to this effect: it is the exhibit No. 22.

"Dear Sir,—It being very desirable to avoid the exposure, annoyance, and expense of agitating the question how far Major Blewitt may be capable of managing his affairs, and in order that his comforts and necessities may be properly provided for, we request that you will have the goodness to countersign the major's cheques as heretofore, namely, that they appear to be ac-**[438]**-cording to his wishes, so far as he can express them, and be not for other than ordinary household and necessary purposes, and upon the distinct understanding, as required by you, that such countersigning is to be considered only as consequent upon this request, and that you shall not be deemed as expressing any opinion upon Major Blewitt's state of mind, or capability to manage his affairs, but such opinion is to be as free, uncontrolled, and unprejudiced, as if you had never countersigned such drafts."

This authority, having been signed by Mr. Reginald Blewitt, was sent to Mrs. Blewitt for her signature. Thus an arrangement was effected for Mr. Carrick to countersign the drafts; and I may here observe that the paper was not calculated to cause the deceased to take offence at his son: if it were indeed at all calculated to give offence to him, it would, I think, rather be as against his wife; but I do not see that, unless perhaps to Mr. Carrick, it was likely to occasion offence to any party. At the interview upon the subject of this arrangement, not the least intention of any steps to take out a commission of lunacy, or in any other way to interfere with Mrs. Blewitt and the family, was suggested; on the contrary, the letter which I have just read expressly declared that the object of all parties was "to avoid agitating the question how far Major Blewitt was capable of managing his affairs:" yet in that state of things, on the 11th of February, three days after this arrangement had been settled, Mrs. Blewitt and her son, Mr. Thomas Blewitt, took the deceased, found out a Mr. Binns at his office in Essex-street, and represented to him that they came for the sole purpose of preventing a commission of lunacy issuing **[439]** against Major Blewitt, and the management of his person being taken from his wife and family; and to this end, before they quit the office, a most extraordinary instrument is drawn up by Binns: it is the exhibit marked No. 24, and is in these terms: "I hereby authorize and require you, Thomas Binns, to enter a caveat against any commission, wherein I am in any way concerned, being any way proceeded upon without due notice to you, Thomas Binns; and I hereby further authorize and require you to retain Sir James Scarlett, Sir E. Sugden, Mr. Horne, and any other counsel generally you may think proper on my behalf; also that you require Dr. Macmichael to attend upon me at my house, at 26 Phillimore Place, Kensington, on Monday next, at three o'clock; and I hereby authorize and require you to act in all my affairs as my attorney and solicitor, and as you shall think proper or be advised; and for so doing this shall be your sufficient warrant and authority. Dated this 11th of February, 1832." (Signed) "EDWARD BLEWITT."

These are pretty extensive powers taken at one interview from a person in the condition of the deceased—only able to pronounce monosyllables—in the hands of these persons—his wife and his illegitimate son, and taken by an individual who had a very slight knowledge of the deceased: for who is Mr. Binns, and what was his connexion with the deceased? Mr. Binns' history of himself is that, after having been five years in an office at Chesterfield, he came to London in 1812 for his advancement, and became a clerk in Mr. Stevenson's office at 70*l.* per annum; he was about twenty when he came to London, for at his examination he describes himself as forty years old; **[440]** that in 1818, having by degrees become senior or managing clerk, he was articled to Stevenson. Reginald Blewitt was also an articled clerk to Stevenson; and the deceased was a client of the house. When Stevenson retired from the business Binns quitted the office, set up in business for himself, and sent circulars to some of Stevenson's late clients. In 1826 he was employed by the deceased, but received his instructions from Edmund Blewitt, who was at the bar, in some business connected with the Llanturnam estate. In 1827 the bill was sent in, and it was paid by a draft in 1828. Binns once or twice, in 1826, saw the deceased at his office, but he had never seen him from 1826 to 1832, unless by some accidental meeting in the street: he was not employed to prepare the instrument of 1828; and it was at the office of Bicknell and Roberts, Stevenson's successors, that the deceased executed his will of October, 1830; and there was not any intercourse or business between him and Binns,

nor was he in any way employed by the deceased after 1826, till this interview in February, 1832. There is no evidence that he even knew Binns was living in 1832, much less where he lived, though Mrs. Blewitt knew there was such a person; for Miss Blewitt, in her second letter, speaks of applying to him: but on the 11th of February, as I have mentioned, Mrs. Blewitt and her son hunt him out, and on their way to his office Mrs. Blewitt receives payment at Coutts' of a draft countersigned by Carrick. This shews that the arrangement in that respect was speedily carried into effect, and therefore that no intention to embarrass Mrs. Blewitt and her family could exist.

The result of what passed at Binns' on the 11th **[441]** pretty clearly shews, as I have stated, that the ostensible object of going there was to prevent a commission of lunacy, and to defeat Reginald Blewitt and Roberts in any attempt to get possession of the deceased, and the management of his property: that is hardly to be doubted, from the paper drawn up by Binns, and to which the deceased's signature is obtained. It is then important to see, first, what account Binns gives of this interview, and more especially of the state and condition of the deceased; for, if his account is quite inconsistent with all the other evidence in the cause, particularly as to that important fact which could be ascertained with more precision and certainty than the state of his mind, namely, the deceased's power of speech; and should, in that respect, his evidence be nearly if not quite incredible, there is an end of Mr. Binns' testimony, and of the case itself. For Mr. Binns is the only witness to the instrument propounded, and unless the Court can venture to give him credit—nay, full credit—it is quite impossible that the instrument should be established. I should not, therefore, do justice to Mr. Binns himself, or to the Court, or to the parties, were I not to read the whole of his deposition on the 10th and 12th articles; for it gives the whole detail of this most important interview:

"When Major Blewitt came to me in Essex-street, in February, 1832, he evinced great satisfaction at finding me: he had been seeking me in New Inn, where I had chambers when he employed me before; he had met with some difficulty in finding out where I had removed to, and he seemed excited with pleasure at having at last found me: he shook hands with me with the **[442]** left hand, intimating that he had not the use of the right hand for the purpose. It was on the 11th of the month, and his wife, and eldest son by her, were with him: he told me that he required my advice in consequence of what his son, Mr. Reginald Blewitt, and Mr. Roberts were doing respecting his affairs: he seemed to resent very much their interference, and he shewed me the letter (the exhibit No. 22), signed by Reginald Blewitt and by Mrs. Blewitt. He complained that Reginald Blewitt wished to control him in the expenditure of his income and the management of his affairs, and declared that he would not submit to their interference, and would not allow any person to sign his cheques for him" [though one had only just been presented, signed by Mr. Carrick]. "He alluded to the conduct of his son formerly, and to their reconciliation, and what he had done for him, as hurt, that, after having restored him to his favour, he should just then, when from his state of illness he might require more indulgence, make an attempt to limit his expenditure. He seemed to feel it as a bad return for his kindness that Reginald Blewitt should attempt to take advantage of his illness, and to control his affairs; and it was to prevent that control, and to meet what Reginald Blewitt and Roberts might intend to do, as far as it could be collected from the letter which he handed me, that he then required my advice and assistance. He deeply resented this attempt of his son and Roberts, and expressed his determination to have the management of his affairs himself; and he gave me directions to discharge his son from interfering any further in the management of his estates in Monmouthshire, or of any of his concerns, and to **[443]** obtain an account from him. After Major Blewitt had thus explained himself to me, I put it to him whether he apprehended that, when they knew what his determination was, they would agitate the question of his capacity, and he replied 'he thought they would.' I thought so too, from the wording of the letter, and that they would apply for a commission of lunacy; and therefore I advised him as to the precautions I thought necessary to be taken against such a step on their part—among other things, to see Dr. Macmichael, that he might report on his capacity to continue in the management of his affairs without control, and he adopted my suggestion at once. He seemed quite apprehensive, unless they were prevented, that Reginald Blewitt and Roberts would possess themselves, by some means, of the

management; he seemed to entertain a bad opinion of them, and he signed an authority to me, requiring me to act for him according to the advice I then gave him, and generally on his affairs, as his attorney and solicitor. I wrote out the authority at the time, requiring me to enter a caveat against the issuing of the commission, to retain particular counsel, and to procure the attendance of Dr. Macmichael upon him. He fixed the time for the doctor's attendance himself, and gave me his residence (his own), with which I was not then acquainted, and I not only read this authority to him, but he conned it over himself, and went from his own chair to mine, in which he sat, to sign it: he was more than an hour with me, I should think, on the occasion, and I was anxious and particular in the advice I gave him to meet the circumstances in which he might be placed when the other parties should find he was determined **[444]** to have the uncontrolled management of his affairs, and not to permit their interference. As Major Blewitt was leaving my office he told me there was another letter (No. 23) connected with that which had been the subject of our conference, and he desired his wife or son to send it to me; and I think it was sent to me in a day or two. Major Blewitt said he wished me to see it."

It is impossible to read this account, given by Mr. Binns, without being struck that he has, on this 11th of February, represented the deceased as not only possessed of perfect capacity and intelligence, but also that he had full power of originating intentions, and of communicating and explaining his objects. It would hardly be supposed that the deceased, at this time, laboured under any difficulty of speech; yet from other evidence in the cause it is quite clear that he had hardly the power of speech—that he could only express himself in monosyllables, or at most, with a great effort, in short sentences. Even Dr. Macmichael admits that the deceased had very great difficulty in order to express himself; and he gives only two instances in which, in the course of his visits, the deceased attempted to utter a sentence. Dr. Macmichael's conduct confirms his evidence; for notwithstanding that the deceased could only write with his left hand, yet Dr. Macmichael gets him to write down answers to some of his questions, that he might be the better able to understand him than by word of mouth; while, according to Binns, the deceased would appear to have been in possession of perfect intelligence of mind, and of the power of expressing his wishes and intentions without any difficulty whatever.

Nor has Mr. Binns left it open to the supposi-**[445]**-tion that he collected what was said by the deceased from explanations given by Mrs. Blewitt; for in his cross-examination he has negatived any such supposition. "Major Blewitt's visit to me on the 11th February last was not the result of any previous arrangement: I had not seen him before that, except accidentally, since March, 1826. Sitting down, he did not appear much altered since I had last seen him: he appeared thinner, and when he got up he required assistance, he could not walk without it. I recognized him immediately: I saw at once there was something the matter with his side; he appeared indisposed, but not very feeble; I think when he entered my office he was leaning on his wife's arm; he was the first person who addressed me; and himself explained the object of his visit. At first I had some difficulty in understanding him, but when I found what was the matter, and directed my attention particularly to him, I understood him without difficulty; he was altogether intelligible, and I had no occasion to have recourse either to Mrs. Blewitt or her son to interpret what he said; they did not even offer to do so; I had no occasion to lead him by questions; he did not merely answer by signs, or by monosyllables."

Now can this account be correct? Can the Court venture to rely upon the testimony of this person where he is a single witness—single he is to the instructions, and to the preparation and drawing up of the paper propounded? Without his evidence there is not a tittle of proof that the transaction, even such as it is, which he has represented, ever passed. But it does not seem that at this interview with Binns, on the 11th of February, there was the slightest intention of doing any testament-**[446]**-ary act; the object was to get an authority from the deceased to prevent Reginald Blewitt and Roberts from issuing a commission of lunacy against him, and to enable Binns to supersede Reginald in the management of his father's estates. In his deposition in chief Mr. Binns says that he was directed to send to Reginald for the account between him and the deceased; but what was Binns' conduct? Does he write to Mr. Reginald Blewitt, who had been his fellow clerk, who was the legitimate son of the deceased, and had, as he knew, been employed in preparing his will? No.

The whole of this important transaction is carried on behind his back; he is not even apprised of his father's displeasure.

What is the effect of this state of facts, founded upon the history previous to the 11th of February, and upon what occurred on that day at Binns' office—looking back to the application in December, 1831, for the purchase of a commission; the deceased's refusal; his state of excitement; his wish to change his house, with Carrick's refusal to sanction it; the refusal of Carrick, on the 6th of January, to countersign the drafts; the visit of Roberts and Osborne on the 8th of January, when it was agreed to write to Reginald; Anne's letter of the 9th, misrepresenting the cause of Carrick's refusal; Reginald's answer on detecting its falsehood; her menacing reply on the 23d; the attempt on the 26th at Coutts' to get rid of the countersignature; Dr. Arnott's visit on the 6th of February, and Carrick again agreeing to countersign; the visit of Roberts and Osborne on the 8th; the deceased's apathy to what was passing; the fact of Mrs. Blewitt's attempt, by referring to Reginald's letter, to excite the deceased **[447]** against him; the authority on the 9th, expressly wishing to avoid the exposure of the deceased's state, and by which Reginald promptly consented to every thing for his comfort; the receiving a countersigned draft on the 11th at Coutts'; the false account given by Binns of the deceased's condition on that day; Binns' obtaining on that day, upon a fraudulent representation, the power of attorney with the deceased's signature to it—they are facts that do, in my mind, wear the appearance of a gross fraud and circumvention on this paralytic old man, which he was either not able to understand, or which, if he could detect and understand in any degree, he was not able to resist and defeat. This previous history thus throws on the whole case a strong suspicion, strengthened by the fact that though, according to Binns, he was authorized to supersede Reginald as his father's agent, the whole of this important business on the 11th was concealed from Reginald: every thing respecting it was clandestine, and conducted behind his back.

Having procured the deceased's signature to the power of attorney, the plan of the parties immediately changed: the object was no longer to prevent a fancied commission of lunacy, but it now was to get the deceased to sign a codicil materially altering his will. As, however, Dr. Arnott and Mr. Carrick had expressed an unfavourable opinion of his capacity to do general acts of business, it became a measure of necessity to resort to some other medical man of reputation, but who had no previous knowledge of the deceased, his family, or connexions. Dr. Macmichael, and perhaps they could not have selected a more respectable man, was accordingly called in, expressly with a view **[448]** to decide whether the deceased was competent "to make a will:" this he states both in his certificate and in his deposition. The certificate is to this effect: (*a*)—

"Having been requested to visit Major Blewitt with a view to ascertain his competency to make a will, I went to see him for the first time on the 13th of February, 1832, and was introduced to him by Mr. Binns, of Essex-street; Major Blewitt, who is about seventy, labours under the effect of paralysis, which attacked him about fourteen months ago: he has lost the use of his right side, is unable to walk alone, and his speech is so much affected that he articulates with great effort and difficulty: his attempts at conversation are therefore chiefly confined to the monosyllables 'yes' and 'no,' though occasionally he can utter an entire sentence; for example, I asked him 'whether he often went to London?' he replied audibly and distinctly, 'No, I have no occasion for it;' and so on." (*b*)

(*a*) June 27, 1832.—On the allegation propounding the codicil being debated, objections were (inter alia) taken, by the King's advocate and Nicholl, to the introduction of this certificate, annexed as an exhibit, and also to the plea setting forth the opinion and inferences of Carrick; but the Court, in directing parts of the allegation to be reformed, overruled the objections, stating that, without the examination of Dr. Macmichael and of Mr. Carrick upon the allegation, the certificate, opinion, and inferences would not be admissible as evidence.

(*b*) The certificate continued thus: "Upon my being told that about last Christmas he wished to go to the Tavistock Hotel, Covent Garden, and upon asking him 'why he wished to go there,' he answered, 'Because he had been formerly used to go there, and wished for a change of scene;' this is, as I am told, quite true. Since the attack of paralysis he has learned to write with his left hand, and in my presence he wrote his name, 'Edward Blewitt,' legibly. On my next visit, on the 15th, I requested him

[449] Dr. Macmichael visited the deceased on the 13th, 15th, 17th of February, and he signed the certificate **[450]** on the 18th; and his account is satisfactory to shew that to a certain extent, and for some purposes, the deceased possessed a testamentary capacity. There is no material difference as to facts between Dr. Macmichael and Mr. Carrick: the deceased had some degree of memory and understanding; he was not irrational; he was not a lunatic; there was no aberration; no absolute idiotcy, nor total imbecility: he could answer correctly ordinary questions, and assign a reason for his ordinary conduct; as, when asked "whether he often went to London," he answered, "No, I have no occasion for it." So, in regard to memory, when asked "how many children he had," "who was the colonel and lieutenant-colonel of his regiment," or, "how much money he had at his banker's" (probably a subject often mentioned to him, and then recently a matter of much anxiety and concern), he might answer correctly; or, in regard to his cheques, he would probably (aware of their usual amount), if a cheque were drawn for 2000l., instead of 250l., have taken alarm at the sum, and refused to sign it, as he did the draft for the son's commission—such a degree of memory and understanding the deceased did possess; but had he that mind, memory, and understanding to enable him to make this codicil?

The degree of capacity retained by Major Blewitt might have been sufficient to do a common testamentary and natural act; he might have been competent to make a reasonable provision for natural children not before provided for, or for a faithful servant, more especially if such a provision were supported by previous declarations of intention, or by strong probabilities arising out of a clear and well ascertained state of circumstances. But what is the act to be here done? **[451]** it is not merely to alter a will recently made, by which he had provided largely for Mrs. Blewitt and her children, but to alter a most important part of that will, and thus, contrary to every previous testamentary disposition, take away the residue from his legitimate children.

In support of this change, attempted after the paralytic attack, there is no previous declaration—not the slightest intimation that his will, made only six weeks before that attack, was to be altered in any respect, nor was there in the conduct of the former residuary legatees any real cause of departure from his will. If Dr. Macmichael

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to make the following addition, 8l. 4s. 2d., and 3l. 18s. 6d., and without being in the least assisted or prompted he wrote underneath the same 12l. 2s. 8d., in very legible figures. The cheques he had lately drawn upon his bankers, Messrs. Coutts, had been countersigned by his apothecary Mr. Carrick, of Kensington; but to this arrangement he now objects. When I asked him if he knew the amount of his balance at his banker's, he wrote down upon a piece of paper 6000l.; and I have ascertained since that this is within a few pounds the precise amount. Mr. Carrick, whom I met on my second visit, informs me that when a compliance with his request to go to the Tavistock Hotel was refused, he gave signs of anger and impatience, and drew his finger across his throat, as if he would commit suicide; this was regarded at the time as indicating unsoundness of mind; but when it is recollected that Major Blewitt is deprived, in a great degree, of the power of speech, ought it not rather to be considered as the readiest mode he possessed of expressing his indignation at the control attempted to be exercised over his movements, and the gratification of what he might deem a most reasonable wish? On my third visit, after the interval of two days, he wrote down correct answers to various questions I put to him, which related to the number of children he had had by his first marriage, the yearly value or rent of his estate in Monmouthshire, when he made his last will, who drew it up, how many children he had by his present wife? He told me also the names of the colonel and lieutenant-colonel of the York Fencibles, in which he formerly served, and which he had quitted for many years. In my several interviews with him I could not discover that he laboured under any delusion; he appeared to think correctly upon all the subjects upon which I questioned him, as far as it was possible to catch and thoroughly understand his answers. What is said to himself he seems completely to understand, but the difficulty of the case consists in being sure you comprehend his replies. Upon the whole, I am of opinion that, if due time be allowed him to reflect, and if proper caution be used to avoid mistaking his intentions, that he is competent to make a will. But as a will made under such circumstances may possibly become hereafter a subject of litigation, it would be more prudent to take the opinion of another experienced physician." (Signed) "WILLIAM MACMICHAEL, M.D."

had been aware of all the facts, and that without any real offence by his legitimate children to the deceased, subsequent to the execution of his last will, and that, on the other hand, after he became paralytic, false impressions and feelings—for instance, that his son Reginald was about to deprive him of self-management—were forced upon and excited in the deceased with no just foundation—he (Dr. M.) probably would not have been of opinion that Major Blewitt had capacity, firmness of mind, and quickness of apprehension sufficient to take a view of all the circumstances connected with his will, and form any thing like a disposing judgment: he would, I think, have hesitated in attesting such a codicil. Carrick was aware of most of the facts, and therefore, though he deposes to similar traits, shewing a degree of capacity, yet, in his judgment, the deceased had not a sufficient capacity for the purpose of making this disposition.

But inferences, drawn from the conduct of a witness and from the res gestæ, are generally safer grounds upon which to rely than mere opi-**[452]**-nion. And what was Dr. Macmichael's conduct? He paid three visits to the deceased—so doubtful is his state of capacity!—before he formed his final opinion; when at length he ventured to write the certificate of that opinion it was hesitatingly worded, for he concludes by recommending the family to take "the opinion of some other experienced physician." How completely does this conduct (there being no access of disorder in the mean time) contradict Binns' account of the deceased's state on the 11th of February! For if the deceased had been on that day in the enjoyment of that full state of mind, memory, and understanding, and also of powers of speech, so that without assistance he could have communicated his views and wishes, would Dr. Macmichael have hesitated a moment as to his perfect capacity either to make or alter a will, or manage his whole concerns?

Again, what is the sort of alteration that it is suggested to Dr. Macmichael that the deceased wished to make? The removal of Roberts as a trustee and executor, and the substitution of Binns. The deceased appeared to have been set against Roberts, and as he had been with the deceased so recently as the 8th, there might have been no difficulty in making an impression prejudicial to him. But independent of such a false impression, the merely changing a trustee or an executor does not require the same degree of capacity as an important alteration in the disposition of the residue, and that it is which here was attempted. When capacity is in question, the inquiry always is—Was it adequate to the act? and that inquiry becomes more imperative when false impressions—which are strongly to be inferred in this case—have been apparently fixed in the mind **[453]** of a testator, and he has become a mere instrument in the hands of interested persons. Here Dr. Macmichael's own conduct shews that he considered the deceased liable to undue influence; for while probing his capacity he desired, on two or three occasions, to be left alone with him: even at his third interview, on the 17th, when he still felt the difficulty of deciding as to the state of the deceased's understanding, he required the absence of the wife and of Binns, in order to be satisfied that he was not under their influence and control. Indeed, what he collects relative to the deceased's family, to his not being on good terms with his son Reginald, and to his dislike to Roberts, he is by no means certain was derived from the deceased himself: he cannot distinguish between what he learned from him, and what from Mrs. Blewitt, and from Binns; and that the deceased's answers were correctly given, he only judges from the information of those same individuals: this is not immaterial, and he states it in his deposition to the 27th interrogatory.

Looking, then, to the evidence of Dr. Macmichael, and with full credit for its truth, though he does establish in this helpless old man a certain degree of understanding, sufficient, under some circumstances and with due precaution—for he says "that he would have required the assistance of a good and faithful person, and one who was accustomed to him"—to give effect to a testamentary act, yet connected with all the facts which appear in the evidence before me, and applied to so imperfect an instrument as the present codicil, that degree of understanding to which he deposes is by no means sufficient; nor, indeed, to satisfy my mind that, even in the exercise of that remnant of understanding, the deceased was not **[454]** acting under control and the influence of false impressions fraudulently made upon his mind: and to rely on proof of a more perfect capacity, a more decided intention and volition, and of a free and intelligent agency, upon the testimony of Mr. Binns, is, after the account that he has

given of the interview of the 11th of February, what the Court, though with reluctance it may feel itself bound to express such opinion, cannot venture to do.

Again, the entire history of the codicil in question depends on the single testimony of this Mr. Binns. Carrick was not present at any of the conversations deposed to respecting the paper: Dr. Macmichael was not aware, as he expressly says, in answer to the 29th interrogatory, that any such transaction had taken place till after the deceased's death, or at least till he had become quite incapable: he was not trusted to be present; he was not made acquainted with the nature and object of the act to be done, nor even that any act had been done. Here, then, was contrivance, and also concealment, even as respected Dr. Macmichael. It rests, therefore, upon Mr. Binns alone to prove the case: however, for the reasons already assigned, I shall not in my further examination of the case refer to the details in his evidence, but shall look at and consider his conduct.

Now Mr. Binns asserts that he received, on the three several days upon which Dr. Macmichael visited the deceased after he was first called in, full, clear, and final instructions from the deceased as to his intended alterations, yet Mr. Binns does not commit to paper one single word respecting them. On the 20th or 21st of February, for he is not quite certain as to the day, Binns carried Dr. Macmichael's certificate to the deceased, and again read his will over to him, recapitulating in the most **[455]** careful manner all the instructions that he had before received from him; and it was then understood, as Binns states the matter, that he should draw out a codicil—that was settled and approved; yet again on this occasion there were no heads of the intended alterations—there was not even a memorandum put down in writing; this is, on the part of Mr. Binns, a strange mode of proceeding, and most extraordinary conduct.

What is his further conduct? Though instructed, as he says, to draw out this codicil, and though in respect to it he had, at no less than four interviews, found the deceased's mind quite uniform, yet no rough draft even of a codicil made its appearance till the 26th, and all this is accounted for by this singularly cautious man under the pretence that there was no hurry, as Dr. Macmichael had told him that there was a probability of the deceased's living for several years; but Dr. Macmichael does not so depose: he says, on the 24th interrogatory, "I do not think I could have told Mr. Binns that Major Blewitt would probably live many years, for that was not my opinion;" and the very nature of the disorder was sufficient of itself to contradict any such probability.

On Sunday, the 26th, Binns went again to the deceased—not with a codicil, as he says the deceased had directed, prepared for execution, but—with this draft hastily written on the back of some paper before used for other purposes. But what passed on that occasion? The deceased, if he then had any mind, had altered it as to part of this codicil, for an annuity given under it to the grand-daughter was disapproved of and struck through with a pencil, and the wife's name erased from a share in the residue. When these alterations were **[456]** made, Mr. Binns states that he read the draft codicil over to the deceased, who approved of it, and the draft was finally settled.

Then, supposing the deceased to have had a capacity adequate to the act, this last point—as to final intention—remains to be considered.

On the 26th of February, after the alterations were made in the draft codicil, Binns states that it was read over to and approved of by Major Blewitt. The witness thus deposes on the 19th article: "The only point Major Blewitt had not made up his mind upon at this time was the amount of the legacy to myself; on every other point he had fully and finally made up his mind I am perfectly satisfied, and I had nothing further to do but to have the codicil copied fair for execution, and to see it executed. I said nothing to Major Blewitt as to having it copied and ready for execution, nor did he to me, nor was any time fixed for the execution of it. I felt that the whole matter was settled, and that I was to see it completed; and that as Major Blewitt was to all appearance in the same health as when Dr. Macmichael had told me he might live several years, there was no occasion for any hurry." Again, on the 20th article, he says: "Major Blewitt had unquestionably finally and fully made up his mind to alter his will as it is altered by this draft codicil."

It is, perhaps, rather bold in the witness to swear that the deceased "had unquestionably, finally and fully made up his mind," for at most this could only be

matter of opinion. But it is safer for the Court to look to facts and conduct. What had already taken place? On the 20th of February the new disposition was repeated and settled for the fourth time, and the codicil was to be prepared. Mr. Binns, however, did not **[457]** prepare it, and on the 26th the disposition was altered; the legacy to Binns himself remained still in blank, and on that day there were no directions to prepare a codicil.(*a*)

[458] Dr. Macmichael, in his certificate, had recommended an experienced physician to be called in, **[459]** and on this 26th of February the deceased himself expressed a wish again to see Dr. Macmichael. Binns thus deposes on the 20th article to this point. "After I had gone over the draft codicil with Major Blewitt on the Sunday, I sat in conversation with him some short time, and as I was about to leave him he said 'he should like to see Dr. Macmichael again, and asked me to appoint him at three o'clock on Tuesday.' I asked him 'if he wished me to attend him at the same time,' he said 'Yes.' I accordingly made the appointment." What was Binn's conduct in the meantime? Did he have the rough and altered draft copied? No. Yet, is it possible, if the alterations were finally settled, that he would not have had a codicil drawn up ready for execution on the Tuesday, when Dr. Macmichael might have sanctioned the act and attested it. This observa-**[460]**-tion, however, applies to the Tuesday; but there was, assuming a sufficient capacity, at least the postponement of one day in effecting these alterations, and that caused by the deceased himself; for if the instructions were final, an opportunity of executing on the Monday a codicil prepared for them was lost; and that because the deceased wished again to see Dr. Macmichael and Binns. But further—assuming a sufficient capacity—what

(*a*) The following are portions of Mr. Binns' evidence as to his interview with the deceased respecting the alterations in his will:—

On the 17th article Binns deposed: "On the 13th of February, as Dr. Macmichael took his leave, Major Blewitt beckoned me to remain, and desired his wife to fetch his will from the next room and shew it me." . . . "I, having read it, read it to Major B., and he pointed to the clause of appointment of Mr. Roberts as an executor; and said in an angry and distressed manner, 'That must be out, and your name in instead:' when I came to the residuary clause he pointed to it and said 'not to go to either Reginald or Frances,' or to that effect: he seemed quite familiar with the will, and the parts he wished altered." . . . "As I went home with Dr. Macmichael I consulted him on the competency of Major B. to alter his will; and I remember Dr. M., besides giving me his opinion as to the competency of Major B., said 'he was likely to live, or, that it was not improbable he would live, many or several years.'" . . . "Mrs. Blewitt was present on this occasion, and the other occasions afterwards, when he spoke to me of these alterations. Thomas Rogers Blewitt, the son, might be, now and then. I was with Major B. on the days of Dr. Macmichael's visits; and with respect to the intended alterations, Major B., both on the second and third occasions, expressed himself as nearly as possible as he had on the first."

On the 18th article: "'I believe' it was on the 20th of February last, but it was either on that or the following day, I saw Major B." . . . "I, to avoid all possibility of mistake, asked him 'if he meant me to be an executor and trustee with his wife in the place of Roberts;' he said 'Yes, and look after the children, and their interest in life;' adding that he should leave me something to remunerate me for my trouble. I then learnt from Major or Mrs. B. that he was allowing the daughter of his son Edmund 100*l.* a year, which he told me he wished to continue to her, as she would take less than Reginald or Frances under the settlement." "He answered every question I put to him in a perfect, clear, and intelligible manner." "I asked him 'to whom he would leave the residue, since he would not leave it to Reginald and Fanny,' and I understood him to say, pointing to his wife, who, as well as I recollect, was all the time present, 'All to her and her children.'" "I then read over the will to him, pointing out what I understood to be the alterations; I am certain that he understood and approved of my drawing out a codicil in conformity with my statement of the alterations, and I told him I should draw out a codicil in conformity with what I understood to be his wish—that his will should stand except with respect to Roberts—the grandchild's annuity, and the altered disposition of the residue: and I clearly understood that he wished me to draw a codicil to that effect."

On the 19th article: "According to the instructions, I drew a codicil; but my

is there to shew that this interview with Dr. Macmichael was not for the purpose of consulting and reconsidering with him these intended alterations; and perhaps with a view to make a fresh disposition? How then can it be safely sworn that on the 26th the deceased "unquestionably had finally made up his mind?"

Binns further deposes on the 20th article: "On Tuesday, the 28th, Dr. Macmichael and I went to see the deceased; we found him very unwell, in a drowsy and lethargic state; Dr. Macmichael said it would be better not to say any thing to him; he prescribed for him, ordered him to be cupped, and we left." The deceased is restored, and Dr. Macmichael deposes that he became better than he had ever seen him, so much so that he says, "On the very day before he was seized with the fatal attack of apoplexy he was better than I had seen him; instead of finding him moping by the fire, he was sitting at the window amusing himself with what was passing out of doors." Yet, from the 28th he considered his full recovery hopeless; for on the 31st interrogatory he answers: "When I saw him (on the 28th) his entire recovery was out of the question; it was impossible to foretell when the fatal attack of apoplexy might supervene: it is very possible that I might have said to Mr. Binns **[461]** that by the use of the means I had prescribed he might be restored to the same state in which he was when I had seen him before, and in a few days—an anticipation in fact verified, for on the day immediately preceding the fatal attack his head was more relieved than it had been during the whole of my attendance." Still, notwithstanding the opinion of Dr. Macmichael that the deceased might get better, but that "the entire recovery of the deceased was out of the question," and notwithstanding that, on the 28th, Binns had told Mrs. Blewitt that if she would send for him when the

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own business pressing, and wishing, under the circumstances, to allow Major B. full time to consider of the act he was about to do, and feeling secure of what Dr. Macmichael had told me of the probability of his living several years, that there was no immediate haste necessary, and no danger in the delay of a few days, I did not wait upon Major B. till Sunday, the 26th, with the draft codicil I had prepared: I had written it on three sheets of rough draft paper, on the two sides of the first sheet, and on one side only of the other two sheets; the other sides of those two sheets having been previously used for another instrument, unconnected with the codicil or Major B. The draft codicil was quite in a rough state, with several alterations in it. I read the will and then the draft codicil to Major B.: Mrs. B. being present. Of some parts he approved, of others he disapproved: the grandchild's annuity was expunged; the deceased, pointing to that part of the will which referred to the settlement, said 'she would take her father's share.' I asked him, as I thought if she wanted the allowance in his life-time, she would after his death, 'whether he thought she would take her father's share under the settlement;' he said 'Yes, and I leave her no more.' The next part objected to was that clause giving the wife a share of the residue; Major B., pointing to that part of the will which gave her an annuity of 600l., said 'No more, that's enough.' I struck the lines through with a pencil. I asked him whether he meant to make any preference among his children; whether he would provide more for the youngest than the eldest? He said, 'No; if I give more to one than another, they will be jealous:' and (in answer to inquiries) he said 'he wished his sons to go to college, be well educated, and his youngest to be brought up to the law.' It was because he appeared to hesitate a little when I asked him, after I had expunged his wife's name, whether he intended the residue to go equally among his children by her, that I inquired if he had any preference to make, and he said 'No; if I do, they will be jealous.' Mrs. Blewitt did not interfere during the reading of the codicil and the alterations, except in reference to the granddaughter, when she remarked 'she thought he intended to continue that allowance to her;' she seemed to have the care and anxiety of a mother, but there was no interference, no suggestion on her part whatever. I read the codicil as altered in pencil, distinctly and clearly to Major B., and asked him whether it then stood as he wished, or whether he had any other alteration to make, and he said, 'No; it was then as he wished it to be;' and afterwards he said 'that he and his wife would consider what was to be inserted as to the legacy to myself.' I was fully satisfied then that he had fully and finally made up his mind as to the alterations he intended to make in his will: indeed, I was quite satisfied in that respect the first time he spoke to me on the subject."

deceased should get better he would attend immediately, yet the codicil remained unprepared to the day of the deceased's death. Binns says on the 20th article, "I heard nothing from Mrs. Blewitt, and being pressed with other matters of business, I did not have the codicil copied fair for execution, nor take any steps to have it completed." Is it possible, I repeat, that Binns could have considered the draft as finally approved of and settled? His conduct contradicts such a supposition.

Again, could Mrs. Blewitt have considered the alterations finally settled? If she had so considered them, would she not, when the deceased had so much rallied, have sent for Binns who, had enjoined her so to do? And she herself must have been fully aware that the codicil was unfinished. Is not the inference, then, rather that they—both Mrs. Blewitt and Binns—considered the attempt to get a codicil executed would be abortive, and that it was vain and hopeless to proceed further. If they had made the attempt, they must have called in credible witnesses to attest the execution; and who would have been **[462]** satisfied, for such an act, of the deceased's volition and capacity?

But, above all, what is the legal inference from the deceased's own conduct? When he was thus much recovered from his state on the 28th—if he had a sufficiency of mind and memory left, and had really wished this great alteration of his will—he himself must have been aware that something more was to be done in order to give effect to his wishes. His very silence, therefore, raises the legal presumption that he had abandoned the instrument, and given up the intention of altering his will: his recovery afforded him, if he had desired it, an opportunity of completing the codicil; the act of God did not prevent him.

But the Court is not left upon this point to mere inference, arising from the deceased's silence and omission; for, as far as he had memory and capacity, the subject is expressly brought to his recollection. Dr. Macmichael thus answers to the 32d interrogatory: "I have no doubt the deceased was on the 5th of March as capable of making his will as at any time I had seen him, for his brain was more relieved; but, as a matter of prudence, I should have advised the postponement of any matter of business with him so soon after he had been threatened. I did on one, possibly on this identical, day, finding him so much better, say to him, 'Now, have you anything to say to me on the subject of your will, or anything in confidence as to your affairs?' or to that effect; and he answered me, 'No.'" Here, then, the deceased was expressly reminded of his will—was asked if he had anything to say on the subject of his affairs, and he answered, "No:" and this could not be from any unwillingness on his part to communi-**[463]**-cate with Dr. Macmichael, for he had informed him of Roberts' removal from the executorship. Dr. Macmichael further says: "He did not, on that day, make any inquiry after Mr. Binns that I recollect, nor any inquiry of me on the subject of his codicil." Coupling this with the other circumstances, and with the legal presumptions arising upon the case, it to me seems impossible to consider the instrument propounded as valid without violating all the principles of a Court of Probate.

The case being of some importance, the Court might have felt disposed, for the satisfaction of the parties, to have recapitulated rather in detail the grounds of its decision, had it not already gone pretty fully into the material parts of the evidence. It is not necessary to advert to Binns' conversation with Mr. Prothero in the Vice-Chancellor's Court, nor to declarations that the instructions for a codicil were signed, which, if I could rely upon, would disprove the identity of the instrument propounded; but the Court never relies much on evidence of mere conversations and declarations; nor shall I examine the fact of taking probate of the will, without this codicil, on the day of the deceased's death, without the knowledge of Mr. Roberts, which looks like what is termed snatching a probate; nor shall I enquire into the propriety of the oath of the widow on that occasion, as one of the surviving executors of the will—"power being reserved to Wightwick Roberts, the other executor;" though it is difficult to give any satisfactory explanation of this conduct of the widow, if there were a codicil revoking the appointment of Roberts and substituting Binns: but, without adverting further to these facts, I shall content myself with **[464]** again referring to the principles of law applicable to the decision of the Court: first, the strong presumption of law is always adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform acts of disposition: and it is

difficult to conceive a case in which that presumption would exist with more force than in the present, looking to the former wills, to the condition of the deceased, to the parties in whose favour the codicil was to be made being, at the time, about the deceased, and to the absence of other parties to whose prejudice these alterations were to operate. In such a case the fullest proof of capacity, equal not merely to some testamentary act, but to this important revocation of former dispositions and to a new direction given to a large proportion of his property, should be clearly established: and in this instance the condition of the deceased, the possession of him by the parties to be benefited, and the false impressions made upon his mind, have also a strong appearance of fraudulent circumvention, requiring the case to be proved by the most satisfactory evidence: and, lastly, when the instrument propounded is so imperfect, and in which there has been so little progress, even if it were proved that it contained at that time the mind and intention of the deceased, still it must be shewn that such intention was final, that it continued, and that he was prevented from the completion of it only by the interruption of death. In all these respects, in my judgment, the proof fails; and it is my duty to pronounce against the paper propounded as a codicil to the will.

Codicil pronounced against.

[465] CONSTABLE AND BAILEY *v.* TUFNELL AND MASON. Prerogative Court, Mich. Term, Caveat-Day, 1833.—A will need not originate with a testator, nor need proof be given of the commencement of such a transaction, provided it be proved that a testator completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition.—A will—opposed on the ground of alleged incapacity, fraud, and conspiracy, and revoking a former will and codicils (which gave the residue between a sister by the half-blood and a stranger in blood), made shortly before, but under circumstances not rendering a departure improbable—pronounced for with costs; though the instructions for such latter will were not proved to have originated with the deceased; though two (out of three) of the attesting witnesses were sons of the respective executors—considerably benefited by the will, and one of which, and three other principal, witnesses were children of a niece by the whole blood—the wife of one of the executors—which niece and a sister were also largely benefited, and were immediately about the deceased—the credit of the witnesses not being shaken, and the will being sufficiently proved to have been adopted by the deceased, a free and capable testator.

James Robinson, farmer, died a bachelor, aged 76, at his house at Wormingford, Essex, on the 14th of September, 1832. On Sunday, the 27th of May, 1832, he duly executed a will, by which he appointed the Rev. George Tufnell, vicar of Wormingford, and Mr. Abram Constable, executors and residuary legatees. By a codicil executed on the same day as the will the testator, after reciting that Mr. Constable declined to act as executor, revoked his appointment and bequest, gave him a legacy of 500l., free of duty, and appointed William Mason, Esq., co-executor and residuary legatee with Mr. Tufnell. Mrs. Mason was afterwards substituted for her husband as co-residuary legatee. On the 7th of June the testator executed a second, and on the 23d of June a third, codicil—each attested by two witnesses.

The question was whether the above will and codicils were not revoked by a will executed, with all requisite formalities, on the 27th of August, 1832, and propounded on behalf of Mr. Abram Constable and the Rev. Rishton Robinson Bailey, the executors. This (last) will was opposed, on the ground that it was unduly obtained from the testator at a period when he was of unsound mind.

The King's advocate and Phillimore for Messrs. Constable and Bailey.

Lushington and Addams for Messrs. Tufnell and Mason.

[468] *Judgment—Sir John Nicholl.* Mr. James Robinson died on the 14th of September, 1832, at the age of 76, a bachelor, leaving three sisters of the half-blood his only next of kin, one nephew and three nieces by a deceased sister of the whole blood, entitled upon an intestacy in distribution: his property, at his death, consisted of a freehold estate valued at about 3000l., and of a personalty of 10,000l. and upwards; but the exact amount is not material to the decision of this question. A will, dated the 27th of August, 1832, has been propounded in this cause by Mr. Constable and the Rev. R. Robinson Bailey as the executors, and opposed by the Rev.

George Tufnell and William Mason, Esq., the executors under a former will, dated the 27th of May, 1832, with three codicils annexed; one dated the 27th of May—the same day as the will: another, the 7th of June; and the third, the 23d of June: and it is proper that I should consider the contents of these different testamentary instruments.

[The Court here compared them. See Comparative Abstract of the Testamentary Papers.]

The real issue of the case, as was truly stated by counsel, is whether the will of the 27th of August is proved to be the act of a capable testator. It has been propounded in what is called a common condidit, which in the usual form merely pleads the preparation and execution of the instrument and the capacity of the testator. On the condidit the attesting witnesses have been examined, and the first object to which the Court must direct its attention is their evidence. Two of these witnesses are sons of the parties, and being on that account liable to the suspicion of **[469]** bias, are to be heard with caution: but still they are competent; and unless their evidence in the cause be falsified, or bear with it marks of insincerity, they are credible witnesses. The third attesting witness, the solicitor who prepared the will, is a disinterested person deserving of full credit, unless, as I just observed with respect to the other two witnesses, there be something in the cause tending to falsify and discredit his evidence. Of these three witnesses the first, in point of date, who takes up the history of the transaction, is Mr. William Bailey, son of the executor: he is a great-nephew of the deceased, but has no immediate and direct interest in his effects: he describes himself, at the commencement of his deposition, as of Trinity College, Cambridge, and of the age of 22: and I proceed to state his evidence fully:—

"On or about the 18th of August last, 1832, I, then staying at my father's house at Wormingford, was in the early part of the day desired by my father to make a transcript of a paper which he handed to me: such paper was in my father's handwriting, and contained instructions for a will of the deceased. I made a copy of it, and at the desire of my father and mother I took the copy to the deceased, who resided at two miles' distance or thereabouts from my father's house. I reached the deceased's house at about the middle of the same day, probably at between the hours of one and two: I found the deceased sitting in his parlour, and my mother and Mr. Abram Constable in conversation with him. I, on recollection, cannot be certain whether it was on the same day that I copied the said paper that I carried it to the deceased; it may have been a day or two after I **[470]** had so copied it. When I so entered the room the deceased was conversing on the subject of his then last will (that is, the will of May), and I joined in the conversation; I asked the deceased whether it was not a pity to sell his farm, meaning the estate on which he was then residing (viz. at Wormingford): I asked that question, knowing that in his then last will such estate was directed to be disposed of: the deceased replied, 'I never wished that it should be sold, but we must sell it, to divide the money alike.' I then said that that might be done without selling the farm, for that if it was left to Judith Rolfe's four children, they might agree among themselves how it should be divided: the deceased in further answer said, 'Let it be so.' I then reminded the deceased that 'by Mr. Tufnell's will' he had left 1000l. to the school which Mr. Tufnell had established in the deceased's parish, and suggested that he had better in lieu thereof leave the sum of 500l. for the benefit of the poor. The deceased replied, 'I should wish it to be so, but how can it be done? there is nothing handy.' My mother then said, 'There is William who has got a paper of instructions which he will read to you.' The deceased replied, 'Let us hear it.' I then produced the paper which I had copied as already mentioned, and read it to the deceased; and having done so, I pointed out to him that the only alterations which such instructions contained, as from the disposition made by his last will, were in regard to the sale of his estate, and the substitution of a legacy of 500l. to the poor instead of 1000l. to Mr. Tufnell's school, and of 20l. to Mr. Tufnell's clerk, instead of the sum of 200l. I asked the deceased whether he wished these alterations to **[471]** be made in his will: the deceased answered 'Yes.' I then asked the deceased who he wished to have for his executors: he said that he had all his life wished Mr. Constable to be his executor; and Mr. Constable observed that he was willing to act as an executor with Mr. Bailey, but not with Mr. Tufnell; upon which the deceased begged Mr. Constable to see to

WILL (a draft will), dated 27th May, 1832.	WILL (propounded), dated 27th August, 1832.	WILL, prepared on 8th or 9th of August, 1832, but not executed.
EXECUTORS AND UNIVERSAL LEGATEES, IN TRUST, REV. GEORGE TUFNELL, and *Mr. ABRAM CONSTABLE.*(*a*)	EXECUTORS AND RESIDUARY LEGATEES, IN TRUST, REV. R. R. BAILEY, ABRAM CONSTABLE.	EXECUTORS, R. R. BAILEY, JAMES DANIELL.
Testator directs his real estate at Wormingford, with the tithes, &c., and all his personal estate, to be converted into money. Also that his executors, in compliance with Deed executed by him on 9th Feb. 1832, should invest a sum sufficient to produce £35 per annum for charitable uses; and a further sum sufficient to produce the following Annuities, viz.	Executors to convert into money his personal Estate, and to pay Legacies at the end of 12 *months* after his decease.(*b*) To invest £500 in their names, and apply interest *to use of the deserving Poor of Wormingford,*(*c*) as the trustees for the time being and Vicar of Wormingford shall think fit:— To invest a sum sufficient to produce £50 per annum, and thereout to pay, during the lives of Annuitants—	Same. Executors to invest £300 in the names of R. R. Bailey and A. Constable, in trust to apply dividends for use of the deserving Poor of Wormingford, at the discretion of Trustees.
Abi Elliott, his late housekeeper . . . £25 Mary Hayward (servant) . . . . 20 Mrs. Crabbe 10	A. Elliott . . . . . £20 M. Hayward . . . . . 20 M. Crabbe 10	A. Elliott . . . . . £40 M. Howard . . . . per annum 12
As the Annuitants die, the portions of the principal to revert to his personal estate.		
Wm. Rolfe, M.D. (nephew) . . . . £1000 Mrs. Bailey, Anne Rolfe, Mrs. Chase (nieces) . . . . 1000 each	Wm. Rolfe . . also, all his freehold estates at Wormingford, as tenants in common, and residue as below. £1000 Mrs. Bailey . . 1000 Anne Rolfe . . 1000 Mrs. Chase . . 1000 Abram Constable (*d*) 500	W. Rolfe . His freehold house at Wormingford, occupied by Scott. Anne Rolfe, Mrs. Chase . His freehold estate at Wormingford, in his own occupation, as tenants in common. A. Constable £50
Child of W. Rolfe . . . . . 300 (If more than one, £400 among them.) Children of Mrs. Bailey . . . . 400 of Mrs. Chase 400		
Mrs. George Nottidge, *Mrs. Wm. Mason*, Mrs. George Sadler (sisters) . . . . 800 each	Mrs. Nottidge, Mrs. Mason, Mrs. Sadler (sisters) . . . . 1000 each	Mrs. Nottidge . . . . . 100 Mrs. Mason . . . . . 100 Mrs. Sadler 100

[467]

Three Sisters' Children { £200, 200, 200 } . . . 600

Legacies to be paid within 12 months after his death.

Legacies and Annuities *to be free from Legacy Duty;* the legacies to his Sisters, Nephew and Nieces, in case of death, to vest in the Children of each.

Rev. W. Tufnell (*part of debt of* £1700). . £700 he to account for remainder.

John Sidey Constable £500

Both last legacies to be paid within 12 months, free from legacy duty.

RESIDUE.

Rev. George Tufnell and *Abram Constable*—they accounting for what they owe deceased.

If any Legatee contests will, his legacy to be void, and to go into residue.

(*a*) The italics denote a revocation by codicil.

J. S. Constable 100

Spellen Grimwood 20

RESIDUE.

Harriett Bailey.
Abram Constable.
Anne Rolfe.
Mrs. Chase.
Wm. Rolfe, M.D.

(*b*) In the instructions, and in the will at first—6 *months.*
(*c*) In the instructions—"*charitable purposes.*"
(*d*) "My friend the said Abram Constable" was interlined.

Grimwood 20
John Brown 5

RESIDUE.

Anne Rolfe.
Mrs. Chase.
Wm. Rolfe, M.D.

1st Codicil, 27th May, 1832.

In consequence of Abram Constable declining to act as executor, his appointment as such and share in residue revoked; and gives him, free from duty £500

Appoints executor and residuary legatee with George Tufnell, William Mason, he forfeiting his right to the legacy of £800, and *to share only in residue.*

2d Codicil, 7th June, 1832.

All the legacies to be subject to, but the Annuities to remain free from, duty.

To Spellen Grimwood (servant)—to be applied at the discretion of the executors . . . £200

Revokes legacy of £700 to W. Tufnell.

Revokes appointment of W. Mason as residuary legatee.

Gives residue to said G. Tufnell, as in Will, and Anne Mason, wife of said W. Mason.

Revokes legacy to Mrs. Mason, of £800, by Will.

Continues W. Mason as executor.

3d Codicil, 23d June, 1832.

Revokes legacy of £500 to J. S. Constable, in consideration of money he has received, and in lieu gives him £100

the ordering of it, meaning that it was his wish that Mr. Constable should cause a will to be drawn up conformable to such instructions. I then delivered the said paper, which I had read over to the deceased, to him, saying, I will leave the paper with you, sir, for a few days, that you may think of it: the deceased replied, 'Aye, I like to have a few hours to turn a thing over in my mind.' Mr. Constable got up to take his leave of the deceased, who said to him, 'Are you going, when will you come again, and finish what we have begun?' Mr. Constable said that he would see him again in a few days. I, upon this, observed to the deceased that there was plenty of time yet. Mr. Constable then came away, and I accompanied him, leaving my mother with the deceased.

"On the following day I again went over to the deceased's house and found him in his parlour, and my mother sitting with him: I asked the deceased whether he had thought of the alterations which we had talked over on the preceding day: the deceased said in answer that he considered them (the alterations) to be very fair, and the sooner they were done the better."

This is a pretty direct approval of the instructions, which appear to have been perfectly understood, and a clear expression of his anxiety to have them completed.

[472] "I told him there was plenty of time, and that my father and Mr. Constable were both out of the way and would not be back for several days. I well recollect that on that occasion the paper of instructions copied by me as aforesaid was produced, and I believe that my mother took it out of the deceased's bureau, which was in the room in which he was sitting. I do not recollect that the paper was more immediately referred to than by my offering to read it to him again, which I did not do, because he said, 'I heard it yesterday.'"

Therefore, provided this account be true, the deceased had a recollection of what had passed on the day before. "On Sunday, the 26th of August last, my aunt, Miss Rolfe, told me that her uncle, the deceased, wished to execute his will on the next day, and desired me to go over to him on the following morning to fetch the paper of instructions which had been left with him, and then carry the same to Mr. Daniell, a solicitor in Head-street, Colchester [about six miles from Wormingford], and I undertook to do so. In the morning of the 27th of August I went over to the deceased's house, arriving there at about ten o'clock: I did not see the deceased; he was still in bed."

The witness (after stating that he carried the instructions to Colchester to Mr. Daniell, who drew out the will, and that they returned together to Wormingford, reaching the deceased's house at about three) thus goes on: "We found Mr. Constable standing outside the deceased's house, with his son John. Mr. Daniell then, accompanied by myself, my brother Rishton, Mr. Constable, and his son, went into a room on the ground floor, divided by a passage from that in which the deceased was sitting. Daniell then read the will, which he had so prepared, to Mr. Con-**[473]**-stable, and while he was in the act of reading, my aunt, Miss Rolfe, came into the room, and told Daniell that Constable was not satisfied, on account of his not having an equal share in the farm with the children of Judith Rolfe. Mr. Daniell said that there could be nothing done on that subject unless Mr. Bailey (my father) was there, and the deceased agreed to it. Miss Rolfe replied, that as Mr. Bailey had no interest in the will, it could make no difference whether he was there or not. Mr. Daniell said that he could have no objection to insert the name of Mr. Constable as a party to be entitled to a share of the estate (the deceased's farm), provided the other parties agreed, and the deceased sanctioned it; and Mr. Daniell begged my aunt to consult the deceased on the subject. Miss Rolfe left the room, and went, as I believe, to the deceased, and in a few minutes after she returned, telling Mr. Daniell that the deceased had given his full concurrence to the insertion of the name of Mr. Constable as a joint devisee of his real property, and Mr. Daniell thereupon made an alteration in the will to that effect. Miss Rolfe again came into the room, and said that the deceased was ready, and Mr. Daniell, myself, Mr. Constable, his son, and Miss Rolfe went into the deceased's room, where he was sitting. I forget whether my mother was there with him; if she was with him she left the room upon our entering it. My mother was at the deceased's house at the time. Upon entering the room I asked the deceased how he was; he answered, 'Very sadly,' and complained that his hands were very much swelled. I said, 'Why, uncle, you have not got your spectacles on, you can't sign your will without.' The deceased answered, 'No, I

can do [474] nothing without them.' Miss Rolfe then got the deceased's spectacles. I introduced Mr. Daniell to the deceased, saying, 'Here is Mr. Daniell, of Colchester, come to see the will signed.' The deceased, who was not previously acquainted with Mr. Daniell, said to him, 'How do you do, sir?' Mr. Daniell made some observation to the deceased about having met him some ten years ago; and he introduced the business he had come about by telling the deceased that he would read the will to him. Mr. Daniell then commenced reading the will, and read it through. The deceased stopped him once or twice in the course of the reading, particularly at hearing the legacy of 1000l. to Mrs. Nottidge read, saying, 'How is that?'"

It is not surprising that the deceased should stop Mr. Daniell at this point, because there is a difference in the legacy to Mrs. Nottidge between the will of May and the will then being read. In the will of May Mrs. Nottidge has a legacy of 800l. only, and her children 200l.; substantially therefore the benefit may be considered as the same under both wills, but the sum of 1000l. to Mrs. Nottidge probably at the time struck the deceased's ear, and induced him to say, "How is that?" "Mr. Daniell again read over such legacy, which the deceased then approved of, I saying that such legacy was of the same amount in Mr. Tufnell's will, meaning the will which the deceased had then last executed. I also recollect that when Mr. Daniell had read over the annuities, the deceased stopped him, asking whether they 'did not amount to too much?' to which Mr. Daniell replied that the same made together just 50l. a year." That is, 20l. a year to Mrs. Elliott, 20l. a year to Hayward, and 10l. to Mrs. Crabbe [475]—the same bequests as in the will of May, except that Elliott, under that will, has an annuity of 25l.

"With this explanation (of Mr. Daniell) the deceased was satisfied. When the will had been read, the deceased said, 'It appears very fair for all parties.' Mr. Daniell then pointed out to the deceased the place where he was to sign his name on the will, the deceased saying that he hardly knew whether he should be able to do it on account of his hands being so swelled. Miss Rolfe handed a pen to the deceased, and he then, in the presence of Mr. Daniell, Mr. John Constable, and myself, signed his name to the will which had been so read to him, Miss Rolfe and Mr. Abram Constable being the only other persons present. It was at the suggestion of Mr. Daniell that I and Mr. John Constable attended the execution of the said will. The deceased, by the direction of Mr. Daniell, put his finger on the seal attached to the will, and according to a form of words, which Mr. Daniell dictated, he declared the paper so signed by him to be his last will. When this had been done, I and Mr. John Constable and Mr. Daniell signed our names as witnesses to the execution of the said will, in the presence of the deceased and of each other, and also set our initials against the alteration made in respect of the insertion of the name of Mr. Constable, and also to another alteration which had been made previous to our going into the deceased's room, substituting the time of twelve months instead of six months for the payment of legacies. When the execution of the will was completed, Mr. Daniell said to the deceased, 'I hope, sir, that you are better now?' the deceased answered, 'Yes, sir, I feel better here,' at the same time laying his hand upon his heart. [476] Mr. Daniell also asked the deceased who he wished to take charge of the will, for that it might be done in three ways; that sometimes the executors, and sometimes the lawyer, took it, and sometimes the testator kept it himself. The deceased in reply said that Mr. Constable was as proper as any one to take it, and the deceased then himself handed the will to Abram Constable, and asked him if he was satisfied, adding, 'Now is the time to speak.' Mr. Constable answered, 'Nothing can be fairer.' They then retired into the room which we had occupied previous to attending the execution of the will, leaving me alone with the deceased." The witness then deposes that, on each of the occasions of his having with the deceased the communications already set forth, "the deceased was of sound, perfect, and disposing mind, memory, and understanding; and in every respect a capable testator."

It is manifest that this account does not furnish the origin of the testamentary instructions, for something may have passed, or be inferred to have passed, between the Rev. Mr. Bailey and the deceased before the paper which the witness was thus desired by his father to transcribe was written; but of any conversation or preparatory communication, in respect to such instructions, there is no direct evidence, as the executor—the person with whom it passed—cannot be examined. It is also obvious

that the deceased, Mrs. Bailey, and Mr. Abram Constable were, on, and before, the entrance of Mr. William Bailey, the witness, in conversation together about a will, and the disposition of particular parts of the property; but the Court is not otherwise acquainted with the nature of their conversation, so that it has neither **[477]** the origin of the instructions nor the beginning of this conversation in evidence: but neither are absolutely necessary, provided what is proved be sufficient to shew that the testator was capable, and that his mind and testamentary disposition went with the transaction in the manner related. It is no part of the testamentary law of this country that the making a will must originate with a testator, nor is it required that proof should be given of the commencement of such a transaction, provided, I repeat, it be proved that the deceased completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition.

Now if the account here given by this witness be quite correct and true—if every thing passed in the way he has deposed, the case admits of but little doubt: he, however, is only one witness, and necessarily open to the suspicion of bias; and the persons about the deceased were all interested; Mrs. Bailey, the mother of the witness, who was a niece of the deceased, is a legatee, and one of the residuary legatees under this will; and Mr. Constable, one of the executors, has a legacy, and is also a joint residuary legatee; these were persons, therefore, interested in obtaining this will.

The next witness is Mr. John Constable, the son of the other executor, and he is, therefore, exposed to the same imputation of bias as the witness whose evidence I have read. He describes himself as a young farmer, twenty-five years of age; he knows nothing of the origin of this transaction—it was by mere accident that he became an attesting witness, and was only present at the execution: but his account of what passed at the execution is to the same effect as Mr. William **[478]** Bailey's, and so far he confirms and corroborates the testimony of that witness. The remaining attesting witness is Mr. Edward Daniell, a witness of more importance; he is the solicitor who prepared the will, attended the execution, and attested it: he is not exposed, like the other two attesting witnesses, to an imputation of bias from personal favour, but, a priori, stands above all exception before the Court. He confirms Mr. W. Bailey's account as to the instructions for the will being brought to him at Colchester—the preparation of the instrument—and their return together to Wormingford: he also gives a similar account to that witness of what occurred upon their arrival at the deceased's house. Mr. Edward Daniell then proceeds in his evidence as follows:—

"We were, on arriving, shewn into a small room on the right hand of the entrance passage, being a room opposite to that in which I afterwards found the deceased. Miss Rolfe (till then unknown to me) came in, as also did Mr. Abram Constable, with whom I was acquainted. The two Baileys were in and out of the room. There then arose some conversation in respect of the contents of the will which I had brought with me. I quite forget how precisely that conversation commenced, but Mr. Constable inquired of me in what manner the deceased's real estate was disposed of, saying, 'Mr. Robinson always said that I should take an equal part with the rest.' I am not quite sure whether I read over the will to him and Miss Rolfe, but I at any rate fully explained to them the manner in which the estate was devised, upon which Mr. Constable said that 'he would have nothing to do with the business, unless Mr. Robinson did as he promised to do:' or he expressed **[479]** himself to that effect.(*a*)

(*a*) Annexed to Mr. Tufnell's and Mr. Mason's allegation was this letter addressed to the deceased:—

Dedham, May 29, 1832.

Dear Sir,—I have seen Mr. Mason this morning, and I find his name is put instead of mine as executor, and, as I said, I think a very proper person. I find Mr. G. Tufnell has made a codicil to the will he made for you (wherein you are pleased to give me £500).

Now, I wish Mr. Tufnell to dispose of my legacy in any way he thinks proper, for he said as much at Mason's office that my brother Sidey might thank him for his legacy, and I am very sure he will say the same by me; therefore I will not accept it through his hands. I can't say but I feel mortified and hurt very much, as you always gave me reason to think you would make me equal with the rest, and have told me as much

Upon this Miss Rolfe said, 'Then I'll take the will to Mr. Robinson, and talk to him about it;' and she left the room carrying the will with her. In five or six minutes Miss Rolfe returned with the will, saying that Mr. Robinson was agreeable that Mr. Constable should share the real estate with the rest, and I then interlined the name of Mr. Abram Constable as one of the devisees in the said will."

Here was nothing unnatural in this, as bearing on the validity of the will. Whether Mr. Constable acted with delicacy and disinterestedness—whether his conduct was wise or weak—whether he was actuated by self-interest in any part of the business—is not a point upon which it is necessary for the Court to come to any decision: the validity of the will does not depend upon his conduct in this respect: he was a very old friend and near relation—a first cousin by the whole blood—and much in the **[480]** confidence and kindness of the deceased; and the acquiescence and consent of the deceased to the introduction of Mr. Constable's name into the devise of the freehold comes through hands not liable to suspicion: for Miss Rolfe was acting in this matter in opposition to her own interest; for she would take only one-fifth, instead of one-fourth, of the real estate, and the very circumstance of previously consulting the deceased shews that he was considered and treated as a capable person.

The will being thus in readiness for execution, the persons assembled (Mr. Daniell, Abram Constable and his son, Miss Rolfe, and the two young Baileys) went into the deceased's room. It appears from another part of the evidence that the deceased was impatient for the execution, and this was natural enough if he had made the appointment for it, and expected it. It was also natural that having been kept waiting should, in his state of bodily weakness, increase his impatience. Two other witnesses, quite unbiassed, had, it is stated, been sent for to attest the execution; these were Mr. Symmons, a medical gentleman, and Scott, a smith residing in the neighbourhood and well acquainted with the deceased; but as they did not arrive, these two young men—Mr. William Bailey and John Constable—were desired to attest the execution. When Mr. Daniell and the other persons entered the room they found the deceased—not in bed, but sitting up in his chair—labouring under dropsy and gout, with his hand very much swelled; so that his bodily powers were weakened: his disorder, however, was not of that sort, nor in such a part, as would affect his intellects.

But to proceed with Mr. Daniell's evidence; he thus deposes to the execution: "On enter-**[481]**-ing the deceased's room I addressed him saying, 'How do ye do, sir?' his answer was, 'Oh, sadly, sir.' I then said, 'I have brought the will over.' I do not remember that he, by word, gave any reply, but he assented by bowing his head. The deceased enquired, 'Is Mr. Mason come?' or 'Is Mr. Mason coming?' Miss Rolfe in answer said, 'No sir, we sent for Mr. Daniell;' and it was suggested to the deceased, I believe by Miss Rolfe, that it was more proper that I, being a stranger, should be employed, than Mr. Mason, or to that effect, to which the deceased assented, but in the midst of the conversation which took place between Miss Rolfe and Mr. Constable I did not distinctly hear what the deceased said. I then said to the deceased, 'I will read the will over to you, if you please.' A chair was placed for me close to the deceased, and having therein seated myself, I commenced reading the will audibly and slowly, asking him after I had proceeded a little way whether he heard me, to which he replied that he did. I do not recollect that the deceased made any observation until I came to the bequest for the benefit of the poor of the parish of Wormingford, when hearing its amount he said, 'That will be giving too much, won't it?' I fancied at the moment that he might have misunderstood me, and I explained the amount and nature of the bequest; that is to say, I clearly pointed out to him that the interest only and not the amount of the capital sum was yearly to be applied: with this explanation he was satisfied, as if agreeable to his intention, but he did not say that he had misunderstood me. I then proceeded in and completed the reading of the will in the same slow and audible **[482]** manner, and having so done, I said to the deceased, 'Is it right, sir?' or something to that effect: the deceased, who spoke but little, and then in a low tone, assented, I believe, more by a motion of the head than by any words; but I was quite satisfied that he had understood and did approve of what had been read to him."

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a hundred times; but I know the will [of 27th May] is not of your own making, therefore I am obliged for your good intentions toward me, and I sincerely hope, when you leave this troublesome world, you may go to one where you may be for ever happy. (Signed) ABRAM CONSTABLE.

"We then made preparations for the execution of the will. I said, 'Now, sir, you will be so good as to sign:' and observing that the table was rather low, I proposed that a book should be laid on it for him to sign upon. A book being procured, I laid it on the table, and on the book disposed the will conveniently for his signature. By this time the deceased, apparently through weakness of body or fatigue, appeared indisposed to take up the pen, which was placed with the ink ready for him, saying, 'My neck aches so; I'll do it presently.' Miss Rolfe said to him, 'Take a glass of wine, sir; you'll be better presently.' A glass of sherry was brought to him and he drank it, and in a few minutes became better and desirous of signing, but he then discovered that he wanted his spectacles. Miss Rolfe handed him his spectacles, and the deceased of his own accord (I placing his arm and hand, the latter being very much swelled, in a convenient position) signed his name at the foot of the said will, I telling him so to do opposite the seal. I then placed a seal appended to my watch upon the wax impression already affixed to the will, and desired the deceased to take the seal off, which he did; he then, at my desire, took hold of the will, and while he held it I said to him, 'You sign, seal, publish, and declare this to be and contain your last will and testament. You have heard it read, you ap-**[483]**-prove its contents, and you desire me, Mr. Constable, junior, and Mr. Bailey, junior, to be witnesses?' to which the deceased signified his assent, either saying 'Yes,' in a low tone, or by bowing his head. We, the subscribing witnesses (myself, W. Bailey, and John Constable), in the presence of the deceased and of each other, then attested the execution of the will by signing our names."

"The will being now complete, I, in consequence of not having received my instructions for it from the deceased himself, yet not at all doubting the entire competency of the deceased, thought it necessary to proceed beyond the usual caution observed by me in ordinary cases; and at the risk of being considered too particular by the relatives of the deceased, who were around him (that idea suggesting itself at the time), I accordingly said to the deceased, 'Now, Mr. Robinson, you perfectly understand what you have been doing? You have given your real property to so and so' (naming the several devisees as they were named in the will), 'you have also given your personal property to so and so' (naming the persons legatees in the will), 'and you have appointed Mr. Bailey and Mr. Constable your executors; does this perfectly correspond with your meaning?' The deceased replied, rather addressing those about him than myself, 'Are you all satisfied? because if any alteration is to be made, now is the time.'" [This is the testator's own observation and answer to Mr. Daniell's inquiry.] "Mr. Abram Constable said, 'Yes, sir, we are all satisfied, it is quite right, sir;' and Miss Rolfe also expressed herself to the same effect. I then folded the will up, and said to the deceased, 'Who do you wish to have the custody of this **[484]** will?' He asked, 'What was usual?' I said, 'Sometimes the testator keeps it, sometimes the executor takes it, and sometimes it is left with the solicitor; now you can do as you please.' The deceased in reply said, 'I wish Mr. Constable to have it, if you think he is a proper person;' my answer was, 'No one more so, either as a man of business or a gentleman.' The deceased, to the best of my recollection, himself then handed the will so executed to Mr. Abram Constable. I recollect that it was said by some one, 'I hope, sir, you feel better now?' The deceased answered, 'I am better already, I'm better here,' at the same time placing his hand on his breast. In a few minutes after this I went out of the room."

This witness also speaks to the perfect capacity of the deceased.(*a*)

(*a*) He further deposed that (after the execution) Mr. Symmons came and asked deceased "how he did." "Sadly, sir;" that Symmons went on saying—"They tell me you have been making your will:" but that witness did not hear deceased's answer; and quitted the room. Mr. Symmons (a surgeon, aged 33) deposed: "I never was in Mr. Robinson's company but twice in my life; once was on the 27th of August last; I went to his house in consequence of a message delivered at my house, desiring me to go to his house immediately; I was not aware of the purpose for which I was wanted; I was not told I was too late for any purpose: Mr. Constable, whom I had known for some years, informed me upon my arrival that Mr. Robinson had just executed his will, and that I might as well step in and see him, to speak to the state he was in; I said I could have no objection to see Mr. Robinson, and went into the room in which he was, and entered into conversation (though a very short one)

[485] This is the substance of the evidence given by the attesting witnesses upon the condidit; and though there may exist between this last witness and Mr. William Bailey some difference in their respective statements, as will generally, if not always, be the case with honest witnesses, yet they concur in the most material points. If this evidence upon the condidit be delivered, there is an end of the case.

Whether the will originated with the deceased, or was suggested to him, yet if he (possessed of testamentary capacity to understand and comprehend) adopted and approved of it, and was resolved and decided so to dispose of his property, the will must be pronounced for: for it is not necessary, as I have before observed, that the Court should have before it the very origin of the whole transaction; nor that it should be satisfied that the will originated with the deceased himself; it may have been suggested by the persons around him: but if importunity is to vitiate the instrument, the importunity must be proved; and proved to be of such a nature and degree that the deceased was unable to resist it—that his free-will and free-agency were destroyed, and that he acquiesced only for peace: but the mere circumstance of his being, at the time of the preparation and execution of the will, surrounded by interested persons, provided, I again repeat, that the deceased himself were competent, and that he gave his sanction to the instrument pro-[486]-posed to him, will not make such instrument null and void: now here the evidence, if it be not utterly discredited, proves intention, execution, and capacity.

The case set up in opposition to this will, both in plea and in argument, takes pretty much the view of the subject that I have pointed out: for it is attempted to be maintained that the whole is fraud, imposition, conspiracy, and perjury. Who then are the conspirators? Mr. and Mrs. Bailey, their two sons and two daughters (who have been examined in the cause)—Miss Rolfe—Mr. Constable and his son—and the solicitor, Mr. Daniell, for he must also be included. Here then are ten persons—a pretty numerous body—combining as actors in this conspiracy.

When fraud, conspiracy, and perjury are imputed, the imputation must be supported by strong facts and clear evidence; it is not to be maintained upon slight variations between the witnesses as to times, and dates, and trivial circumstances, nor upon conflicting opinions as to capacity. No case occurs in which such variations may not be picked out, and such differences of opinion extracted. It does not, therefore, seem a matter of duty cast upon the Court to discuss minutely all the different parts of the evidence in this cause: the grounds of opposition have been very strenuously and elaborately argued; and whatever impressions those arguments were calculated to make upon the mind of the Court as to particular points, they were for the most part answered and removed by a very able reply. But referring again to the main ground—the evidence upon the condidit—on which the will of the 27th of August rests, I cannot find any thing that materially, or [487] at all, shakes the force of that evidence. It will then be sufficient for me to notice very briefly the general outline of the grounds of opposition.

The making of the will of the 27th of May, followed up by two codicils in June, was mainly relied upon, as rendering it highly improbable that a different disposition would so soon afterwards be adopted. Upon that will—the disposition of the property that it contains—the mode of its preparation and execution, I shall forbear to observe further than that it was not made under circumstances which rendered a departure from it extremely improbable. It was the deceased's first testamentary act; it was not preceded by a series of former wills to the same tenor and effect, and establishing any very fixed character in respect to the disposition of his property; it has many of the same marks of infirmity which are imputed to the latter will; and it is not satisfactorily proved that the will itself had its origin with the deceased, nor that the disposition it contained proceeded entirely from him; this, I think, is not even pre-

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with him; I do not think I was with him ten minutes altogether; my questions to him were common-place, and his answers were correct to them, but there was nothing to try the strength of his mind; my questions regarded his health, his ability to walk out, and the weather; and he answered me those questions correctly; I said to him that I understood that he had just executed his will, and he answered me, as I thought, rather sharply, as if he thought my observation rather impertinent, 'Yes, sir; have you any objection?' I did not consider his manner joking; I have no opinion at all to give as to the state of his mind; I had not the means of judging."

tended. Mr. Mason (the husband of a half-sister of the deceased), the drawer of that will, had no communication himself upon it with the deceased; he received his instructions from Mr. Tufnell—a party interested, and one of the executors and residuary legatees; he was not at the execution, and never saw the deceased on the business. The will is executed at rather a strange time (on a Sunday evening), through the intervention and in the presence of the same executor. A considerable benefit is given to this executor—(a total stranger in blood, though, being the incumbent of Wormingford, the deceased was acquainted with him)—and also to his brother, who was rather a [488] large bond debtor to the deceased. Such a disposition of property—so made—does not appear to me, without entering into any further observations upon the instrument itself, or upon its preparation and execution, to carry a strong inference that this will of May would not, under an alteration of circumstances, be departed from.

The next ground set up is that the deceased's capacity had wholly changed; that in the latter part of July he became incapable, or at least much worse in mental as well as bodily health; and that while in that debilitated state his niece, Mrs. Bailey, and her family, and also Miss Rolfe—another niece—obtruded themselves into the deceased's house—took up their residence in it—obtained the possession—almost the custody of the deceased, and by undue influence and false suggestions procured this new will—containing, however, a disposition not very widely different from the will of May, except in respect to the residue and the executorship.

Upon the question of general capacity, as very frequently happens—perhaps in every case—there are conflicting opinions; and in such opinions each set of witnesses are apt to go a little beyond the exact and correct state and condition of the party; the opinions on one side making the capacity too good, and on the other side too bad. But the opinion of Spellen Grimwood and Mary Hayward (two of the deceased's servants), and other such witnesses, cannot have any great effect, because their opinion is opposed to the facts and circumstances proved in the cause. Conversations, acts of business, attendance upon private family worship—in all of which the deceased engaged—are established, and yet both Grimwood and Mary Hayward venture to depose to his incapacity, and [489] particularly that on the 27th of August, the very day of the execution of this will, "the deceased was quite childish;" these are the very words of their deposition on the 27th article. This description is inconsistent with the evidence on the condidit: both cannot be quite true; and unless I find that the latter is so affected by other testimony as to be unworthy of credit, I shall consider the evidence of the attesting witnesses as more entitled to the confidence of the Court than that of Grimwood and Hayward.

That a person of the deceased's time of life at the period in question—labouring under such infirmities—addicted to habits of intemperance—might occasionally exhibit lapses of memory, and even symptoms of some wandering, may easily be imagined; but this cannot weigh against his conduct, and against all the circumstances and considerations detailed in the evidence, and to some of which I have just cursorily referred. That conduct and those circumstances and considerations leave no doubt on my mind that his general capacity was quite adequate to give effect to a new disposition of his property: and, moreover, he lived and went about for a fortnight after the new will was executed.

It was not attempted, even in argument, to maintain a total want of testamentary capacity: but it was inferred that if the deceased shewed signs of some torpor in the months of May and June, he was probably much worse in July and August; but such an inference is considerably weakened, if not extinguished, by the difference of his habits at the two periods: in the former months he was indulging in habits of intemperance—often drinking strong liquors to a late hour at night, and lying in bed to a late hour on the fol-[490]-lowing day. Even Spellen Grimwood makes large admissions on this point. In answer to the ninth interrogatory he says:

"The deceased's chief drink during the last twelvemonth of his life was 'purl;' he sometimes, if a friend came in, drank a glass of wine, sometimes a little gin. I have seen him when he has drunk too much; it happened rather more frequently than I wished. I never took any particular account of how often he got drunk; it may have happened once a week; he went on in this way till the latter end of July last; he sometimes, when he had drunk too much, sat up at night till twelve or one o'clock; I always sat up with him on those occasions; I used to have a glass with him some-

times. Scott, the blacksmith, when he has come up about work, used to stay at the deceased's invitation and drink a glass or two with him; he also sometimes used to call in one of his farming men and give him a glass. Clarke, the shoemaker, formerly used to sit and drink a glass with the deceased, but I don't recollect that he did so within the last twelvemonth. Brown is the farming man. I never heard what advice was given by the deceased's medical attendants; but when the Baileys came to the deceased's house, the deceased was kept, as I thought, too low; he was not allowed so much drink as he had been previously accustomed to: I don't know that I ever saw him intoxicated after that Mrs. Bailey and her family came there. I account for that in this way, namely, that his mind was no longer what it was; for neither Mrs. Bailey nor any one else could have persuaded him to leave off drink when he was himself, for 'then he had great resolution, and would have his own way.'"

[491] The witness may account for it in that manner, but it does not follow that his conclusion is correct: however he admits that, after Mrs. Bailey came, the deceased was restrained, and no longer indulged in these habits of intoxication. On the tenth interrogatory he further says: "When the deceased had got a little liquor in his head he was apt to be abusive, he then spared no one, 'gentle or simple,' 'twas all one to him." Mary Hayward, also, upon these interrogatories, speaks much to the same effect: and the correctness of their statements on this point is in some degree confirmed by four bills for liquor, supplied to the deceased, which are annexed to the interrogatories. In February, 1832, there is a bill for 12l. 2s. 4d.; in April, for 12l. 5s. 8d.; in June, for 12l. 14s.; and in July the amount is reduced to 2l. 11s.

It was in July that Mrs. Bailey and her family went to reside at the deceased's house, and from that time his habits of intemperance greatly diminished; and the probability is that although it might be necessary for him to have recourse to some degree of support from cordials, yet he refrained from the excessive use of his favourite "purl." I see no reason, therefore, to infer that his mental faculties were more impaired, or that his liability to be imposed upon was greater, or that he was in these respects in a worse state in the months of July and August than in those of May and June: the reverse seems to me rather the just inference.

There is, however, an important fact pleaded in opposition to the will, namely, that Mrs. Bailey and her family almost forced themselves into the deceased's residence —took the possession and management of his house, and had a complete influ-**[492]**-ence over the deceased in the state of incapacity to which he was then reduced. The fifteenth article of the opposing allegation pleads: "That Miss Rolfe and Mrs. Bailey, together with her two sons and two daughters, on the 28th of July, 1832, took up their residence at his house, although the Rev. R. Bailey, who from such time was very frequently backwards and forwards at the testator's, had a house two miles distant: that they so took up their residence, and continued to reside at the testator's until after his death, without any previous intimation, and wholly uninvited by the testator; that the testator was not partial to any or either of such persons; that he never before had invited them to spend, and they never had spent, a night at his house; and that he entertained the worst opinion of Mr. Bailey, and uniformly spoke of him in terms of strong dislike and reprobation."

The nineteenth article is to this effect: "That his mental faculties began visibly to decline from the commencement of July, 1832, that such decline rapidly increased from the beginning of August, and the faculties of the testator became, and ever after continued to be, decidedly deranged and impaired; that from the beginning of July, and especially after the beginning of August, his conversation became wandering and incoherent, his memory lost and defective, and that he almost constantly confused times, persons, and places." After pleading various delusions it alleged "that during the whole period aforesaid he was of unsound mind." (*a*)

(*a*) On this article Mr. Harrold, of Great Horsley, surgeon, aged 68, deposed: "I had been in the habit of attending the late Mr. Robinson, of Wormingford, for many years. I visited him from June last until his death, and for the last two months of his life, about twice a-week on an average. During the whole of the two last months of my aforesaid attendance I observed a very material failure in his memory with respect to recent occurrences, which, more particularly during the latter part of his life, and throughout August last, increased, so as to reduce the deceased to a state of considerable mental imbecility; in which condition he frequently mistook facts,

[493] Now this alleged custody and assumption of authority is a most important feature in the cause; [494] if true, they would lay a foundation for, and give a colour to, all the subsequent transac-[495]-tions. If Mrs. Bailey and her family did take possession of this gentleman in his debilitated state, and if their conduct was such as is here represented, it would create the greatest suspicion against any act obtained from him, departing from the will of May, and changing in their favour the disposition of his property: but, on the other hand, if the deceased, sensible of his growing infirmities, and of the state of domestic misrule that prevailed under his roof, had himself invited Mrs. Bailey to come to his house, this would of itself lead to a new and different testamentary disposition of his property, and strongly indicate that it was his own act.

I have already noticed the deceased's habits of intemperance; he would indulge in drinking strong liquors with any persons who would join his revelries, and, among others, with the witness, Spellen Grimwood, as he himself admits. This Grimwood was the clerk of Mr. Tufnell's parish, and was brought, after service on a Sunday evening, to attest the former will—of which Mr. Tufnell is an executor; he is a legatee—not [496] in the will, but in the codicil of the 7th of June—in no less a sum than 200l.; he was a sort of spy, to give information to Mr. Tufnell of what passed in the deceased's house, and was in the habit of making memoranda for that purpose; and he is a very forward and leading witness in opposition to the will propounded in this cause. The other person, Mary Hayward, had lived as the deceased's housekeeper for ten or eleven years, and had the chief management of his house while these intemperate habits were indulged: she is a fellow witness with Grimwood to prove the incapacity of the deceased, the intrusion of the niece, Mrs. Bailey, and her

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fancying that those things had occurred which had not; saying on some occasions, for instance, that he had been riding out, when on that day he had not left the house. My visits were merely professional, and my enquiries were confined to the object of my visit: I did not enter into any question relating to his affairs, unless when the same were obtruded upon me. My attention was more drawn to the deceased's mental condition in August and September, on account of circumstances which I will more fully depose. In answer to the enquiries I made of the deceased in respect of his bodily state, his ordinary reply was 'Very poorly:' he did not enter into any description of his complaints or feelings; but he always knew me, and often asked me to take refreshment. From the limited intercourse I had with the deceased during the last two months of his life, I was able only to observe, in a general way, that he laboured under a considerable deficiency of memory, accompanied by an imbecility of mind, which, as I have already noticed, led him to fancy the reality of things which had never occurred. From the general observation made by me of the state of the deceased's mental faculties during the period of my attendance on him before mentioned, it is my opinion that he, the deceased, was not during August last, or subsequently, of sufficiently sound mind, memory, or understanding to make or duly execute a will. Having given this as my opinion, I feel myself bound to state that, having in the latter part of August been informed that the deceased had executed a new will, I, in a day or two after, took an opportunity, in order to ascertain the then state of his mind, of putting a question to him on the subject of his former employment, namely, of farming, and asked him what was the proper season for sowing winter tares; he answered, 'The sooner the better.' I then enquired whether there was any distinguishable difference between the seed of winter tares and of spring tares; his answer was to the effect that a difference would be seen by persons who were accustomed to them. There being two of his nieces (Mrs. Bailey and Miss Rolfe) present, I asked him, 'These ladies are more nearly allied to you, are they not, than Mrs. Sadler and her sisters?' He answered 'They are: there are three of each.' So far I consider the deceased to have answered me very rationally; but in two or three days after the foregoing conversation I, in further enquiry, said to the deceased, 'Have you thought of your will, Mr. Robinson?' He answered, 'I've nothing to leave;' and this answer was given as if he really thought so." On interrogatory, he answered, "I did previous to the deceased's death, in reply to a letter from W. Mason, Esq., write to him to the effect 'that I did not know what amount of intellect was necessary to constitute a legal competency.'"

On the 17th article Dr. Rolfe, the deceased's nephew, in deposing to an interview

family into his house, and his dislike of the Baileys—particularly of Mr. Bailey—though it is proved that they had been in constant intercourse with the deceased, and had received presents from him, while with his sisters by the half blood he kept up little or no intimacy (nor indeed does Mary Hayward depose to any partiality of the deceased for them), and Mr. Mason had not been in his house for twelve years.(*a*)

But Hayward is not merely Grimwood's fellow witness, a great degree of intimacy has existed between them: she was, on the 27th of May, 1832 (the date of the first will) far advanced in her pregnancy, for on the 7th of June—the day on which the codicil giving to Grimwood a legacy of 200*l.* was executed—she was brought to bed of an illegitimate child, which was affiliated to this Grimwood on the 14th of September. In what a state then was the deceased's house in the months of May and June (and indeed previously), when [497] the former testamentary acts took place. Here were this confidential housekeeper and this man cohabiting together in the house, and, to the quantity of spirits consumed in it during a few months, the bills that I have referred to bear ample testimony. If the deceased had any intervals of sobriety and reason, he must have become sensible of the hands in which he was, of the mismanagement of his domestic affairs, of the conduct of the persons by whom he was surrounded, and he must have been anxious to be relieved from such a state.

Mrs. Bailey and her family, who had been in London during the winter and spring, went down to their residence at Wormingford on the 26th of May—the day before the execution of the first will. At that time the scandalous pregnancy of Mary Hayward must have been notorious in the parish—it could hardly be otherwise. On Mrs. Bailey's arrival at Wormingford, Hayward was still living in the deceased's house, and Mrs. Bailey did not then go to it. Mr. Bailey remained in London, doing his

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on the 13th of August, 1832, at Wormingford, at Mr. Bailey's, when the will of the 27th of May (which was well known) was spoken of, said: "Mr. Bailey designated the will as one which had been obtained from the deceased by undue influence, exercised, as he intimated, chiefly by Mr. George Tufnell: my sisters (Mrs. Bailey, Mrs. Chase, Miss Rolfe) also complained, as did Mr. Bailey, of the large donation of 1000*l.* out of so small a property as that of the deceased's to charity; and particularly of the large interest which was taken, amounting, as they said, to 200*l.* by Mr. William and Mr. George Tufnell. The will had produced general dissatisfaction among the family so assembled. I cannot depose that either Mr. Bailey or any one else did, in direct terms, intimate an intention of procuring or causing the deceased to execute a new will; but I had a strong idea that an intention was entertained among the family of procuring another will from the deceased, of which I, in my own mind, disapproved, on the ground of the dissension which I foresaw must be created by such a measure. My sister, Mrs. Bailey, on the said occasion, asked me whether I did not consider the deceased capable of making a will. I believe she used these words: 'You can't say that my uncle is not capable of making a will now: he is quite conscious of every thing about him.' I replied, 'I can't say much of his capabilities; but you can't think of troubling him to make a will: his bodily powers are too weak, and a business of that sort will agitate him too much,' or to that effect. I did not, in positive terms, declare that the deceased was altogether incapable of then making a new will, but I dwelt rather upon the impropriety of troubling him in his weak state of body. Previous to going over to Mr. Bailey's on that day I sat a short time—and a very short time—with the deceased: he did not recognize me when I first entered the room, but mistook me for one of the sons of Mrs. Bailey; he afterwards recollected me; he conversed very little; he never was a man of many words; his memory was much weakened, but he appeared to be quite conscious of what was passing; while I was there Mr. Abram Constable came into the room, and the deceased knew him. I did not apply any test to ascertain how far his mental faculties retained their vigour, and I had so little conversation with him that I cannot undertake to depose positively either way in respect of his testamentary capacity on that occasion. The opinion given to my sister and the others present in respect of procuring a new will from the deceased was given by me rather on a point of propriety than on a question of mental capacity."

(*a*) The two Misses Bailey, on the 20th interrogatory, spoke to this fact as coming from Mr. Mason on the occasion of a visit of about half an hour that he and his son paid to the deceased on the 12th of August, 1832.

duty in the Tower where he was chaplain, and where the cholera was at that time raging.

How, then, do the matters pleaded in the fifteenth article of the allegation stand upon the evidence? Did Mrs. Bailey intrude herself into the deceased's house, or was she invited by him? This is the important fact—the hinge on which the case turns. A piece of evidence bearing upon this point comes out from a witness examined on behalf of Mr. Tufnell, and a respectable witness—Abi Elliott, who had lived for twenty-nine years in the deceased's service as housekeeper, and is now far advanced in years, being at the time of her exa-**[498]**-mination of the age of 73: she is an annuitant under both wills, but for a less amount under the latter than under the former will: if, therefore, she has a bias, it will not be in favour of the latter will. She thus deposes on the 16th additional interrogatory: "The deceased did about June and the beginning of July last (1832) ask me to go and stay with him; he said 'he wanted somebody.' I told him I was very poorly and could not be of any use to him." This answer should be connected with what the witness had previously stated. On the 46th general interrogatory she had deposed—"It was said in May and June last that Mary Hayward, the deceased's servant, was with child by Spellen Grimwood: I do not believe that that report at all prevented Mrs. Bailey going to the deceased's house sooner than she did go: I never did advise or recommend Mrs. Bailey to reside with and take care of the deceased; I did recommend her to call and tell him how matters stood about Mary Hayward:" and on the 45th interrogatory—"It was not before, but after that I heard Mrs. Bailey had gone to reside at the deceased's house, that I said 'I was as pleased as if a person gave me a hundred pounds that Mrs. Bailey had gone there:' I said so, because I thought it would be a comfort to him."

Here, then, is this faithful old housekeeper advising Mrs. Bailey to acquaint the deceased with what was passing in his house, and expressing her joy when she heard she had gone to reside there: but what is of more importance is the fact that the deceased himself (before Mrs. Bailey went to reside in the house)—aware "that things were not going on right at his house"—wished his old housekeeper to come and stay with him, "for he wanted somebody." Mrs. Elliott, from her age and infirmities, **[499]** being unable to go, what then took place? The deceased himself drove down to Mrs. Bailey's; he was at that time infirm, and he did not get out of his carriage; but his niece and her family went out to him, and he courted them to come and stay at his house. Mrs. Bailey at first rather declined, and the deceased pressed and intreated her, according to Miss Margaret Bailey's account of what passed; for she states thus (after mentioning that the deceased did not alight from his carriage, it being too much trouble for him to ascend and descend): "It was after some indifferent conversation that he said to my mother, 'Well, Harriett, I wish you could come and be with me, for I don't think things go on as they should.' I did not pay much attention to what passed, for I was moving about at the time; it appeared to me that my mother shifted the matter, and said it would be inconvenient for her to leave home; and in his way he said, 'Well, I wish you would come, and as many as can come.' I do not think there was much said on the subject, but I did not hear all, for I was running about getting fruit; but I collected enough to know that Mr. Robinson had asked my mother to go and stay with him, because things were not going on right, as he thought, at his house; and that my mother had declined it rather on the ground of the inconvenience of leaving her own home."

And that the deceased was aware that things were not going on as they ought at his own house is, as I have already pointed out, confirmed by the old housekeeper:

"On the 27th of July I called upon Mr. Robinson with my mother, and he was then very urgent with my mother to come and stay at his house, **[500]** and he almost cried; and it was not until then that we thought him so ill as he really was: he complained of being very ill, and said he should never be well again: he said to my mother, 'If you don't come, I do not know who to ask—I can place dependence in nobody now;' and besides he said to my mother, 'I want you to be with me—there are plenty of rooms up stairs—I am too ill to be left to myself—if ever I wanted seeing after, it is now: I do not want to find fault with any one in particular—you will see how things go on, and you must guess at a great deal: you ought to come and look after things, for if there is five shillings to spare you will share it amongst you.' He expressed himself to that effect, and much more to the same purpose he said, which I do not remember."

Now this matter does not depend upon the testimony of one or two witnesses, for there are no less than six who depose to the fact that the deceased did himself invite his niece, Mrs. Bailey, to take up her residence with him: even the evidence of Abi Elliott alone would leave no doubt upon this important point. Yet Grimwood and Mary Hayward have been brought forward to give a different colour to this fact and to support the allegation—that Mrs. Bailey and her family forced themselves on the deceased, he being in a state of diminished capacity and unable to resist the intrusion; this—the very ground-work and substratum of the opposition to the will of the 27th of August—is a false foundation.

It is very probable, and I am disposed so to consider it, that Mr. Tufnell received his information from Spellen Grimwood; but if Mr. Tufnell chose to trust to the representations of his parish-clerk, whom he had appointed to that office; **[501]** who, for aught that appears, still continues in that office, and who is a releasing witness—or to the representations of Mary Hayward—and if he and his co-executor chose to act upon the representations of such persons, and to found upon them charges of fraud, conspiracy, and perjury, the parties making such charges necessarily do it (however much I may lament it) at their own risk and peril, and are responsible for the consequences.

Mrs. Bailey and some of the family, in consequence of the urgent invitations and intreaties of the deceased, went to reside at his house in the latter end of the month of July. It was at that time well known to Mrs. Bailey that the deceased had executed testamentary acts (though she was not aware of the contents) under Mr. Tufnell's advice, and that he was an executor: but having, shortly afterwards, accidentally discovered that his brother, Mr. W. Tufnell, who was indebted to the deceased in a bond for 1700*l.*, had been under his will acquitted, as a legacy, of 700*l.*,(*a*)[1] Mrs. Bailey became somewhat alarmed, or, as one of the witnesses expresses it, "rather nettled," and she thereupon, not unfairly nor improperly I think, remonstrated with the deceased, and represented to him that he had favoured a stranger to the prejudice of his near relations, and might otherwise have been led to do an act of injustice.

It does appear that in the beginning of August, on Mr. Bailey's return to Wormingford, a will was prepared to be submitted to the deceased, and I must make some observations upon its contents. In substance it is as follows: (*b*) it appoints Mr. **[502]** Bailey and Mr. James Daniell executors; it directs them to invest 300*l.* in the names of Mr. Bailey and Mr. Constable, the interest to be divided among the poor of Wormingford; it bequeaths an annuity of 12*l.* to Mary Hayward,(*a*)[2] a legacy of 40*l.* to Abi Elliott, of 20*l.* to Grimwood, and 5*l.* to Brown; it further gives 100*l.* to each of his sisters of the half blood, and 50*l.* to Abram Constable; to W. Rolfe the freehold house at Wormingford; and to Miss Rolfe and Mr. Chase his freehold farm; and it gives to the two Rolfes and to Mrs. Chase the residue.

Such are the contents of this paper. Mr. James Daniell, who prepared it, drew it from instructions he received from Mr. Bailey; but of what had previously passed between him or Mrs. Bailey and the deceased there is no evidence. The instructions might have originated with the Baileys, and the deceased only have given a general assent that he would make a new will in the place of Mr. Tufnell's will, if they would get one drawn and submitted to him; certainly at that time the Baileys did not know the exact contents of that will, nor the precise amount of the deceased's property. Grimwood states, on the 15th interrogatory, that the matter originated in this way:—

"Within and about ten days after the 28th of July I one day overheard Mrs. Bailey saying to the deceased, 'Well now, uncle, if there was a regular will drawn up, would you agree to it?' I thereupon went to the Rev. George Tufnell, and told him that, and of other things which had happened since the Baileys came to the house, and had led me to believe that another will was about to be made. I told him I did not think the deceased **[503]** in a fit state to make a will: Mr. Tufnell asked me why I thought so: I told him that I had taken notice of what had been said and done by him lately, and that I had written some of it down. Mr. Tufnell answered that it was all very well, and might not be amiss for me to do so; but he never did desire

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(*a*)[1] This appeared from the endorsement upon the bond itself; the bond was annexed as an exhibit to Mr. Constable's and Mr. Bailey's allegation.

(*b*) See ante, Comparative Abstract—will of 8th or 9th of August.

(*a*)[2] In the will written "Howard."

me to watch the conduct of the family of Mr. Bailey, or to observe on what passed in the deceased's house while they should remain there, or to report to him what might occur: but I did, from what Mr. Tufnell then said, consider that he sanctioned my continuing to take notes of what might thenceforward take place." Mr. Tufnell, therefore, was, as I have stated, receiving information from, and probably has been sincerely deceived by the representations of, this man.

Suppose, then, that the instructions of the 8th of August did originate from the remonstrances of Mrs. Bailey, in the way this witness has suggested, yet that would not of itself vitiate a testamentary act. A will being accordingly prepared by Mr. James Daniell, he took it over to Wormingford on the 9th for execution, but did not arrive till three o'clock, which was after the time appointed; and he was then informed that the deceased could not see him—he was too much fatigued—and that the execution must be postponed.(*a*) The reason **[504]** thus given might have been one reason for postponing the execution; there might have been additional reasons (for what exactly had passed respecting this will the Court has no means of knowing); there might have been objections taken by the deceased himself to the contents of the instrument; he might have thought a different disposition more fair and proper, and have said, "You should have consulted me—the matter must be reconsidered." Such conduct in the deceased would not have been unnatural; but, at any rate, the transaction has to my judgment no appearance of fraud on the part of Mr. Bailey; the will cannot have been made with a view to his own advantage, for he and his family take no interest **[505]** whatever under it; they are excluded by this paper from any share in the deceased's property, while almost the whole benefit is given to his other relations: as far as the Baileys are concerned, this will would seem to have been intended to defeat the former will; but, whatever may have been its origin or object, I can see no ground for ascribing fraud to Mr. Bailey.

Suppose, however, that this will was prepared without any detailed instructions from the deceased, with the view and purpose of being submitted to his consideration—to reject, to alter, or to adopt—the fact is that it was not adopted; and there was then nothing, I say, unnatural or improbable that, upon a further discussion of the subject with the deceased, he should have given different instructions, or at least sufficiently

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(*a*) Mr. James Daniell (brother of Edward) deposed: "I am an attorney at law at Colchester: I never had the least acquaintance with Mr. James Robinson, late of Wormingford, in the county of Essex, the party deceased in this cause: save the occasion now to be mentioned, I never was employed concerning his testamentary affairs. On the 8th of August last, the Reverend Mr. Bailey, with whom I had no previous acquaintance, called on me at my office, stating that the deceased wished him to procure a will to be prepared, and he then produced a paper from which he dictated to me the substance of a will, which instructions I reduced into writing, and from which I subsequently prepared a will for execution: in the will so prepared for execution he, Mr. Bailey, and myself were named as the executors: that will was never executed as I believe: at the desire of Reverend Mr. Bailey I attended at the deceased's house at Wormingford on the following day, carrying with me the will I had so prepared: on arriving at the deceased's house I found that I was rather beyond the time appointed, and Mr. Bailey met me at the door, saying that he was afraid that Mr. Robinson was too much fatigued to do anything on that day; this must have occurred at about three o'clock, p.m. I, however, remained there about half an hour, at the end of which time Mr. Bailey (who apparently had in the meantime been in communication with the deceased) came from another room and informed me that the deceased was too much fatigued to attend to business on that day, and that he (Bailey) would let me know when the deceased wished to see me. I never had any further communication on the subject with Mr. Bailey: the will so prepared was left with him." On interrogatories: "Mr. Bailey, when giving me the instructions, informed me that the deceased wished him to be the sole executor; but he (Bailey) said it was usual to have some professional man joined, and he on that account asked me to act with him; that the deceased, he was sure, would approve of it; I consented, and my name was accordingly inserted." "Mr. Bailey said that he had employed my late father (a solicitor) some years ago; and he particularly inquired of me to ascertain whether I was one of his sons: he gave no reason why I was applied to in particular to make the will."

consented to the disposition contained in the subsequent will of the 27th of August. There is not, in my opinion, any thing inconsistent with the evidence that the transaction should have taken that course.

On the 12th of August Mr. Bailey's sons obtain somewhat of a detailed knowledge of the contents of the May will: they had, one or two days before, made an application to Mr. Tufnell for the will itself, which he refused to deliver up, but at the same time did not object to communicate the contents to Mrs. Bailey and the family, and appointed the 12th for that purpose. On the evening of the day on which this application was made, Mr. Tufnell called at the deceased's house, and either then, or perhaps on the preceding day, conversed with the deceased; and he states himself that afterwards he went to the deceased's house, and saw him frequently. On the 12th, in the afternoon, Mrs. Bailey's two sons went by her [506] direction to Mr. Tufnell's house; they there found Mr. Mason, his co-executor, who read over the will to these young men, and they, as far as their recollection served, carried away the particulars in their minds.(*a*) After this, Mr. Mason also, accompanied by his son, went to the deceased's, and they were both admitted; indeed they were at no time excluded: so that access to the deceased was not refused. At this interview of the 12th, Mr. Mason appears to have had a long conversation with the deceased. It is not necessary for the Court to enter into a minute examination of what then passed; but if the two daughters of Mr. Bailey have given a misrepresentation of that interview, of the conversation, and of the capacity of the deceased on that occasion,(*b*) Mr. Mason's son might easily have been examined to contradict them.

The transaction then arrives at the 18th of August, as already stated from the evidence on the condidit. What had occurred in the mean time, from the 8th to the 18th, between Mr. or Mrs. Bailey, or both, and the deceased, is not in evidence: but if what is stated to have occurred afterwards be true, the deceased must have consented to and approved of making a will, giving much the same legacies to the whole and to the half-blood as by the former will of May, but giving the real estates and residue to the whole blood and to his cousin, Abram Constable, appointing him and Mr. Bailey executors, and excluding Mr. Tuf-[507]-nell from the executorship and a share of the residue. In this view of the case, omitting some of the minute parts, I can discover nothing sufficient to shake and falsify the evidence of the attesting witnesses upon the condidit, and to induce me to suppose that the case in support of the will to which they depose is made up of fraud, conspiracy, falsehood, and perjury. It is true that two of these witnesses are nearly connected with the executors of this will, but after a careful examination and consideration of the whole tone and character of their depositions—for the tone and character of depositions are often better criteria of judging the credit due to witnesses than minute variations between witness and witness—it appears to me that they have candidly and fairly wished to state the truth according to their best recollection and their real impression of the facts.

The charges against Mr. Bailey and his family of fraud, imposition, conspiracy, and perjury, seem to me by no means established; possibly—indeed very likely—they have originated in the representations of Spellen Grimwood and Mary Hayward —persons living together in the deceased's house at the time of his intemperate habits in a state of unlawful cohabitation: but, in my opinion, these representations are unfounded. It is proved to me quite satisfactorily that when Mrs. Bailey and her family went to reside at the deceased's house, it was by his own express invitation; the idea originated with the deceased himself: and this circumstance, I think, furnishes a safe clue to the sequel of the history.

The will of the 27th of May was, as I have remarked, made under such circumstances, and in [508] such a way, that a departure from it was neither improbable nor improper: and being satisfied that the will of the 27th of August is sufficiently proved, I am bound to pronounce for it.

With respect to costs, they have been pressed on account of the persevering attacks upon the character of Mr. Bailey and his family: and it is with some reluctance that

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(*a*) Mr. W. Bailey, on the 14th interrogatory, addressed to him as a witness on the condidit, and the answer of Mr. Constable and Mr. Bailey to the 16th article of the adverse allegation give the above account.

(*b*) In their respective answers to the 20th interrogatory.

I feel called upon to give costs; but if parties will receive information that has no foundation in truth from individuals of bad character, and will act upon that information in the conduct of a cause, they must be responsible for the consequences. I think it by no means improbable that the executors, particularly Mr. Tufnell, has been imposed upon by misrepresentations, but that is no justification of their opposition to this will, nor of the charges (which they ought to have known were groundless) upon which that opposition was founded. I am therefore bound, in justice to the other parties, to condemn the executors of the former will in the costs of this suit.

The Court pronounced for the force and validity of the will of 27th of August, 1832, and condemned Mr. Tufnell and Mr. Mason in costs.

[509] SMYTH *v.* SMYTH. Arches Court, Easter Term, 4th Session, 1833.—A suit for cruelty and adultery, brought by the wife, was appealed from the Consistory Court of London to the Arches, and in 1828 was there alleged to be agreed, and the husband dismissed; but the inhibition to the Consistory was not relaxed. In 1831 a suit for cruelty and adultery was again brought by the wife in the Consistory; the husband appeared under protest; the judge, having directed the wife's libel (which referred to and prayed leave to invoke the proceedings in the former suit, and also pleaded new facts) to be brought in, over-ruled the protest; but, on the ground that the inhibition was still in force, did not assign the husband to appear absolutely, nor did it dismiss him, nor admit nor reject the libel. The wife appealed: that appeal was dismissed for irregularity, and the cause remitted: the judge below, as still inhibited, refused to proceed: the wife again appealed; and the Court of Arches held that the agreement and consequent dismissal of the husband put an end to the former suit, and consequently to the inhibition, and that the judge of the Consistory Court was bound to proceed in the cause.

This was an appeal by the wife from the Consistory Court of London upon a grievance. On the 11th of May, 1831, the proctor for the wife had, in the Consistory Court, alleged that a former suit, between the same parties, and appealed to the Arches, had been there agreed, and that in May, 1828, the husband had been thereupon dismissed by consent of the wife's proctor, and that no suit between the parties was pending in the Court of Arches or Delegates; and, in proof thereof, brought in an office copy of the decree of the Court of Arches dismissing Mr. Smyth. The Judge of the Consistory refused to direct the husband to appear absolutely, or to admit the libel, on the ground that the inhibition was so far in force that the Judge of the Consistory Court ought to defer to it. The wife appealed to the Arches: that appeal was dismissed on the ground of irregularity, both in the Arches and Delegates; (*a*) and that cause having been remitted to the Arches, the Judge of that Court, on the fourth session of **[510]** Michaelmas Term, 1832, relaxed the inhibition to the Judge of the Consistory decreed in the present suit, but, though prayed, made no order as to the inhibition in the former suit.

On the second session of Hilary Term, 1833, Mrs. Smyth, in person, brought into the Consistory Court the relaxation of the inhibition: and the Judge thereof decreed to proceed according to the tenor of former acts. On the fourth session Mrs. Smyth tendered additional articles to her libel, with an exhibit annexed; and prayed leave to correct the ninth and tenth articles of the libel, by substituting "December" for "November;" and further, that the Judge of the Consistory would assign "to hear on admission of the libel and exhibits, as altered, and of the additional articles, on the by-day."

The Judge refused to receive the additional articles, and rejected the prayers of Mrs. Smyth; and this was the grievance—the subject matter of the present appeal which was interposed by the wife.

The husband appeared to the inhibition and citation, and after the usual steps the cause, on the fourth session standing assigned "for informations and sentence, and W. H. C. Smyth [the husband] is admonished to attend," Mrs. Smyth prayed the Court "to reverse the decree appealed from—retain the cause, decree a monition for

(*a*) See a report of the proceedings in some of the earlier stages, and in these appeals, supra, p. 72-7; and infra, p. 516, for a report of Dr. Lushington's judgment in the Consistory Court.

the Court below to transmit the libel and exhibits there given in on her behalf, and, when transmitted, permit her to correct them and bring in additional articles."

Mr. Smyth, in person, prayed the Court to affirm the decree, and remit the cause.

[511] *Judgment—Sir John Nicholl.* This matter is now before me as an appeal from a grievance: in the Consistory Court it was a suit instituted by the wife charging her husband with cruelty and adultery. Both parties are without proctor or counsel —a most unusual and inconvenient form of appearance—throwing upon the Court a burden which should not be imposed upon it; and in the present case this appearance in person, both by plaintiff and defendant, is the more extraordinary, as from the former proceedings between them the Court has no reason to think that there is any want of "faculties" in the husband; and the wife is entitled to have her costs taxed, de die in diem.(*a*) From the minute also of the 11th of May, 1831, namely, upon the third session of Easter Term, I perceive that the wife appealed to this Court by her proctor; but as she now thinks proper to appear in this form, I have no power to make any order upon the matter.

Upon the appeal in 1831 this Court, though possibly of opinion that the original cause ought to have gone on, was bound to dismiss the appeal as void for irregularity; the Court of Delegates having affirmed this decree remitted the cause to this Court; and as soon as the cause had travelled back to the Consistory Court, it was the duty of that Court to "proceed according to the tenor of former acts," as it is technically expressed—namely, to proceed with the cause as it stood assigned in that Court on the 11th of May, 1831. **[512]** The libel and exhibits on that day stood on admission; they have not been rejected nor admitted, nor is the husband dismissed. Upon this fresh appeal the question for me now to decide is whether the Judge of the Consistory Court has done right in not allowing the wife's additional articles to her libel to be received; and in rejecting her other prayers. I may here observe that, in the suspended state in which the libel stood, it was quite competent to the wife to pray either to correct the libel, or to give in additional articles, or both, so that the statement might stand for admission in a complete form.

The Court cannot here but lament the slow progress of this suit: it is upwards of two years since the wife took out her citation, and the libel is not yet admitted. The libel indeed shews that there was a previous suit between these parties in 1824, which in 1828, while the suit was depending here upon appeal, was agreed, and the husband thereupon dismissed.

The Court has no means of preventing a husband and wife from thus harassing each other, but it would have been better, in my opinion, if the husband, in the first instance, had met the question fairly, and not retarded, by objections of form, the investigation into his wife's complaint.

From the Judge of the Consistory Court (as appears from the minute) overruling the protest of the husband upon the 11th of May, 1831, yet not assigning him to appear absolutely—from his having on a previous day given leave to the wife to bring in her libel and exhibits, yet not admitting nor rejecting them—from his subsequently, in 1833, not allowing the wife to amend her libel, and from his refusing to receive the additional articles, **[513]** and to assign to hear on admission thereof, and of the libel, I am led to infer that the learned Judge of that Court acted upon this notion, that he had no authority to proceed in the cause, inasmuch as that his hands were tied by the inhibition in the former suit between these parties having never, in form, been relaxed; but the minute of this Court, in 1828, shews that the cause in which that inhibition had been served was then agreed, and the husband, or, in other words, the cause, dismissed; this is tantamount to the formal relaxation of an inhibition; the agreement and dismissal supplied its place—they extinguished the suit, and consequently the inhibition; the suit and every thing that had taken place under it was at an end by the agreement and dismissal. I feel, therefore, some difficulty in adopting the notion of the learned Judge, that his hands were any longer tied by that inhibition. A fresh suit, in which new facts are alleged, has been instituted in the Consistory between these parties, and in this fresh suit there has been an inhibition served upon that Court: but again, that inhibition has been relaxed; and the relaxation brought in. How then can the Court below be precluded from proceeding in this cause?

(*a*) *Bray* v. *Bray*, 1 Hagg. Ecc. 168. *Cheale* v. *Cheale*, ib. 375. *D'Aguilar* v. *D'Aguilar*, ib. 787. *Westmeath* v. *Westmeath*, 2 Hagg. Ecc. (Supplement) 133.

In 1828, when the husband was dismissed, the suit then pending stood assigned "for informations and sentence." What, then, was the effect of the agreement and dismissal? That the wife waived her remedy—that the agreement and dismissal were tantamount to an admission on her part either of a failure of proof or of a condonation; she is then barred from praying relief upon proof of those former charges alone, but she is not barred against a remedy for new acts—nay, in **[514]** the same manner perhaps as the law regards new acts pleaded after condonation, the former acts might even be revived.(*a*)[1]

Again, what is the legal character of these parties?—husband and wife. In legal contemplation that mutual relation still exists, for any private understanding or agreement to live separate is not recognized by the law.(*b*) Suppose in 1829, or at any time subsequent to the termination of the first suit, the husband had lived in open adultery; or suppose various acts on his part of personal violence—of manifest cruelty towards his wife—would she be compelled to endure such treatment without a remedy? Would she be entitled to no relief—no protection by law? And to what law could she apply but to the matrimonial law administered in a matrimonial court—the court of that diocese in which the husband was residing? The wife could not, in such a case, resort in the first instance to any other court: an action at common law would not lie, and the Court of Arches has only an appellate jurisdiction in the matter; and the former suit between these parties, which had come before this Court on appeal, was at an end.

The Judge of the Consistory Court, therefore, in my opinion, did wrong in not entertaining this suit, so far as to receive the additional articles, and examine whether the libel, so assisted, did contain **[515]** such matter as might form the foundation of an entire new suit; and whether also there might not even be sufficient to revive the former charges: thus far, I think, the wife was entitled to be heard. It is not, however, for me at present to consider the effect of the libel; still less of the additional articles, which, not being received by the Court below, are not before me. I can therefore form no opinion upon one or the other; but considering this case without reference to their contents, I must endeavour to place the suit where it stood on the 11th of May, 1831—that is the shape that it ought to assume; I accordingly pronounce for the appeal; allow the additional articles, if tendered by the wife in this Court, to be brought into the registry (for as they have not been received it rests with the wife to annex them or not), and if brought in, the libel and additional articles will together stand on admission. The Court will then have to adopt one of three courses, —either to admit the whole; reject the whole; or, if there should be irregularities or defects, to direct any part to be amended and reformed.

Having now disposed of the appeal, I strongly recommend both parties to reconsider together whether they cannot do effectually what in 1828 they thought that they had done—viz. carry into effect a private arrangement; whether this will not be most consistent with their own welfare and interest. I trust that the intervention of friends may prevent the continuance of an harassing suit; or, at all events, that should such an intervention not be successful, the cause will be conducted by professional agents.

[516] Consistory Court, Easter Term, 3rd Session, 1831.—The libel, in a suit for cruelty and adultery, disclosing the existence of a former suit between the same parties, partly on the same facts, and that such former suit was appealed, and in the Superior Court dismissed, by consent, before sentence, held, that the Inferior Court cannot hear on the admissibility of such libel, the inhibition in the former suit not having been expressly relaxed.

Judgment (*a*)[2]—*Dr. Lushington.* In the early part of this year a citation—taken out by a person alleging herself to be the wife of W. H. C. Smyth, and calling upon him to answer in a suit for cruelty and adultery—was returned into this Court. Mr.

(*a*)[1] *Durant* v. *Durant*, 1 Hagg. Ecc. 733. *D'Aguilar* v. *D'Aguilar*, ib. 781. *Westmeath* v. *Westmeath*, 2 vol. (Supplement). *Timmings* v. *Timmings*, 3 vol. 83.

(*b*) *Nash* v. *Nash*, 1 Hagg. Con. 142. *Beeby* v. *Beeby*, ibid. notis: and S. C. 1 Hagg. Ecc. 789. *Mortimer* v. *Mortimer*, 2 Hagg. Con. 318. *Barker* v. *Barker*, 2 Add. 285. *Sullivan* v. *Sullivan*, ibid. 299. *Westmeath* v. *Westmeath*, Jacob, 126. Roper on Husband and Wife (ed. by Jacob), vol. 2, p. 270, in notis.

(*a*)[2] See ante, p. 509.

Smyth appeared under protest; and after having heard him on a former day in support of this protest, I have no doubt in what way I shall dispose of it, namely, to overrule it.

Another difficulty, however, strikes me. It appears from the records of this Court —and the fact is distinctly recognized by the libel (*b*)—that in a suit, by reason of cruelty and adultery, and depending in this Court between these same parties, there was an appeal prosecuted in the Arches; **[517]** and the inhibition consequent upon that appeal has never, I understand, been relaxed: but it is alleged that that cause was agreed in 1828, and Mr. Smyth thereupon dismissed; and an office copy of the minute of the Court of Arches to that effect has been brought in. It is now suggested that subsequent acts have revived the previous charges against the husband, and the Court is asked to allow the matters pleaded in the former libel—the evidence taken upon it—and the acts and records of this Court and of the Court of Arches to be imported into a new libel. Such a course of proceeding will, it is said by the counsel for Mrs. Smyth, be beneficial to the husband; but I am not aware of an instance in which such a course has been adopted; and I must take care that, in seeking to do justice in an individual case, and without precedent to guide me, I do not myself attempt to establish a dangerous precedent. I either must treat this suit as a new or an old **[518]** suit: I cannot treat it as a new suit because the contrary is expressly alleged; and if I treat it as part of the old suit, then this Court is, in my judgment, under an inhibition.

Where parties choose to abandon legal modes of redress, and resort to agreements, and those not validly drawn up, a Court of Justice will, I conceive, be very reluctant to step out of its way to assist them; and if a cause pending before me were stopped by private arrangement, I should take time to consider whether I could permit the suit to be revived, merely because an agreement, alleged to have been entered into, had not been, or could not be, fully carried into effect: and in the consideration of such a matter it might be proper to bear in mind that precedents are not wanting of injunctions, in former times, to the Prerogative Court, where parties interested in the effects of a deceased have attempted to proceed in that Court after an agreement.(*a*)

But I am not called upon at present to express any opinion whether the averments

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(*b*) The libel bore date on the 1st Session of Easter Term, 1831; it consisted of fifteen articles and five exhibits; the first article pleaded "that W. H. C. Smyth and Eliza Ann C. Smyth, his wife, the parties in this cause, intermarried, as pleaded and set forth in a certain libel with exhibits thereto annexed, given in and now remaining in the registry of this Court, and admitted in a certain cause of separation or divorce from bed, board, and mutual cohabitation, by reason of cruelty and adultery, brought by the said E. A. C. Smyth against her said husband, and which was depending in this Court between the said parties in 1824, 1825, 1826 and 1827; that after the said marriage the said W. H. C. Smyth behaved with great cruelty to his said wife, and committed the foul crime of adultery with (&c.), as also pleaded in the said libel and an additional article thereto; and the marriage of the said parties was confessed. the facts of cruelty and adultery were set forth and pleaded, and witnesses examined in proof thereof, and publication of their sayings and depositions decreed, and the cause concluded and assigned for sentence; that the said cause was not proceeded in to informations and sentence by reason of the said W. H. C. Smyth resisting the payment of costs and alimony, and he prosecuted an appeal to the Arches Court in relation to a pretended grievance, which appeal was pronounced against, but the cause was retained in the said Court at petition of both proctors; and in consequence of the continued resistance of W. H. C. S. to the payment of costs and alimony, the said cause was not brought to informations and sentence in the Court of Arches, and the party proponent in verification of the premises craved leave to refer to the acts and records of this Court and of the Court of Arches."

The second pleaded certain terms of compromise, that no deed of separation, or instrument to the effect thereof, was ever drawn out; but that, on the faith of the same, E. A. C. Smyth instructed her proctor to allege the cause to be agreed, and it was accordingly so declared on the 4th Session of East. Term, 1828 (in the Arches), and the husband dismissed.

The remaining articles pleaded circumstances, in date, subsequent to the above minute.

(*a*) See dictum by Lord Chancellor Hardwicke in *Barnesley* v. *Powell*, 1 Ves. 288.

in this libel, subsequent to the date of the agreement, are sufficient to revive former acts. The first point for consideration is whether I have any right to proceed at all: the Court of Arches must, as it appears to me, determine that point; I am inhibited by its superior authority, its inhibition upon this Court still remains unrelaxed, and I am bound to defer to it.

The course I propose to follow is—to overrule Mr. Smyth's protest, because it cannot in law be sustained; but I shall abstain from directing him **[519]** to appear absolutely, because from the inhibition on record in this Court, and from the contents of the libel before me, it appears to me that I am precluded from taking at present any further or other steps. The wife may resort to the Superior Court and obtain a decision upon the validity of the inhibition; and perhaps the learned Judge presiding in the Court of Arches, and where the appeal between these parties was lodged, may retain the cause.

The Court overruled the protest; but did not direct the husband to appear absolutely, nor did it admit the libel.

End of the Sittings after Hilary Term.

TABLE OF CASES IN VOLUME II.

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